

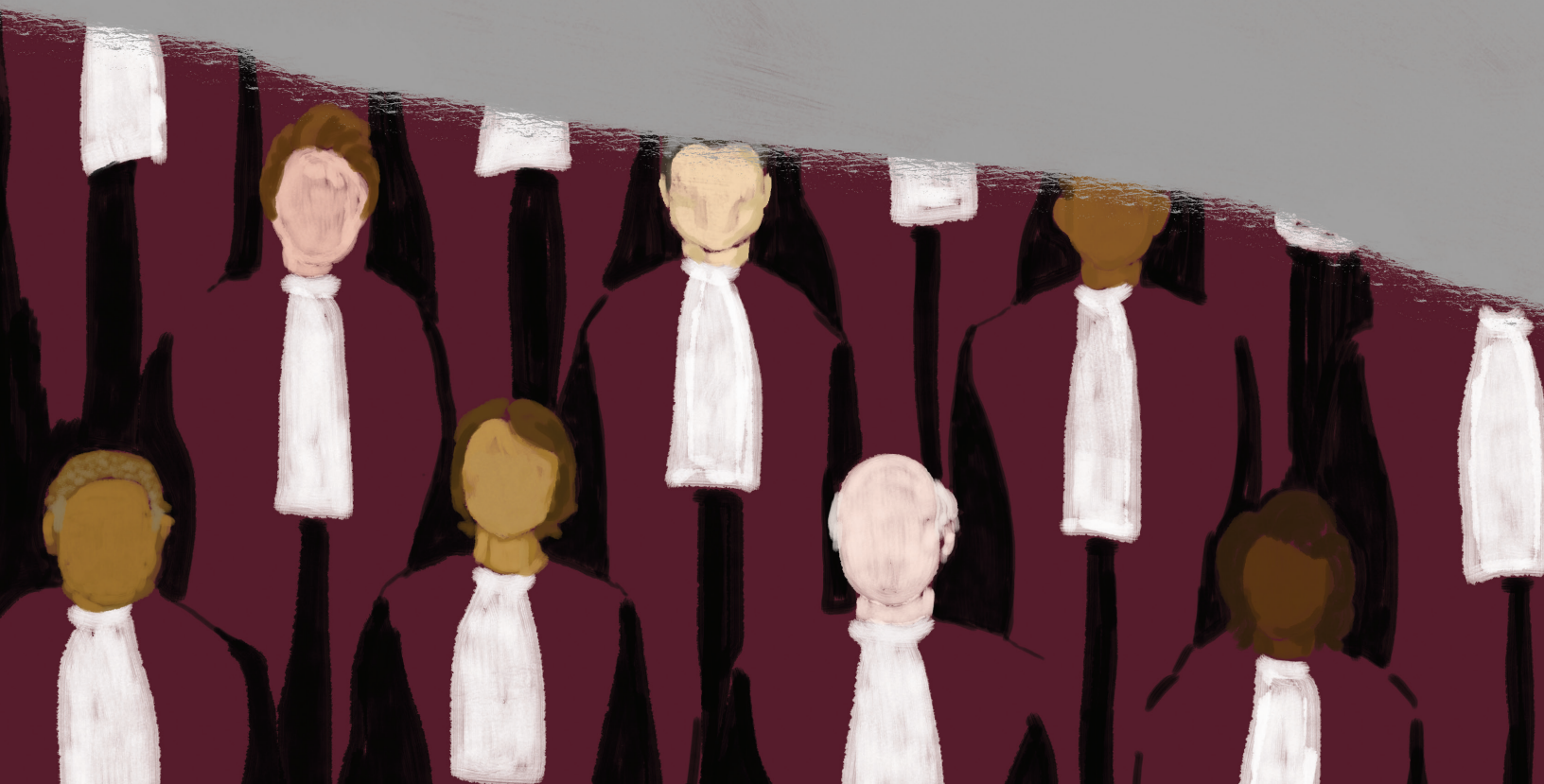


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Committing to Justice for Serious Human Rights Violations

Lessons from Hybrid Tribunals



INTERNATIONAL CENTER FOR
TRANSITIONAL JUSTICE

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RESEARCH REPORT

Elena Naughton

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About ICTJ

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org

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Lead counsel representing the interests of Assad Hassan Sabra makes closing argument on September 21, 2018.
(Special Tribunal for Lebanon)

Forward

Tragically, large-scale atrocity crimes continue to be committed with frequency and intensity in many locations around the globe. Experience shows that the number of such crimes places them well beyond the capacity of any single tribunal to prosecute even a fair share of them. Moreover, the crimes often are committed in countries whose domestic legal systems are fragile or have been entirely compromised, such that domestic trials cannot constitute the initial, primary, mechanism for conducting prosecutions. Thus, for the foreseeable future, the hybrid criminal tribunal—that is, a tribunal that combines features of international and domestic legal systems—will be necessary to complement international criminal prosecutions and/or domestic criminal prosecutions of mass atrocity crimes (e.g., genocide, crimes against humanity and war crimes).

Given the potential need to create future hybrid tribunals as well as the need to support those already created, this ICTJ report provides an in-depth and timely look at some of the key lessons learned from the practices of five hybrid criminal tribunals: the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Section of the State Court in Bosnia-Herzegovina, the Special Panels for Serious Crimes in East Timor, and the Special Tribunal for Lebanon.

This comprehensive report engages in a systematic analysis of: (1) the set-up phase of hybrid tribunals, in terms of the initial tasks to be accomplished and time-periods required; (2) the importance of a well-defined prosecutorial strategy for case selection, and the criteria that have been utilized for case prioritization; (3) the organizational structure of the various hybrid tribunals and challenges for ensuring rigor in selecting staff; (4) the resources and commitment required for designing and implementing effective victim and witness protection and support, and (5) the importance of ensuring that hybrid tribunals have sufficient financial resources to complete their mandates.

This in-depth examination of comparative experiences in establishing and implementing hybrid tribunals provides an important guide for practitioners working in the field as well as members of the international community endeavoring to design future accountability mechanisms or bolster support for existing hybrid tribunals. The hybrid tribunal is thus still an indispensable tool in the fight to ensure the worst crimes of concern to the international community, no matter where perpetrated or by whom, do not go unpunished. Consolidating best practices helps those attempting to tackle the daunting challenges that remain in this field, challenges made more difficult by a hostile political landscape, increasingly less supportive of accountability.

While the report does not ultimately recommend any single model for a hybrid tribunal—as any hybrid tribunal needs to be shaped by the context in which it is created—the report provides a practical guide of lessons learned which should be drawn upon as the international community continues working towards a future where mass atrocity crimes are no longer tolerated or committed. ICTJ has made an important contribution to this work.

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Abbreviations

AFRC	Armed Forces Revolutionary Council, Sierra Leone
AU	African Union
BiH	Bosnia and Herzegovina
CAVR	Commission for Reception, Truth and Reconciliation in East Timor
CDF	Civil Defence Forces, Sierra Leone
CFET	Consolidated Fund for East Timor
CHRAC	Cambodian Human Rights Action Committee
DLU	Defense Lawyers Unit, Timor-Leste
DMU	Detainee Management Unit, International Force in East Timor
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOMOG	Economic Community of West African States Monitoring Group
KPP-HAM	Commission for Human Rights Violations in East Timor
ICC	International Criminal Court
ICD	International Crimes Division of the High Court of Uganda
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
INTERFET	International Force in East Timor
OKO	BiH's Criminal Defense Section (Odsjek krivicne odbrane, in Bosnian)
OPG	Office of the Prosecutor-General of Timor-Leste
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
RoR	ICTY Rules of the Road Procedure
RUF	Revolutionary United Front
SCIT	United Nations Mission in Timor, Serious Crimes Investigation Team
SCSL	Special Court for Sierra Leone
SCP	Special Crimes Process, Timor-Leste
SCU	Serious Crimes Unit of the Public Prosecution Service, Timor-Leste
STL	Special Tribunal for Lebanon
TJSC	Transitional Judicial Services Commission
TRC	Sierra Leone Truth and Reconciliation Commission
UN	United Nations
UNAMSIL	UN Mission in Sierra Leone
UNAKRT	UN Assistance to the Khmer Rouge Trials
UNIIC	UN International Independent Investigation Commission
UNMISET	UN Mission of Support in East Timor
UNMIT	UN Integrated Mission in Timor-Leste
UNSG	UN Secretary General
UNTAET	UN Transitional Authority in East Timor
WVS	Witness and Victim Section, Special Court for Sierra Leone



Five senior police and military officers stand trial before the Serious Crimes Panels in Timor-Leste in 2002.

Introduction

A Hybrid Model of Justice

Hybrid courts (or mixed tribunals combining international and national components) are no longer a novel approach to pursuing criminal accountability for egregious crimes of international concern (war crimes, crimes against humanity, and genocide). Created and implemented in diverse contexts around the globe for over a decade, they provide countries with an alternative to a fully domestic or international judicial process to hold perpetrators to account for mass atrocities.

Over time, hybrid jurisdictions have proven themselves to be a viable model of justice in difficult circumstances. Although almost all have faced funding shortfalls at some time during their mandate and most have been met with strong opposition from those hostile to rigorous accountability efforts, each has investigated crimes and brought about justice where few if any other justice options existed. Their inherent strength rests, in part, on the flexibility they offer for responding to complex international crimes at the national level and on the opportunity they provide for promoting the exchange of information and expertise and for building capacity.

There is no model hybrid tribunal. Rather, each hybrid court is established in response to the particular needs of the context and may be “internationalized” in varying ways and to different degrees. The degree of international involvement has almost always been negotiated to meet the needs of domestic authorities who were reluctant to cede sovereignty and to address the concerns of international actors who were uncertain about the adequacy of existing due process norms or wary of limitations in the state’s judicial, legal, and institutional capacity.

As a result, a hybrid tribunal usually reflects the political compromises reached among the negotiating parties, most often the United Nations (UN) and the host state. The negotiation process itself can provide space for different factions to come together to build consensus around a common and sustainable approach to achieving accountability. They can also make accountability processes more responsive to the needs of victims and communities, including by giving victims the right to participate in the proceedings.

Because of this process of give and take, hybrid tribunals offer the promise of independent justice within a mechanism that is capable of responding to complex international crimes at the domestic level. Box I.1 presents an overview of hybrid tribunals.

Box I.1: What Is a Hybrid Court or Tribunal?

It is sometimes not easy to decide whether a particular court fits the typology of a hybrid court, given the many features they share with international criminal justice bodies. For many, the sine qua non of the hybrid model of justice is the participation of international staff, in particular international judges and prosecutors, in national processes. Their presence is seen as a safeguard in support of impartiality and independence, and as adding expertise in international criminal justice and fair trial norms that may not be available locally. Despite significant differences in practice, there are certain features common to hybrid tribunals, although not all may be present in every instance. These features include the following:

Jurisdiction over international crimes. Hybrid tribunals have jurisdiction to prosecute and try persons for violations of international law (e.g., war crimes, crimes against humanity, genocide, and torture). Some, such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), were also given jurisdiction over crimes under domestic law. Despite its name, the International Crimes Tribunal Bangladesh is not a hybrid tribunal, but instead a domestic judicial mechanism set up under national legislation to try internationally recognized crimes, as are the International Crimes Division of Uganda and the War Crimes Chamber of the District Court in Belgrade.

Application of international procedural and substantive law. Sometimes, the applicable law of a hybrid tribunal may be domestic, yet the rules or practices that govern the process may be those used in international tribunals. Thus, although the Special Tribunal for Lebanon (STL) is mandated to prosecute domestic crimes relating to, for instance, terrorism and “offences against life and personal integrity” under the Lebanese criminal code, it is also mandated to interpret that law “based on the highest standards of international criminal procedure.” The rules of procedure and evidence of the STL are also to be interpreted based on principles “laid down in international law” and based on “international standards on human rights.”

International staff. Most hybrids are staffed by both national and international judges, prosecutors, and staff, although the balance of national to international personnel varies greatly by context and may change over time, as happened in Bosnia and Herzegovina (BiH) where the hybrid section of the court gradually transitioned to a fully domestic one. The Supreme Iraqi Criminal Court is sometimes mentioned as a hybrid tribunal, although its international components and the role played by international staff in its proceedings were ultimately quite limited.

International sources of funding. Hybrid tribunals almost always receive their financing at least in part from international sources. The War Crimes Chamber in BiH received funding at the beginning of its mandate through voluntary contributions from international donors, but over time the funding came from the state budget, which eventually subsumed it.

Hybrid Tribunals in Context

Hybrid tribunals can exist as stand-alone jurisdictions, operating outside the domestic justice system, such as the Special Tribunal for Lebanon (STL) and the Special Court for Sierra Leone (SCSL).¹ Or they can be integrated into and form a part of the national judicial system, but with international judges, prosecutors, and staff, such as the War Crimes Chamber in Bosnia and Herzegovina (BiH) and the internationalized panels in Kosovo.² Some, such as the Extraordinary Chambers in the Courts

¹ Statute of the Special Tribunal for Lebanon, art. 4. In Sierra Leone, the SCSL had primacy over the Sierra Leonean courts and could request a case to be deferred to it from a national court. See Statute of the Special Court for Sierra Leone, art. 8(1). Amnesties previously granted under the Lomé Agreement could not bar prosecutions before the SCSL (Statute of the Special Court for Sierra Leone, art. 10).

² In 1999, the UN Interim Administration Mission in Kosovo established panels known as “Regulation 64 Panels,” consisting of a mixture of local and foreign judges in local courts to examine serious crimes. For more information, see Perriello and Wierda (2006a).

of Cambodia (ECCC), SCSL, and STL, are based on bilateral agreements between the UN and the government.

Depending on the context, hybrid courts have been modeled on both civil and common law traditions, consistent with national practice. For instance, in Cambodia, the ECCC operates within Cambodia's domestic legal system, which is based largely on the French civil system of justice, with co-investigating judges. In BiH, however, the Office of the High Representative introduced a criminal procedure code with features from an adversarial system of justice, for instance, giving police and prosecutors rather than judges investigatory responsibility, in a country that had been using accusatorial procedures for years.³ The STL incorporates aspects of the civil law system, including questioning of witnesses by the presiding judge and the conducting of trials in absentia.⁴

A few of the hybrid tribunals set up since 2000, such as the hybrid mechanism in Timor-Leste,⁵ have concluded their operations. Others, such as the ECCC, have become veritable fixtures in the national and international justice landscape, with large bureaucracies and political networks having been built up in and around them. At the STL, the office of the prosecutor closed its case-in-chief concerning the February 2005 attack that killed 22 persons, including former Lebanese Prime Minister Rafiq Hariri.⁶ Although at the time of this report's writing, the prosecutor was considering an additional indictment and investigations of other attacks within the tribunal's jurisdiction.⁷ The War Crimes Section in Bosnia and Herzegovina, which began as a hybrid tribunal with mixed panels of international and national judges, has since made the transition to a fully national justice process.

Hybrid tribunals have achieved some notable convictions and have provided a measure of justice for victims with little or no other means of redress. The judgments rendered against former heads of state, including Former Liberian President Charles Taylor and Khieu Samphan of Democratic Kampuchea,⁸ who were tried and sentenced to lengthy prison terms,⁹ and rebel and paramilitary leaders, such as Issa Hassan Sesay and Moinina Fofana in Sierra Leone, are but a few.¹⁰ In BiH, the War Crimes Section of the Criminal Division has reached a total of 202 first instance judgments and a total of 180 final verdicts,¹¹ including for crimes relating to the Srebrenica Massacre of Bosniak men and boys in 1995, which was deemed a genocide by the International Criminal Tribunal for the former Yugoslavia (ICTY).

These efforts at fighting impunity have influenced, in ways large and small, the operations of other tribunals, such as the Extraordinary African Chambers in the Senegalese courts, inaugurated in February 2013.¹² Each effort offers lessons for building credible processes applicable to ongoing international

³ Ivanišević (2008), p. 13. This shift required the commitment of additional resources for training those prosecuting, trying, and defending cases. Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (2015) p. 5.

⁴ Statute of the Special Tribunal for Lebanon, arts. 20 and 22.

⁵ This paper uses the name Timor-Leste, the name of the territory as of May 20, 2002. Before that time, the name East Timor was used.

⁶ Special Tribunal for Lebanon, Ayyash et al., Case No. STL-11-01. The trial in the primary case is proceeding against the defendants in absentia. See Special Tribunal for Lebanon (2018c), p. 3.

⁷ The prosecutor submitted an indictment in Case STL-17-07 connected to the attack of 14 February 2005. At present, the details of the victims, crimes, and suspects in that case are confidential and ex parte. Special Tribunal for Lebanon, Case No. STL-17-07/II/AC/R176bis.

⁸ ECCC (2018b).

⁹ Charles Taylor and Khieu Samphan were sentenced to 50 years and life imprisonment, respectively.

¹⁰ Sesay was sentenced to 52 years imprisonment, and Fofana was ultimately sentenced to 15 years.

¹¹ Court of Bosnia and Herzegovina, Statistic on judgments of the Court of Bosnia and Herzegovina for the period of 2004 – 2017.

¹² The Extraordinary African Chambers were established within the Senegalese courts by agreement between the African Union (AU) and the Government of Senegal to prosecute international crimes committed in Chad. On May 30, 2017, the chambers convicted Hissène Habré, the former Chadian dictator, of crimes against humanity, war crimes, and torture, including rape and sexual violence. See Statute of the Extraordinary African Chambers within the courts of Senegal, art. 11.

criminal justice projects and those actively under consideration, particularly in countries just emerging from conflict that suffer from fractured or highly politicized institutions and a deep trust deficit.¹³

The decisions—both procedural and substantive—issued by hybrid tribunals continue to have an impact on both national and international jurisprudence, for instance, the recognition of the crime of forced marriage as a crime against humanity,¹⁴ the crime of child recruitment,¹⁵ the crime of criminal association,¹⁶ attacks against peacekeepers,¹⁷ the right to reparation,¹⁸ and victims' participation, and the definition of the crime of terrorism.¹⁹

Still, hybrid tribunals have been criticized for prosecuting a relatively small number of perpetrators in contexts where hundreds of people were involved in the commission of crimes. More often than not, they pursue only exemplary prosecutions involving a handful of suspects. SCSL operated for 11 years, but only issued 13 indictments for serious crimes, conducted four trials, and convicted nine defendants. Since it was established in 2005, the ECCC has charged seven persons, conducted three trials, and convicted three defendants.²⁰ Even when measured against a narrow mandate of prosecuting culpable individuals at the highest levels, these efforts pale in comparison with the horrific numbers of lives lost and harms suffered.

In addition, the costs of operating a hybrid tribunal have been consistently high, even though one of the earliest hybrid tribunals, the SCSL, was intended to be “leaner and meaner” than the ad hoc tribunals²¹—the ICTY and International Criminal Tribunal for Rwanda (ICTR)—that came before it, which were criticized for having outsized budgets. Despite efforts to rein in costs, hybrid courts continue to exceed their initial budgets, which often begin small but then grow over time. For instance, the ECCC, after operating for over 10 years, has so far completed only three trials, at a total cost in excess of USD 318.9 million,²² although the estimated original budget was USD 56.3 million.²³

Yet, despite these challenges, hybrid courts still offer a practical, feasible, and meaningful option for filling the impunity gap, especially in contexts where national judicial processes are underdeveloped or where capacity is so lacking that trials are unlikely to meet international standards. Oftentimes, the political obstacles to national trials, including entrenched and dominant interests opposed to accountability, are so great that only international backing and the involvement of international staff can ensure that trials move forward fairly. As such, hybrid tribunals continue to have enduring appeal.

¹³ At the time of this report's writing, new hybrid tribunals were being considered, being developed, or underway in the Central African Republic, the Democratic Republic of Congo, South Sudan, Sri Lanka, and the Specialist Chambers in Kosovo. See, e.g., Kosovo Specialist Chambers and Specialist Prosecutor's Office (2018). *Cour Penale Speciale* (2018).

¹⁴ The Appeals Chamber of the SCSL recognized the crime of forced marriage as an “other inhumane act,” for the purpose of determining a crime against humanity in February 2008. *Special Court for Sierra Leone* (2008b), paras. 105, 181-203. Case 002/02 against Khieu and Nuon Chea at the ECCC also listed “other inhumane acts” as crimes against humanity—including forced marriage by the regime and sexual violence within those marriages.

¹⁵ For more analysis, see Aptel (2014), pp. 340-360.

¹⁶ For description of the crime of criminal association and its distinctiveness from the crime of conspiracy, see *Special Tribunal for Lebanon*, Case No. STL-17-07/I/AC/R176bis.

¹⁷ *Special Court for Sierra Leone* (2004d).

¹⁸ ECCC (2010).

¹⁹ *Special Tribunal for Lebanon*, Ayyash et al., Case No. STL-11-01/I/AC/R17bis.

²⁰ Kaing Guek Eav, Khieu Samphan, and Nuon Chea were convicted. See ECCC (2018e).

²¹ *Agence France Presse* (2006).

²² See ECCC (2018f). Total expenditures were USD 318.9 million (USD 293.0 million from 2006-2016 and 25.9 million in 2017).

²³ ECCC (2018k), p. 6.

Why a Hybrid Court?

Because of their hybrid structure, hybrid courts combine the potential advantages of national prosecutions (such as geographical and psychological proximity to victims and positive impact on domestic judicial and prosecutorial processes) with the benefits of international involvement (such as resources, personnel, and security).

Although hybrid courts are constituted primarily for the purpose of combating impunity and delivering justice to victims by adjudicating serious violations of international law in line with international standards, many of these courts were created to serve broader societal goals as well, reflecting the motivations and objectives of a host of different actors, both national and international. Because most conduct trials in the country where the crimes occurred, they are seen as a mechanism for making a lasting impact on a society.

For instance, in the foundational documents of the SCSL, the court is cited not only as a mechanism for ending impunity, but also for contributing to the “process of national reconciliation” and to “the restoration and maintenance of peace.”²⁴ Similarly, in the agreement between the United Nations (UN) and the Government of Cambodia, prosecutions were undertaken “in the pursuit of justice and national reconciliation, stability, peace and security.”²⁵

Impact can also take the form of improving public confidence in state institutions and in the willingness of state authorities to enforce the law. In Sierra Leone, where conflict resumed after the request for a court was made to the UN Security Council, it was suggested that the court would “send the right signals to the perpetrators of the violations that they will not continue committing atrocities with impunity.”²⁶ Victims who are demanding trials are assured that no one is above the law and thus that the rule of law has meaning.

At the societal level, it is often hoped that national justice processes will concretely impact the justice sector and improve capacity. The War Crimes Section in the Criminal Division of the Court of Bosnia and Herzegovina (BiH), for instance, was created as part of a wider rule of law initiative aimed at legal and judicial reform and strengthening national institutions. That objective entailed many challenges, as well as opportunities, as the prosecutor emphasized during the inauguration of the chambers in March 2005:

The Court of BH [Bosnia and Herzegovina] must become a truly national court, which will mean a big step forward towards reconciliation. Enormous effort and crystal-clear fairness are needed to destroy suspicion, prejudice, lack of confidence. It is a great challenge, not a privilege. And

“The establishment of both the Court of Bosnia and Herzegovina and the Prosecutor’s Office of Bosnia and Herzegovina at the state level, which became fully operational in 2005, was an important milestone for the country’s battle against impunity. Overall, the state level institutions have delivered efficient, fair, and human rights compliant proceedings.”

²⁴ UN Security Council (2000f), p. 1.

²⁵ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, preamble.

²⁶ UN Security Council (2000a), para. 1.

in many ways your task will be more difficult, as you don't have the powers of the International Tribunal, however, your power and authority is even greater—as this is your country.

This strategy of combining both international and hybrid criminal justice processes ultimately expanded the reach of justice and provides examples of cooperation that are worth considering. International involvement enhanced the country's domestic capacity by making the national courts better equipped to address complex cases in a fair and transparent way,²⁷ as the Organization for Security and Co-operation in Europe (OSCE) concluded at the end of the international mandate: “The establishment of both the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina at the state level, which became fully operational in 2005, was an important milestone for the country's battle against impunity. Overall, the state level institutions have delivered efficient, fair, and human rights compliant proceedings.”²⁸

Hybrid judicial processes are also pursued to send a strong message to society that crimes occurred and must be remedied, to affirm that victims should be treated with dignity and compassion, to underscore the nation's commitment to democratic principles and human rights, and, in some cases, to assist in the rehabilitation of offenders. Local trials can communicate a condemnation of past actions and reinforce the message that the nation has “turned a new page” and will not tolerate the recurrence of such abuses.

Many of the objectives advanced in connection with hybrid processes are important aspirational goals. It is crucial, however, that hybrid courts, similar to other justice mechanisms, are advanced with realistic expectations about what they can achieve and are not oversold as a vehicle for correcting a society's ills.

The Purpose of This Report

This report aims to help practitioners in the transitional justice field to understand the experience of establishing and operating hybrid courts and to address some common assumptions about these entities. To do so, it looks at hybrid or mixed courts in practice, drawing on experiences in five different contexts:

HYBRID COURT	HEADQUARTERS	DATE CREATED	YEARS OF OPERATION	FOUNDING DOCUMENT
War Crimes Section of the Criminal Division within the Court of Bosnia and Herzegovina (Court of BiH) and the Special Department for War Crimes within the BiH Prosecutor's Office	Sarajevo, Bosnia and Herzegovina	2004 Inaugurated March 2005	2005-2012 with international judges The War Crimes Section is still operating	Agreement between Office of the High Representative for Bosnia and Herzegovina and the Government of Bosnia and Herzegovina Followed by passage of a law by Parliament
Extraordinary Chambers in the Courts of Cambodia	Phnom Penh, Cambodia	June 2003	2005-present	Agreement between the UN and the Government of Cambodia
Special Tribunal for Lebanon	Leidschendam (near The Hague), the Netherlands and Beirut, Lebanon	2007 Inaugurated March 2009	2009-present	UN Security Council Resolution 1757 (2007)

²⁷ Organization for Security and Co-operation in Europe (2010a), p. 34.

²⁸ Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2011), p. 7.

HYBRID COURT	HEADQUARTERS	DATE CREATED	YEARS OF OPERATION	FOUNDING DOCUMENT
Serious Crimes Process in Timor-Leste, made up of (i) the Special Panels in the Courts (Special Panels) and (ii) a Serious Crimes Unit (SCU) in the national Public Prosecutor's Office	Dili, Timor-Leste	June 6, 2000	June 2000-May 20, 2005	Regulation of the UN Transitional Administration in East Timor
Special Court for Sierra Leone	Freetown, Sierra Leone	April 2002	2002-2013 Currently functioning as a residual mechanism	Agreement of the UN and the Government of Sierra Leone, ratified by Parliament

These hybrid tribunals span more than a decade of international experience and offer a window into shifts in thinking about the role that international and national justice systems can play in fighting impunity. Because discussions around hybrid processes are so often animated by concerns over their creation, sustainability, effectiveness, and fairness, this report is divided into five parts, covering the following topics:

- **The timeline for creating a hybrid court, from proposal to an operating court.** Because hybrid courts are typically created during periods of political change, and sometimes amid ongoing violence, many factors will affect the amount of time needed for these processes to get underway. This section examines the factors that affect the amount of time necessary to establish a hybrid court, including the extent and depth of international and national commitment to the process, the availability of evidence, and availability of sufficient funding.
- **Considerations for bringing cases to trial, prosecutorial policy (or strategy).** This section discusses the realities and hard choices facing prosecutors tasked with prosecuting mass atrocities. It covers the policies for selecting and prosecuting cases at each of the five tribunals and the criteria for making those decisions, including cases “ready for trial,” those involving the “most responsible” or most senior persons, or those involving the “most grave” or “most serious” crimes. It also looks at mapping processes; practices for making the criteria public; the selection of crimes for prosecution; and political and other considerations.
- **Structure, staffing, and recruitment and its challenges.** This discussion provides a brief overview of the organizational structure of hybrid courts and then examines staffing at each of the five focus courts and recruitment practices and protocols for key positions, including for judges, prosecutors, the defense counsel, and the registrar.
- **Protecting witnesses and victims.** Measures to protect witnesses and victims are essential to ensuring that critical testimony is available during criminal processes and that victims can participate. This section summarizes the measures for protecting and supporting witnesses and victims and for determining who is entitled to this protection. It also discusses the effectiveness of these measures, the amount of resources dedicated to them, and the scale of services provided.
- **Financing hybrid tribunals.** This section provides an in-depth look at the cost of each of the five hybrid tribunals and how they have been funded. It discusses underfunding at the courts

and the use of management committees to assist with fundraising and the monitoring of court operations.

A detailed assessment of the legacy of each court is beyond the scope of this report. To be meaningful, such an analysis would require more extensive and focused study of a range of effects on society, which are by nature difficult to measure, including improvements in the efficiency of national justice systems; increased capacity among judges, prosecutors, and other staff; and enhanced respect for the rule of law and international norms.

This report highlights instead the key attributes of an effective hybrid court and many of the conditions that are helpful for establishing one. These include:

- **Establishing a realistic timeframe for setting up the court.** Fair and effective accountability mechanisms take time to build. Countries where mass atrocities have occurred are often lacking in the essential capacity, legal framework, and public trust required for delivering meaningful justice. Many have poorly functioning justice systems and entrenched interests opposed to accountability. Crime and corruption may be endemic and flourish, often with the support of people in power. Thus, it is advisable to first assess the extent to which the justice system can perform basic functions necessary for the rule of law and the capacity of key actors on the ground who must assist with implementation, including civil society.
- **Formalizing the court's relationship to other bodies, including other courts and transitional justice mechanisms such as truth commissions.** Hybrid courts have a distinct function from truth seeking and documentation institutions; they may also have primary or exclusive jurisdiction over international crimes. The relationship and modalities of cooperation between hybrid courts and other bodies should be defined in advance to ensure that each can operate effectively and in a complementary manner, while protecting the rights of the accused and others who appear before them.
- **Committing sufficient resources.** To provide meaningful accountability for mass atrocities, a hybrid court requires a reliable and adequate funding stream. These resources also include a sufficient number of staff with the necessary expertise and training to get the job done. This is true not only for judges and prosecutors but also for court administrators, forensics experts, archivists, and others, who will be entrusted with sensitive public functions, including interacting with victims and witnesses. A hybrid court also requires political support to carry out its mandate fairly and effectively.
- **Ensuring that the legal and procedural framework is consistent with international human rights norms and standards and will provide victims with equal access to justice.** Human rights standards should guide the court's work. As such, efforts should be undertaken to harmonize and if necessary promulgate or amend domestic criminal law and procedure to incorporate international legal obligations into domestic law, ensure due process, and protect the rights of all persons who appear before the court. Consideration should be given to principles of liability and the non-applicability of statutory limitations to grave crimes such as torture, war crimes, genocide, and crimes against humanity.

- **Guaranteeing equality of arms.** Trials before hybrid courts should be conducted in compliance with fair trial standards, which include the rights to defend oneself in person or through counsel, to call and examine witnesses, and to exclude evidence obtained in violation of international standards.
- **Creating adequate oversight mechanisms.** To promote public trust in the integrity and legitimacy of court processes, oversight mechanisms should be established to separately oversee and manage court operations, resources, and funding, and should issue regular reports. Oversight may be conducted by an international body, or by a separately constituted oversight committee.
- **Ensuring the independence of prosecutors, the judiciary, administrators, and staff.** To ensure the independence and impartiality of justice at the court, all court personnel, especially those serving as judges and prosecutors, should be recruited and vetted, in accordance with professional standards and principles of integrity. Otherwise, public perceptions of the credibility and fairness of the processes may be compromised.
- **Guaranteeing that witnesses and victims receive appropriate protection and support.** In situations of impunity, the potential for retribution is a persistent concern especially given the nature of international criminal justice processes, which challenge not only individual perpetrators but also the structures and networks of power. It is essential that the type and degree of victim participation are considered and that adequate structures are established for protecting those who participate.
- **Cultivating local ownership and support for the process.** Hybrid tribunals can help promote national ownership of post-conflict accountability processes.
- **Planning ahead for the transition to a fully national process or the completion of hybrid court trials.** To maximize a tribunal's impact on national processes, it is essential to plan well in advance for what will happen once the court closes, including the possibility of creating a residual mechanism for ensuring the enforcement of sentences, the review of judgments, and the management of court archives.



Survivors Chum Mey (left) and Vann Nath (right) wave copies of the judgment issued against Kaing Guek Eav (alias Duch) on August 12, 2010, 30 years after the end of the Khmer Rouge regime and almost a decade after the formal request to establish a court. (Extraordinary Chambers in the Courts of Cambodia)

PART 1

Waiting on Justice: The Timeline for Creating a Hybrid Court

How Long Before a Hybrid Tribunal Is Fully Operational?

The timeline for setting up a hybrid tribunal and the tasks of building cases, indicting defendants, and moving those cases from trial to final judgment varies greatly by context. Many variables can affect the timeline at each stage, with perhaps the degree of national and international commitment for implementing and funding the process having the greatest impact. Credible national processes almost always follow an assessment of what is feasible and the building of a sustainable foundation of political support, which is required for implementation. Thus, it can be difficult to draw conclusions about timing across contexts. Nevertheless, experience provides some general guidance.

On average, it takes approximately three to four years, from conception to the reality of a fully operational court, although this timeframe is open to interpretation, depending on how you define the beginning (e.g., the request to establish a court or a formal agreement to do so) and the end of the startup process (e.g., the passage of a court's statute, swearing-in of judges, the first indictment, or the first trial).

Each stage of the startup process—from the earliest discussions, to the planning and passage of legislation, to the building and staffing of the court itself—offers opportunities for formulating and acting upon national priorities for reform and capacity building. Planning has moved forward quickly in some instances, when hybrid tribunals have been established at the request of the country where the offenses occurred, sometimes with the help of the United Nations (UN).

Rarely, however, is there consensus in favor of setting up an accountability mechanism. Rather, consensus must often be built over time and must usually overcome stiff opposition by those who seek to derail efforts to hold accountable persons responsible for serious crimes.¹

Attempts, however, to accelerate the startup process have not always produced good results, especially in situations where there is little local capacity for providing swift, effective, and comprehensive justice

¹ The Lomé Peace Agreement, which temporarily ended the civil war in Sierra Leone and established a truth and reconciliation commission, included an amnesty provision when it was signed in 1999. However, Kofi Annan, the UN Secretary-General at the time, added a written statement to his signature on the document, clarifying that the “United Nations holds the understanding that the amnesty provisions of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” Ultimately, amnesties were not a bar to prosecution under the Statute of the Special Court for Sierra Leone. Statute of the Special Court for Sierra Leone, art. 10.

and no clear, or at best only conflicted, political will for building this capacity. Hybrid tribunals that were established as a type of emergency response under the administration of the UN have sometimes suffered from structural flaws, such as an unclear mandate, inadequate recruitment and staffing practices, and persistent perceptions of unfairness.²

Box 1.1 describes parallel truth-seeking and truth-telling processes.

Box 1.1: Parallel Truth-Seeking and Truth Telling Processes

The demand for, and sequencing of, other transitional justice mechanisms, such as truth commissions, many affect a hybrid tribunal's timeline. In many contexts, proposals for a hybrid court and a truth commission are made at or around the same time, given the many natural links between truth and accountability and victims' rights to truth and redress. There are many complexities inherent in undertaking both processes in parallel. In Sierra Leone, where the government and the international community agreed to establish both a hybrid court and a truth and reconciliation commission, competing demands for funding and resources and other tensions arose between the bodies during their startup phases and over the course of their lifetimes. Many of these challenges could have been mitigated if thorough guidelines had been established early on and followed, such as for managing basic operational issues (e.g., information sharing, the use of self-incriminating evidence, and access to detainees). In Timor-Leste, the UN, civil society, the Catholic Church, and community leaders also considered setting up a truth commission close to when the hybrid court was established. On July 13, 2001, shortly after the hybrid court began issuing indictments, the UN Transitional Administration in East Timor (UNTAET), issued Regulation No. 2001/10, establishing the Commission for Reception, Truth, and Reconciliation in East Timor.

² Reiger and Wierda (2006).

Timor-Leste

In Timor-Leste, the event that precipitated the creation of a hybrid process was the violent and destructive rampage carried out by the Indonesian army and militias following a UN-supervised referendum on independence in 1999. This violence left little in the way of physical infrastructure or a justice system capable of addressing even ordinary crimes, much less the atrocities that had occurred during decades of Indonesian occupation.³ For background on Timor-Leste, see Box 1.2.

In October 1999, when the UN Transitional Authority in East Timor (UNTAET) was established,⁴ violence was ongoing, refugees were still returning, and some 80 percent of the population had lost their livelihood.⁵ The country was experiencing a legal and political vacuum. As a result, UNTAET needed to start from scratch and created the court system, at both the district and appellate levels, in addition to a mechanism for adjudicating the many serious crimes perpetrated.⁶

Because there was no independent national government with which to consult, UNTAET issued a series of regulations under its peacekeeping and administrative mandate. First, national courts were organized in Timor-Leste. Then, “panels with jurisdiction over serious criminal offenses” were created,⁷ as a section within the newly established District Court in Dili and with international judges sitting beside Timorese.⁸ These hybrid panels known as Special Panels for Serious Crimes (Special Panels) were managed by the UN and were given primacy over national courts with respect to crimes within their exclusive jurisdiction.⁹ At the same time, UNTAET created the Public Prosecution Service, separate from the national judicial structure that included a specialized unit—the Serious Crimes Unit (SCU)—to prosecute serious crimes.¹⁰

With UN involvement, the startup process of the Serious Crimes Process in Timor-Leste (SCP) happened quickly after the escalation of violence and within the ongoing UN territorial administration.¹¹ The process from conception to a signed agreement took less than one year, from around October 1999¹²—the time of the establishment of

Serious Crimes Process TIMOR-LESTE

Timeline

OCTOBER 25, 1999

UNSC establishes
UNTAET by
Resolution 1272

MARCH 6, 2000

UNTAET regulations
create district and
appeals courts and
allow for the
creation of Special
Panels to try serious
crimes

JUNE 6, 2000

Special Panels
within the courts
and the SCU
within the Public
Prosecution Service
are created to deal
with serious crimes

DECEMBER 2000

SCU issues first
indictments of
serious crimes

January 2001

First trials before
the Special Panels

JULY 9, 2001

First trial to include
crimes against
humanity

³ Reiger and Wierda (2006), p. 11.

⁴ UN Security Council (1999c).

⁵ UN (2000).

⁶ UN Transitional Administration in East Timor (2000a).

⁷ The serious offenses covered included war crimes, genocide, crimes against humanity and eventually torture, murder and certain sexual offenses.

⁸ UN Transitional Administration in East Timor (2000a); UN Transitional Administration in East Timor (2000b).

⁹ UN Transitional Administration in East Timor (2000b).

¹⁰ UN Transitional Administration in East Timor (2000c).

¹¹ The head of the United Nations Transitional Administration in East Timor (UNTAET), Sergio Vieira de Mello, took up his duties on November 17, 1999, less than a month after the administration began. See UN Peacekeeping (1999).

¹² UN Security Council (1999c).

UNTAET— to approval of Regulation 2000/15 on the establishment of the Special Panels in June 2000.¹³ As such, there was little ability for coordinated and comprehensive planning across the various UN departments involved.

As a result, in the first year of operations, the SCU lacked an effective prosecution strategy and possessed little capacity for directing resources and staff to implement whatever strategy it did have. Given that many of the perpetrators with the greatest degree of responsibility for the crimes committed had fled to Indonesia, the investigations that were launched related to complaints received mainly in relation to low-levels suspects already in custody. The first indictments issued by the SCU, only a few months later in December 2000, involved primarily ordinary crimes of murder or rape.

The first trial to include crimes against humanity, the *Los Palos case*, started on July 9, 2001, and ended with a guilty verdict rendered at a two-hour public hearing on December 11, 2001, barely one and a half years after the SCP was formally created.¹⁴ However, although the SCP eventually convicted over 80 individuals, after incurring operating costs in excess of USD 20 million, it left a substantial number of cases with pending indictments by the time it closed down,¹⁵ many against individuals outside Timor-Leste's jurisdiction.¹⁶ The SCP's mandate was timed to end when the UN mission there closed on May 20, 2005,¹⁷ in accordance with Security Council resolutions,¹⁸ despite the fact that it had not nearly completed its work.¹⁹

A commission of experts reviewed the justice processes in Indonesia and Timor-Leste,²⁰ concluding that the SCP did not provide “accountability of those who bear the *greatest responsibility* for serious violations of human rights.”²¹ Rather, convictions were achieved largely against “low-level perpetrators, primarily illiterate or semiliterate farmers” and a few “low-ranking” members of the Indonesian army.²²

¹³ UN Transitional Administration in East Timor (2000b).

¹⁴ The first major case from Los Palos, the capital of the eastern district of Lautem in East Timor, was Public Prosecutor v. Joni Marques and 9 others, 9/00. The 10 defendants were charged with murder, torture, deportation, or forcible transfer of population and persecution. See Judicial System Monitoring Programme (2002).

¹⁵ UN Security Council (2005f), p. 19.

¹⁶ Despite steps taken by Timor's general prosecutor, no extradition agreement or other form of mutual legal assistance framework was signed between Indonesia and Timor-Leste, severely hampering the SCU's operations. UN Security Council (2005f), p. 26.

¹⁷ UN Security Council (2004c). “Commending the Serious Crimes Unit for the efforts it has undertaken in order to complete its investigations by November 2004, and any further trials and other activities no later than 20 May 2005.” After the SCU closed in 2005, a serious crimes investigation team was established within the UN Integrated Mission in Timor-Leste to complete pending investigations under the direction and supervision of Timor's Office of the Prosecutor-General. See, e.g., International Center for Transitional Justice (2010). Starting in 2003, UNDP's Justice System Programme (JSP) also provided capacity building support to the justice sector, including training national judges and recruiting international judges, prosecutors, and public defenders to assist in proceedings. See UN Development Programme in Timor-Leste (2018).

¹⁸ UN Security Council (2004b); UN Security Council (2004c).

¹⁹ UN Security Council (2004c). “Noting with concern that it may not be possible for the Serious Crimes Unit to fully respond to the desire for justice of those affected by the violence in 1999 bearing in mind the limited time and resources that remain available.”

²⁰ The Secretary-General created a three-person commission of experts to look at the work of the SCP and the Indonesian Ad Hoc Human Rights Court on East Timor. The experts appointed were Justice P.N. Bhagwati, Dr. Shaista Shameem, and Professor Yozo Yokota. See UN Security Council (2005b) and UN Security Council (2005c).

²¹ UN Security Council (2005f), p. 86.

²² Cohen (2006b), p. 4.

Box 1.2: Background: Timor-Leste

For more than 450 years, the eastern portion of Timor Island (East Timor) was under the colonial control of Portugal. Changes finally came in 1974, when Portugal began to divest control over its overseas territories with the end of dictatorial rule by its long-serving Prime Minister Antonio Salazar. East Timor, however, fell into turmoil and factionalism, facilitated in significant part by forces from Indonesia. Less than a year later, in December 1975, Indonesia invaded and annexed East Timor, claiming tensions on the island represented a security threat. For the next 24 years, Indonesia imposed a brutal military occupation in which widespread and systematic violations of human rights were perpetrated against pro-independence supporters, including *Forças Armadas de Libertacao Nacional de Timor Leste* and many civilians.

Finally, in response to intense international pressure and with the resignation of Indonesian President Suharto in February 1999, incoming President B.J. Habibie agreed to hold a popular consultation (referendum) on Timorese independence under the auspices of the United Nations. On August 30, 1999, almost 80 percent of eligible voters voted in favor of independence and against integration into Indonesia. The results of the referendum were met with a campaign of violence by pro-integration forces and Indonesian Armed Forces.

Over the course of Indonesia's decades-long occupation of East Timor and during the post-referendum violence, approximately 102,800 Timorese were killed, including about 18,600 who were disappeared and 84,200 who died from hunger and illness.^a

^a Human Rights Data Analysis Group (20018, accessed).

Sierra Leone

SPECIAL COURT OF SIERRA LEONE

Timeline

JUNE 12, 2000

Sierra Leone's president requests that a special criminal court be established

AUGUST 14, 2000

UNSC adopts Resolution 1315 on the intention to create a special court

JANUARY 16, 2002

UN and Government of Sierra Leone sign agreement to create the special court

APRIL 12, 2002

Statute of the Special Court for Sierra Leone enters into force

DECEMBER 2002

Judges of the trial and appeals chambers are sworn in

MARCH 7, 2003

First indictments approved

JUNE 3, 2004

First trial begins

In a letter addressed to the UN in June 2000, the Government of Sierra Leone called on the international community for help setting up “a strong and credible court.”²³ The letter acknowledged that, given the “magnitude and extent of the crimes committed,” Sierra Leone on its own did not have the “resources or expertise to conduct trials for such crimes,” or the “legal and judicial infrastructure” necessary for doing so.²⁴ Although Sierra Leone’s government recognized that there was need for such a court, intensive negotiations were nonetheless required before the final details could be worked out.²⁵

The process of working through the details extended over a period of years, and through a series of ceasefire agreements, before a meaningful disarmament was achieved and a consensus was reached for prosecuting (rather than amnestying) perpetrators.

Peace negotiations began in Sierra Leone on May 25, 1999, under the auspices of the Economic Community of West African States. On July 7, 1999, a peace agreement was reached by the warring parties in Lomé, the capital of Togo. The Lomé Peace Accords signed between the Government of Sierra Leone and the Revolutionary United Front (RUF) largely defined the terms of that peace, providing for the establishment of a truth and reconciliation commission to recommend measures for rehabilitating victims of human rights abuses, and calling for the creation of a special fund for war victims, among other things. These measures, it was hoped, would begin the process of repairing the harm, mass suffering, and devastation experienced by so many, including some 70,000 killed and 2.6 million displaced persons.²⁶

The Lomé Peace Accords however granted an “absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives.”²⁷ Kofi Annan, then UN Secretary-General (UNSG), signed the agreement, but appended a statement to his signature, clarifying that the “United Nations holds the understanding that the amnesty provisions of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”²⁸

²³ UN Security Council (2000a).

²⁴ UN Security Council (2000a).

²⁵ For instance, the framework originally proposed for the SCSL did not include its own court of appeals, but instead would have allowed the court of appeals for Rwanda and the former Yugoslavia in The Hague to be used. See UN Security Council (2000a), para. 6.

²⁶ Kaldor and Vincent (2006). See, e.g., Tufts University (2015).

²⁷ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Agreement), Chapter IX.

²⁸ UN Security Council (1999a). Ultimately, the Statute of the Special Court excluded the amnesty provision under the Lomé Peace Agreement. Statute of the Special Court for Sierra Leone, art. 10. For additional background, see Sierra Leone Truth and Reconciliation Commission (2004), vol. 3B, ch. 6, p. 364.

That peace, however, held for almost a year before conflict resumed in May 2000. In the interim, Parliament signed the Truth and Reconciliation Act in February 2000, establishing the Truth and Reconciliation Commission (TRC). The commission, however, would not become operational for another two years because of the resurgence of violence.

When peace was finally restored, the government and the international community agreed to establish a hybrid court. That process was initiated by a formal letter from President Ahmad Tejan Kabbah of Sierra Leone to the president of the UN Security Council, dated 12 June 12, 2000. The Special Court for Sierra Leone was finally established by agreement between the government and UN on January 16, 2002,²⁹ almost two years after the letter was sent. In between, however, the UN Security Council needed to issue a resolution on the special court,³⁰ as well as organize a UN planning mission,³¹ in coordination with a government created task force.³² In addition, a group of experts on the relationship between the TRC and the special court was convened to recommend a framework for governing the relationship between the two bodies.³³

The Special Court for Sierra Leone (SCSL) began its operations officially on July 1, 2002,³⁴ with the newly appointed registrar and prosecutor traveling to Sierra Leone in July and August 2002, respectively. The first indictments were approved in March 2003, about a year after the court was established.

That brisk pace was achieved in part because of UN involvement. The UN was a major catalyst during the conceptualization process, and also contributed legal expertise and laid out much of the administrative and financial bases for the court's existence.³⁵ During that time, the political will to mobilize the resources, personnel, and importantly the levers of power to get it done held firm, although support later waxed and waned over the life of the court. Overall, the SCSL benefited from the cooperation of organs of government such as the police, which provided an "essential bridge that helped those operations to succeed."³⁶ Cooperation also included the Special Court Ratification Act, which incorporated into domestic law obligations to assist the special court, including the arrest of persons and their delivery into custody.³⁷ As a result, once indictments were issued, five suspects were arrested within a matter of hours.³⁸

National and international civil society also helped define the parameters of the court's jurisdiction, conducted conflict mapping to establish "what happened during the conflict both temporally and geographically," and engaged Sierra Leoneans in the work of the court, an expenditure of effort that was to pay dividends in the court's eventual outreach campaigns.³⁹

²⁹ UN Security Council (2000b); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

³⁰ UN Security Council (2000f).

³¹ The UN planning mission was led by Assistant Secretary-General for Legal Affairs Ralph Zacklin in January 2002. It included members of the UN Office of Legal Affairs, a security coordinator, a building management expert, an interim prosecutor, two investigators, an interim registrar, an administrative expert, a representative of the UN Office for Project Services. UN Security Council (2002a), pp. 3-4.

³² The government-created task force was headed by Solomon E. Berewa, Sierra Leone's former Attorney General and Minister of Justice.

³³ UN Security Council (2002a), pp. 10-11.

³⁴ Special Court for Sierra Leone (2014), p. 9.

³⁵ UN Security Council (2002a).

³⁶ Perriello and Wierda (2006b), p. 21.

³⁷ Special Court for Sierra Leone (2002a).

³⁸ Indictments were announced only nine months after the prosecutorial staff had arrived in the country. Special Court for Sierra Leone (2004a), p. 14.

³⁹ Smith (2014), pp. 46-66.

The first trial began in June 2004,⁴⁰ with the first judgment following three years later, on June 20, 2007.⁴¹ Combined, the main cases against the three main factions—the Armed Forces Revolutionary Council, the Civil Defence Forces, and the RUF—moved from indictment through confirmation of the verdicts in just about six years. (See Appendix A.) Only the case against Charles Taylor pushed the end date of the tribunal back.⁴² The SCSL issued its last trial judgment in April 2012 against Charles Taylor, and the Appeals Chamber confirmed it in September 2013.⁴³ With the issuing of that final appeals judgment, the court closed its doors and became a residual mechanism.⁴⁴ For background on Sierra Leone, see Box 1.3.

Box 1.3: Background: Sierra Leone

The conflict in Sierra Leone began on March 23, 1991, with the invasion of a rebel group from Liberia. For the more than 10 years that followed, Sierra Leone, a small country of about 5.8 million people on the West African coast, was the scene of massive and systematic human rights violations. The Sierra Leonean Army and the government-aligned Civil Defence Forces (CDF), with the backing of some West African regional forces, fought the Revolutionary United Front (RUF), which was best known for its practice of amputating limbs of innocent civilians, perpetrating widespread sexual violence and sexual slavery, and kidnapping young people and conscripting them into its forces. The army and CDF, as well as the troops of ECOMOG, a regional intervention force, also committed atrocities.

Sierra Leone ultimately established both a hybrid court and a truth and reconciliation commission. The commission began operations in 2002 and presented its final report to the government in October 2004. The report recommended various reparations measures for victims, covering a broad spectrum of specific needs, including health care, education, pensions, skills training, and microcredit, as well as community and symbolic reparations.^a

^a Sierra Leone Truth and Reconciliation Commission (2004).

⁴⁰ The first case to begin was against members of Sierra Leone's Civil Defence Forces, Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa. Special Court for Sierra Leone (2004b).

⁴¹ Special Court for Sierra Leone, Case No. SCSL-04-16-T.

⁴² On appeal, Charles Taylor challenged the trial chamber's finding of individual criminal liability, with respect to the elements of aiding and abetting and planning liability. In the appeals chamber, the defense upheld Taylor's conviction, finding that his assistance to the rebels had a "substantial effect" on the commission of violations of international law. That decision did not require showing that the defendant had "specifically directed" aid toward a specific crime, as the ICTY had found in the Perišić case. See Harvard Law Review Association (2014).

⁴³ Special Court for Sierra Leone (2013a).

⁴⁴ Ongoing functions at the court's residual mechanism include continued witness protection and support; supervision and review of convictions, acquittals, prison sentences, and early releases; and contempt of court proceedings, among others.

Cambodia

During the startup process of some tribunals, negotiations were bogged down over whether a tribunal was needed at all, and, if so, in what form and with what amount of international and national involvement and control. That happened during negotiations over Cambodia's tribunal for prosecuting former leaders of Democratic Kampuchea. There, disputes over issues of sovereignty and judicial independence dragged on for years, making the startup process for the Extraordinary Chambers in the Courts of Cambodia (ECCC) the longest among the hybrid tribunals.⁴⁵ Eight years passed between when Cambodia's co-prime ministers sent formal requests for assistance to UN Secretary General Kofi Annan in June 1997 and when the agreement establishing the ECCC finally entered into force in 2005.⁴⁶

Much of that time was spent in a tug-of-war between the Cambodian government and the UN over the form the court would take and the balance of international and national control.⁴⁷ Fundamentally, the UN was concerned about whether appropriate structures were in place to ensure that the tribunal would apply international standards of justice and due process, while the government insisted that the tribunal should maintain Cambodian characteristics. There were also delays related to efforts to raise sufficient pledges and funds to cover operations.⁴⁸

After that long startup process, less than two years elapsed before staff members took up their duties and the court became fully operational, with the adoption of the internal rules on June 12, 2007. About a month later, on July 31, prosecutors introduced the first indictment against Kaing Guek Eav (alias Duch), the former chairman of the notorious S-21 prison. However, the first trial did not get started until February 17, 2009, with an initial hearing.⁴⁹ During the interregnum between the indictment and the beginning of trial, the court faced a significant financial and managerial crisis. In response, the UN Secretary-General Ban Ki-moon appointed Special Expert David Tolbert to advise him about how to address these and other challenges facing the court, including pursuing allegations of corruption.⁵⁰ As a result, the UN Office of Internal Oversight Services conducted a

Extraordinary Chambers in the Courts of CAMBODIA

Timeline

JUNE 21, 1997

Cambodian co-prime ministers request UN assistance in Khmer Rouge trial process

JUNE 1999

Cambodian president asks for UN assistance drafting legislation for a "special national Cambodian court"

JUNE 6, 2003

Agreement between UN and Cambodian government concerning prosecution under national law of crimes committed during the period of Democratic Kampuchea

APRIL 29, 2005

ECCC agreement enters into force

JULY 3, 2006

Judges are sworn in

JULY 31, 2007

First indictment against Kaing Guek Eav (alias Duch)

⁴⁵ In other contexts, efforts to create hybrid courts have similarly stalled for significant periods: In 2009, the African Union Peace and Security Council recommended the establishment of a hybrid court for Darfur because of the "very profound lack of trust in the justice system." African Union (2009). Kenya, too, failed to make good on the recommendation of the Commission of Inquiry on Post-Election Violence to establish a special tribunal including international judges to seek accountability against persons bearing the greatest responsibility for crimes related to the 2007 elections in Kenya. Government of Kenya (2008).

⁴⁶ UN Secretary-General (1997); Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea.

⁴⁷ Ciorciari and Heindel (2014).

⁴⁸ UN Assistance to the Khmer Rouge Trials (2015).

⁴⁹ The trial of Duch lasted a little more than one year.

⁵⁰ Postlewaite (2008).

confidential review, and the government created a new anticorruption committee.⁵¹ None of the other hybrid courts received such input; after Tolbert's tenure concluded, a decision was made to maintain the Special Expert post.

Proceedings at ECCC are still ongoing. According to the court's completion strategy, which is still being revised and updated quarterly, proceedings are expected to stretch through at least the third quarter of 2020.⁵² For background on Cambodia, see Box 1.4.

Box 1.4: Background: Cambodia

From 1975 to 1979, during the Khmer Rouge's rule, Cambodians experienced egregious human rights abuses. A quarter of the population or approximately 1.747 to 2.2 million people were killed,^a and many others suffered hunger, imprisonment, torture, and displacement and other forms of persecution. Educated members of the population, as well as minority groups such as Chinese people and Muslims, were particularly targeted. The ECCC's overall mandate is limited in that it does not include other Cambodian victims of massive human rights violations before Khmer Rouge rule or victims from Vietnam, Laos, and other parts of the region, who were killed, disappeared, detained, sexually abused, or economically displaced or forcibly removed, as a result of the larger conflict in Indochina of which the period of Khmer Rouge was but a part.

^a These estimates are derived from the expert demographic report issued pursuant to Expertise Order No. D140 of the ECCC's co-investigating judges. Tabeau and Kheam (2009).

⁵¹ Ciorciari and Heindel (2014); Interview with David Tolbert.

⁵² See also ECCC (2018d).

Lebanon

The process of creating the hybrid tribunal in Lebanon was likewise protracted.

The Special Tribunal for Lebanon was established to bring to trial individuals accused of carrying out the bombing attack on February 14, 2005, (and related attacks) that killed 22 people, including Lebanon's former Prime Minister Rafik Hariri, and injured many others.

Measured from the date of the bombing that was the primary impetus behind the court's creation, it took almost four years for the tribunal to officially begin operating on March 1, 2009. The process began with a formal request by letter dated December 13, 2005 from the Prime Minister of Lebanon to the UN Secretary General formally requesting a "tribunal of an international character."

A number of factors stretched out the startup process for the STL,⁵³ including most significantly the decision to move forward with a comprehensive investigation of the bombing by the International Independent Investigation Commission (UNIIC), which was formed in April 2005 by a UN Security Council resolution.⁵⁴

As a result, although many of the details of the tribunal had been worked out well in advance of its eventual starting date,⁵⁵ the STL did not officially start functioning until after the UNIIC investigation concluded in February 2009. However, the investigatory process at the UNIIC effectively "morphed" into the STL, with the last UNIIC commissioner, Daniel Bellemare, becoming the first STL prosecutor and the STL receiving all of the evidence collected by the UNIIC.⁵⁶

The first indictment was filed two years later in 2011; and the first trial, the *Ayyash et al.* case, did not begin until January 16, 2014, eight years after the first request and almost nine years after the bombing.

Recently, the office of the prosecutor closed its case-in-chief concerning the February 2005 attack. Although at the time of this report's writing, the prosecutor was considering an additional indictment and investigations of other attacks within the tribunal's jurisdiction.

SPECIAL TRIBUNAL FOR LEBANON

Timeline

FEBRUARY 2005

Attack kills Rafik Hariri and 22 others in Beirut

DECEMBER 2005

Government of Lebanon requests an international tribunal

JANUARY 23, 2007

Lebanon signs agreement with UN, but Parliament does not ratify agreement

MAY 14, 2007

In a letter to UNSG, prime minister requests that the tribunal be established without the agreement's ratification

JUNE 10, 2007

Agreement and Statute of the STL enter into force

MARCH 2009

UNSG announces that the STL will begin operating and the prosecutor assumes post

JANUARY 2011

First indictment filed

⁵³ In addition, a political crisis in Lebanon delayed finalization of the court's agreement and statute. External events also created delays as well; for example, negotiations over the tribunal stalled when conflict broke out between Hezbollah and Israel in 2006.

⁵⁴ UN Security Council (2005g).

⁵⁵ This negotiation process included an agreement and statute for the court, a series of Security Council decisions, and a "National Dialogue" that gathered "all representative components of the Lebanese political spectrum with a view to easing tensions in the country." Michel (2014).

⁵⁶ Alamuddin and Bonini (2014).

Bosnia and Herzegovina

War Crimes and Prosecutor's Office BOSNIA AND HERZEGOVINA

Timeline

NOVEMBER 2000

Law on the Court of BiH (state-level court) is promulgated

JUNE 2002

ICTY report recommends a war crimes chamber be established in the new state-level court that includes international judges

JANUARY 2003

Agreement between OHR and ICTY to create special war crimes section in state court and prosecutor's office

DECEMBER 1, 2004

Agreement between OHR and government on creation of registry for war crimes section

MARCH 9, 2005

War Crimes Chamber inaugurated

OCTOBER 1, 2005

ICTY transfers first case involving Radovan Stankovic

FEBRUARY 2006

Stankovic trial begins

The civil war and ethnic cleansing in Bosnia and Herzegovina (BiH) that followed the break-up of The Socialist Federal Republic of Yugoslavia lasted from 1992 until the signing of the Dayton Accords in December 1995. The conflict was characterized by acts of genocide, widespread rape, ethnic cleansing, torture, disappearances, and other crimes against humanity and violations of the laws and customs of war. An estimated 100,000 people were killed and 2.2 million were displaced. Around 7,000 people remain missing. In a particularly egregious incident over 8,000 Bosniak men were killed in Srebrenica in an act of genocide.

The creation of the War Crimes Section in Bosnia and Herzegovina (BiH) stemmed from the completion strategy of the ICTY and the need for that tribunal to transfer cases to national jurisdictions. For this reason, the establishment process was defined in large part by the 2003 completion strategy at the ICTY and by discussions between the ICTY and the Office of the High Representative for Bosnia and Herzegovina (OHR), which was created under the General Framework Agreement for Peace in Bosnia and Herzegovina to monitor implementation of the agreement and coordinate the activities of civilian organizations and agencies in BiH.⁵⁷

The authorities in BiH had been pursuing war crimes cases for some time at the “entity level,” i.e., in the 10 cantonal courts of the Federation of BiH, the five district courts in the Republika Srpska, and the Basic Court of Brčko District.⁵⁸ Between 1995 and 2005, local courts throughout BiH rendered 55 final verdicts in war crimes cases, although standards of fairness in those courts sometimes came under criticism.⁵⁹ Ordinary national courts in BiH, Croatia, Serbia, and Montenegro were “not currently equipped to hear war crimes cases—which are often politically and emotionally charged, as well as legally complex—in a fair manner. Key obstacles included bias on the part of judges and prosecutors, poor case preparation by prosecutors, inadequate cooperation from the police in the conduct of investigations, poor cooperation between the states on judicial matters, and ineffective witness protection mechanisms.”⁶⁰

In response, the BiH War Crimes Section and the prosecutor's office were established as sections within the new state-level system of justice, with competence throughout the entire country.⁶¹ This state-level system

⁵⁷ See Agreement on Civilian Implementation (1995).

⁵⁸ BiH consists of two entities—the Federation of Bosnia and Herzegovina and the Republika Srpska—as defined under the Constitution of Bosnia and Herzegovina. Constitution of Bosnia and Herzegovina (1995). The Brčko District is a local self-governing unit with its own institutions, laws and regulations, and powers.

⁵⁹ See American Bar Association, Rule of Law Initiative (2007).

⁶⁰ Human Rights Watch (2004b).

⁶¹ In 2013, the state prosecutors of BiH, Croatia, and Serbia signed bilateral protocols on cooperation in prosecuting perpetrators of war crimes, crimes against humanity, and genocide. In 2014, BiH also signed a cooperation protocol with Montenegro. Moreover, in

came into existence in 2000;⁶² the agreement to establish the special War Crimes Section of the court followed in January 2003.

It took more than two years of negotiation to determine the legal basis for the BiH court, from June 2002, when the ICTY called for a reform of the national judicial system so that it could adjudicate the cases referred to it,⁶³ to December 2004, when the War Crime Section was officially established in law. During those years, a self-regulatory body of judges and prosecutors—the High Judicial and Prosecutorial Council—was established and tasked with ensuring an independent, impartial, and professional judiciary.⁶⁴ Judges and prosecutors had to reapply for their jobs from 2002 through 2004; reappointments of judges and prosecutors were not completed until September 2004.

In addition, a case file assessment process was undertaken to determine which cases should be referred to the national jurisdictions. As a result, the War Crimes Section did not actually begin operating until March 2005, with trials starting near the beginning of 2006, almost *three years* after the agreement was signed between the OHR and ICTY.⁶⁵

April 2015, under the auspices of the UN, the state prosecutors of BiH, Croatia, and Serbia signed the guidelines for enhancing regional cooperation in war crimes processing, the search for missing persons, and the establishment of a coordination mechanism. Council of Europe, Commissioner for Human Rights (2017).

⁶² Ivanišević (2008).

⁶³ UN Security Council. 2002b.

⁶⁴ Office of the High Representative (2002). The Council is funded from the BiH budget and from international donations.

⁶⁵ Bergsmo (2010).



Lead Defense Counsel Emile Aoun makes closing arguments for Salim Jamil Ayyash on September 17, 2018.
(Special Tribunal for Lebanon)

PART 2

Bringing Cases to Trial: Prosecutorial Policy (or Strategy) at Hybrid Courts

Prosecutors at hybrid tribunals face enormous challenges when deciding which crimes to investigate, as well as whom to prosecute, and on what charges and when.

Hybrid courts are usually created after periods of oppression or in the aftermath of war, or occasionally even in the midst of ongoing conflict. In these contexts, the systems of justice are almost always severely degraded by years of neglect and corruption, or by the chaos of war. The essential characteristics of democratic policing (including the fair and equal enforcement of the laws and respect for fundamental rights and freedoms) may not exist. Witnesses and victims may be in refugee or detention camps or dead, police forces may not be in control of the areas where the crimes occurred, or the crimes may have been committed years or even decades earlier. There may also be gaps in the nation's constitutional and legal framework. In many instances, the government will have failed to ratify international human rights conventions and to domesticate international crimes. These realities can complicate decisions around prosecutions.

Prosecutors at hybrid tribunals are usually tasked with charging individuals and groups for serious criminal activity at a scale and of a nature far exceeding that faced by ordinary public prosecutors. Although investigations of war crimes and crimes against humanity share certain commonalities with investigations of ordinary crimes (including identifying and locating the accused and marshaling the evidence to establish guilt), the scale and patterns of the abuses are usually of a different order of magnitude. War crimes investigations often encompass massive numbers of incidents occurring over a large geographic area and involving a range of actors, including army forces, police, paramilitaries, politicians, rebel groups, and other non-state actors.¹

Along with establishing the individual responsibility of perpetrators for particular acts or incidents, prosecutors may need to establish contextual circumstances, e.g., patterns of violence and a chain of command that includes not only persons who gave orders to commit crimes, but also those who failed to take action to prevent or punish crimes that they knew (or should have known) were being committed. For crimes against humanity, it is necessary to show not only that one or more prohibited acts occurred—e.g., murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape, or enforced disappearance—but also that they occurred within the context of a widespread or systematic attack against a civilian population.

¹ For instance, estimates of the number of people killed during the Khmer Rouge's rule of Cambodia range from 1 to 3 million, and, in BiH, one estimate of individuals killed during three years of war stands at 104,732. Zwierzchowski and Tabeau (2010).

In many cases, prosecutors will not be able to prepare the most complex or high-level cases first. Instead, they will need to investigate and build cases once more is understood about the events, criminal command structures, and roles of individual leaders.

Therefore, many considerations guide the formulation of a prosecutorial policy and the exercise of prosecutorial discretion at hybrid tribunals.

Prosecutorial Policy (or Strategy) at Hybrid Tribunals

The jurisdictional mandate of the court and essential principles of fairness, consistency, and transparency should dictate most of the decisions about how prosecutors are to proceed.

An informed prosecutorial strategy (or policy) is an important tool, however, for implementing the governing legal framework of hybrid as well as other courts. It sets out the way that a prosecuting authority and its individual prosecutors exercise their discretion. It guides prosecutors in the way they should perform their functions, exercise their powers, and carry out their duties. Customarily, it covers topics such as the role of the prosecutor and the criteria governing decisions to prosecute, conduct case review, and cooperate with other agencies.

By necessity, however, prosecutorial choices also must be squared with practical realities. The order in which cases are received, the available evidence and resources (including staff), the capacity of the court and amount of space available on the docket, and the need to shield prosecutorial decisions from political interference can all affect the choices made. Over time, internal dynamics within the court and the cases themselves may cause priorities to shift, as case-specific rulings are issued and jurisprudence at the court develops.

To manage these demands, some hybrid mechanisms, such as the War Crimes Section in Bosnia and Herzegovina (BiH), have adopted specific formal criteria for selecting and prioritizing cases from among the immense pool of potential matters to be investigated, charged, and prosecuted. In some instances, those criteria were then revised based on assessments of their effectiveness, or in response to the findings of oversight bodies.² In other situations, the prosecutor defined a general prosecutorial strategy early on and largely adhered to it. This was true at the Special Court for Sierra Leone (SCSL), where the court's first prosecutor quickly confirmed indictments based on the court's general legal framework and anticipated timeline of operations; additional indictments were not issued, except on allegations of contempt for interfering with witnesses.

Usually, a prosecution policy is compiled by the prosecution authority and issued by the head of that body. While the prosecution authority ought to consult widely before issuing the policy, the authority is expected to act independently and in the interests of justice. In producing the policy, a prosecuting authority should never become subject to the dictates of others, be they politicians, the government, or the president.

In some instances, the UN defined much of the strategy for deciding which suspects to charge, and in what order and for what crimes. In Timor-Leste, the UN Security Council directed the Serious Crimes

² The prosecutorial strategy for war crimes employed in the state court in BiH has been reviewed on a number of occasions. See, e.g., Korner (2016).

Unit (SCU) in the prosecutor's office to concentrate on concluding 10 priority cases and "widespread pattern" cases and set strict deadlines for doing so. As a result, the SCU eventually stopped filing indictments in order to keep within the deadline set by the UN Security Council for the court's closing,³ leaving many important cases against high-level Indonesian suspects and others untried, many of whom were residing in Indonesia. Similarly, at the Special Tribunal for Lebanon (STL), the prosecutor's course of action was at least initially guided by the results of a previous investigation by the UN International Independent Investigation Commission, explained in more detail below.

This report examines the prosecutorial strategies pursued at each of the five hybrid tribunals and discusses some of the contextual, legal, and political imperatives that came together to influence the decisions made by the prosecutors and investigators at each.

The Mapping Process at Hybrid Tribunals

A process of mapping violations and victims often occurs before the launching of formal investigations or the entering of charges at a hybrid tribunal. Mapping can help prosecutors anticipate the number of cases and estimate the workload and resources necessary to complete them. At its best, mapping includes a comprehensive process of assessment and consultations to give prosecutors a good sense of the nature and extent of the crimes that occurred and credible information about when and where they took place and the universe of victims and possible suspects, with the proviso that any mapping should be updated to reflect new information as it becomes available.

Mapping exercises can involve the collection and analysis of vast amounts of information in different forms and from different sources and may include not only documents and witness statements, but also resources collected by civil society and online and print media. This information can be an essential resource for understanding the context in which the crimes took place and identifying cases of both sufficient gravity and patterns in the atrocities or conduct that can facilitate later prosecutions. Mapping can also help the office of the prosecutor define a work plan and identify which cases or patterns of violations to prioritize.

Depending on the context, mapping has occurred on the specific initiative of various bodies within or related to the court, including the prosecutor's office, national authorities or international bodies such as the UN, or civil society organizations. Often, efforts are undertaken by different actors at the same time. Sometimes, these processes can create conflicting pressures in support of a particular agenda or may even seek to influence the authorities to dispense with prosecutions entirely.

In Sierra Leone, the UN Office of the High Commissioner for Human Rights mapped violations on behalf of the country's truth and reconciliation commission;⁴ further mapping was conducted by No Peace Without Justice, an international nonprofit organization.⁵ In addition, David Crane, the

³ The UN established the UN Mission of Support in East Timor (UNMISSET) on May 20, 2002, coinciding with East Timor becoming an independent country. UNMISSET completed its mandate three years later, although the UN established the UN Integrated Mission in Timor-Leste to consolidate stability and strengthen national capacities in 2006. UN Security Council (2004b): The resolution extended UNMISSET mandate for a period of six months, with a view to subsequently extending the mandate for a further and final period of six months, until May 20, 2005. UN Security Council (2004c): The resolution extended UNMISSET mandate until May 20, 2005.

⁴ Sierra Leone Truth and Reconciliation Commission (2004), vol. 1, ch. 2 ("Setting Up the Commission").

⁵ Perriello and Wierda (2006b), p. 27.

Special Court for Sierra Leone

JURISDICTION
Serious crimes committed in the territory of Sierra Leone after November 30, 1996.
Crimes against humanity, war crimes, other serious violations of international humanitarian law, certain serious crimes under Sierra Leonean law.
PERSONS
Persons over 15 years of age who bear the greatest responsibility for serious violations.
CONVICTIONS AFTER TRIAL
9
EVIDENCE PRESENTED
552 witness testimonies (310 for the prosecution and 242 for the defense).
PERIOD OF OPERATION
2002-2013.
Currently functioning as a residual mechanism.
FINANCING
Voluntary contributions from states and, in part, the UN.

SCSL's first prosecutor, held "town hall" meetings to gather "feedback from the people of Sierra Leone before issuing indictments" during the pre-investigation stage at the SCSL.⁶ As part of this process, consultations were held to "discern which names were part of the public discourse on who bears responsibility" and on the concept of "forced marriage."⁷ This public outreach helped define the SCSL's prosecutorial strategy so that it reflected the cultural context and victims' interest in fair and just decisions. Such consultations, however, are not always recommended because of the potential for introducing bias and subjectivity into the decision-making process and for exposing persons soliciting or providing input to threats and intimidation.

In other cases, mapping occurred by way of an official investigation. The UN International Independent Investigation Commission (UNIIC) was created on April 7, 2005, in advance of Lebanon's special tribunal and after an earlier fact-finding mission carried out at the behest of the UNSG.⁸ The mandate of the UNIIC was comparable to that of domestic law enforcement, involving a full-scale

criminal investigation into the terrorist attack that killed former Lebanese President Rafiq Hariri. In many ways, it was unprecedented with respect to earlier fact-finding missions created by the UN;⁹ with broad coercive powers, it could "interview all officials and other persons" and access locations across Lebanon. Under UN Security Council Resolution 1636 (2005), it could name suspects and trigger travel bans and asset freezes, and it partnered with the Lebanese police to carry out raids on homes and searches and seizures of evidence.¹⁰ In addition, in December 2005, at the request of the Government of Lebanon, the UNIIC's mandate was expanded by the UN Security Council to allow for investigations of "attacks of a similar nature since October 1, 2004."¹¹

Over almost four years of operations, the UNIIC collected over 1,200 witness statements and thousands of gigabytes of data, "including 6.5 billion call records, more than 10,000 forensic exhibits, over 40,000 pictures," as well as "physical evidence, including material recovered from each of the crime scenes."¹² In part because of the commission efforts, enough evidence had been compiled to allow prosecutors to file a confidential indictment within two years of the court's creation.¹³

Similarly, in Timor-Leste, the UN Commission on Human Rights established an international

⁶ University of California–Berkeley, War Crimes Studies Center (2005), p. 5.

⁷ Perriello and Wierda (2006b), p. 27.

⁸ UN Security Council (2005g); see also UN Security Council (2005e).

⁹ See Alamuddin and Bonini (2014), p. 55.

¹⁰ See Alamuddin and Bonini (2014), p. 55.

¹¹ UN Security Council (2005h).

¹² See Alamuddin and Bonini (2014), p. 53.

¹³ Special Tribunal for Lebanon (2011b).

commission of inquiry to “gather and compile” information on possible violations of human rights.¹⁴ Based on interviews of more than 170 individuals taken over the course of nine days, as well as briefings and information provided by UN bodies, the Australian-led International Force in East Timor (INTERFET), the Indonesian government, and various nongovernmental organizations, the commission of inquiry concluded that there were “patterns of gross violations of human rights and breaches of humanitarian law” and identified particular incidents that would ultimately be prioritized by prosecutors at the Special Crimes Unit (SCU), under the direction of the UN.¹⁵ It also recommended that an “international human rights tribunal consisting of judges appointed by the UN” be created.¹⁶ Investigations were also undertaken by the Commission for Human Rights Violations in East Timor (KPP-HAM),¹⁷ and by three special rapporteurs on a joint mission undertaken in November 1999,¹⁸ among others. KPP-HAM also identified “primary cases” from January 1999 to October 1999 that required investigation.¹⁹

In other instances, civil society organizations have undertaken significant mapping efforts, and the office of the prosecutor has taken their findings onboard to begin investigations and eventually to build cases. At the Extraordinary Chambers in the Courts of Cambodia (ECCC), because of the 30-year lag between the commission of the crimes (1975-1979) and the establishment of the court (2005-2006), the court faced many challenges in collecting evidence. However, during those many years, scholars and researchers painstakingly studied and collected the evidence and facts. Prosecutors benefitted from that scholarship when the ECCC was established. The work of the Documentation Center of Cambodia, previously part of Yale’s Cambodian Genocide Program,²⁰ for instance, was particularly useful, with its large archive of contemporaneous documents from the Khmer Rouge regime. The prosecutors culled through and analyzed over 50,000 of these documents, eventually selecting thousands to tender as evidence.²¹

At the BiH War Crimes Section, using the knowledge and evidence assembled during the work of the ICTY, the state prosecutor’s office conducted a strategic inventory of all war crimes-related criminal files in conjunction with victims’ groups, nongovernmental organizations, and others.²² Based on that review,

¹⁴ UN Commission on Human Rights (1999).

¹⁵ UN Security Council (2000d).

¹⁶ UN Security Council (2000d).

¹⁷ KPP-HAM was composed of nine members, including four human rights activists, and was empowered to investigate gross violations of human rights, such as genocide, massacre, torture, enforced disappearance, and crimes against women and children. KPP-HAM was staffed by 13 assistant investigators, 14 secretariat staff and three resource persons. This team gathered information through interviews and publicly available sources and by conducting field visits, including one to a mass grave with an expert forensics team. KPP-HAM (2000).

¹⁸ This mission involved the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, the Special Rapporteur of the Commission on the question of torture, Sir Nigel Rodley, and the Special Rapporteur of the Commission on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy. See UN General Assembly (1999).

¹⁹ These cases included “the massacre at the Liquica Church on April 6; the kidnapping of 6 Kailako, Bobonaro villagers on April 12; the murder of a civilian in Bobonaro; the attack on Manuel Carrascalao’s home on April 17; the attack on the Dili Diocese on September 5; the attack on the house of Bishop Belo on September 6; the burning of people’s homes in Maliana on September 4; the attack on the Suai Church complex on September 6; the murder at the Maliana Police Headquarters on September 8; the murder of the Dutch journalist, Sander Thoenes, on September 21; the murder of a group of priests and journalists in Los Palos on September 25; and acts of violence against women.” See KPP-HAM (2000).

²⁰ Documentation Center of Cambodia is a nonprofit Cambodian research institute founded on January 1, 1997. It began as the field office in Phnom Penh of Yale University’s Cambodian Genocide Program, an initiative of the Office of Cambodian Genocide Investigations in the U.S. State Department’s Bureau of East Asian and Pacific Affairs. Documentation Center of Cambodia (2018b).

²¹ Cayley (2012), pp. 446-47.

²² Dr. Marko Godart Prelec, then head of the research and analysis section in the Special Department for War Crimes, produced this comprehensive survey of war crimes-related situations and events after reviewing ICTY indictments, judgments, and available investigative files; materials collected from military and other archives in BiH; investigative files held by the BiH’s prosecutors office; information

it created a database (or catalogue) of cases by situation, event, crime committed, and actor, referred to as the “yellow pages.” This database allowed state prosecutors to “cross-reference matters” against their existing files in order “to coordinate existing evidence and leads and to avoid the possibility of duplication in investigation.”²³ It also gave investigators and prosecutors a snapshot of their outstanding workload, even as new complaints were being received. Although this database was developed relatively late in the process (in 2008), it has proven to be an indispensable resource for prioritizing cases.²⁴

Box 2.1 explains the considerations for deciding on a prosecutorial strategy.

What Criteria Were Used?

Prosecutors apply various criteria when deciding which matters will be done in what order and when determining whether or not to undertake an investigation or prosecution. Generally, no single criterion is likely to be determinative. Instead, in most instances, more than one factor will influence the decision. As such, this report considers the main criteria that were in play at the different courts and references other factors, where necessary, to give a fuller picture of the complexity of the process.

Cases Ready for Trial

Given the importance of providing prompt justice, some hybrid tribunals have brought forward their first cases based on what is most readily doable.²⁵ The ECCC’s framework agreement and law, for instance, limit the mandate to “senior leaders of Democratic Kampuchea” and to “those who are most responsible” for crimes from 1975 to 1979.²⁶ This mandate was intended to “target” a “small number” of people.²⁷ The office of co-prosecutors began its investigations with them.

The first case targeted five high-level perpetrators and was “the product of a year of work by both the international and national side” of the office of co-prosecutors.²⁸ Eventually, a decision was made to proceed first against only one of the accused, Kaing Guek Eav (also known as Duch), the head of internal security and the former chairman of one of the most notorious prisons in Democratic Kampuchea, the S-21 detention center in Phnom Penh. Although he was not the most senior Khmer Rouge leader in detention, he was among those “most responsible for crimes,” having allegedly overseen the torture and deaths of some 12,200 victims.²⁹ Along with the notorious nature of his crimes, there was ample evidence

provided by witnesses and informants during special department investigations; and information provided by civil society, including information provided by the Research and Documentation Centre in Sarajevo.

²³ Human Rights Watch (2008), pp. 18-19.

²⁴ As former deputy prosecutor David Schwendiman reflected, it enables people “to see what happened, what the situation was like and which events happened in each region.” “The catalogue gives us a much better idea of how the events were distributed per regions,” he continued. “I do not want to say one thing is more important than the other. Finding out when a person was killed, tortured, deported or when a church or mosque was demolished is of equal importance. [But although] we have great compassion for all those who had to live through that, we cannot do everything.” Ahmetasevic (2008).

²⁵ The notion of “trial ready” is in some instances a misnomer, given the many challenges prosecutors face when marshalling the necessary evidence. David Schwendiman, then deputy chief prosecutor at the Special War Crimes Division in BiH, questioned the notion of “trial ready” in relation to Rule 11 bis cases transferred from the ICTY, saying that although prosecutors at ICTY had “done everything they could to get everything to us,” further preparation was still required because “nothing had been done for awhile.” Orentlicher (2010), fn. 809.

²⁶ Law on the Establishment of the Extraordinary Chambers.

²⁷ Ahmed and Day (2010), pp. 109-110.

²⁸ Petit (2010), pp. 189, 198.

²⁹ ECCC (2012c).

Box 2.1: Considerations for Deciding on a Prosecutorial Strategy

Applicable law. Hybrid tribunals are usually created through a conferral of authority from a UN body (such as the Security Council) or a grant of jurisdiction under domestic law by the state where the court is situated. The applicable law and mandate of the court will determine much of the prosecutorial strategy.

Estimated number of cases and the size of the anticipated workload. It is important to assess the number of potential suspects, as well as victims and witnesses, even though estimates are likely to be imprecise. Care should be taken, however, to avoid redundancy and duplication in the incidents reported and the suspects named. Effort must also be made to ensure that the suspects are alive and witnesses are available.

Identifying patterns of crime and systematic violence. Along with identifying individual acts of criminal responsibility, international crimes such as crimes against humanity require proof of threshold elements showing that the crime was committed as part of a widespread or systematic plan against civilians. Prosecutors may also need to build cases and expertise about command structures and the linkages between the accused and the person's subordinates. To do so, it is necessary to collect evidence in an organized fashion, sometimes delaying the bringing forth of more complex or high-level cases until later.

Means of conducting fair, efficient, and effective prosecutions. This consideration is fundamental and involves determining who will conduct the prosecutions, how the cases will be distributed, and how the cases will be conducted without compromising the rights of the accused.

Need for cooperation from other countries and authorities. When investigating and prosecuting crimes, it is often necessary to work together with investigators and prosecutors in other jurisdictions. Mutual legal assistance agreements are essential components for defining the terms of such cooperation.

Supporting and protecting victims and witnesses. The management, support, and protection of witnesses and victims in war crimes cases must be considered when assessing which cases to prioritize. In every case, prosecutors need to strike a balance between obtaining the testimony and evidence that is necessary to prosecute, and protecting victims and witnesses who participate in the process from harm. Wherever possible, witnesses and victims should not be called on multiple times to testify or be interviewed. Special attention should be paid to particularly vulnerable witnesses.

Funding. Realistic budgets have proven to be difficult to estimate and to stay within in many courts, given the inherent uncertainty in predicting how long it will take to investigate and prosecute cases. Prosecutorial decisions may be affected by these estimates and by the court's projected timeline.

already available, including documentation and incriminating admissions by the accused himself, much of it documented in the 45-page closing order that indicted him.³⁰ Because he had been arrested and was being held by Cambodia's military authorities, his case was not seen as politically sensitive.³¹

Similarly, in Timor-Leste, the SCU's initial indictments focused on those already in detention and cases involving less complex charges. A number were being detained in inadequate facilities by INTERFET, the multinational peacekeeping taskforce deployed to restore peace and security in the country,³² creating a sense of urgency and demand for quick trials.³³ As a result, the first trials were against low-

³⁰ ECCC (2008a).

³¹ ECCC (2018a); Ciorciari and Heindel (2014), pp. 104-105..

³² UN Security Council (1999b), authorizing establishment of a multinational force under a unified command.

³³ Oswald (2000).

level Timorese militia members, who could be indicted on simple murder charges after a quick handover of files by INTERFET's Detainee Management Unit (DMU).³⁴ Although this case selection process was somewhat reactive, those first cases allowed investigators and prosecutors in the SCU more time to build the contextual elements that would be needed to prove crimes against humanity in later cases.³⁵

The BiH War Crimes Section was given a far-reaching mandate to conduct investigations and try cases transferred from the ICTY. In line with the ICTY's completion strategy, the War Crimes Section worked on cases ready for trial first. Because the ICTY was focused on the most senior leaders suspected of crimes within the tribunal's jurisdiction, the War Crimes Section was mandated to pursue cases involving intermediate- and lower-ranking accused perpetrators.³⁶ Although there was never an expectation that prosecutions would be brought against all those who committed war crimes, the ICTY's completion strategy was ambitious in that it sought to build the capacity of complementary national processes, while simultaneously holding significant numbers of perpetrators accountable.

In many of these cases, an indictment had already been confirmed, and the accused had been arrested or had surrendered and was in pre-trial detention when the ICTY's completion strategy was adopted in 2003. As a result, the War Crimes Section was given a docket of cases involving low- to intermediate-level perpetrators referred to it by the ICTY's Trial Chamber, pursuant to Rule 11 *bis* of the ICTY rules of procedure and evidence, in which an indictment has already been issued and confirmed. Other cases that were still under investigation (in which no indictment had yet been issued) or in which an investigation had not yet begun or been completed would also eventually be transferred.³⁷

The Court of BiH was obligated to prosecute the Rule 11 *bis* cases, continuing the broader strategy endorsed at the ICTY; other cases, depending on their level of sensitivity, could be tried either at the Court of BiH or at the entity level, i.e., within the courts of the two entities that make up BiH, the Federation of Bosnia and Herzegovina and the Republic of Srpska, and the courts of the District of Brčko.

As a result, the first cases prosecuted in the War Crimes Section were six Rule 11 *bis* cases, involving 10 defendants. On September 29, 2005, the ICTY transferred the first case against Radovan Stanković, a member of a Bosnian-Serb paramilitary unit, to the Court of BiH.³⁸ A little over a year later, on November 14, 2006, he was found guilty of crimes against humanity and sentenced to 16 years in prison, subsequently raised to 20 years by the court's appellate panel.³⁹ Another five Rule 11 *bis* cases, involving 10 persons, were also transferred from The Hague to Sarajevo. By October 1, 2008, all but one case had been completed in the first instance.⁴⁰

In addition, decisions about the cases to be tried before the War Crimes Section were also centered

³⁴ Oswald (2000). See, e.g., General Prosecutor v. Joao Fernandes, Case No. 01/2000, United Nations Transitional Administration in East Timor; General Prosecutor v. Julio Fernandes, Case No. 02/2000, United Nations Transitional Administration in East Timor.

³⁵ Hirst and Varney (2005), p. 7.

³⁶ The ICTY prosecutor investigated many lower- or intermediate-level perpetrators. Although with an estimated 10,000 perpetrators, it was not realistic for the ICTY to prosecute and try even a small percentage of them. See UN International Criminal Tribunal for the Former Yugoslavia (2018).

³⁷ When determining whether to refer a case under Rule 11 *bis*, the referral bench considered "the gravity of the crimes charged and the level of responsibility of the accused."

³⁸ Tolbert and Kotic (2008), p. 6.

³⁹ Stanković was charged on the basis of individual criminal responsibility and was convicted of rape and other crimes against humanity in connection with atrocities occurring at a women's detention house that he established in Foča. He is currently serving his sentence in BiH. International Criminal Tribunal for the Former Yugoslavia (2006).

⁴⁰ Tolbert and Kotic (2008), p. 6.

on an assessment of the cases being transferred. The ICTY transferred files after the ICTY prosecutor conducted an extensive review process known as the “Rules of the Road” (RoR) procedure—established by agreement between the presidents of BiH, Croatia, and the Federal Republic of Yugoslavia—and assigned the files a “standard designation.” Under the RoR, before authorities at the local level could proceed to arrest and indictment, they were required to submit each case to the ICTY for approval.⁴¹ That oversight mechanism, which lasted from 1996 to 2004, was designed in response to allegations of arbitrary arrests and unfair trials that threatened to undermine the fairness of the prosecutions before domestic courts in BiH. To protect against the politicization of prosecutions or bias based on ethnicity, for instance, the RoR unit reviewed case files and assigned a basic designation. That designation was based largely on whether the evidence was sufficient by international standards to provide reasonable grounds for believing that the person has committed a serious violation of international humanitarian law. The designations were as follows:

- **Standard Designation A** was granted to indicate that the evidence was sufficient.
- **Standard Designation B** was assigned when the evidence was insufficient.
- **Standard Designation C** was given to cases in which the ICTY was unable to determine the sufficiency of the evidence, and it instructed the authorities to gather further evidence after which the case could be submitted for re-categorization.
- **Standard Designations D** applied to cases in which the ICTY prosecutor sought a deferral.
- **Standard Designation E** indicated that the crime was not within the jurisdiction of the ICTY.
- **Standard Designation F** was applied to cases where the evidence was sufficient but the suspect, accused, or sentenced person was an important witness in proceedings before the ICTY.
- **Standard Designation G** indicated that there was sufficient evidence of a crime other than a violation of international humanitarian law.⁴²

This approach generally prioritized cases that were ready to proceed over other considerations, including whether they fit into a pattern of violations. However, it also helped to overcome a predisposition against seeking accountability of individuals from the same ethnic group. During that process, the ICTY RoR unit reviewed and categorized cases against almost 4,000 persons and referred them to the domestic authorities. Of the cases referred back, 877 received an “A” designation, 2,389 received a “B,” and 702 received a “C.”⁴³

When sorting through the returned files, the BiH prosecutor focused on, at least preliminarily, files receiving an “A” designation.⁴⁴

⁴¹ For a discussion of the applicability of the RoR procedure under domestic law, see Organization for Security and Co-operation in Europe (2005), pp. 47-50.

⁴² Mujkanović (2010), pp. 85-87. See also Organization for Security and Co-operation in Europe (2005), pp. 5 and 47 (The numbers reported differ slightly as follows: 846 cases received an “A” categorization, 2,346 received a “B”, and 675 received a “C.”)

⁴³ Mujkanović (2010), p. 84.

⁴⁴ Mujkanović (2010), p. 85.

“Most Responsible” or a Senior Position in the Hierarchy Under Investigation

This criterion has been used at a number of hybrid tribunals. It often comes directly from the mandate of the court and is designed to focus on a narrow field of suspects and offenses. The hybrid tribunals in Cambodia and Sierra Leone were both tasked with the specific objective of pursuing suspects at the top of the “pyramid of responsibility,” especially those who planned or ordered atrocities.⁴⁵

For instance, the second case brought at the ECCC was against four of the most senior leaders of the Khmer Rouge who were still alive when the court began operations. This case was more politically sensitive than the earlier one filed against Duch and legally more complex.⁴⁶ During the trial, the prosecutors needed to prove not only that the defendants committed crimes involving a vast number of victims, some committed across the whole of Cambodia (including forced transfers of populations), but also knowledge on the part of the accused; the charges were ultimately severed into two separate trials.

The SCSL was given a similar mandate.⁴⁷ It had the power to prosecute persons who bore the “greatest responsibility” for serious violations of international humanitarian law and Sierra Leonean law.⁴⁸ The prosecutorial strategy was largely tailored to discharge that mandate, considering what could be “reasonably accomplished within the timeframes and budget contemplated,”⁴⁹ which “the Prosecutor understood to mean a period of roughly five years.”⁵⁰ The idea was to “be quick and efficient in its tasks of doing justice, while at the same time breaking the command structure of the criminal organization responsible for the violence.”⁵¹

Early on, it was noted that the SCSL would need an “exceptionally clear and well-defined prosecutorial strategy” to accomplish these goals,⁵² and to overcome the criticisms leveled against the ad hoc tribunals (ICTY and ICTR), which were considered by some to be slow, costly, and unimpactful for the victims.⁵³ To be fully representational, the court adopted the ICTY’s approach of prosecuting more than one side in the conflict, as recommended at the conclusion of the UN’s planning mission and in advance of the court’s opening.⁵⁴

Based on that thinking, the SCSL’s first prosecutor, David Crane, interpreted the court’s mandate narrowly, arguing that a “broader mandate would be untenable, as it could result in ten times as many

⁴⁵ Office of UN High Commissioner for Human Rights (2006), p. 8.

⁴⁶ Ciorciari and Heindel (2014), p. 134.

⁴⁷ Under the original framework for the proposed special court that was enclosed with President Alhaji Ahmad Tejan Kabbah’s letter, the court was to be mandated to prosecute only “the most responsible violators and the leadership of the Revolutionary United Front.” UN Security Council (2000a), para. 2.

⁴⁸ Reydams and Odermatt (2012), p. 81.

⁴⁹ Crane (2005).

⁵⁰ University of California–Berkeley, War Crimes Studies Center (2005), p. 6.

⁵¹ University of California–Berkeley, War Crimes Studies Center (2005), p. 6.

⁵² UN Security Council (2002a).

⁵³ Perriello and Wierda (2006b), pp. 10-11.

⁵⁴ “It should, nonetheless be inclusive of persons of all political affiliations and encompass the crimes committed throughout the country during the relevant period. In developing a prosecutorial strategy, the Prosecutor, bearing in mind the limitations of the evidentiary material, will as a first step be required to ‘map the conflict,’ reconstruct the history of the hostilities and study the organizational and command structure of the different factions and the means of their financial support. On the basis of this study, an investigation launched into the crimes committed would lead the Prosecutor to ‘those who bear the greatest responsibility’ and enable him or her to establish a limited but comprehensive list of indictees on the basis of the parameters indicated.” UN Security Council (2002a), p. 6. The Prosecution worked with two task forces early in 2003 in the Investigations Section to look at crimes of the RUF, AFRC and the CDF. Special Court for Sierra Leone (2004a), p. 14.

potential indictees.”⁵⁵ Accordingly, he decided to pursue cases against 13 individuals, quickly filing indictments within a year after the court became operational; no other cases were added afterward, other than those brought on contempt charges. As such, the case selection taken by the prosecutor did not vary much over the life of the court. Although, amendments were made to some of the alleged charges (discussed below in the “Selecting Crimes” section); for instance, the crime of forced marriage was added, which was not specifically listed as a prohibited act within the crime against humanity provision of the court’s statute.⁵⁶ Civil society identified other suspects, and still others were identified during the course of the trials, although no further indictments were ever filed.

In practice, the prosecutor’s decisions about what cases to bring before the SCSL and in what order raised concerns and criticism. The decision, for instance, to bring charges against several leaders of the former Civil Defence Force was particularly contentious because many Sierra Leoneans considered them heroes for resisting the rebels.⁵⁷ In addition, some questioned the politics behind some of the decisions. For instance, Sam Hinga Norman was Sierra Leone’s Interior Minister at the time of his indictment and arrest. As such, the indictment was seen simultaneously as evidence of the prosecutor’s willingness to charge all factions responsible for atrocities and also a political move by the ruling party to remove a potential opponent from power.⁵⁸

“Most Grave” or “Most Serious Crimes” and Their Perpetrators

In other contexts, efforts have been made to broaden the scope and reach of prosecutions to include intermediate- and lower-level perpetrators, including some who implemented the plans or orders of others. In those cases, prosecutors often expand the selection criteria to consider not only the degree of responsibility of alleged perpetrators but also the gravity or seriousness of the crimes committed.

Bosnia and Herzegovina

Prosecutors at the BiH War Crimes Section sought to continue in the national courts accountability efforts started at the ICTY against intermediate and lower-level accused. The numbers of cases involving possible war crimes were vast. Cases being transferred to the BiH War Crimes Section came from different sources and were at different stages of investigation. The cases included allegations of war crimes arising since March 1, 2003, the date when the new criminal code establishing state-level criminal jurisdiction over certain crimes came into effect, as well as cases that arose before.⁵⁹

⁵⁵ University of California–Berkeley, War Crimes Studies Center (2005), p. 6.

⁵⁶ Stephen J. Rapp served as prosecutor at the SCSL after David Crane. He described the dynamic as follows: “And first of all, the point needs to be made that the decision on the thirteen people of which indictments were sought, and of which against whom indictments were returned, was made by the first Prosecutor. When I came to the SCSL on December 15, 2006, with my appointment in hand, for all practical purposes the issue was settled.” Rapp (2014), p. 25.

⁵⁷ CDF represented approximately 6 percent of violations alleged by statement-makers at the Truth and Reconciliation Commission (2,419 out of 40,242). Sierra Leone Truth and Reconciliation Commission (2004), vol. 2, ch. 2, p. 38.

⁵⁸ University of California–Berkeley, War Crimes Studies Center (2005), p. 9. Stephen Rapp, one of the prosecutors at the SCSL, answered the question of who was most responsible as follows: “At the SCSL, it was determined according to a number of factors. Among these were effective control. As in the law of command responsibility, it is a question of who had the capacity to restrain bad conduct, or to punish it. But command responsibility focuses on responsibility for specific criminal acts, and the question here also has to do with who had the power to establish or alter the general course of conduct over months and years. This may not be so clear in a situation like the genocide in Rwanda that was committed in only a hundred days, but when the crimes go on for an extended period, you can see who has been in a position to gain the greatest knowledge of events on the ground, who was promoted to higher rank or received benefits because of what was done, and whose actions were most instrumental in making possible the continuation of the conduct.” Rapp (2014), p. 36.

⁵⁹ Category I war crimes cases fell within the exclusive jurisdiction of the Court of BiH and the BiH prosecutor’s office and were sent

War Crimes and Prosecutor's Office Bosnia and Herzegovina

JURISDICTION
Serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991; genocide, crimes against humanity, and war crimes under the BiH criminal code.
PERSONS
All the persons responsible for such serious violations.
CONVICTIONS AFTER TRIAL
Over 188 (as of November 2017).
EVIDENCE PRESENTED
6,427 witnesses (2005-2012).
PERIOD OF OPERATION
2005-2012 with international judges. The War Crimes Chamber continues to operate.
FINANCING
Supported through voluntary contributions from international donors and the BiH state budget.

As already noted, many of the files were transferred to the War Crimes Section following an extensive review process at the ICTY, known as the “Rules of the Road” (RoR) procedure, which was established by agreement between the presidents of BiH, Croatia, and the Federal Republic of Yugoslavia.⁶⁰

With the establishment of the War Crimes Section, the BiH prosecutor’s office—whose staff included members of the three main ethnic groups—took over the review of war crimes cases.⁶¹ The office had to separately review cases that had originated at the entity level and that had not been submitted to the RoR unit. A blend of case allocation and prosecutorial strategies was employed to distinguish among the large numbers of cases and decide whether cases would be tried by the state-level BiH War Crimes Section or by one of courts at the entity level.

To make the necessary decisions, the Collegium of Prosecutors of Bosnia and Herzegovina issued the Book of Rules on the Review of War Crimes

Cases in December 2004. The book included a set of orientation criteria based on the sensitivity of the case to guide prosecutors when separating out the cases for trial at the War Crimes Section: “Highly sensitive” cases were to be tried at the War Crimes Section, and “sensitive cases” could be remitted for trial to entity or district courts, contingent upon the discretion of the chief prosecutor and his staff. Cases judged as sensitive would be given a second look by a different prosecutor or legal advisor to ensure that the file was suitable to be remitted.

Table 2.1 presents the sensitivity criteria that were used by the BiH prosecutor to review war crimes cases.

Once a case was judged suitable for trial at the War Crimes Section, the prosecutor considered the following:

- the gravity of the case, “e.g., the allegations made are against a person in a leadership position, the nature of the crimes alleged; if not a leader, nonetheless is the person still in the area in which the crimes were allegedly committed and/or still committing crimes and thereby an obstacle to reconciliation in the area;”

to the courts following the entry into force of the new criminal legislation on March 1, 2003. Category II war crimes cases were cases on which the courts and prosecutor’s offices in the entities and Brčko District worked before the entry into force of the new criminal legislation on March 1, 2003. The Court of BiH, however, could opt to take over these Category II cases.

⁶⁰ The Rome Statement (or Agreement).

⁶¹ For more information about the RoR process, see Organization for Security and Co-operation in Europe (2005).

Table 2.1: Book of Rules on the Review of War Crimes Cases—Guiding Criteria for Sensitive Cases

CRITERIA	VERY SENSITIVE	SENSITIVE
CRIMINAL OFFENSE	<ul style="list-style-type: none"> • Genocide • Extermination • Multiple murders • Rapes and other sexual acts as part of a system (e.g., in concentration camps or during attacks) • Enslavement • Torture • Persecution on a widespread and systematic scale • Mass, unlawful detention in concentration camps 	<ul style="list-style-type: none"> • Murder committed as part of, or subsequent to, an attack or in a camp • Rape and other serious sexual offenses • Serious attacks committed as part of a system • Inhuman and degrading treatment committed as part of a system • Mass deportation or forcible transfer • Destruction of or damage to religious or cultural institutions on a widespread or systematic scale • Destruction of property on a widespread or systematic scale • Denial of fundamental human rights, such as medical care, on a widespread or systematic scale • Crimes that, although not within the range of gravity encompassed by Category I, are nonetheless notorious
PERPETRATOR (PAST OR CURRENT POSITION)	<ul style="list-style-type: none"> • Current or former commander (including paramilitary forces) • Present or past political leaders (including municipal presidents or crisis staff) • Present or past members of the judiciary • Present or past heads of police forces • Camp commanders • Persons with a present or past notorious reputation • Multiple rapist 	<ul style="list-style-type: none"> • Present or past police officers • Present member of the military • Persons holding or who used to hold political office • Persons affiliated with the administration of camps
OTHER CONSIDERATIONS	<ul style="list-style-type: none"> • Cases in which witnesses are insiders or “accused” • Realistic chances for intimidation of witnesses • Cases involving perpetrators in an area where authorities are sympathetic to them or where the authorities have a vested interest in preventing public scrutiny of the crimes 	<ul style="list-style-type: none"> • Witness protection issues • Difficult legal issues • Crimes for which a potential long-term prison sentence could be imposed • Allegations connected with events that were already tried before the ICTY • Cases with extensive documentation

SOURCE: Mujkanović (2010), pp. 85-87.

- the available evidence and whether, with some investigation, more serious offenses would come to light;
- whether the case was ready for trial;
- the likelihood of a quick arrest, or surrender, of the accused, once an indictment was issued;
- the likely length of the trial.

These sensitivity and other criteria used in the Court of BiH were amended following the adoption of the National War Crimes Strategy for Processing of War Crimes Cases in 2008.⁶² Box 2.2 presents the objectives of the national war crimes strategy.

The War Crimes Strategy was intended to provide a systematic approach for resolving the large number of war crimes cases. In 2008, at the time of the national strategy was adopted, the estimated number of outstanding cases in the various prosecutor's offices in BiH was around 10,000 cases: 3,819 in the BiH prosecutor's office, 202 in Brčko district, 4,099 in the Federation of BiH, and 1758 in the of Republika Srpska, although these numbers likely included some redundant and duplicative files.⁶³ In addition, prosecutors were also responsible for managing the prosecutorial function in relation to excavations and exhumations and for examinations and identification of victim remains, which also affected capacity.

The strategy was undertaken, in part, to correct problems in managing war crimes processing between the state and entity levels. These problems included a lack of harmonization between court practice in war crimes cases in the Court of BiH, the entities, and Brčko, including the application of several criminal codes; a lack of interstate cooperation in the region; and the lack of a centralized database of cases.⁶⁴ The strategy laid out a timeline for processing the most complex and highest-priority war crimes cases within 7 years, and other war crimes cases within 15 years.

Under the national strategy, the Court of BiH was to prioritize and prosecute “the most responsible perpetrators of war crimes” at the state level, based on new harmonized criteria for case selection.

The national strategy established criteria based on “case complexity,” which prioritized, once again, the gravity of the criminal offenses, the position and role of the perpetrator, and other circumstances.⁶⁵ See Table 2.2 for the case complexity criteria. The BiH prosecutor's office reviewed the war crimes cases, taking into account their complexity, before the Court of BiH issued a decision about whether a

⁶² This strategy was adopted by the Council of Ministers of BiH to provide a systematic approach to handling the large number of war crimes cases in the court's and prosecutor's offices. It defines the timeframes, capacities, criteria, and mechanisms of managing war crimes cases, standardizing court practices, and managing issues of regional cooperation, protection, and support to victims and witnesses, as well as the financial aspects and supervision for implementing the strategy. See *Bosnian National War Crimes Strategy*.

⁶³ See Bergsmo et al. (2010), p. 54; *Bosnian National War Crimes Strategy*.

⁶⁴ Those problems included a lack of harmonization in the application of substantive law. Organization for Security and Co-operation in Europe, *Mission to Bosnia and Herzegovina* (2111), p. 8. The OSCE 2005-2010 report discusses problems with the allocation of war crimes caseload and the impact that it had on the court's ability to prioritize the trial of the “most responsible perpetrators.” “A key element for the successful implementation of the national strategy is therefore the transfer of less complex cases to the entity level, which will allow the BiH Prosecutor's Office and the Court of BiH to concentrate their resources on more complex cases.”

⁶⁵ In November 2009, BiH's Criminal Procedure Code was amended to reflect those criteria: Article 27(2), which is only applicable in war crimes cases, identifies “the gravity of the criminal offense, the capacity of the perpetrator and other circumstances of importance in assessing the complexity of the case” as criteria for transfer. See *Criminal Procedure Code of Bosnia and Herzegovina*, art. 27a.

Box 2.2: Objectives of the National War Crimes Strategy

- a. Prosecute the most complex and top priority war crimes cases within 7 years and other war crimes cases within 15 years from the time of adoption of the Strategy;
- b. Centralize and update at the level of the Court and Prosecutor's Office of BiH the record of all war crimes cases pending before the BiH judiciary;
- c. Ensure a functional mechanism of the management of war crimes cases, that is, their distribution between the state-level judiciary and judiciaries of the entities and of Brčko District that will facilitate efficient prosecution within the set timeframe;
- d. Prosecute as a priority the most responsible perpetrators before the Court of BiH, with the help of the agreed upon case selection and prioritization criteria;
- e. Harmonize the court practice in war crimes cases in order to ensure legal certainty and equality of citizens before the law;
- f. Strengthen the capacity of the judiciary and police in the whole of BiH to work on war crimes cases;
- g. Establish a more efficient co-operation with countries in the region concerning war crimes cases for the sake of prosperity in the whole region;
- h. Provide protection, support and same treatment of all victims and witnesses in the proceedings before all courts in BiH;
- i. Establish an appropriate legal framework for the implementation of measures adopted in the Strategy and the accomplishment of its objectives.

particular case would be prosecuted before it and the prosecutor's office or before the entity courts and prosecutors' offices or the Brčko District of BiH.⁶⁶

At the same time, the Special Department for War Crimes developed a set of case selection and prioritization criteria, known as Practice Direction No. 5, to better organize its work. Prosecutors used Practice Direction No. 5 to help select the matters they would work on and which ones would be transferred on to the entity-level courts.

The criteria established under Practice Direction No. 5 were “general guidelines for managing subjectivity in selecting which matters will be done in which order.” They were to be applied “as a progressive set of sieves through which the facts are sifted.” They included the following: *gravity*, i.e., the nature and seriousness of the acts committed in connection with the situations and events that gave rise to criminal activity; the *status and role of actors*, with attention paid to organizers, implementers, and foot soldiers, in that order; *public interest or impact*, including cases involving a large geographic area or that had a significant impact on the communities affected; *viability*, e.g., the accused and witnesses are alive; and *capacity* of the investigatory, prosecutorial, and witness protection and support staff.

⁶⁶ Under BiH's Code of Criminal Procedure, the Court of BiH could transfer proceedings involving a criminal offense to a court in the jurisdiction where the offense occurred; or, it could take over the case. See Criminal Procedure Code of Bosnia and Herzegovina, arts. 27 and 449.

Table 2.2: Bosnia War Crimes Section: Case Complexity Criteria

CATEGORY OF CRITERIA	SPECIFIC CRITERIA
Gravity of Criminal Offenses	<ul style="list-style-type: none"> a) Legal qualification of criminal offense—genocide, crimes against humanity (proving that there was a widespread and systematic attack), and war crimes against civilian population and prisoners of war, providing that some other criteria have been fulfilled as well b) Mass killing (killing of a large number of persons, systematic killing) c) Severe forms of rape (multiple and systematic rape, establishment of detention centers for the purpose of sexual slavery) d) Serious forms of torture (taking into account the intensity and the degree of mental and physical injuries, large scale consequences) e) Serious forms of unlawful detention or another severe deprivation of physical liberty (establishment of camps and detention centers, escorting to and detention in the camps and detention centers, taking into account the large scale of or particularly severe conditions during the detention) f) Persecution g) Forced disappearance (taking into account the consequences, circumstances, and the large scale of forceful disappearance) h) Serious forms of infliction of sufferings upon civilian population (starvation, shelling of civilian building structures, destruction of religious, cultural, and historical monuments) i) Significant number of victims (or severe consequences suffered by the victims—degree of physical and mental suffering) j) Particularly insidious methods and means used in the perpetration of criminal offense k) Existence of particular circumstances
Position and Role of the Perpetrator	<ul style="list-style-type: none"> a) Duty within unit (commander in the military, police, or paramilitary establishment) b) Managing position in camps and detention centers c) Political function d) Holder of a judicial office (judge, prosecutor, public attorney, attorney at law) e) More serious forms and degrees of participation in the perpetration of a criminal offense (taking part in the planning and ordering of a crime, manner of perpetration, intentional and particular commitment to the planning and ordering of a crime, the degree of intent should be taken into account)
Other Circumstances	<p>The following should be taken into account:</p> <ul style="list-style-type: none"> a) Correlation between the case and other cases and possible perpetrators b) Interests of victims and witnesses (witnesses who have been granted protection measures before the ICTY and the Court of BiH—protected witnesses, necessity to provide witness protection, witnesses included in the program of protection, repentant witnesses) c) Consequences of the crime for the local community (demographic changes, return, possible public and social relations or anxiety among citizens, and the consequences of the public order in relation to the perpetration or prosecution of the crime)

SOURCE: Bergsmo et al. (2010), pp. 207-209.

A supervisory body was established in 2009 to oversee the processing of war crimes cases and implementation of the national strategy. Based on the findings of this supervisory body and other evaluators, additional amendments to the national war crimes strategy continue to be proposed to improve fairness and efficiency in the distribution and processing of cases.⁶⁷

Timor-Leste

The SCU was mandated to conduct investigations and prepare indictments against persons who committed serious criminal offenses in Timor-Leste as follows: genocide, war crimes, crimes against humanity,⁶⁸ murder, sexual offences, and torture. After East Timor's independence, the unit functioned within the national Public Prosecution Service, a constituent organ of the civil administration, and operated under the legal authority of the Office of the General Prosecutor, with its seat in Dili, the capital. The Office of the General Prosecutor oversaw two departments, one for ordinary crimes and the other for serious crimes, each headed by a deputy general prosecutor, although both were effectively under the control of the UN.⁶⁹

Different units attached to the Office of the Special Representative of the UN Secretary-General undertook and managed the core investigations, including the UN Office of Human Rights Affairs, as well as UN Police (UNPOL) and INTERFET, depending in part on which entity was responsible at the time. Between October 21, 1999, and January 12, 2000, INTERFET's DMU acted as an "interim judicial system pending the re-establishment of a civil judiciary," and in that capacity reviewed approximately 60 cases based on written submissions.⁷⁰ The DMU consisted of a reviewing authority, prosecutor, defending officer, two visiting officers, and a police expert. Under the detainee ordinance issued by INTERFET's commander, troops were authorized to detain persons suspected of committing a serious offense under certain chapters of the Indonesian penal code, essentially offenses warranting a maximum sentence of more than five years. These offenses included murder, manslaughter, grievous bodily harm, rape, possession of a weapon with intent to injure, carrying a weapon with criminal intent, causing an explosion likely to endanger life or property, kidnapping, and looting.

When the first civilian judges took their seats on January 7, 2000, DMU transferred all the cases to the new judges and disbanded.⁷¹ As already mentioned, the first investigations focused on individual crimes, rather than cases involving patterns of violations, and individuals selected for indictment and trial first were already in custody.⁷²

A coherent prosecutorial strategy for prosecuting serious crimes was laid out, with the identification of 10 priority cases based on the findings of the earlier international commission of inquiry and the files handed over by INTERFET.⁷³ These cases would eventually involve some 202 accused persons, all

⁶⁷ European Commission (2018), p. 12. In order to address the still significant backlog of cases and complete all war crimes cases by 2023, further revisions to the national war crimes strategy were under consideration. Inside Sarajevo (2018).

⁶⁸ Crimes against humanity were defined to include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, persecution of any identifiable group or collectivity, enforced disappearance, apartheid, and other inhuman acts of a similar character. UN Transitional Administration in East Timor (2000b).

⁶⁹ UN Transitional Administration in East Timor (2000c).

⁷⁰ As part of that process, the DMU held a three-day seminar during which the DMU prosecutor, UNPOL, and INTERFET case investigators presented the evidence in each case to the Timorese prosecutors. Oswald (2000).

⁷¹ Judicial System Monitoring Programme (2002), p. 14.

⁷² Reiger and Wierda (2006).

⁷³ Harris Rimmer (2010); Office of the Deputy General Prosecutor for Serious Crimes Timor Leste (2003).

Serious Crimes Process Timor-Leste

JURISDICTION
Serious criminal offenses, namely genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture committed between January 1, 1999, and October 25, 1999.
PERSONS
Universal jurisdiction.
CONVICTIONS AFTER TRIAL
Over 80 convicted; 24 plead guilty.
EVIDENCE PRESENTED
Over 6,000 witnesses.
PERIOD OF OPERATION
2000-2005.
FINANCING
Support from UNTAET and later UNMISSET. Public Prosecution Service funded independently.

of whom were accused of committing crimes against humanity in 1999,⁷⁴ although many were still at large at the time, mostly in Indonesia.⁷⁵

The 10 priority cases were selected based on the following criteria:

- number and type of victims
- seriousness of the crimes
- political significance of the crimes
- availability of evidence⁷⁶

It was decided that the investigations and prosecutions should focus on those cases involving murder—there were approximately 1,400 such cases. Some cases of rape and torture were also investigated, particularly when associated with murders. But cases that, for example, concerned

forcible transfer of persons, even though it potentially constituted a crime against humanity, were not pursued.⁷⁷ Cases involving the destruction of property, deportation, and unlawful transfer of persons were not “investigated thoroughly,” and investigations into cases involving rape and torture remained incomplete.⁷⁸ In addition, the SCU also decided to focus its mandate and resources on the events of 1999, rather than investigating “pre-1999 incidents” that occurred during the long period of Indonesian occupation.⁷⁹

Along with making decisions based on trial readiness as has already been discussed, prosecutors used a strategy of “building upwards,” an approach designed to establish evidence and culpability that would allow charges to be brought later against individuals in command. The General Prosecutor Mohamed Othman explained some of the thinking in December 2000, soon after the first indictments involving only murder charges were filed:

[W]hy these cases? The main reason is because there is a specific strategy or policy of the prosecution. We would like that in every accusation that comes out for crimes against humanity, we reflect in those indictments, people with different levels of responsibilities. So you will have—when these indictments

⁷⁴ Office of the Deputy General Prosecutor for Serious Crimes Timor-Leste (2004), p. 2. See also UN Security Council (2005f), para 49; Reiger and Weirda (2006), p. 19. These 10 priority cases were: the Liquiça Church massacre (April 6, 1999); the murders at the house of Manuel Carrascalão (April 17, 1999); the Maliana Police Station (Sept. 2–8, 1999); the Los Palos case (April 21–Sept. 25, 1999); the Lolotoe case (May 2–Sept. 16, 1999); the Suai Church massacre (Sept. 6, 1999); the attack on Bishop Belo’s compound (Sept. 6, 1999); the Passabe and Makaleb massacres (Sept.–Oct. 1999); a second case in Los Palos (April–Sept. 1999); and other sexual violence cases carried out in various districts (March–Sept. 1999). Wiranto’s indictment, the former Indonesian Minister of Defence and Tentara Nasional Indonesia commander, originated in these 10 cases.

⁷⁵ Reiger and Wierda (2006).

⁷⁶ Reiger and Wierda (2006), p. 19.

⁷⁷ Hirst and Varney (2005), pp. 7–8.

⁷⁸ UN Security Council (2005f), p. 20.

⁷⁹ UN Security Council (2005f), p. 18.

are forthcoming—the people who did the actual killing but also their commanders and people in commanding positions, who are responsible for these acts. We think that with these five cases it is a first step to be able to reach the district military leadership, maybe the regional, maybe the Bupatis [District Administrators] involved, and so on. This is how we are proceeding on these five cases.⁸⁰

Eventually, early in February 2003, an indictment was issued against 32 leaders, including both militia leaders and Indonesian military officials. This indictment was followed soon after by the indictment of retired army general and former Indonesian Minister of Defense and Security Wiranto and seven other defendants. Issued on February 24, 2003, it charged Wiranto, six high-ranking commanders in Indonesia's Armed Forces,⁸¹ and the former governor of East Timor, with crimes against humanity, in connection with events that took place in East Timor in 1999, on the bases of both individual and superior responsibility.⁸²

About the indictment, a prosecutor at the SCU said: “This is the most important indictment filed yet.... You have the leader of all the militias in East Timor being charged and a military commander indicted. These are not minor offenders.... There is a certain sense of relief for the victims' families. Even though there might never be a trial, there still is a sense that the UN is doing something to bring these people to justice.”⁸³

The Wiranto indictment, however, caused a ripple of political turmoil in Timor-Leste, Indonesia, and the UN. The president of Timor-Leste made a public statement expressing regret over the indictment and asserted that “it was not in the nation's interest,”⁸⁴ and the Government of Indonesia chose to ignore the indictment, continuing its practice of noncooperation with the court.⁸⁵ The then-head of the UN mission in Timor-Leste issued a statement disassociating the UN from the indictment as well, saying that “While indictments are prepared by international staff, they are issued under the legal authority of the Timorese Prosecutor-General. The United Nations does not have any legal authority to issue indictments.”⁸⁶ At a press briefing in New York, the UN spokesman went even further to clarify the distinction with reporters, saying “We hope that in the future you'll say ‘East Timor indicts’ and not ‘the United Nations indicts.’”⁸⁷

Considering the initial UN Security Council resolution establishing the serious crimes process, which called for full accountability and an end to impunity for persons responsible for atrocities, this shift was troubling. Shortly after the indictment was issued, the SCU was instructed to take the UN seal off its letterhead. In 2004, when an arrest warrant was issued for Wiranto, who at the time was running for president of Indonesia,⁸⁸ Timorese authorities denounced Special Panel Judge Phillip Rapoza as a UN judge. UN representatives responded by reiterating that he worked as a judge within the Timorese court system. This time, the president of Timor-Leste responded by flying to Bali to meet with Wiranto and gave him a much publicized “bear hug.”⁸⁹ The Timorese prosecutor general, in turn, refused to submit the arrest warrant to Interpol. Although he had submitted such warrants in the past, he refused to do

⁸⁰ UN Transitional Administration in East Timor (2000e).

⁸¹ The Indonesia Armed Forces (Angkatan Bersenjata Republik Indonesia) were renamed Tentara Nasional Indonesia.

⁸² UN Security Council (2005f), p. 20.

⁸³ *Associated Press* (2003b).

⁸⁴ Rapoza (2006), pp. 525, 533.

⁸⁵ *Associated Press* (2003a).

⁸⁶ UN News Center (2003).

⁸⁷ UN News Center (2003).

⁸⁸ Perlez (2004).

⁸⁹ Rapoza (2006), pp. 525, 534.

so in the case of Wiranto and all subsequent defendants, thus abandoning the very process that could assist in the apprehension of individuals charged with serious criminal offenses in Timor-Leste.⁹⁰

Selecting Crimes

Hybrid tribunals are almost always given jurisdiction to prosecute and try persons for violations of international law, although some, such as the SCSL and the ECCC, also have jurisdiction over crimes under domestic law. Therefore, the court's subject matter jurisdiction is a prime factor for prosecutors when selecting and prioritizing cases. Some tribunals have hewed strictly to the crimes enumerated under their jurisdictional umbrella; others have interpreted their mandates broadly to bring forward indictments for crimes such as forced marriage that had not been previously articulated as separate crimes.

The SCSL, for instance, had jurisdiction not only over international crimes, but also two charges under Sierra Leonean criminal law. It had personal jurisdiction over “those persons over 15 years old who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”⁹¹ Working within these statutory strictures, the SCSL's prosecutor made several strategic choices. For instance, in November 2002, before finishing investigations, he announced that he would not prosecute children, although the court's statute allowed for such prosecutions.⁹² He also opted not to bring charges under domestic law after concluding that such cases would present a “‘legal mine field’ that could complicate the court's docket with jurisdictional challenges.”⁹³ And he did not bring charges for forced transfer of persons, although charges of enslavement were brought forward, in relation to the removal of civilians from their homes.⁹⁴

In addition, among the enumerated international crimes, the prosecutor prioritized certain crimes over others. In February 2004, the prosecution applied for and was granted leave to amend the consolidated indictment to include alleged acts of forced marriage as a count under “crime against humanity or other inhumane act.”⁹⁵ This crime was added based on consultations with women's groups and was motivated, in part, by the decision to prioritize local views about the crimes that had occurred in Sierra Leone; it reflects how the criminal conduct there was perceived by victims. This decision on the part of the prosecutor was criticized by some international gender experts, who believed the existing legal concepts such as enslavement and rape subsumed the charge, but was welcomed by others.⁹⁶

The prosecutor defended the choice. “These additional charges of crimes against humanity reflect the fact that women and girls suffered greatly during the war, including through widespread forced marriage,” he said. “The Office of the Prosecutor is committed to telling the world what happened in Sierra Leone during the war, and gender crimes have been at the core of our cases from the beginning. These new charges recognize another way that women and girls suffered during the conflict.”⁹⁷

⁹⁰ Rapoza (2006), pp. 525-540.

⁹¹ Statute of the Special Court for Sierra Leone, art. 7.

⁹² Special Court for Sierra Leone (2002b). “Speaking at a local secondary school in the town of Kabala, near the Guinean border, Crane said, ‘The children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes,’ he said. Many of the students at the school had been child soldiers. Crane told them that he plans to establish ‘crimes against children’ as war crimes. Child abduction and forced recruitment are crimes in the Court's statute that have never been prosecuted before by an international tribunal.”

⁹³ University of California–Berkeley, War Crimes Studies Center (2005), p. 7.

⁹⁴ Dawson and Farber (2012), p.104.

⁹⁵ Special Court for Sierra Leone (2004c), para. 58.

⁹⁶ Perriello and Wierda (2006b), pp. 27-28.

⁹⁷ Special Court for Sierra Leone (2004f).

Similarly, at the ECCC, forced marriage was added as a charge to the closing order of Case OO2, after civil party lawyers pushed for investigations of sexual and gender-based violence in Cambodia; it had not been part of the original prosecutorial strategy.⁹⁸

The STL's prosecution was defined by the specific crime of terrorism outside of armed conflict. The tribunal was given a relatively small mandate and thus, in many ways, is a special case among the hybrid tribunals. There was no overarching prosecutorial strategy, other than bringing charges against persons alleged to have been involved in the 2005 attack and connected cases. Instead, the prosecutor's approach has been guided largely by the results of his investigations and the outcomes of the UNIIC. This approach is summarized as follows:

This is a particularly complex terrorist case, which is built by hundreds of pieces of evidence. Each piece of evidence needs to be submitted individually and is put to strict proof, and allowed to be challenged. Often to prove a single fact, dozens of documents or numerous witnesses may be required. The complexity of preparing and presenting such a case is reflected in its magnitude and time-consuming nature.

In order to present the evidence in comprehensible segments, the Prosecution has identified for the Court three main categories of evidence to be called at trial:

- ◆ **first:** the forensic evidence on the cause of the explosion of 14 February 2005 and evidence related to the death and injury of the victims of this attack;
- ◆ **second:** the evidence of the preparatory acts undertaken by the five Accused and their co-conspirators in 2004-2005 to prepare for the assassination of the former Prime Minister; and
- ◆ **third:** the evidence concerning the identity of the Accused and their respective roles in the attack.”⁹⁹

The presentation of evidence at trial is consistent with this approach.¹⁰⁰ For related cases occurring after December 2005, the prosecutor must consider whether the attack “is of a similar nature and gravity.”¹⁰¹

Political and Other Considerations

Prosecutors have a duty to carry out their functions “impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.”¹⁰² As such, the statutes and rules governing hybrid tribunals typically include provisions for ensuring the independence of judges, prosecutors, and

⁹⁸ Strasser et al. (2015), pp. 32-33.

⁹⁹ Special Tribunal for Lebanon (2016), p. 17.

¹⁰⁰ An indictment was submitted in a connected case, Case STL-17-0. At present, the details of the victims, crimes, and suspects that are currently the subject of the proceedings before the pre-trial judge are confidential and ex parte.

¹⁰¹ Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 12 (Exercise of Jurisdiction over Attacks that Occurred after 12 December 2005).

¹⁰² Office of the UN High Commissioner for Human Rights (1990), para. 13(a).

Special Tribunal for Lebanon

JURISDICTION

Attacks occurring in Lebanon between October 1, 2004, and December 12, 2012, including the attack on February 14, 2005 that killed then Prime Minister Rafiq Hariri and 22 others.

Other attacks determined to be connected to the February 14 attack and of a similar nature and gravity.

PERSONS

Persons responsible for the abovementioned attacks or crimes.

CONVICTIONS AFTER TRIAL

0 (primary cases).

2 (on contempt charges).

Other trials are still ongoing.

EVIDENCE PRESENTED

Over 260 individual witnesses and about 2,470 exhibits in documentary form at the conclusion of prosecution case in Ayyash et al.

PERIOD OF OPERATION

2009-present.

TRUTH SEEKING

No existing mechanisms.

FINANCING

Assessed and voluntary contributions from states. The Government of Lebanon provides 49 percent of the total funds.

staff. The laws governing the ECCC and STL, for instance, include language barring the prosecutor (or in the case of the ECCC, the co-prosecutors) from seeking or receiving instructions from any government or any other source.¹⁰³

In all cases, the role of the prosecutor should be to conduct investigations and to apply the law consistently. The prosecutor should not become politically involved, including in the exercise of the prosecutor's inherent prosecutorial discretion.

Yet prosecutorial discretion is a key element in prosecutorial decision making about which cases to select and prosecute or which charges to bring forward. The court's authorizing mandate may also enumerate other considerations relevant to such decision making.

Under Article 53 of the ICC's Rome Statute, for example, the prosecutor in exceptional circumstances can decline to investigate or prosecute an otherwise admissible case, in which "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."¹⁰⁴ There is, however, a presumption in favor of investigation or prosecution, and the prosecutor is to be guided by the objects and purposes of the Rome Statute when making that decision, "namely the prevention of

serious crimes of concern to the international community through ending impunity," as well as the interests of victims and other factors.¹⁰⁵ This discretion is subject to review by the Pre-Trial Chamber.

Political tensions around case selections, however, still arise. In 2010, Cambodian Prime Minister Hun Sen, for instance, publicly announced that he was against more trials taking place after Case 002.¹⁰⁶ And earlier in 2009, Cambodian Co-Prosecutor Chea Leang refused to sign the necessary introductory submission required by the co-investigating judges to initiate a judicial investigation against new suspects; the Cambodian judges in the Pre-Trial Chamber followed suit. Nevertheless, the investigation went ahead because of a clause in the court's statute providing that, when the decision of a chamber is split, the investigation or prosecution moves forward.¹⁰⁷

¹⁰³ Statute of the Special Tribunal for Lebanon, art. 11; Law on the Establishment of the Extraordinary Chambers, art. 19.

¹⁰⁴ The provision of the Rome Statute giving the prosecutor discretion not to pursue an investigation in the "interests of justice" has generated significant debate and controversy. As a result, in 2004, the ICC's office of the prosecutor solicited comments as to the meaning of the phrase, "interests of justice," and issued a policy paper in 2007 setting out its understanding of the concept.

¹⁰⁵ International Criminal Court, Office of the Prosecutor (2007).

¹⁰⁶ Scully (2011).

¹⁰⁷ In the event of differences between co-investigating judges or co-prosecutors at the ECCC, an affirmative vote of at least four judges is required. Otherwise, an investigation or prosecution must move forward. Agreement between the United Nations and the Royal

A later incident over additional cases, however, did not resolve itself so easily. This incident began when UN Co-Investigating Judge Seigfried Blunk, together with his Cambodian counterpart, announced on April 29, 2011, that there would be no further investigations in Case 003, stating only that they considered the investigation to have concluded.¹⁰⁸ Many UN staff resigned after that decision. International Co-Prosecutor Andrew Cayley objected, and in a statement he laid out his intention to request additional investigation because he did not agree.¹⁰⁹ He was forced to retract his statement but continued to fight to restart the investigations.¹¹⁰ The investigations were eventually resumed by judicial decision, after the resignation of Judge Seigfried Blunk.¹¹¹

How Public Were the Criteria?

The policy ought to be a public document in order to inform the public about the principles governing the prosecution process and thereby enhance confidence and respect for the process. That being said, the criteria for selecting and prosecuting cases may or may not be made public.

By sharing the criteria, the office of the prosecutor recognizes the public's legitimate interest in obtaining information about its processes and helps to make the tribunal a transparent and accountable institution. However, at the same time, it risks the possibility that other stakeholders will seek to influence or even control the court's processes.

This tension was captured by David Schwendiman, a former prosecutor at the BiH War Crimes Section, in his advice to the chief prosecutor of the BiH prosecutor's office. He advised that he should "resist every effort by anyone, [Organization for Security and Co-operation in Europe], [High Judicial and Prosecutorial Council], the State Court or anyone else, to dictate what your case selection criteria ought to be."¹¹² At the same time, he urged that "you must be forthright with the public and let them know, within limits dictated by operational and security concerns what criteria we are using to select the cases we will investigate and prosecute and the order in which we will address them."

Extraordinary Chambers in the Courts of Cambodia

JURISDICTION

Serious crimes committed during the Khmer Rouge regime from 1975 through 1979.

Homicide, torture, and religious persecution under the 1956 Cambodian Penal Code; genocide; crimes against humanity; grave breaches of the 1949 Geneva Convention; destruction of cultural property during an armed conflict; crimes against internationally protected people under the 1961 Vienna Convention on diplomatic relations.

PERSONS

Senior leaders of Democratic Kampuchea and those who are "most responsible for crimes" committed in that period.

CONVICTIONS AFTER TRIAL

3

EVIDENCE PRESENTED

334 witnesses (as of September 27, 2017).

PERIOD OF OPERATION

2009-present.

FINANCING

Staff provided by Cambodia, the UN, and states. Voluntary funds from foreign governments, international institutions, nongovernmental organizations, and private donors.

Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 7.4. "If there is no majority, as required for a decision, the investigation or prosecution shall proceed." Scully (2011).

¹⁰⁸ Scully (2011), p. 328.

¹⁰⁹ Scully (2011), p. 329.

¹¹⁰ Scully (2011), p. 330.

¹¹¹ Mydans (2011); ECCC (2011c); Scully (2011).

¹¹² Bergsmo et al. (2010), p. 91.

The balance between these two views is never easy to navigate. At the ICC, the office of the prosecutor circulated a draft policy paper for comment prior to adopting it.¹¹³ And at the SCSL, Prosecutor David Crane was public about some elements of the selection criteria he used when deciding on which cases to bring to trial and the choices he ultimately made. In November 2002, before finishing investigations, for instance, he announced that he would not prosecute children, although the court's statute allowed for such prosecutions,¹¹⁴ putting to rest an issue that had proved to be contentious during the drafting of the court's statute. He also announced that his investigations would focus only on "those bearing the greatest responsibility" for violations of international humanitarian law—not the rank and file of the military," during a meeting with civilian leadership from the Ministry of Defense and over 40 members of Sierra Leone's Armed Forces.¹¹⁵ By contrast, in Cambodia, the two co-prosecutors have not made public the criteria they apply.

How Detailed Can and Should These Criteria Be?

Criteria should be detailed enough to articulate a clear policy for deciding among cases and for prioritizing which cases to bring forth. Otherwise, it can be difficult for prosecutors to defend the fairness of their prosecutorial choices. In most situations, the criteria are general guidelines designed to maintain objectivity in the selection of matters.

In the absence of well-articulated criteria, claims of selective prosecutions may be leveled against the prosecutor's office. At the ECCC, a suspect in Case 003 argued that transparency was required to ensure that the prosecution did not abuse its discretion in the exercise of its prosecutorial and investigatory policies, a matter within the ambit of review by the ECCC's Supreme Court Chamber.¹¹⁶

A lack of specificity in the applicable criteria can also lead to inconsistencies in the selection of prosecutions, with serious consequences for principles of legal certainty and equality of citizens before the law. In BiH, the Ministry of Justice established a working group to draft a "National Strategy for war crimes and dealing with the issues related to war crimes." That working group was chaired by the chief prosecutor and tasked with developing a "systematic approach" to facilitating "prosecution of all or at least most of the perpetrators in a reasonable period of time."¹¹⁷ As a result, in 2008, the BiH Council of Ministers adopted a national strategy that provided greater policy clarity for prosecutor's offices at both the state and entity level on war crimes cases and in articulating an internal strategy for taking cases to trial.¹¹⁸

¹¹³ Seils (2010).

¹¹⁴ Special Court for Sierra Leone (2002b).

¹¹⁵ Special Court for Sierra Leone (2003b).

¹¹⁶ ECCC (2013b).

¹¹⁷ Bosnian National War Crimes Strategy.

¹¹⁸ Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2011), p. 26.



The Special Court for Sierra Leone is located in Freetown. (Special Court for Sierra Leone)

PART 3

Organizing the Court: Structure, Staffing, and Their Challenges

Organizational Structures of Hybrid Courts

Similar to the International Criminal Court (ICC) and the ad hoc tribunals, hybrid courts are commonly organized into three or four sections or units, often referred to as organs. Most of the core functions of the court are conducted by the chambers (consisting of one or more trial chambers and an appeals chamber), the prosecutor's office, and the registry,¹ which is responsible for the court's administrative services. The Special Court for Sierra Leone (SCSL) had this basic structure. At the SCSL, the registry housed the Office of the Principal Defender and was responsible for essential services relating to victims and witnesses, as well as nonjudicial functions such as security, detention, communications and information technology, public affairs and outreach, general services, facilities management, procurement, personnel, and finance.²

At the Special Tribunal for Lebanon (STL), the Defense Office is an additional, standalone unit of the court. Although this office does not represent or take instructions from the accused, who are separately represented, its role is crucial: It “exists to ensure the protection of the rights of an accused and to make the exercise of these rights effective.” It does so by screening counsel, in accordance with the court's qualification criteria, and by maintaining a list of the qualified counsel. As such, the STL has four sections: Trial Chambers, the office of the prosecutor, the defense office, and the registry, which is supported by the immediate office of the registrar, the public information and communications section, the judicial division, and the division of administration.

Some hybrid courts also have an office of the presidency, consisting of a president and often a vice president and staff. The president is usually a judge of the court who has been elected by a vote of fellow judges.³ The office of the presidency plays a broad supervisory role, including over the activities of the registry. The president of the STL, for instance, is responsible for coordinating the work of the court, presiding at all plenary meetings, issuing practice directives, consulting with Lebanese authorities, making decisions on pardons, supervising the conditions of detention, and submitting annual reports.⁴

¹ Statute of the Special Court for Sierra Leone (2002), art. 11 and 16.

² Special Court for Sierra Leone and the Residual Special Court for Sierra Leone (2018).

³ At the SCSL and the STL, the president is elected by a majority of the votes of the judges within the appeals chamber. Special Tribunal for Lebanon, Rules of Procedure and Evidence (2009), Rule 31; Special Court for Sierra Leone (2003c), Rule 18.

⁴ Special Tribunal for Lebanon, Rules of Procedure and Evidence (2009), Rule 32.

The hybrid tribunals in Cambodia, Bosnia and Herzegovina (BiH), and Timor-Leste were established within the domestic court system, although the ECCC is its own special jurisdiction and is not fully integrated into the Cambodian court system. Conversely, the Timorese Serious Crimes Process (SCP) and the Bosnian War Crimes Section were part of a larger justice system. In Timor-Leste, the District Court in Dili was established alongside seven other district-level courts across the country, although it was given exclusive jurisdiction over serious crimes.⁵ The BiH War Crimes Section is one of three sections within the criminal division of BiH's state-level court system. The other sections handle organized crime, economic crime, and corruption (Section II) and other criminal offenses (Section III). In both Timor-Leste and BiH, the prosecutor's office is separate from the court.

The ECCC serves as a special Cambodian human rights court within the Cambodian justice system. Yet in many ways, it is an organizational outlier. Similar to the other hybrid courts, the ECCC is organized into three main sections: the chambers (Pre-Trial, Trial, and Supreme Court Chambers), the Judicial Offices, consisting of the co-investigating judges and co-prosecutors, and the office of administration, which includes the director and deputy director of administration and the departments of budget and finance, court management, personnel, information and communications technology, public affairs, security and safety, general services, defense support, and civil party lead co-lawyer and victim support.⁶

Positions at the court are categorized as either national or international, with separate staff, management, and budgets. From the start, the ECCC's bifurcated national and international organizational structure presented many challenges, as an early report by two independent experts—Robin Vincent and Kevin St. Louis—found: The divided nature of the court “serves only to constantly hinder, frequently confuse and certainly frustrate the efforts of a number of staff on both sides of the operations.”⁷

In addition, the ECCC lacked both a registrar and a president, which created gaps in oversight at times. The decision to create an office of administration, led by both a Cambodian director and an international deputy director of administration with separate but overlapping administrative portfolios, rather than having a single registrar, contributed to administrative inefficiencies, allegations of undue influence on the national side, and reluctance to provide funding by donors.⁸

In addition, the lack of UN supervision over national components of the ECCC created a trust deficit.⁹ As a result, over the tenure of the ECCC, there have been repeated calls for changing aspects of that divided structure, such as, for instance, merging the administrative side of the court and having the UN taking the lead in most areas or establishing a registry atop the ECCC's administration.¹⁰ As a partial fix, the internal rules established a “Judicial Administration Committee” in 2007, composed of three Cambodian and two international judges.¹¹

⁵ UN Transitional Administration in East Timor (2000a), Section 10.

⁶ ECCC (2018i).

⁷ Kinetz (2007b).

⁸ In most instances, hybrid courts have a single administrative director—the registrar—centralizing responsibility over the court's fundamental administrative tasks. For discussion of challenges faced at the ECCC, see section on Registry below.

⁹ Ciorciari and Heindel (2014), p. 73.

¹⁰ Ciorciari and Heindel (2014), p. 72; Kinetz (2007b).

¹¹ Ciorciari and Heindel (2014), pp. 75-76.

Staffing and Recruitment

In hybrid tribunals, international and national staff work together to implement the court's many functions. Because hybrid tribunals have different structures and are internationalized in different ways, staffing and recruitment for key positions at the court—judges, the prosecutor, head of the defense office, and the registrar—varies as well.

In most cases, the mandate of the hybrid tribunal stipulates who may hold key positions at the court (national or international staff members) and who is responsible for appointing and selecting those individuals. This is true at the ECCC, where recruitment is effectively split along national and international lines, with separate hiring and reporting structures, depending on whether a position is designated for an international or national staff member. However, both the Cambodian and international judges at the ECCC are appointed by the same Supreme Council of the Magistracy (Supreme Council), the country's highest judicial body.¹²

Under the law establishing the ECCC, for instance, positions for national staff include president of the Trial and Supreme Court Chambers; director of administration;¹³ the chiefs of the court management section, the public affairs section, victims support section, the budget and finance section, and the head of human resources. International staff members hold the positions of deputy director of administration, head of the defense support section, chief of information and communications technology, and senior advisor to the court management section.¹⁴

In other instances, the court's mandate does not designate whether a national or international staff member is to hold a particular position. Rather, it specifies who is responsible for making appointments. The Trial Chamber of the SCSL was composed of two judges appointed by the UN Secretary-General and one appointed by the Government of Sierra Leone; the prosecutor was appointed by the UN Secretary-General in consultation with the government, whereas the Sierra Leonean deputy prosecutor was appointed by the Government of Sierra Leone in consultation with the Secretary-General; and the registrar, who was the only UN staff member, was appointed by the UN Secretary-General in consultation with the president of the Special Court.¹⁵ Although not required, it was generally assumed that the UN Secretary-General would appoint international judges and the Government of Sierra Leone would designate nationals.

Similarly, at the STL, the power of appointment resides with the UN Secretary-General, who is responsible for appointing judges, prosecutors, the registrar, and head of the defense office, although appointments of Lebanese judges and the Lebanese deputy prosecutor are made from a list of nominees proposed by the government. The registrar must be a UN staff member. The defense office has 12 staff representing 7 different nationalities.¹⁶

¹² The Supreme Council was established “to guarantee the independence of the judiciary, maintain discipline of judges, and to assure the good functioning of the courts of the Kingdom of Cambodia.” See Law on the Organization and Function of the Supreme Council of Magistracy, art. 1.

¹³ The ECCC does not have a registrar. Rather, the director of administration is responsible for supporting and facilitating the “judicial process through effective, efficient and coordinated provision of services.” ECCC (2018h).

¹⁴ See, e.g., Law on the Establishment of the Extraordinary Chambers; ECCC (2014b).

¹⁵ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 2-4.

¹⁶ Special Tribunal for Lebanon (2018c), p. 33.

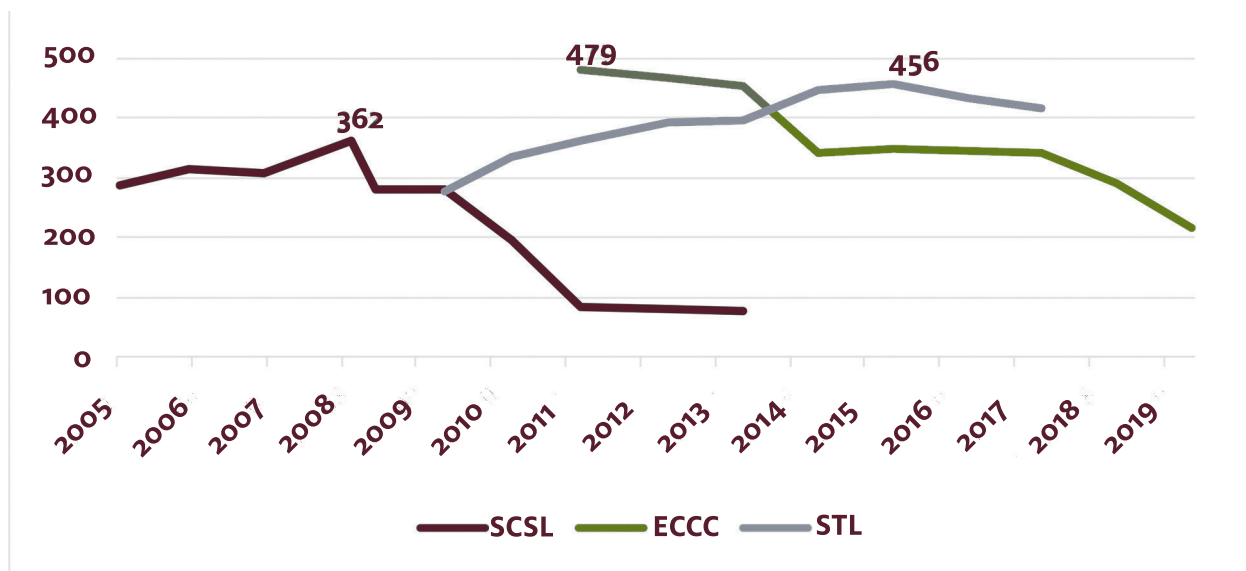
In BiH, because of its design as an internationalized court within the domestic court system, appointments of international judges were made first by the Office of the High Representative for BiH and later by a national body known as the High Judicial and Prosecutorial Council for BiH (HJPC), which took over recruitment of all judicial and prosecutorial positions under a law passed in 2004.¹⁷

Total Staff at Hybrid Tribunals

The total number of staff at a hybrid court will fluctuate over time, often peaking at the height of the court’s operations and with downsizing occurring as the court approaches the end of its mandate.

However, because of the indispensable work that hybrid courts perform to provide fair and impartial justice, most employ a large staff of professionals, administrators, and other personnel who are responsible for a range of tasks. Everyone must be properly trained to ensure each staff person can perform the assigned tasks while also meeting standards of professional ethics and codes of conduct. At their peak, the SCSL employed 362 staff members, the ECCC 479 staff members, and the STL 456 staff members (shown in Figure 3.1).

Figure 3.1: Total Number of Staff over Lifetime of Tribunal



Sources: Official annual reports issued by the Special Court for Sierra Leone and its Residual Mechanism from 2005 through 2017; official budget reports issued by ECCC from 2004 through 2018; official annual reports of the Special Tribunal for Lebanon, years 2010-2011 through 2017-2018.

How Much of the Staff Is Usually National?

The ratio of national to international staff differs across contexts. The numbers are consistent with the court’s mandate and the availability of competent and impartial international and national personnel within a particular context and time.

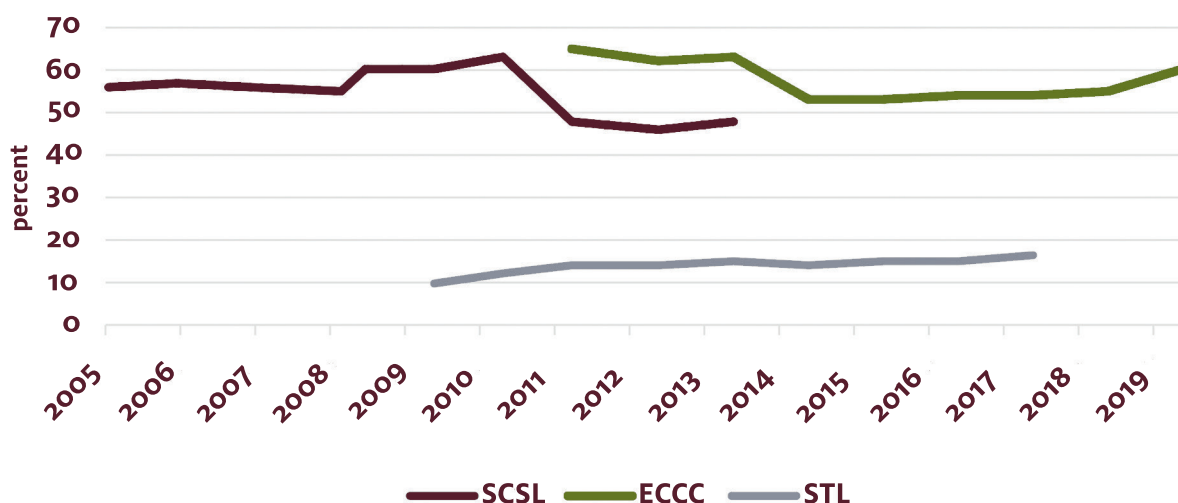
¹⁷ Office of the High Representative (2002); see also Fitchelberg (2015), p. 108.

At the SCSL, nationals made up the majority of staff throughout most of its operations (except during the Charles Taylor trial which was held in The Hague), although many senior positions (judges, prosecutors, principal defenders, and registrar) were held by international staff.¹⁸ To encourage the selection of national personnel, the court implemented a policy of short-listing Sierra Leonean applicants for interviews.¹⁹

At the ECCC, national staff outnumber international staff not only in the overall totals,²⁰ but also in each of the court's three chambers, where they are the majority. They also occupy most of the lead positions in the tribunal, including the presidency of both the Trial and Supreme Court Chambers; the director of administration; and the chiefs of the court management section, the public affairs section, victims support section, the budget and finance section, and human resources.²¹

At the STL, international staff has consistently occupied more positions than Lebanese nationals, with the percentage of Lebanese staff only recently exceeding 15 percent since it began operations in 2009. Figure 3.2 shows the percentage of national staff members at the ECCC, the SCSL, and the STL over the operational life of the court.

Figure 3.2 Percent of Staff Who are National Over Lifetime of Tribunal



Sources: Official annual reports issued by the Special Court for Sierra Leone and its Residual Mechanism from 2005 through 2017; official budget reports issued by ECCC from 2004 through 2018; official annual reports of the Special Tribunal for Lebanon, years 2010-2011 through 2017-2018.

¹⁸ See, e.g., Trial Chamber I: Justice Pierre Boutet (Canada), Justice Benjamin Mutanga Itoe (Cameroon), and Justice Rosolu John Bankole Thompson (Sierra Leone); Trial Chamber II: Justice Teresa Doherty (Northern Ireland), Justice Julia Sebutinde (Uganda), Justice Richard Lussick (Samoa) and Justice El Hadji Malick Sow (Senegal) as alternate judge; Appeals Chamber: Justice George Gelaga King (Sierra Leone), Justice Emmanuel Ayoola (Nigeria), Justice Renate Winter (Austria), Justice Hassan Jallow (The Gambia) who was replaced by Justice Raja Fernando (Sri Lanka) and Justice Shireen Avis Fisher (US), Justice Geoffrey Robertson (UK) who was replaced by Justice Jon Kamada (Sierra Leone) and Alternate Justice Philip Nyamu Waki (Kenya). Prosecutors: David Crane (US), Desmond de Silva (UK), Stephen Rapp (US), and Brenda Hollis (US); Deputy Prosecutors: Desmond de Silva (UK), Christopher Staker (Australia), and Joseph Kamara (Sierra Leone). Registry: Robin Vincent (UK), Lovemore Munlo (Malawi), Herman von Hebel (The Netherlands), and Binta Mansaray (Sierra Leone).

¹⁹ Perriello and Wierda (2006b), p. 25.

²⁰ ECCC (2014a). "Last year, ECCC staff numbered 436 positions in total – 267 for national staff under Cambodian government contracts and 169 for international staff employed by the UN. In 2014, however, the budget will allow for only 341 positions, including 182 national staff and 159 UN staff, and in 2015, staff numbers will be cut further, down to 317 positions —71 national staff and 146 UN posts."

²¹ See, e.g., Law on the Establishment of the Extraordinary Chambers (2004); ECCC (2014b).

Annual staffing numbers for the Serious Crimes Process in Timor-Leste are unavailable. There is, however, enough information to get an overall sense of the size and scale of its operations. Initially, both the Special Panels established in the Timorese courts and the Special Crimes Unit established within the public prosecution service were under resourced and staffing levels fluctuated. For a time, support from UN Transitional Authority in East Timor (UNTAET) and UN Mission of Support in East Timor (UNMISSET) grants, bilateral assistance, and assistance from the UN police, UN volunteers, and others assisted the unit in building its capacity to investigate and try complex crimes.²² At the Special Panels, however, “as a result of a shortage of international judges, the Court [of Appeals] did not function at all from the end of October 2001 until June 2003.”²³ At its peak, the SCU had more than 130 staff, including prosecutors, case managers, investigators, and forensic staff. The unit was downsized in 2003; before its closure in May 2005, it had 88 staff members, comprising UN international staff working as prosecutors, investigators, forensic experts, and translators.²⁴

The War Crimes Section in BiH began with a majority of international judges, but then transitioned from a hybrid court, with minority international representation, to an entirely domestic one. During the transition, the registry provided professional training and education programs, which benefitted more than 350 staff members and included the financing of doctoral, post-graduate, and undergraduate study programs; management courses; and in-house training for international and national judges, prosecutors, translators, defense counsel, and others.²⁵ The Court of BiH’s criminal defense section (Odsjek krivicne odbrane, or OKO) organized more than 130 professional training sessions and six annual conferences featuring prominent criminal law professionals, to improve operations.²⁶ Figure 3.3 break down the judges at the War Crimes Section in BiH. For staffing numbers at the SCSL, the ECCC, and the STL, see Appendix C.

How Are Staff for Key Positions Recruited and Selected: Judges?

The mandates of the courts under examination in this report have established the composition of their court panels in terms of national and international personnel in various ways. The STL includes a pre-trial judge who is not an investigating judge in the usual sense of the term, but who reviews and confirms indictments submitted by the prosecutor and can collect evidence at the request of the prosecution, the defense, or a participating victim. At the ECCC, there are five pre-trial judges who hear motions and appeals against orders issued by the co-investigating judges while a case is still under investigation.²⁷ Table 3.1 presents the composition of the judicial panels of the five hybrid tribunals.

The mandates also establish who is responsible for appointing judges, sometimes with significant ramifications in terms of potential outside or foreign interference. In Cambodia, the Supreme Council of the Magistracy appoints both national and international judges, although the process for selecting the panel of candidates differs for domestic and international judges: National judges are nominated and selected by the Supreme Council according to the procedures already existing in Cambodia for judicial appointments under Cambodia’s Constitution, whereas international judges are chosen from a list of

²² Reiger and Wierda (2006), p. 18.

²³ Hirst and Varney (2005), p. 9.

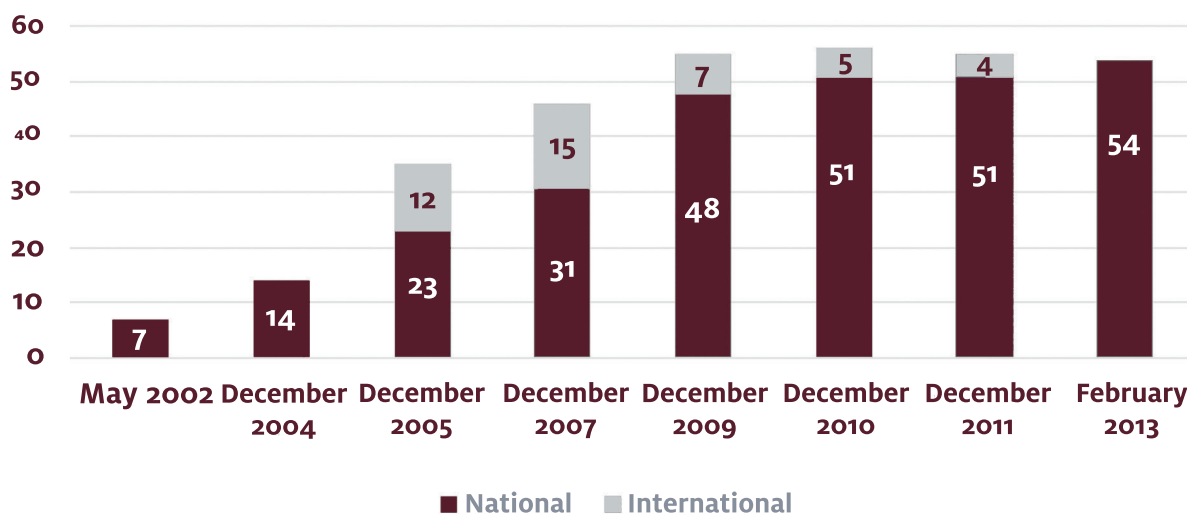
²⁴ Reiger and Wierda (2006), p. 18.

²⁵ Court of Bosnia and Herzegovina (2012), p. 20.

²⁶ Court of Bosnia and Herzegovina (2012), p. 20.

²⁷ ECCC (2018j).

Figure 3.3: Number and Composition of Judges in the Bosnia and Herzegovina War Crimes Section



Source: Court of Bosnia and Herzegovina, Registry (2012), pp. 13, 32.

nominations put forward by the UN Secretary-General.²⁸ The selection process for Cambodian judges is almost entirely nontransparent, and virtually nothing is known about how they are selected and by what criteria. This lack of openness has frustrated participants and observers of the court, leading to charges of illegitimacy and corruption. Early in the court’s tenure, the Cambodian Human Rights Action Committee, a coalition of 21 nongovernmental organizations, recommended criteria for appointments by the Supreme Council of the Magistracy, unfortunately without success.²⁹

The process for international judges is more open, although final appointments are still made by the Supreme Council of the Magistracy. The UN Secretary-General submits “a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia,” from which the Supreme Council then appoints five sitting judges (two for the trial chamber and three for the appeals chamber), and at least two reserve judges. To create the original list, the UN called on member countries to submit the names of possible nominees for international judges and prosecutors. Short-listed candidates were invited to New York for interviews. Table 3.2 presents who is responsible for appointing judges in the five tribunals.

The power of appointment is of course not the only risk point for political influence. Court rules usually prohibit judges from sitting on a case within which they have a personal interest.³⁰ And the court itself must ensure that court processes generally are not subject to improper influences.

²⁸ Law on the Establishment of the Extraordinary Chambers (2004), art. 11.

²⁹ Cambodian Human Rights Action Committee (2006).

³⁰ See e.g., Special Court for Sierra Leone (2003c), Rule 15. “A Judge may not sit at a trial or appeal in any case in which his or her impartiality might reasonably be doubted on any substantial ground.”

Table 3.1: Composition of Judicial Panels at the Hybrid Tribunals

CHAMBER OF THE COURT	BOSNIA AND HERZEGOVINA WAR CRIMES CHAMBER	EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA	SERIOUS CRIMES PANELS IN TIMOR-LESTE	SPECIAL COURT FOR SIERRA LEONE	SPECIAL TRIBUNAL FOR LEBANON
Co-Investigating Judges	N/A	1 Cambodian judge 1 international judge	N/A	N/A	N/A
Pre-Trial Judge or Pre-Trial Chamber	N/A	3 Cambodian judges 2 international judges	N/A	N/A	1 international judge
Trial Chamber	Five 3-judge panels 1 BiH judge and 2 international judges until 2008 (as a hybrid court). Then, BiH judges were the majority.	3 Cambodian judges 2 international judges	1 Timorese judge 2 international judges	2 judges appointed by the UN Secretary-General 1 judge appointed by the Government of Sierra Leone No requirement that any judge must be Sierra Leonean	1 Lebanese judge 2 international judges 2 alternate judges (1 Lebanese judge and 1 international judge)
Appeals Chamber	2 BiH judges 3 international judges	4 Cambodian judges 3 international judges	1 Timorese judge and 2 international judges Or 2 Timorese judges and 3 international judges (for cases of special importance or gravity)	5 judges served in the Appeals Chamber. 3 judges appointed by the UN Secretary-General 2 judges appointed by the Government of Sierra Leone No requirement that any should be Sierra Leonean	2 Lebanese judges 3 international judges

SOURCES: Official annual reports issued by the Special Court for Sierra Leone and its Residual Mechanism from 2005 through 2017.

Table 3.2: Who Appoints the Judges?

BOSNIA AND HERZEGOVINA WAR CRIMES SECTION	EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA	SERIOUS CRIMES PANELS IN TIMOR-LESTE	SPECIAL COURT FOR SIERRA LEONE	SPECIAL TRIBUNAL FOR LEBANON
<p>The High Representative for BiH initially appointed international judges.</p> <p>Later, the High Judicial and Prosecutorial Council (HJPC) appointed both international and national judges.^a</p>	<p>The UN Secretary-General nominates a list of international judges and Cambodia’s Council of Magistracy makes the final appointments.</p> <p>Cambodia’s Council of Magistracy appoints national judges.</p>	<p>The Transitional Administrator appoints judges based on the recommendations of the Transitional Judicial Service Commission.</p>	<p>The UN Secretary-General appointed 2 judges to the trial chamber and 3 judges to the appeals chamber.</p> <p>The Government of Sierra Leone appointed 1 judge to the trial chamber and 2 judges to the appeals chamber.</p>	<p>The UN Secretary-General appointed international judges based on nominations forwarded by states (at the invitation of the UN Secretary-General).</p> <p>The UN Secretary-General appointed Lebanese judges from a list of 12 persons presented by the Lebanese government and proposed by the Lebanese Supreme Council of the Judiciary.</p>

NOTE: International judges (and prosecutors) were initially appointed by the Office of the High Representative. They were seconded by their governments and were given short-term, renewable contracts, usually for one or two years. Since July 2006, the HJPC also appointed the international judges and prosecutors (in coordination with the registry and the president of the court and chief prosecutor) through a competitive process. National and international judges were required to have eight years of international criminal law experience.

Qualified to Serve: Selection Criteria Used in the Recruitment of Judges

Individuals or groups entrusted with the task of selecting judges must apply certain minimum criteria to ensure that the judges are capable of rendering justice in a fair and competent way, independent and free of political influence. Full details about the recruitment processes for judges at the hybrid tribunals are not uniformly accessible. Yet there is still much to be learned about the criteria for gauging judges’ suitability to serve and the process for making those decisions.

Integrity, Impartiality, and High Moral Character

The Basic Principles on the Independence of the Judiciary (Basic Principles), adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985,³¹ recognize the special role judges serve in society. Judges are “charged with the ultimate decision over life, freedoms, rights, duties and property of citizens.”³² Accordingly, they must be individuals of “high moral character” and “personal integrity.” Hybrid tribunals have adopted different approaches for appointing judges that meet that standard.

³¹ The Seventh Congress was held in Milan from August 26 to September 6, 1985. The Basic Principles were endorsed by General Assembly resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985.

³² Basic Principles on the Independence of the Judiciary (1985). The right to an independent and impartial judiciary is established under multiple human rights instruments. See Universal Declaration of Human Rights (1948), art. 10; European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art. 6(1); American Convention on Human Rights (1969), art. 8(1); and African Charter on Human and Peoples’ Rights (1981), art. 7(d).

The SCSL's statute explicitly required judges to be “impartial, have a high moral character and integrity, and perform their functions independently.” Similarly, the STL requires appointed personnel to be “persons of high moral character, impartiality and integrity, with extensive judicial experience.”³³

In BiH, an extensive vetting process was developed to reevaluate individuals already serving within the judiciary before their appointment as judges and prosecutors to the state-level Court of BiH. This was necessary to guarantee the impartiality and neutrality of national judges appointed to represent the BiH system of justice within the hybrid—national and international—justice process. To assess the integrity and moral standards of applicants during this vetting process, candidates' applications were evaluated based on a number of factors, including conflict-related complaints from citizens.³⁴ Judges and prosecutors that were applying or reapplying for positions were required to provide evidence of their political affiliations and compliance with property laws, as well as records of their personal assets, past military or paramilitary involvement (if any), and government positions.³⁵ These factors were all considered in the hiring of new judges, with applicants able to file an application for reconsideration if denied rehire. The HJPC rejected approximately 200 applicants, of the 1,000 reviewed.³⁶ The vetting procedure reduced the size of the judiciary and helped ensure adequate ethnic diversity.

Political neutrality in the selection process can be particularly important if the tribunal is to avoid the kinds of allegations of political influence or perceived lack of impartiality that have plagued some courts, such as the ECCC and the UN Interim Administration Mission in Kosovo.³⁷

Consistent with conflict-of-interest principles articulated by the Council of Europe,³⁸ the specialized War Crimes Section forbade judges from serving in “public or private office” or from holding “any duties in party organs, political associations or foundations connected to them, [or to] be involved in any political or party activities of a public nature.”³⁹ “Teaching duties or scientific research of a juridical nature” was excluded from this rule. In some places, the past work record of the applicant, including prior judicial pronouncements, and public assessments of competence would also be relevant, as would materials available online on social media.⁴⁰

Competency

Hybrid tribunals like other courts impose strict professional competency requirements on hires. For example, judges on the Court of BiH were required to have 8 years of practical experience as a judge, deputy prosecutor, attorney, or “other comparable legal experience,” after passing the bar examination, or 15 years of academic work experience if they were not practicing attorneys.⁴¹ Likewise, under the SCSL statute, candidates had to fulfill the requirements for high judicial positions in their own countries to

³³ Statute of the Special Tribunal for Lebanon (2007), art. 2.4.

³⁴ Meyer-Rieckh (2007), p. 180, 195-203.

³⁵ Meyer-Rieckh (2007), p. 180, 199.

³⁶ International Center for Transitional Justice (2009), p. 2. There were three councils, one at the state level and one each for the Federation of BiH and the Republika Srpska.

³⁷ International Bar Association (2011); Perriello and Wierda (2006a), p. 14.

³⁸ See, e.g., Council of Europe (2002).

³⁹ Law on Court of Bosnia and Herzegovina (2004), art. 8(1).

⁴⁰ The Inter-American Court of Human Rights relies not only on the materials submitted by the applicant to evaluate their personal character, but also does a search of available social media. See Bethel et al. (2015).

⁴¹ Law of High Judicial Prosecutorial Council of Bosnia and Herzegovina (2002), arts. 22 and 23.

qualify for appointment, and preference was given to judges who had previous experience in international human rights and humanitarian law.⁴²

To assess a candidate's level of knowledge, some jurisdictions required candidates to pass written or oral examinations. The HJPC that selects judges for the BiH War Crimes Section, for instance, conducts competitive examinations, including on the following substantive topics:⁴³

- Constitutional law of BiH
- criminal law
- criminal procedure
- civil law
- civil procedure
- administrative law and procedure
- European Convention on Human Rights and Fundamental Freedoms and other international human rights documents, treaties, and agreements to which BiH is a party
- ethical principles for conducting judicial or prosecutorial functions
- other matters relevant to the post⁴⁴

Competency can also include a preference for candidates with an understanding of the conflict, region, or country. The SCSL's Special Court Agreement specified that in selecting judges the UN Secretary-General must consider nominations forwarded by state governments, "in particular the member States of the Economic Community of West African States and the Commonwealth."⁴⁵ Such a preference can prevent some criticism, such as that leveled against the STL for not appointing any "judges from nearby Arabic-speaking countries."⁴⁶

Also, selection criteria have sometimes sought to encourage applications from judges "with legal expertise on specific issues, including, but not limited to, violence against women or children," as the Rome Statute requires and as the SCSL required for judges in its chambers.⁴⁷ Table 3.3 presents the provisions establishing the qualifications required of judges in the five tribunals.

⁴² Statute of the Special Court for Sierra Leone (2002), art. 13.

⁴³ Similarly, the ICC requires candidates not only to have expertise in international humanitarian law, human rights law, and conflict resolution, but also to (i) have established competence in criminal law and procedure, and the necessary relevant experience, in criminal proceedings, whether as judge, prosecutor, advocate, or in other similar capacity or (ii) have established competence in relevant areas of international law, such as international humanitarian law and human rights law, and extensive experience in a professional legal capacity that is of relevance to the judicial work of the court. See Rome Statute of the International Criminal Court (1998), art. 36(3)(b).

⁴⁴ Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (2002), art. 29.

⁴⁵ Statute of the Special Court for Sierra Leone (2002), art. 2.

⁴⁶ Hobbs (2016), p. 514.

⁴⁷ Statute of the Special Court for Sierra Leone (2002), art. 13. Originally, UN Secretary-General Kofi Annan had proposed a special "Juvenile Chamber" that was to be "composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice." That proposal was not implemented. Amann (2001), p. 167-185.

Table 3.3: Provisions Establishing Qualifications Required of Judges

HYBRID TRIBUNAL	PROVISION
<p>BOSNIA AND HERZEGOVINA WAR CRIMES CHAMBER</p>	<p>Article 33: Criteria for Appointment</p> <p>The [High Judicial and Prosecutorial] Council shall assess whether the applicant is able to perform judicial or prosecutorial functions, taking into account the following criteria:</p> <p>Professional knowledge and performance;</p> <p>Proven capacity through academic written works and activities within professional associations;</p> <p>Proven professional ability based on previous career results, including participation in organized forms of continuing training;</p> <p>Work capability and capacity for analyzing legal problems;</p> <p>Ability to perform impartially, conscientiously, diligently, decisively, and responsibly the duties of the office for which he/she is being considered;</p> <p>Communication abilities;</p> <p>Relations with colleagues, conduct out of office, integrity and reputation; and</p> <p>Managerial experience and qualifications (for the positions of president of court and prosecutor).</p> <p>The Council shall implement relevant Constitutional provisions regulating the equal rights and representation of constituent peoples and others. Appointments to all levels of the judiciary should also have, as an objective, the achievement of equality between women and men.</p>
<p>EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA</p>	<p>To qualify all judges must have a “high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.” They are not to “accept or seek any instructions from any government or any other source.”</p> <p>The Working Group on the Extraordinary Chambers and the Open Society Justice Initiative issued the following International Standards for the Judges of the ECCC in February 2004 based on the court’s law and agreement:</p> <p>Selecting judges based on objective criteria and through an open and fair appointment process is critical to the establishment of a competent, independent and impartial tribunal.</p> <p>Candidates must be persons of “high moral character, impartiality and integrity”</p> <p>Candidates must be committed to being “independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.”</p> <p>Judges should not be chosen from among persons who are likely to be repeatedly disqualified from cases.</p> <p>Candidates must possess the “qualifications required in their respective countries for appointment to judicial office.”</p> <p>Candidates should have experience in “criminal law [or] international law, including international humanitarian law and human rights law.”</p>

HYBRID TRIBUNAL	PROVISION
SPECIAL COURT FOR SIERRA LEONE	<p>Article 13: Qualification and appointment of judges</p> <ol style="list-style-type: none"> 1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source. 2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice. 3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.
SPECIAL TRIBUNAL FOR LEBANON	<p>Article 9: Qualification and appointment of judges</p> <ol style="list-style-type: none"> 1. The judges shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. 2. In the overall composition of the Chambers, due account shall be taken of the established competence of the judges in criminal law and procedure and international law. 3. The judges shall be appointed by the Secretary-General, as set forth in article 2 of the Agreement, for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.
SERIOUS CRIMES PANELS IN TIMOR-LESTE	<p>28.2 During the initial period, the performance of duties of every judge shall be solely monitored by the Transitional Judicial Service Commission. With regard to the independence of each judge, the Commission shall only monitor the professional conduct of the judge, including the judge's integrity and dedication, regular attendance in court, ability to cope with the workload, impartiality shown in dealing with the cases, without any interference with, or influence upon, the substantive decisions of the judge.</p> <p>9.2 It is mandatory that candidates have completed their legal training and hold a university degree in law, by a recognized university.</p> <p>9.3 In addition, the Commission shall be guided by the following criteria: (a) Legal competence, taking into consideration academic qualifications; (b) Relevant experience in a legal profession or as a civil servant; (c) Moral integrity and standing within the community.</p>

SOURCES: Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina; Law on the Establishment of the Extraordinary Chambers; Statute of the Special Tribunal for Lebanon; Statute of the Special Court for Sierra Leone; UN Transitional Administration in East Timor (2000a); UN Transitional Administration in East Timor (1999b).

Process for Soliciting Applications and Deciding Among Eligible Judicial Candidates

International and hybrid tribunals have used a variety of procedural and institutional mechanisms to solicit, interview, review, and select applicants for the bench. Some of these mechanisms are based on “slates,” or lists of candidates, offered by the government; others have solicited applications through the UN or one of its agencies.

At the SCSL, appointments of international judges to the SCSL were carried out separately from the selection process for domestic judges under an agreement between the UN and the Government of Sierra Leone, pursuant to UN Security Council Resolution 1315, of August 14, 2000 (Agreement). The

Agreement details the procedure for appointing judges to the trial and appeal chambers and stipulates that the Government of Sierra Leone and the UN Secretary-General were to consult with each other on judicial appointments.⁴⁸ The UN Secretary-General was to appoint international judges based on nominations forwarded by UN member states, in particular those members of the Economic Community of West African States and the Commonwealth, on the invitation of the UN Secretary-General.⁴⁹

At the STL, international judges are selected by a panel composed of two former judges and a representative of the UN Secretary-General from a pool of nominations submitted by state governments, whereas domestic judges are appointed based on recommendations from the Lebanese Supreme Council of the Judiciary. Consultations are held with the Lebanese government before final appointments are made.⁵⁰

In other courts, the lists of candidates are posted online, in national and local newspapers, and on public notice boards. The UN, for example, published the short list of candidates for the ECCC online, which the Open Society Justice Initiative then circulated to civil society organizations for comment. Information submitted on the suitability of the candidates was then passed on to the UN in advance of candidate interviews.⁵¹ At the BiH War Crimes Section, before the appointment of judges, the HJPC, which administers the process, has to distribute a public announcement of vacant positions to be occupied by BiH nationals.⁵² Final decisions on appointments are also publicized in a public viewing area at the court or prosecutor's offices and in official gazettes.

In Timor-Leste, the UN Transitional Administrator appointed international judges “through the standard UN recruitment process for peacekeeping missions, which did not involve targeted advertising of vacancy notices.”⁵³ The posts were rated at P3 to P5 levels on the UN salary scale, with “substantially less pay and prestige than the Under-Secretary General level posts” at the ICTY, ICTR, and the SCSL.⁵⁴ The Timorese Minister of Justice was tasked with approving international candidates and required that they speak Portuguese and be from civil law jurisdictions, which slowed down the recruitment process.⁵⁵ The results were disappointing: The bulk of the judges came from lower-level courts in their home jurisdiction or had served in noncriminal jurisdictions. Only two international judges came from superior courts.⁵⁶ Delays in recruiting international judges, combined with high turnover of staff, poor management of recreational leave, and an average contract length of 6 to 12 months caused repeated delays in operations.⁵⁷

Initially, the UN Transitional Administrator appointed Timorese judges, on the recommendation of the Transitional Judicial Services Commission, a five-member body composed of three East Timorese and two international experts.⁵⁸ To identify candidates, UNTAET turned to local staff and civil society

⁴⁸ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (2002), art. 2.

⁴⁹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (2002), art. 2.

⁵⁰ Statute of the Special Tribunal for Lebanon, art. 9.

⁵¹ University of Buffalo (2005). See also Documentation Center of Cambodia (2018a).

⁵² Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, art. 27.

⁵³ Reiger and Wierda (2006), p. 14.

⁵⁴ Reiger and Wierda (2006), p. 14.

⁵⁵ Reiger and Wierda (2006), p. 14.

⁵⁶ Reiger and Wierda (2006), p. 14. Throughout the years, the international judges who sat on the Special Panels came from a variety of national jurisdictions, including Burundi, Uganda, Italy, Portugal, Brazil, Cape Verde, Germany, and the United States.

⁵⁷ Reiger and Wierda (2006), p. 15; See also American University Washington College of Law (2005).

⁵⁸ The Chairperson was East Timorese. UN Transitional Administration in East Timor (1999b).

groups to “identify lawyers, law graduates and law students by word of mouth,” and air dropped leaflets from airplanes with the help of the International Force in East Timor to call for “qualified Timorese to contact any UNTAET or INTERFET office or outpost.”⁵⁹ The response was better than expected, and more than 60 East Timorese jurists applied in the first round for judicial and prosecutorial positions, although none of them had any prior judicial experience, except the president of the Court of Appeal, who was a judge in Portugal.⁶⁰ Judges served first in a probationary capacity, with some receiving training in Australia. Likewise, in BiH, the War Crimes Justice Project was established, in which “over 800 justice professionals participated in project training events.”⁶¹

Public Prosecutors

There is some overlap in the recruitment and selection processes for judges and prosecutors at some of the hybrid tribunals. Some entities, such as the BiH’s HJPC, make decisions for both positions, using similar selection criteria: high moral character, professional competency, and experience. Consistent with international standards for appointing prosecutors, some courts also “employ safeguards against appointments based on partiality or prejudice.”⁶² Table 3.4 presents who is responsible for appointing the prosecutor and deputy prosecutor in the five hybrid tribunals.

Table 3.4: Who Appoints the Prosecutors and Deputy Prosecutors?

BOSNIA AND HERZEGOVINA WAR CRIMES SECTION	EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA	SERIOUS CRIMES UNIT IN TIMOR-LESTE	SPECIAL COURT FOR SIERRA LEONE	SPECIAL TRIBUNAL FOR LEBANON
The High Representative for BiH initially appointed prosecutors. Later, the High Judicial and Prosecutorial Council (HJPC) conducted the appointment process. ^a	The Supreme Council of the Magistracy appoints the Cambodian co-prosecutor and reserve prosecutors from among Cambodia’s professional judges. The UN Secretary-General nominates and the council appoints the international co-prosecutor.	UNTAET	The UN Secretary-General appointed the prosecutor Government of Sierra Leone appointed the deputy prosecutor.	The UN Secretary-General, after consultation with the Lebanese government and upon the recommendation of a selection panel. The selection panel is composed of two judges, currently sitting on or retired from an international tribunal, and a representative of the UN Secretary-General. The government appoints a Lebanese deputy prosecutor, in consultation with the UN Secretary-General and the prosecutor.

^a International judges (and prosecutors) were initially appointed by the Office of the High Representative (OHR). They were seconded by their governments and were given short-term, renewable contracts, usually for one or two years. Since July 2006, the HJPC also appointed the international judges and prosecutors (in coordination with the registry and the president of the court and chief prosecutor) through a competitive process.

⁵⁹ Strohmeyer (2001), para. 15.

⁶⁰ Strohmeyer (2001), para. 15. See also UN Transitional Administration in East Timor (1999b); Office of the UN High Commissioner for Refugees (2018), p. 3.

⁶¹ Organization for Security and Co-operation in Europe (2018a).

⁶² Office of the UN High Commissioner for Human Rights (1990), art. 2a.

At the SCSL, the prosecutor was appointed by the UN Secretary-General for a three-year term, with the possibility of reappointment. Successful candidates needed to be “of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.” Additionally, in the hiring of prosecutors and investigators, due consideration was given to those with experience “in gender-related crimes and juvenile justice.”⁶³

Similarly, at the ECCC the co-prosecutors were required to “be of high moral character, and possess a high level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases.” They also needed to remain “independent in the performance of their functions” and were not to “accept or seek instructions from any Government or any other source.”⁶⁴

In Timor-Leste, the prosecutor’s office (or SCU) was not an organ of the court, but instead operated as a quasi-separate institution with four regional offices in all 13 districts of the country.⁶⁵ There, UNTAET appointed the public prosecutors, both Timorese and international.⁶⁶ East Timorese public prosecutors were to be appointed for an initial probationary period of no less than two years but no more than three years.⁶⁷ The selection criteria were the same as those for judges. (See Appendix B.) Unfortunately, few of the recruited international prosecutors had experience in other international criminal tribunals. Staff were generally recruited on six-month contracts and rapid turnover in international staff was a problem.⁶⁸ International prosecutors were recruited as professional posts, but many of the supporting staff were drawn from the UN volunteer program, with numerous lacking a background in international criminal law and relevant experience.⁶⁹

In BiH, the prosecutor’s office is also part of a stand-alone agency of the state. During its time as a hybrid mechanism, the Special Department for War Crimes of the Prosecutor’s Office of BiH was made up of six prosecution teams formed around the geographical and regional structure of the country.⁷⁰

⁶³ Statute of the Special Court for Sierra Leone (2002), art. 15.

⁶⁴ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (2003), art. 6.

⁶⁵ Initially, the SCU was part of the Human Rights Unit (HRU). It later became part of the office of the deputy general prosecutor for serious crimes once it was created in June 2000. Hirst and Varney (2005). See also Office of the General Prosecutor of the Republic of Timor-Leste, Serious Crimes Unit, Case No. 9/2000. The UNTAET originally comprised the Judicial Affairs Office and HRU, which were tasked with preserving evidence of the serious crimes, detaining suspects, and setting up a justice system from scratch. There was a 1,000-civilian force backed up by a large peacekeeping force. See Reiger and Wierda (2006), p. 10.

⁶⁶ UN Transitional Administration in East Timor (2000c), Section 6.1.

⁶⁷ “6.1 The appointments of public prosecutors, both East Timorese and international, as defined in Section 5 of the present regulation shall be made by the Transitional Administrator in accordance with UNTAET Regulation No. 1999/3 or any subsequent regulation. Notwithstanding any provision to the contrary in any regulation, the appointment East Timorese public prosecutors shall be for an initial probationary period of no less than two (2) but no more than three (3) years. 6.2 During the initial probationary period of appointment, the Transitional Judicial Service Commission established under UNTAET Regulation No. 1999/3 shall solely monitor the performance of duties of every public prosecutor. The Commission shall monitor the professional conduct of each such official, including the integrity and dedication of such official, attendance, ability to cope with the workload, independence and impartiality in the discharge of the functions of the office, any interference with, or influence upon, the substantive decisions of the judges and panels of judges of the courts of law established pursuant to UNTAET Regulation No. 2000/11, UNTAET Regulation No. 2000/14, UNTAET Regulation No. 2000/15 and any subsequent UNTAET Regulation. 6.3 At the end of the probationary period, or at any given time before, the Transitional Judicial Service Commission, in accordance with UNTAET Regulation No. 1999/3, may recommend that the public prosecutor concerned be appointed for life, unless the performance of the functions of such official, as specified in Section 6.2 of the present regulation, was unsatisfactory, in which case such official shall be dismissed from the Public Prosecution Service.”

⁶⁸ Reiger and Wierda (2006), p. 18.

⁶⁹ Reiger and Wierda (2006), p. 17; See also UN Security Council (2005f).

⁷⁰ Team 1 covers the North-West Bosnia region and a part of Posavina; Team 2 covers the Central Bosnia region; Team 3 covers the Eastern Bosnia (the Drina Valley) region and a part of Posavina; Team 4 covers Sarajevo and Eastern Bosnia region, including Foča; Team 5 covers West Herzegovina and the Neretva Valley; and Special Team 6 covers Srebrenica territory. See Bosnia and Herzegovina Prosecutor’s Office

As with judges, to qualify for appointment to the prosecutor's office in the Prosecutor's Office of BiH, a national had to meet competency requirements:

- (a) be a BiH citizen;
- (b) be a graduate from a law school in BiH or in the Socialist Federal Republic of Yugoslavia or from another law school provided that the diploma issued from that law school was validated in accordance with the law;
- (c) have passed a bar examination administered in BiH or in the Socialist Federal Republic of Yugoslavia; and
- (d) have fulfilled professional training requirements as may be determined by the Council under Article 17.⁷¹

Separate procedures were used for hiring investigators for the prosecutor's office. The War Crimes Unit of the BiH State Investigation and Protection Agency (SIPA), the body with the authority to conduct investigations, signed a memorandum of understanding with the prosecutor's office that allowed for some SIPA investigators to be assigned to the prosecution exclusively. Investigators were required to possess a university degree and have at least three years of relevant work experience, although they were not paid a higher salary.⁷²

To supplement capacity at the STL, the prosecutor there created a "Related Cases Team," consisting of investigators, analysts, and lawyers who work together as a multi-disciplinary team.⁷³

Defense Office

In hybrid courts, institutional responsibility for protecting the rights of the accused is usually entrusted to a defense office or unit. That office can be situated within another organ of the court, often the registry, or, as at the STL, exist as an independent and autonomous court organ. In most instances, legal counsel working for the defense office do not represent the accused, but instead ensure that the defense counsel meet certain qualifications and are remunerated when assigned to indigent accused. Although usually not staff of the tribunal, defense counsel, similar to prosecutors, often benefit from cooperation agreements that ensure access to evidence and other mechanisms vital to effective representation, as is the case at the STL.⁷⁴ Table 3.5 describes how the head of defense is recruited at the five tribunals.

(2018). In May 2013, the teams were reduced to three sections. See Korner (2016), p. 17.

⁷¹ Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, 25/04, art. 21.

⁷² Human Rights Watch (2006), p. 13. "The Special Department for War Crimes and the WCU of SIPA signed a Memorandum of Understanding (MOU) regulating the terms of cooperation on October 12, 2005. Pursuant to the MOU, the Special Department for War Crimes would be assigned a number of WCU investigators exclusively for its investigations. The WCU investigators would be provided with the requisite space and equipment by the Special Department for War Crimes. The assignment of these officers to the Special Department for War Crimes does not, however, preclude assistance by other officers in the WCU. There are currently seven WCU officers assigned to the Special Department for War Crimes, one for each regional team and two for the Srebrenica team."

⁷³ Special Tribunal for Lebanon (2018c), p. 30.

⁷⁴ Statute of the Special Tribunal for Lebanon (2007), art. 13 and 15.

Table 3.5: Who Recruits the Head of Defense Office?

BOSNIA AND HERZEGOVINA WAR CRIMES SECTION	EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA	SERIOUS CRIMES PANELS IN TIMOR-LESTE	SPECIAL COURT FOR SIERRA LEONE	SPECIAL TRIBUNAL FOR LEBANON
The registrar in consultation with the President of the Court of BiH ^a	UN Assistance to the Khmer Rouge Trials (UNAKRT)	UN Mission of Support in East Timor (UNMISSET)	The registry	The UN Secretary-General in consultation with the president of the tribunal

NOTE: Court of Bosnia and Herzegovina, Additional Rules of Procedure for Defense Advocates, art. 2.1.

The first international criminal court to introduce the idea of a defense unit was the SCSL. It established and maintained a defense office within the registry, which was headed by the court's principal defender.⁷⁵ Although the defense team was the "last to arrive" when the court began operating,⁷⁶ eventually it brought together a core group of in-house defense counsel with assigned individual lawyers who met certain requirements of excellence in their field.⁷⁷ As soon as someone was arrested, the defense office provided the defendant with initial legal advice through duty counsel. The defendant could subsequently choose his or her own counsel.⁷⁸ Defense teams were made up of international and national counsel, although a Sierra Leonean held the position of principal defender near the end of the court's operations; before that, only internationals held the position. The registry allocated considerable human resources to the defense office, including a chief advisor, three defense associates, and financial and administrative support staff.⁷⁹ Members of the defense counsel were not paid in the same way as other members of the court; they instead entered into direct contractual relationships with the court.⁸⁰

The SCSL adopted a code of professional conduct for counsel that applied to both members of the defense and prosecution, as well as to an *amicus curiae* (or, friend of the court) and to counsel representing anyone else before the court.⁸¹ Under that code, disciplinary proceedings could be initiated against counsel for misconduct, and sanctions (including a fine or public reprimand) could be applied.⁸²

At the ECCC, a defense support section, which is responsible for providing indigent accused with a list of lawyers who can defend them and for granting legal and administrative support to lawyers assigned to work on the cases,⁸³ was established by the UN Assistance to the Khmer Rouge Trials (UNAKRT) to ensure fair trials through the effective representation of counsel. That section is directed by a head, assisted by a national and an international deputy and other staff as necessary. Accused are entitled to

⁷⁵ Special Court for Sierra Leone (2003c), art. 45.

⁷⁶ Skilbeck (2004), p. 17

⁷⁷ Skilbeck (2004), p. 79, 81.

⁷⁸ Perriello and Wierda (2006b), p. 25-26.

⁷⁹ Perriello and Wierda (2006b), p. 25-26.

⁸⁰ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 14.

⁸¹ Special Court for Sierra Leone, Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone.

⁸² Special Court for Sierra Leone, Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, art. 31-35. Complaints of misconduct were made against defense counsel and prosecutors during the time the court was in operation. See Special Court for Sierra Leone (2006), p. 27; Special Court for Sierra Leone (2007), p. 23.

⁸³ ECCC (2015c), rule 11.

two co-lawyers, one Cambodian and one international; lawyer assignments are done in consultation with the Bar Association of the Kingdom of Cambodia.⁸⁴

The STL's defense office is directed by an independent head of office, who is responsible for appointing office staff and drawing up of a list of defense counsel. It is mandated to protect the rights of the accused, including support and assistance to defense counsel and persons entitled to legal assistance. Its creation as a stand-alone entity, characterized by independence and autonomy, was intended to reinforce the principle of equality of arms that puts the defense office on an equal footing with the prosecutor.⁸⁵ The requirements for appointment are similar to those in other jurisdictions, as the description on the STL's website indicates:

Any defence counsel appearing before the Tribunal must be admitted to the practice of law in a recognised jurisdiction. Professors of law may also appear before the court, but only in the capacity of co-counsel. Moreover, any defence counsel must possess oral and written proficiency in French or English, and fulfil requirements of good standing.

In order to be admitted to the list of counsel as lead counsel, in addition to the above criteria that apply to all counsel, a person must have a minimum number of 10 years of relevant experience in criminal law – or seven years in the case of co-counsel. Before counsel may be admitted to the list, they shall be interviewed by an admission panel.⁸⁶

To select the head of the defense office, the UN Secretary-General first issues a vacancy announcement that is circulated to appropriate bar associations and the registrars of international tribunals.⁸⁷ A selection panel then interviews candidates and provides the UN Secretary-General with a report and recommendations. The Secretary-General then appoints the head of the defense office in consultation with the president of the tribunal.⁸⁸ To better meet its mandate, the defense office includes a legal advisory section, a legal aid unit, and an operational support unit.

In BiH, during the transitional period, the OKO was part of the registry's administrative and management structure and was created for the purpose of giving legal assistance to suspects and the accused.⁸⁹ It consisted of the director, appointed by the registrar in consultation with the president of the court, professional staff, and administrative staff recruited by OKO in accordance with the registry's internal rules. Eventually, OKO was given offices in a separate building from the Court of BiH, where counsel could conduct legal research and gain access to computers and research tools necessary for representing their clients, including resources in the local language.⁹⁰

⁸⁴ ECCC (2015c), rule 11. To be included on the list of Cambodian co-lawyers, "a candidate must fulfil the following criteria: To be a member of the Bar Association of the Kingdom of Cambodia; To have established competence in criminal law and procedure at the national or international level." To be included on the list of international co-lawyers, "a candidate must fulfil the following criteria: To be a current member in good standing of a recognised association of lawyers in a United Nations member state. To have a degree in law or an equivalent legal or professional qualification. To have at least ten years of relevant working experience in criminal proceedings, as a lawyer, judge or prosecutor, or in some other capacity. To have established competence in criminal law and procedure at the international or national level. To be fluent in Khmer, French or English. To be authorised by the Bar Council of the Kingdom of Cambodia to practise before the ECCC."

⁸⁵ Jones and Zgonec-Rožej (2014), p. 191.

⁸⁶ Special Tribunal for Lebanon (2018a).

⁸⁷ Statute of the Special Tribunal for Lebanon, art. 13.

⁸⁸ Statute of the Special Tribunal for Lebanon, art. 13, para. 1.

⁸⁹ OKO War Crimes Reporter (2005), p. 3.

⁹⁰ OKO War Crimes Reporter (2005), p. 3.

To gain admission to OKO's list of authorized advocates, applicants needed to:

- be a current and valid member of one of the bar associations in BiH;
- possess at least seven years relevant working experience as an advocate, judge, or prosecutor; and
- have completed continuing professional training.

In addition, defense advocates had to meet certain knowledge criteria that could be fulfilled based on previous experience (e.g., completion of previous trials), post-graduate study, or the completion of an alternative training course.⁹¹ Because of the War Crimes Chamber's role in the completion strategy of the ICTY, detailed protocols were also established for the transfer of defense files to new counsel, upon the signing of a memorandum of understanding between the OKO and the Office for Legal Aid and Detention Matters of the ICTY.⁹²

As of December 31, 2012, 124 defense lawyers were certified to appear before the War Crimes Section. The quality of the section's work in providing counsel with both training and administrative support has been generally considered high. Counsel, for instance, are offered ongoing training and must meet continuing professional training criteria in order to be certified to practice in the chambers,⁹³ and defense lawyers receive advice and research assistance, including on international law and jurisprudence, from "five defense support teams."⁹⁴

Less positive was the experience of the defense unit in Timor-Leste's hybrid tribunal, which largely failed to deliver adequate representation to the accused. When the SCU and the Special Panels were first created, no provision was made for a specialized defense office. A small public defenders' office had been created for the ordinary court system, but it was staffed by young Timorese lawyers with minimal experience and few resources. While some additional defense lawyers were seconded by international nongovernmental organizations, it was not until September 2002 that UNMISSET established the separate Defense Lawyers Unit (DLU) and not until April 2003 did it obtain significant staffing.⁹⁵ The DLU employed only international staff, and rather than bolster local capacity, it seems to have mirrored the SCU's approach. At the conclusion of the DLU's activities in May 2005, it had "seven international defense lawyers working under the head of the unit; three UN defense assistants; two UN Volunteer defense interpreters and translators; legal researchers; and five assistants for translation, logistics, and administration."⁹⁶

Registrar

International and hybrid tribunals establish an administrative arm of the court, often called the registry. It is usually responsible for managing the court's budget, personnel, infrastructure, and all nonjudicial operations. It also serves as the court's official outreach and communication center, as well as supervises

⁹¹ Criteria for Admission to the List, see e.g. OKO War Crimes Reporter (2005), p. 11; and OKO War Crimes Reporter (2006), p. 7.

⁹² OKO War Crimes Reporter (2006), p. 8-9.

⁹³ Court of Bosnia and Herzegovina (2012), p. 22.

⁹⁴ Court of Bosnia and Herzegovina (2012), p. 22.

⁹⁵ Rapoza (2005); Cohen (2006a), p. 25.

⁹⁶ Reiger and Wierda (2006), p. 27.

other court functions. The STL and the SCSL both include a separate registry headed up by a UN appointee.

The BiH War Crimes Section was served by a registry, which comprised the following sections: legal/judicial support, court management, witness support, public information and outreach, and administration. The registry was staffed by national and international personnel, with an internationally appointed registrar who worked in cooperation with the court’s president.⁹⁷ The functions of the registry were divided between a court registrar and prosecution registrar. The registrar for the prosecutor’s office was required to be a law graduate and have at least five years of relevant experience in law.⁹⁸ By and large, the registrars in BiH did a good job of making the transition from an internationalized to a domestic court, although there was some confusion about how the registrars and the court’s management committee were to work together and what were their respective responsibilities.⁹⁹

In Timor-Leste, the UNTAET regulations made no provision for an internationalized registry team and thus there was no such position within the SCP. Instead, the administration for the Special Panels was originally handled through the registry office of the Dili District Court.¹⁰⁰ In 2002, a new post of international administrator was created for the Special Panels, improving management and scheduling.¹⁰¹ The first professional judge coordinator, or head of court registry, to serve at the Special Panels was hired in September 2004, near the end of the panels’ life and was the first with previous court registry experience to serve in this position.¹⁰² Table 3.6 describes how the registrar or director of administration is recruited at the five tribunals.

Table 3.6: Who Recruits the Registrar or Director of Administration?

BOSNIA AND HERZEGOVINA WAR CRIMES SECTION	EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA	SERIOUS CRIMES PANELS IN TIMOR-LESTE	SPECIAL COURT FOR SIERRA LEONE	SPECIAL TRIBUNAL FOR LEBANON
The High Representative of BiH initially appointed the registrars. Eventually, the international registrars were replaced by two national registrars, one for the court sections and the other for the prosecutor’s office.	The Government of Cambodia appoints the director of administration. The UN Secretary General appoints and the Government of Cambodia assigns the deputy director of administration.	N/A	The UN Secretary General appointed the registrar. The registrar was required to be a staff member of the UN.	The UN Secretary General appoints the registrar. The registrar is required to be a staff member of the UN.

⁹⁷ Tolbert and Kontić (2008).

⁹⁸ Law on the Prosecutor’s Office of Bosnia and Herzegovina. “The Prosecutor’s Office shall have a Registrar, appointed by the Collegium of Prosecutors. The Prosecutor’s Office shall have other staff in charge of expert, administrative and technical duties. 2. The Registrar of the Prosecutor’s Office shall assist the Chief Prosecutor in the exercise of the administrative duties and in making the administrative part of the plan under Article 15(2). 3. An individual who is a graduate of law and has at least five years of relevant experience in law shall perform the duties of the Registrar. 4. The Registrar of the Prosecutor’s Office shall assist the Chief Prosecutor in the preparation and execution of the budget of the Prosecutor’s Office.”

⁹⁹ Tolbert and Kontić (2008).

¹⁰⁰ Reiger and Wierda (2006), p. 28.

¹⁰¹ Cohen (2006a), p. 9.

¹⁰² Cohen (2006b), p. 29.

At the ECCC, much of the court's management is controlled by a Cambodian director of administration, with the support of a UN-appointed deputy director.¹⁰³ This approach has been criticized because it created ambiguity about who is responsible for what at the tribunal.¹⁰⁴ As Hans Corell, former UN legal counsel, explained, "Divided administrative leadership is not a 'happy solution' for Court administration, because 'you have to have somebody who makes decisions.'"¹⁰⁵

Challenges

In hybrid courts, the recruitment of both national and international personnel represents a challenge. The obstacles related to the appointment of judges, prosecutors, and registrars coming from different backgrounds and contexts are many.

Recruiting Sufficient, Competent Personnel

Because of the special expertise required of judges, it can be particularly difficult to recruit competent judges in sufficient numbers to handle the number of cases needed to be heard. For instance, in Timor-Leste, there was an insufficient number of judges to form the panels for long intervals of time; as a result, trials were delayed on a number of occasions.¹⁰⁶ Furthermore, none of the Timorese appointees had "any previous judicial experience or training."¹⁰⁷ When Deputy General Prosecutor for Serious Crimes Siri Frigaard, for instance, arrived in Dili in 2002, "There were no professional staff members from Timor-Leste in the SCU apart from one prosecutor who left for Portugal for studies a few months later. Most of the locally-recruited staff members were working in the Ordinary Crimes Unit." Only after she managed to "obtain donor funding through the Government of Norway" was she able to train the national prosecutors and support staff.¹⁰⁸

Judicial Absences and the Rotation of Judges

Hybrid tribunals have suffered hardships as a result of judicial absences. In the BiH War Crimes Chamber, international judges "resided elsewhere and flew into Bosnia once a month for a week-long session."¹⁰⁹ The use of part-time or ad hoc judges can lead to delays in court proceedings and increase the likelihood of conflicts with a judge's other professional responsibilities.

Need for Training

Issues of competence have arisen in connection with both national and international personnel. International staff often require training on the particulars of the country context and national law,

¹⁰³ The ECCC also has a court management section, also on the national side of the court, that is headed up by a chief.

¹⁰⁴ Wiki Leaks (2006). "Another problem Tolbert highlighted was the lack of a Registrar or legal representative on the ECCC's Administrative staff. Many of the current problems are legal in nature, and might be more easily addressed if such an office existed as it does in other international tribunals, noted Tolbert."

¹⁰⁵ Ciorciari and Heindel (2014), p. 72-73.

¹⁰⁶ Reiger and Wierda (2006), p. 15.

¹⁰⁷ Cohen (2006b), p. 2.

¹⁰⁸ Cohen (2006b), p. 2.

¹⁰⁹ Hobbs (2016), p. 514.

whereas nationals often need training in international legal principles and standards.¹¹⁰ However, in both Cambodia and BiH, for instance, participants and observers at the courts also complained about the international judges' lack of experience in mass crimes trials.¹¹¹

Adequate Remuneration of Staff

At times, challenges recruiting the best international personnel stemmed from a lack of funding and, consequently, the inability to adequately remunerate international staff (according to international standards). In other cases, discrepancies in earnings between national and international staff created challenges. In Timor-Leste, differences in salaries were a major source of tension between national and international staff, and for good reason; in April 2001, national staff were paid \$240 per month, whereas international staff earned \$7,800 per month; civilian police, \$3,000; and UN volunteers, \$2,250.¹¹² In Sierra Leone, living allowances for Sierra Leonean judges were lower than that of international judges. And initially in Cambodia, national staff were expected to receive half of what international staff earned.¹¹³

These disparities in remuneration sometimes extended to fringe benefits, such as pensions and special allowances for covering school fees, health insurance, and vehicle expenses. Whether in base salary or fringe benefits, such disparities have been linked to a drop-off in motivation among those staff members receiving markedly less for comparable labor and have been connected to a “local brain drain,” whereby qualified potential national staff leave the country for higher-paying positions—a phenomenon with adverse ramifications not only for ongoing court operations but for building long-term capacity.

Some efforts have been made to mitigate potential tensions over differences in salary at hybrid tribunals. In Sierra Leone, for instance, the SCSL set salary amounts according to position, rather than assigning salary according to candidates' national or international status.¹¹⁴ More broadly, an international team of experts conducted a three-year research project examining the differences in pay between local and expatriate workers and established a Global Task Force for Humanitarian Work Psychology to help build capacity in lower-income countries and explore approaches to address these issues in the context of humanitarian aid—efforts that could result in better policy options.¹¹⁵

¹¹⁰ Office of the UN High Commissioner for Human Rights (2006), p. 36. “Hybrids should make attempts to locate well-qualified locals for all posts. Other tools that may help to alleviate tensions are briefings on the country's context and on cultural sensitivity. Good translation facilities should be prioritized and available at all times. Convenient opportunities should be made available for internationals to learn local languages.”

¹¹¹ Ciorciari and Heindel (2014), pp. 194-195, citing Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina and Cambodia,” JAD-PbP Working Paper Series No. 7, 18 (May 2010).

¹¹² East Timor Institute for Reconstruction Monitoring and Analysis (2011).

¹¹³ Office of the UN High Commissioner for Human Rights (2008), p. 27; Kinetz (2007a).

¹¹⁴ Office of the UN High Commissioner for Human Rights (2006), p. 36.

¹¹⁵ Economic Social and Research Council (2011).



Beit Boeurn testifies before the Trial Chamber of the ECCC on November 28, 2016, about how she was forced to have an abortion after the forced disappearance of her husband. (ECCC/Sok Heng Nhet)

PART 4

Protecting Witnesses and Victims: Security and Support at Hybrid Courts

Security

Because many hybrid tribunals are located in the country where the crimes occurred, they can provide greater proximity to victims and increase the chances for national ownership of these processes.¹ However, because of that proximity, security concerns can also arise, including in relation to the intimidation of staff, witnesses, and visitors, and within the court's detention facilities.²

As a result, significant resources must be committed to protect the court and its operations. The Extraordinary Chambers in the Courts of Cambodia (ECCC), for example, has employed 38 Cambodian security staff, of which 27 are members of the Guard Platoon. It also employs between 25 and 27 UN security staff, including information security and other various security officers.³

The location of the Special Court for Sierra Leone (SCSL) in Sierra Leone presented particular security and witness protection challenges since the conflict had ended recently before the court began operating. Accordingly, the UN mission in Sierra Leone initially helped to provide security; however, this arrangement eventually came to an end when the UN withdrew the mission. In its place, the UN assigned a limited number of blue helmets (from Mongolia) in 2005, after negotiations between the Court and the UN Department of Peacekeeping Operations.⁴

Although the SCSL was based in the capital of Freetown, the SCSL's highest profile defendant, Charles Taylor, was tried outside the country, in The Hague, because his presence in the region was judged "an impediment to stability and a threat to the peace."⁵ Similarly, special arrangements were under consideration for the trial of Samuel Hinga Norman, who before his death was to be held at a secret location in West Africa for security reasons while being tried by the SCSL.⁶

¹ The ECCC is situated in Phnom Penh, Cambodia's capital. Similarly, the SCSL conducted most of its proceedings in Freetown. The trial of former Liberian President Charles Taylor however was held in The Hague, not Freetown, because of security concerns.

² Special Court for Sierra Leone (2014), p. 32. The court's detention facility was "headed by a Chief of Detention supported by highly experienced international supervisors, a Medical Officer and nursing staff, and Sierra Leonean correctional officers seconded from the Sierra Leone Prison Service."

³ ECCC (2017).

⁴ New Citizen (2006).

⁵ UN Security Council (2006).

⁶ The court's prosecutor, David Crane, said the trial was being held in secret because of fears that Mr. Hinga Norman's supporters in the Kamajor militia "might seek to put pressure on the court and disrupt the trial." BBC (2003).

The Serious Crimes Unit (SCU) in Timor-Leste was likewise located in the country's capital, within a "heavily guarded walled compound."⁷ However, responsibility for providing security for the Special Panels resided first with the UN and then with the Ministry of Justice, because the courthouse was a national building. The ministry "supplied no more than one unarmed, untrained, and unequipped security guard during court hours." As a result, security was inadequate.⁸

Hybrid tribunals have been established outside the country where the crimes occurred when security concerns prevent them from operating safely there. These tribunals retain jurisdiction over crimes that occurred within the state's borders.

The Special Tribunal for Lebanon (STL), for instance, has its "seat outside Lebanon," near The Hague in Leidschendam, with jurisdiction over domestic offenses, although it does maintain an office with a head of registry in Beirut as well. Because of heightened concerns at the STL, security measures were put in place even before the opening of the tribunal itself.⁹ The names of judges appointed to the tribunal were initially kept secret until security details could be assigned to them, both on and off the tribunal's grounds.¹⁰ The STL has a security and safety section that ensures the security of the court, facilities, and assets and the safety and well-being of the judges, other principal officials, staff members, and visitors. Its objective is to ensure the effective and efficient operation of the tribunal's programs.¹¹ During the second working year of the tribunal, the court recruited 76 security officers to protect the premises and the staff in Leidschendam and Beirut.¹²

Wherever a court is situated, security is often provided not only on the court premises, but also outside the perimeter as well. In Sierra Leone, the special court was responsible for security on the court's grounds, while the Government of Sierra Leone was responsible for security outside the perimeter of the court complex. Similarly in Cambodia, the UN was responsible for security on the court's grounds and the Government of Cambodia outside the perimeter.¹³

Generally, security incidents at hybrid tribunals have been rare, although security at the STL was challenged in October 2010, during the course of an interview in south Beirut. There, investigators from the office of the prosecutor and a court interpreter were physically attacked. In response, the office took immediate steps to ensure the safety and security of its staff and potential witnesses, while making it clear publicly that the investigation being conducted at the time would not be deterred.¹⁴

⁷ Cohen (2006a), p. 10.

⁸ Rapoza (2006), p. 525, 532. "The courthouse was virtually an open building and it was not uncommon, for those who arrived early at work, to encounter people from off the streets sleeping on the floor of the court vestibule while others used the outdoor faucets to wash. It was always a concern that no security was provided for victims or witnesses, and trials were conducted without any security in the courtroom. Moreover, although numerous U.N. international staff worked and were stationed at the courthouse, no security assistance was ever supplied by the U.N. mission for the premises. This was the case even when the court was besieged by a large group of protesters and the court gates had to be closed to prevent an incident."

⁹ These measures are a high priority, as security concerns were part of the reason that the tribunal was set up in the Netherlands rather than Lebanon, due to ongoing hostility. Special Tribunal for Lebanon (2010), pp. 11, 27, 39.

¹⁰ WikiLeaks (2007).

¹¹ Special Tribunal for Lebanon (2016), p. 36.

¹² Special Tribunal for Lebanon (2011c), p. 36.

¹³ Supplementary Agreement Between the United Nations and the Royal Government of Cambodia, Ancillary to the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, Regarding Safety and Security Arrangements.

¹⁴ Special Tribunal for Lebanon (2011c), p. 26.

To further protect staff, jurisdictions also make it a specific criminal offense to threaten a judge or prosecutor.¹⁵

Protection and Support of Witnesses and Victims

Witness protection and support are integral to the integrity and success of any criminal proceeding and are especially central to the success of trials for mass atrocities which are often held *in situ*, where perpetrators remain at large. Such measures help ensure the participation of necessary witnesses and victims at trial and help protect them before, during, and after their testimonies. They prevent the release of private or sensitive information about those who testify and offer support to prevent trauma and financial hardship connected with appearances at court.¹⁶

Because of the integral role that victims and witnesses play in the prosecution of serious crimes, both individual defendants and culpable governments and institutions often have a vested interest in securing witnesses' silence. This is especially true when witnesses at trial have special knowledge about the command structures behind organized oppression or human rights abuses.

Hybrid tribunals usually provide a wide range of support and protective measures to civil parties,¹⁷ victims, and witnesses who participate in the court's processes. In general, such measures serve two equally important purposes: (1) to protect the privacy and physical safety of witnesses, and (2) to ensure the psychosocial, emotional, and sometimes medical well-being of victims and witnesses.¹⁸

Measures for the protection and support of witnesses and victims (including civil parties) are usually available at each stage of the proceedings. For victims and witnesses who testify, the threat of disclosure and potential physical harm are not only an immediate concern, but continue far into the future, including after the court's closure. Thus, an office or court representative tasked with handling witness protection and support needs to participate in a hybrid court's residual mechanism, as is the case at the SCSL.

Generally, the imposition of blanket protections for witnesses and victims should be avoided. Rather, individual assessments are preferable. At the SCSL, for instance, the witnesses and victims section offered witnesses total protective care, based on an assessment of threat level; after the trial ended, the unit gave witnesses contact numbers for security and psychosocial security and provided "periodic post-trial visits to the witnesses' home to assess their security and wellbeing."¹⁹ During an investigation, the prosecutor could take all measures "deemed necessary" to ensure "the safety, the support and the assistance of

¹⁵ Human Rights Watch (2004b), p. 11, citing Penal Code of the Federation of Bosnia and Herzegovina (2003), art. 358.

¹⁶ UN Office on Drugs and Crime (2008).

¹⁷ Some hybrid tribunals also afford victims a limited right to participate in the proceedings and have established offices responsible for administering that participation. Consistent with Cambodia's civil law tradition, the ECCC includes a legal framework for civil party complaints, implemented with the assistance of the Victims Unit (now the Victim Support Section) and Civil Party Lead Co-Lawyers Section. ECCC (2018c). Similarly, the STL permits victims to present "their views and concerns" for consideration, "where the personal interests of the victims are affected" and when "determined to be appropriate by the Pre-Trial Judge or the Chamber." Statute of the Special Tribunal for Lebanon, art. 17.

¹⁸ The Organization for Security and Co-operation in Europe Mission to Bosnia and Herzegovina noted that "Testimonies of witnesses are the principal evidence in war crimes cases because documentary evidence is often unused, unavailable, or nonexistent as a result of an absence or deficiency of investigation into the crimes at the time they were committed." Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2010), p. 7.

¹⁹ Charters, Horn, and Vahidy (2008), p. 6.

potential witnesses and sources.”²⁰ Following the trial, witnesses could be supplied with the contact information of staff in the court’s protective services unit as part of a long-term plan of support.²¹

Support measures commonly include the provision of travel, lodging, and other allowances to ensure that victims, witnesses, and expert witnesses do not incur “undue financial loss or hardship” as a result of their testimony. The extent of these financial outlays can be significant. It is crucial that the court’s budgeting processes guarantee that the witness support and protection measures are fully and consistently funded.²²

Who Is Entitled to These Measures?

Eligibility criteria for receiving witness protection and support measures vary widely by court. Some courts, such as the BiH War Crimes Section, narrow the scope of the individuals considered eligible, while the STL and SCSL have much broader guidelines covering a number of categories of people. In some instances, family members and relatives can also qualify for protection.

The SCSL, for instance, set up a witnesses and victims section within the registry to provide protective measures not only to witnesses and victims who appeared before the court but also to “others who are at risk on account of testimony given by such witnesses.”²³ This unit included experts in various types of trauma, such as “trauma related to crimes of sexual violence and violence against children.”²⁴ The STL’s registrar provides similar protective measures.²⁵

At the ECCC, a “witness, civil party or complainant” can request services through the court’s witness and expert support unit. The co-investigating judges and the chambers can then order appropriate measures to “protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger.”

Child witnesses, in particular, may require special accommodations, including sometimes special “child-friendly” methods for delivering testimony, e.g., a child may be given a doll to point at when describing what happened. In some instances, children may testify, but not be asked follow-up questions.

Table 4.1 presents a full breakdown of eligibility requirements by court. It should be noted that, in each case, witnesses can qualify for support whether they are appearing on behalf of the prosecution or defense.

²⁰ Special Court for Sierra Leone (2003c), Rule 39: Conduct of Investigations.

²¹ Special Court for Sierra Leone (2003c), Rule 34.

²² The ICTR was criticized for a lack of planning for its victim and witness unit. See UN General Assembly (1997), para. 23.

²³ Statute of the Special Court of Sierra Leone, art. 16(4).

²⁴ Statute of the Special Court of Sierra Leone, art. 16(4).

²⁵ Statute of the Special Tribunal for Lebanon, art. 12(4).

Table 4.1: Eligibility Requirements for Witness Protection and Support

HYBRID TRIBUNAL	ELIGIBILITY FOR WITNESS PROTECTION AND SUPPORT
Special Court of Sierra Leone	The court provided assistance “for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.” ^a Witnesses included “potential witnesses and sources.” ^b
Special Tribunal for Lebanon	Eligible persons are victims and witnesses and “others who are at risk on account of testimony given by such witnesses.” ^c
Bosnia and Herzegovina War Crimes Section	A “vulnerable witness” is one who has been “severely physically or mentally traumatized” by the offence or “otherwise suffers from a serious mental condition rendering him unusually sensitive, and a child and a juvenile.” Under the law on the witness protection program in BiH, eligible persons are those “without whose testimony there would be no prospects in criminal proceedings of investigating the facts or of ascertaining the whereabouts of the suspect, or such would be made much more difficult.” ^d
Extraordinary Chambers in the Courts of Cambodia	The ECCC ensures “the protection of Victims who participate in the proceedings, whether as complainants, or Civil Parties, and witnesses, as provided in the supplementary agreement on security and safety and the relevant Practice Directions.” ^e
Serious Crimes Panels in Timor-Leste	“The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the panels shall have regard to all relevant factors including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.” ^f

NOTES: ^a Statute of the Special Court of Sierra Leone, art. 16(4).

^b The Special Court for Sierra Leone (2003c), Rule 39: Conduct of Investigations.

^c Statute of the Special Tribunal for Lebanon, art. 12(4).

^d Law on Witness Protection Program, Official Gazette of Bosnia and Herzegovina, art. 2(1).

^e ECCC (2011b), Rule 29 “Protective Measures.”

^f UN Transitional Administration in East Timor (2000b), Section 24.

What Types of Measures Have Been Provided?

As in ordinary courts, there are myriad ways to protect witnesses in criminal proceedings involving mass atrocities. They range from permitting a witness to testify behind a screen or by electronically distorting or transferring their voice or image,²⁶ to more involved measures such as the relocation of witnesses to undisclosed locations, perhaps under an assumed identity. The measures granted may vary depending in part on when the request is made during the trial and by whom.²⁷

²⁶ Law on Protection of Witnesses under Threat and Vulnerable Witnesses, art. 13.

²⁷ When considering protective measures, the STL coordinated with the UN International Independent Investigation Commission, which had gathered significant information about potential witnesses over the course of its investigations. UN International Independent Investigation Commission (2008), paras. 16-19.

Possible protective and privacy measures include the following:

- providing 24-hour protection by a security officer
- holding in-camera proceedings
- expunging names and identifying information from the court's public records
- assigning a pseudonym
- allowing persons to give testimony through image- or voice-altering devices or closed-circuit television, video link, or other similar technologies
- submitting questions to the witness in place of direct cross-examination
- holding closed sessions that exclude the press or the public
- using safe houses in advance of testimony
- relocating persons after the conclusion of court proceedings
- notifying victims or witnesses of the filing of an appeal or reversal of a conviction

Because the experience of testifying about past experiences of human rights violations has the potential to retraumatize victims, there is general understanding and acknowledgment among experts that victims and witnesses often require psychosocial support and may need someone (perhaps a court-appointed witness coordinator) to accompany them to court. Psychosocial and related support measures employed by hybrid courts include the following:

- offering counseling with trained mental health professionals, before, during, and after court proceedings to minimize the risk of retraumatization
- providing a thorough “orientation” of what to expect during court proceedings
- providing a “walk through” of the courtroom itself before testimony
- providing victims and witnesses with access to a 24-hour support hotline that they can call with questions or concerns about upcoming proceedings

In some instances, material and financial support has also been offered to victims. Witnesses in Sierra Leone were eligible to receive daily subsistence allowances of approximately USD 8 per day (16,000 leones), along with reimbursement of lost earnings, medical coverage, schooling, armed 24-hour protection, and temporary provision of a mobile telephone. Sometimes, payments to cover rent and travel were made. The BiH court provided witnesses with modest travel allowances, assisted with the procurement of care for witnesses' children while they were testifying, and organized logistics and

transport.²⁸ At the STL, daily subsistence allowances may also cover “reasonable personal expenses” for witnesses requiring overnight accommodation.²⁹

Other examples of support measures that serve the well-being of witnesses include the following:

- assisting in procuring care for witnesses’ dependents
- an allowance for support persons traveling with a witness or victim
- organizing travel logistics
- emergency clothing allowances
- providing food, toiletries, and other basic necessities when away from home to testify
- reimbursing lost wages

The SCSL received high marks for emotional and psychosocial support from witnesses who had testified during its operations.³⁰ In Sierra Leone, the witnesses and victims section (WVS) was housed in separate facilities within the court compound to ensure that witnesses felt secure. Unmarked vehicles were used to transport witnesses, and regular monitoring of witnesses took place after their testimony had finished, not only in Sierra Leone but also in Liberia.³¹ The unit also developed protective programs to respond to female witnesses’ particular needs.³²

Similarly, during trials in the BiH War Crimes Section, defense and prosecution witnesses are afforded separate waiting areas and entrances. Witnesses facing an imminent and manifest risk can provide their testimony at a separate protection hearing. That testimony is then read out at the main trial.³³

Protective and support services sometimes continue even after operations at the court itself conclude. At the SCSL, monitoring for witnesses at risk continued after trials through a different entity, with support and security assessments performed for a period of eight months.³⁴ In addition, the Government of Sierra Leone established a national witness protection program to pick up where the court left off. The Serious Crimes Process in East Timor (SCP), on the other hand, was seriously deficient in regard to managing witness privacy and security issues after proceedings there ended, with few safeguards in place to limit access to sensitive files and testimony.³⁵ Table 4.2 describes the procedure for deciding on the forms of support and protection in the five tribunals.

²⁸ Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2010b), p. 18.

²⁹ The daily subsistence allowance is based, in part, on a fixed rate set by the UN International Civil Service Commission, applicable to the country where a victim participates, or a witness testifies. See Special Tribunal for Lebanon, Registry Regulations on Assistance and Allowances for Victims and Witnesses Testifying before the Special Tribunal for Lebanon.

³⁰ Charters, Horn, and Vahidy (2008), p. 14.

³¹ Special Court for Sierra Leone (2013), p. 28.

³² UN Security Council (2012), para. 25.

³³ Human Rights Watch (2006).

³⁴ Special Court for Sierra Leone (2014), p. 33.

³⁵ Reiger and Wierda (2006), p. 39.

Table 4.2: Providing Witness Support or Protection

HYBRID COURT	WHO DECIDES ON THE FORM OF SUPPORT OR PROTECTION?	WHAT ORGAN OF THE COURT IS USUALLY TASKED WITH PROVIDING MEASURES OF SUPPORT AND PROTECTION TO WITNESSES AND VICTIMS?
Special Court Sierra Leone	The Witnesses and Victims Section (WVS) makes determinations on requests for witness protection and support, in consultation with the offices of the prosecutor and the defense and based on the particular needs and circumstances. ^a Parties could also apply to the judge or the Trial Chamber, which could consult with the WVS to determine the form of protective measures for victims and witnesses. ^b	The WVS
Bosnia and Herzegovina War Crimes Section	The BiH courts and the judges determine both the form of support or protection and whether such measures are necessary. ^c	The court's registry initially had responsibility for witness support and security, although the responsibility eventually shifted to the Witness Protection Department within the State Investigation and Protection Agency, the body responsible for witness protection matters, including out-of-court witness protection. ^d
Special Tribunal for Lebanon	The Victims and Witnesses Unit (VWU) within the registry makes determinations on requests for witness protection and support.	The VWU
Extraordinary Chambers in the Courts of Cambodia	Requests for protection measures or concerns about confidentiality or safety of a witness are referred to the Witness and Expert Support Unit (WESU), whom they can meet in person to develop a strategy for protection. Witnesses can request that judges order protective measures for them, which the judge can do after considering all aspects of the issue including witness' rights and rights of the accused to a fair trial.	The VSS ensures the safety and well-being of victims who participate in the proceedings. This involves ensuring that victims understand the risks inherent in such participation, as well as providing them with protective measures and other assistance, like psychosocial support. ^e
Serious Crimes Panels in Timor-Leste	Witness management team within the Serious Crimes Unit ^f	Witness management team within the Serious Crimes Unit

NOTES: ^a Special Court for Sierra Leone (2003c), Rules 34(A).

^b Special Court for Sierra Leone (2003c), Rule 69.

^c Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2010b), p. 16.

^d Law on Witness Protection Program, Official Gazette of Bosnia and Herzegovina, art. 3.

^e See ECCC (2018)

^f UN Security Council (2005f), p. 19.

How Effective Are Hybrid Tribunals at Providing Protection and Support?

For protective and support measures to be effective, they require a significant commitment of resources, as well as long-term planning and follow-through if witnesses are to receive the promised services. In courts where that has not happened, witnesses and victims have faced intimidation or reprisals, leading some to refuse to testify.

In Timor-Leste, few measures ended up being available to witnesses (partly due to limited resources), although the regulations governing the SCP included a range of protection and support measures for victims and witnesses.³⁶ Witness support and protection measures were poorly staffed and poorly managed. There was no witness protection system at the court itself (including within the defense lawyers unit), and the SCU within the prosecutor's office had only a small witness management unit that handled the logistics of bringing prosecution witnesses to court.³⁷ Sharon Lowery, who served as head of the witness protection unit, reported that “she had ‘no car, no staff, no interpreter’” when she started and had to make repeated requests for them to the UN Integrated Mission of Support in Timor-Leste.³⁸ Witnesses were forced to travel on public transportation to the court, sometimes in the company of perpetrators. There was no “professional counselor or psychologist for witnesses,” and requests for resources for such services were denied.³⁹

Amount of Resources Dedicated to the Program

Overall budget numbers for witness protection and support services are not available for the five hybrid tribunals, although there is some information about a few of the individual services provided. Inevitably, the actual cost per witness varies by court and the type of measure provided.

The costs of some measures, such as resettlement programs, are likely to be much higher and thus may be made available only after the most extensive components have already been implemented. To give an idea of the potential high cost of relocation services, the SCSL's draft budget for one year estimated the cost of externally relocating witnesses to be USD 295,000. Such relocations are rarely feasible without cooperation from the host country. In some instances, the host country assumes the costs of protection measures; in others, a cost-sharing arrangement may be agreed upon or the country sending the witness will arrange for reimbursement. When family members are included, costs are typically higher.⁴⁰ Hybrid courts have not always entered into formal relocation agreements with other countries, which can help facilitate transfers.⁴¹

Costs estimates for other services show some of the resource dynamics at play when deciding among different options. At the SCSL, in 2007, the registrar compared witness travel costs with the cost of installing video-link facilities between the ICC in The Hague and the special court in Freetown in connection with the Charles Taylor trial. Travel costs ended up being much lower—average estimates per witness was USD 1,500 and USD 1,700, whereas the cost of a video-link system came in at approximately USD 300,000 for an 18-month period.⁴²

As a point of comparison, the ICTY incurred approximately USD 1,600 per witness: “From January 1, 1998 to July 1, 2001, 971 victim-witnesses came to The Hague to testify—137 in the period between

³⁶ UN Transitional Administration East Timor (2000d).

³⁷ Reiger and Wierda (2006), p. 39.

³⁸ Cohen (2006a), p. 32.

³⁹ Cohen (2006a), p. 32-33.

⁴⁰ Kramer (2005).

⁴¹ Some courts, such as the ICC and ICTY, have entered into framework agreements with states where witnesses can relocate and reside legally. In 2009, the ICC created a special fund for relocations with voluntary contributions to cover costs incurred by the receiving state. International Criminal Court (2010), p. 6.

⁴² Special Court for Sierra Leone, Registrar's Submission Pursuant to Rule 33(B) Relating to Issues Pertaining to the Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link.

January and May 2001 alone (at an approximate cost of \$1,600 per witness).⁴³ Furthermore, the use of witnesses increased as work intensified: From July 31, 2000 to July 31, 2001, the victims and witnesses section of the ICTY handled 550 witnesses from 30 different countries, a 30 percent increase over the same period from the previous years.

Because of the expertise required to provide psychological counseling, some courts have retained nongovernmental organizations to take over those services. At the ECCC, the German Foreign Office awarded a grant of EUR 1.5 million for the court's victim support services. That money was used, in part, to finance victim-related initiatives to provide psychological support to civil parties, including a national hotline, carried out by the Transcultural Psychosocial Organization, a local mental health organization.⁴⁴

Scale of Services Provided

At the BiH War Crimes Section, approximately 17 percent of participating witnesses to war crimes (858 of 5,075) received protection—a proportion deemed too small in terms of the protection or support measures it could afford and in terms of the number of witnesses who were able to receive the protection and support they needed.⁴⁵ In addition, some have complained that there is little follow-up with witnesses once they have given testimony.⁴⁶ Rather, “They receive a phone call and are given contact information for NGOs that might be able to help them.”⁴⁷ Table 4.3 shows the number of witnesses who received support in the BiH War Crimes Section.

In contrast, at the SCSL, 95 percent of witnesses received some form of protection or support from the witnesses and victims section (WVS): 547 witnesses testified in the court's four main cases (316 for the prosecution; 231 for the defense).⁴⁸ This number included 100 witnesses who received protection from the WVS, but who ultimately did not testify.⁴⁹

Witnesses Experiences:

Another, more qualitative assessment of effectiveness is the number of witnesses who found the experience to be positive or negative. As previously noted, “the success of the SCSL is dependent, in part, on those who testify before it. If witnesses have a negative experience, there will be consequences in terms of the effectiveness of the trials.”⁵⁰ In a study conducted on the experiences of 170 witnesses who testified before the SCSL, 97 (or 57 percent) rated their experience as “very good” or “good” (rating it a 1 or 2, on a scale of 1 to 5, with 1 being very good and 5 being very bad).⁵¹ When asked whether or not they would testify again, if need be, an overwhelming 80 percent (137 respondents) said they would.⁵²

⁴³ Wald (2002), p. 219.

⁴⁴ Stover, Balthazard, and Koenig (2011), p. 516.

⁴⁵ Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2010b).

⁴⁶ Human Rights Watch (2012), p. 29.

⁴⁷ Irwin and Šarić (2012), p. 8.

⁴⁸ Mahony (2010), p. 78.

⁴⁹ Special Court for Sierra Leone (2014), p. 33.

⁵⁰ Horn, Charters, and Vahidy (2009), pp. 135-149.

⁵¹ Horn, Charters, and Vahidy (2009), pp. 135-149.

⁵² Horn, Charters, and Vahidy (2009), pp. 135-149.

Table 4.3: Number of Witnesses Who Received Support and Protection from the Bosnia and Herzegovina War Crimes Section

YEAR	TOTAL NUMBER OF WITNESSES WHO TESTIFIED BEFORE THE WAR CRIMES SECTION	NUMBER OF WITNESSES WHO TESTIFIED AS PROTECTED WITNESSES
2005	39	21
2006	457	153
2007	737	118
2008	1,035	147
2009	733	88
2010	571	56
2011	733	138
2012	770	137
Total:	5,075	858

SOURCE: Court of Bosnia and Herzegovina, Registry (2012), pp. 36-37.

Although witnesses' experiences seemed generally good, the SCSL's WVS has been strongly criticized for some of its practices, particularly the material and financial support it provided to the majority of the witnesses it assisted, including informants and witnesses who were also high-ranking participants in the conflict.⁵³ These criticisms included the suspicion that the financial and material assistance during the investigation period could have (or at least appeared to have) served as an inducement to testify.⁵⁴ These payments were made to witnesses by the office of the prosecutor's witness management unit (OTPWMU), which as its name suggests was located in the office of the prosecutor, and was separate from the WVS. According to the SCSL, the "functions of [the OTPWMU] are complementary rather than duplicative of WVS functions."⁵⁵ However, there were cases in which witnesses for the prosecution continued to receive payments from the office of the prosecutor after the management of their cases was turned over to WVS.⁵⁶ These payments were typically large sums; receipts uncovered by the defense show that in one case several witnesses had been paid sums ranging from USD 800 to USD 2,000 (whereas the average annual income in Sierra Leone ranged from USD 160 to USD 730 during the court's operation),⁵⁷ while another witness admitted that he was paid an estimated USD 30,000 by the prosecution between 2004 and 2006.⁵⁸ "The payments apparently did not always comport with expenses incurred by the witness, were unnecessary, or were not paid for the reasons supplied by the OTP [office of the prosecutor]."⁵⁹

⁵³ University of California–Berkeley, War Crimes Studies Center (2005), p. 6. "The Sierra Leonean public may wonder why high level participants in the conflict are receiving material support from the court."

⁵⁴ Similar charges have been leveled against the STL. See Alakhbar (2014).

⁵⁵ Easterday (2014).

⁵⁶ Easterday (2014), p. 455; See also World Bank (2018).

⁵⁷ Easterday (2014), p. 454.

⁵⁸ Easterday (2014), p. 454.

⁵⁹ Easterday (2014), p. 454.

Another issue of contention revolved around survivors of sexual violence who received fistula surgeries before they testified as part of the support services the court offered them. This was justified under Rule 34(A) of the statute of the SCSL and the rules of evidence and procedure, which require that, in consultation with the prosecution or defense office, the WVS should provide physical protection, in accordance with witnesses' "particular needs and circumstances," and ensure witnesses "receive relevant support counselling, and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children."⁶⁰ Because a fistula (a tear in the bladder caused by rape or childbirth) is not usually a life-threatening injury, some have argued that this measure was costly and unnecessary and raised concerns that such a surgery could serve as an inducement to testify. On the other hand, it was decided the measure was warranted because many women who suffer from a fistula cannot sit long enough to testify or may be stigmatized by the condition.

Administrative Efficiency

The mechanisms that are put in place at hybrid tribunals for protecting and supporting witnesses and victims can have lasting benefits for building national administrative and judicial capacities. Courthouses are often given physical upgrades and technical equipment to facilitate witness protection measures. In BiH, a database was created of witnesses who received support from the witness support section while testifying before the Court of BiH in court or before or after the trials.⁶¹ As already mentioned, the Government of Sierra Leone followed through on its commitment to protecting witnesses after the SCSL ceased operations by establishing a national witness protection program to pick up where the court had left off.

At the SCSL, STL, and ECCC, witness protection and support were centralized in dedicated offices, an approach that seemed to improve the quality and delivery of services at the courts. In contrast, the Court of BiH's witnesses and victims services were not centralized and the process to obtain them was fragmented, resulting in countless slip-ups when it came to witness privacy and anonymity. There was a lack of coordination among units working in separate entity courts and the main prosecutorial office, which exacerbated problems. As a result, "some witnesses testified and gave statements more than four or five times in relation to a single criminal case or incident," and, "in these cases, witnesses were observed to be fatigued and strained."⁶² The OSCE noted that testifying multiple times about the same incident compounded the trauma experienced by witnesses, especially because of the lack of psychosocial support.⁶³

⁶⁰ Special Court for Sierra Leone (2003c), Rule 34.

⁶¹ Court of Bosnia and Herzegovina, Registry (2012), p. 19.

⁶² Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2010b), pp. 20-21.

⁶³ Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina (2010b), p. 20.



Monks wait to enter the public gallery of the ECCC to hear the pronouncement of the judgment in the case against Nuon Chea and Khieu Samphan on November 16, 2018. (ECCC)

PART 5

The Cost of Justice: Financing Hybrid Processes

Hybrid courts require significant financial support, usually over an extended time period if they are to render justice fairly and expeditiously and fulfill their mandates. Each of the five courts discussed in this report have expended millions of U.S. dollars in costs, with most costing hundreds of millions of dollars during their tenures. Figure 5.1 presents the total budgets of the hybrid tribunals in Sierra Leone, Cambodia, and Lebanon.

Given these numbers, funding has been and remains a persistent challenge for those tasked with establishing and operating hybrid courts. Years of combined experience setting up and operating hybrid courts has shown that the funding needs are almost always higher than anticipated. In post-conflict settings in particular, there are almost always severe constraints on available resources and many competing priorities for how they should be used.

How Have Hybrid Tribunals Been Funded?

Hybrid tribunals are usually funded through a combination of national and international sources.¹ Although the type, source, and amount of contributions varies by context, all receive at least some part of their funding from international sources. Those sources may include international organizations, such as the UN, private donors including foundations,² and the governments of other states.

Unlike the ad hoc tribunals—the ICTY and the ICTR—which were funded almost entirely through a system of scaled assessments, in which countries contributed funds in proportion to their size and wealth,³ many hybrid processes have depended on voluntary contributions for most if not all of their funding needs. The Special Tribunal for Lebanon (STL) and the Special Panels in Timor-Leste are the exceptions, with each receiving at least some assessed contributions.

Voluntary contribution structures, such as those in place at the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), however, can lead to funding uncertainties,⁴ although hybrid courts that received assessed contributions such as the Special Panels

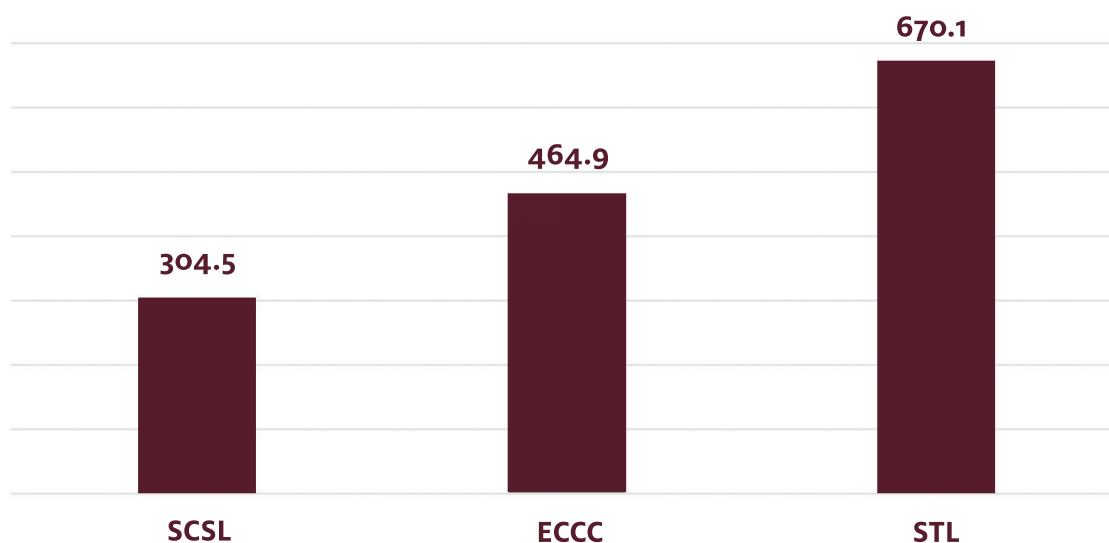
¹ The STL, for instance, receives 49 percent of its funding from the government of Lebanon.

² Kahmi (2007) p. 582.

³ UN International Criminal Tribunal for the former Yugoslavia (2018b).

⁴ The UN Secretary-General predicted as much during negotiations over funding at the SCSL, saying “A financial mechanism based

Figure 5.1: Total Budget over Lifetime of Tribunal in USD (Millions)



SOURCES: Budget figures reported by the finance and budget officer of the Residual Special Court for Sierra Leone; budget reports issued by ECCC from 2004 through 2018; annual reports of the Special Tribunal for Lebanon, years 2009-2010 through 2017-2018.

in Timor-Leste also faced funding shortfalls. These gaps in funding streams can affect essential court functions and present potentially serious consequences for protecting the rights of all persons who appear before the court, including the accused and witnesses.⁵ They can also limit the court's capacity to dedicate some resources to legacy projects that could improve the capacity of national justice systems, an oft-cited goal of hybrid courts.

In a number of instances, to avoid these shortfalls, efforts have been made to ensure that monies are available upfront to fund at least a period of the court's operations. The statute of the SCSL for instance required that the UN Secretary-General "commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation."⁶ The same provision was included in the Statute of the STL.⁷

In addition, some hybrid courts have created management committees to assist with the difficult task of raising funds, while also monitoring court operations. The statutes of both the SCSL and the STL, for instance, provide for the creation of donor-led management committees. The SCSL was the first to have such a body. It was originally to consist of "important contributors," but its membership was expanded to include a broader complement of interested parties, including the Government of Sierra Leone and the UN Secretariat. Its role was expansive and included much more than assisting with the court's funding needs. Under its terms of reference, it also was tasked with identifying nominees for

entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment." UN Security Council (2000e), p. 13.

⁵ UN Security Council (2005f), p. 29.

⁶ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special court for Sierra Leone, art. 6.

⁷ Statute of the Special Tribunal for Lebanon, art. 5(2).

principal positions at the court and for giving “advice and policy direction on all non-judicial aspects of the Court’s operations,” among other things.⁸

Similarly, at the STL, the management committee is composed of nine states and is responsible for “giving policy direction and advice on all non-judicial aspects of the Tribunal’s work.”⁹ It can also engage in formal and informal discussions with the court’s key principals, including judges and the head of the defense office.

The ECCC was not established with a management committee, despite the fact that it, too, relies on voluntary funding. As a result, several donor groups have been formed to coordinate funding there. The French and Japanese embassies, for instance, convened the “Friends of the ECCC” as a working group of ambassadors of principal donor countries in 2006. In addition, a principal donors group (PDG) was formed, “comprised of States that have made a significant monetary contribution and have expressed a clear political commitment to support the UN in its role in providing technical assistance to the Court.”¹⁰

Budgeting at Hybrid Courts

With a few exceptions, the core budget of the court covers most, if not all, organs or units of the court. The funds are usually allocated among all the organs of the court, which then disperses the funds in the exercise of their required functions. At the SCSL, however, the outreach unit did not receive core funding, which meant that it needed to solicit contributions on its own.

In some contexts, the prosecutor’s office is a standalone body. That was the case in both Timor-Leste and BiH. Therefore, because the judiciary and prosecution operated independently, they were funded through separate budgets.

As with any judicial mechanism, basic financial management and procurement protocols are essential at hybrid processes, as are other oversight measures, such as public audits, to prevent financial misstatements, fraud, waste, and abuse. Transparency in budgeting is also imperative.

Figure 5.2 presents the estimated average annual budgets for the tribunals in Sierra Leone, Cambodia, and Lebanon, based on annual reports issued by each of the courts.

Special Panels and Serious Crimes Unit in East-Timor

In Timor-Leste, the Serious Crimes Unit (SCU) and the Special Panels were funded by the UN Transitional Authority in East Timor (UNTAET), and later by the UN Mission of Support in East Timor (UNMISSET), through voluntary and assessed contributions.¹¹ Because the public prosecution service (and its SCU) was not integrated within the court structure, it was administered and funded independently,¹² although still pursuant to UNTAET resolutions.¹³

⁸ Perriello and Wierda (2006b), p. 33.

⁹ Special Tribunal for Lebanon (2018b).

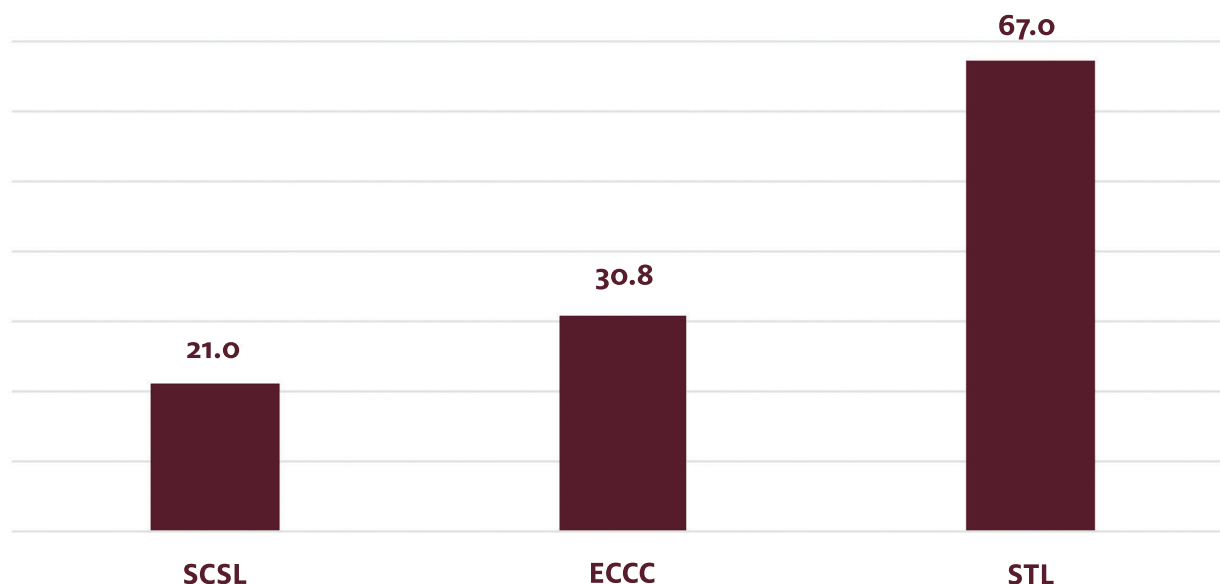
¹⁰ Extraordinary Chambers in the Courts of Cambodia (2014c).

¹¹ Wierda and Triolo (2012). The combined sources budget for 2001-2002 shows the breakdown between assessed contributions of USD 5.25 million and Consolidated Fund for East Timor (CFET) contributions of USD 320,000. World Bank (2018), p. 82.

¹² Reiger and Wierda (2006), p. 13.

¹³ UN Transitional Administration in East Timor (2000c), Section 2. “The necessary funding and technical assistance for the Public Prosecution Service shall be provided by the Transitional Administrator.”

Figure 5.2 Average Annual Budgets for Tribunals in Sierra Leone, Cambodia, and Lebanon in USD (Millions)



SOURCES: Budget figures reported by the finance and budget officer of the Residual Special Court for Sierra Leone; budget reports issued by ECCC from 2004 through 2018; annual reports of the Special Tribunal for Lebanon, years 2009-2010 through 2017-2018.

Detailed annualized budget numbers for both the Special Panels and the SCU are not available. The numbers that are available offer some indication of the sparse allocated budgets, particularly to the Special Panels, although the SCU was similarly under-resourced, especially when one considers the prosecutorial requirements in the country.

In Timor-Leste, the annual budget of the Serious Crimes Process (SCP) was USD 6.3 million in 2001-2002 (with USD 6 million allotted to the prosecution unit),¹⁴ and over USD 14 million from 2003 to 2005. The overall UNMISSET budget for the same period totaled over USD 296 million, with the bulk of that budget going to peacekeeping.¹⁵ By 2005, the SCP's annual budget had grown to between USD 7 and 8 million.¹⁶ The voluntary contributions from donors amounted to roughly USD 120,000.¹⁷

In addition, the Timorese SCU received direct bilateral support by way of seconded posts from international nongovernmental organizations (such as the Coalition for International Justice) and national governments (such as Norway and Australia).¹⁸ USAID's Office of Transition Initiatives provided the SCU with equipment and translation services; the UN Volunteers program provided translators, case managers, and other needs.¹⁹ Even with this support, the SCU suffered from a lack of funding that caused it to decentralize its work and create prosecution teams that decided on where to focus investigations, in part based on information collected from affected communities.²⁰

¹⁴ Rimmer (2010), p. 81, 86.

¹⁵ Cohen (2007).

¹⁶ Cohen (2007).

¹⁷ Reiger and Wierda (2006), p. 30.

¹⁸ Reiger and Wierda (2006), p. 30.

¹⁹ Clark (2003), p. 33. It also supported public outreach activities, providing USD 34,586 to the SCU to create a video series, "The Road to Justice." Development Alternatives, Inc. (2002).

²⁰ UN Transitional Administration in East Timor (2001).

Most of the budget for the SCP's Special Panels (with the exception of the salaries of the international judges) was funded by the Consolidated Fund for East Timor (CFET), which included voluntary state contributions through the UNTAET Trust Fund and East Timor domestic revenues, such as those from the exploitation of oil and gas reserves. The CFET was designed to mobilize funds for recurrent government expenses, rehabilitation of administrative buildings, civil service capacity building, and reconstruction in the justice sector. It included a financing mechanism, called the Transition Support Programme, that was coordinated by the World Bank, with donations from Australia, Canada, Finland, Ireland, New Zealand, Norway, Portugal, Sweden, the United Kingdom, and the United States. As part of the court system as a whole, the Special Panels were "directly dependent on the Ministry of Justice and hence had no control over their budget, including from whom they could accept support."²¹

Special Court for Sierra Leone

The SCSL had to raise its own funds. Because it was not an UN-subsiary organ established under Chapter VII of the UN Charter, it did not have access to mandatory financial support. Instead, it was primarily funded by voluntary contributions from states.²² This arrangement allowed the court greater flexibility and some freedom to depart from UN financial regulations; however, it also faced funding insecurity that made planning difficult and led senior officials to spend a great deal of time travelling to raise funds. Originally, there were proposals to share the Appeals Chamber of the ICTY and ICTR to save costs, but that was ultimately judged "legally unsound and practically not feasible."²³

A management committee was set up with authority over funding decisions and administration.²⁴ The UN mission in Sierra Leone provided support and technical assistance, especially in the realm of security and logistics. However, the Sierra Leonean government was "unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals."²⁵

In its first year, the SCSL had an approved budget of USD 19 million²⁶ and, from 2002 until the end of 2006, an estimated budget of USD 104 million.²⁷ From the beginning, it faced funding shortfalls. In its first year, for instance, it was required to use around USD 2 million from the second year's contributions.²⁸

Thereafter, due to its inability to secure enough voluntary funding for core operations, the UN supplemented its financial needs on at least four occasions with grants of money from its program budget, officially known as subventions.²⁹ In 2004, the UN General Assembly authorized a subvention of USD

²¹ Reiger and Wierda (2006), p. 30.

²² UN Security Council (2000f), para. 8(b); Perriello and Wierda (2006b), p. 11.

²³ UN Security Council (2000e), p. 8.

²⁴ Special Court for Sierra Leone (2004a), p. 30. A new courthouse was ultimately built.

²⁵ UN Security Council (2000e), p. 11.

²⁶ Special Court for Sierra Leone (2004a), p. 29.

²⁷ Perriello and Wierda (2006b), p. 30.

²⁸ Special Court for Sierra Leone (2004a), p. 29.

²⁹ UN General Assembly (2004a); UN General Assembly (2004b); UN General Assembly (2010).

16.7 million, and, on December 22 of the same year, a further USD 20 million was allocated.³⁰ In 2005, USD 13 million was additionally granted, although some unused funds were ultimately surrendered under the program budget.³¹ In some of these instances, the shortfalls resulted from unpaid pledges.

As a result, at different points during the life of the court, key operations of the court were underfunded, including the defense office, the witness and victim support unit, and the chambers.³² Vendor payments had to be deferred and all nonessential travel and activities curtailed. Voluntary salary reductions for professional staff were even considered, as was a suspension of the trial proceedings in the case against Charles Taylor.³³

Overall, the total budget allocation at the SLSC through 2013 USD was 292,363,461. Additional allocations for the residual mechanism increased the total to USD 304,522,961.³⁴ See Appendix D for the annual budgets of the court and residual mechanism over their lifetimes.

Extraordinary Chambers in the Courts of Cambodia

At the ECCC, responsibility for funding, similar to operations, is essentially bifurcated. Under the agreement between the UN and the Government of Cambodia, the UN is responsible for costs associated with the international components of the chambers, while the Government of Cambodia is responsible for the national components. Both parties, however, receive their funding primarily through voluntary contributions, including from foreign governments, international institutions, nongovernmental organizations, and private donors.

The international components of the court, for instance, have raised funding each year from governments, many of whom participate in a PDG based at the UN headquarters in New York or in the “Friends of the ECCC,” a group of ambassadors from donor countries that is co-chaired by Japan and France and convenes in Cambodia.³⁵ In addition, the court also receives significant technical assistance through the UN project, UN Assistance to the Khmer Rouge Trials.

When the ECCC began operations in 2006, the initial goal was to begin work when there was a large enough budget to sustain the ECCC for at least three years. The initial anticipated budget for that period was estimated to be USD 56.3 million, agreed to in December 2004 by the UN and the Government of Cambodia.³⁶ Later, annual budgets were consistently higher. Table 5.1 presents the ECCC’s budgets.

³⁰ Human Rights Watch (2004a), p. 42.

³¹ UN General Assembly (2010), p. 4.

³² Human Rights Watch (2004a), p. 4.

³³ UN (2007).

³⁴ Funding for the residual mechanism has been supplemented partly by voluntary contributions from the international community and partly by additional grants from the UN. Subvention funds were granted in 2016 (USD 2,438,500) and in 2017 (USD 2,800,000) to sustain activities at the residual special court.

³⁵ McGrew (2018), p. 161-162.

³⁶ ECCC (2008b), p. 4.

Table 5.1: Budget for the Extraordinary Chambers in the Courts of Cambodia in USD

YEAR	BUDGET	INTERNATIONAL CONTRIBUTION	NATIONAL CONTRIBUTION
December 2004 ^a	56.3M	43.0M	13.3M
2005-2009 revised	100.4M	\$78.7M	\$18.7M
2010 revised	31.3M	\$23.4M	\$7.9M
2011 revised	40.7M	\$30.8M	\$9.9M
2012 revised	34.3M	\$25M	\$9.3M
2013 revised	35.4M	\$26M	\$9.4M
2014 revised	27.8M	\$21.7M	\$6.1M
2015 revised	33.75M	\$27.1M	\$6.7M
2016 revised	32.34M	\$25.7M	\$6.64M
2017 revised	26.46M	\$20.09M	\$6.37M
2018 projected	24.72M	\$18.93M	\$5.79M
2019 projected	21.40M	\$16.02M	\$5.37M
Total	464.87M	356.49M	92.17M

SOURCE: Official budget reports issued by ECCC from 2004 through 2018.

NOTE: ^a The initial budget was based on estimates that were agreed upon for the first three years. The UN share was set at USD 43.0 million, funded through voluntary contributions, and the Government of Cambodia's share was set at USD 13.3 million.

As of June 14, 2018, expenditures at the ECCC totaled USD 318.9 million, lower than the overall budgeted amounts shown in Table 5.1, including the actual contributions by the Cambodian government.³⁷ Contributions from Cambodia total USD 46 million, including USD 16 million of in-kind donations. Donations have been received from almost 40 countries, individuals, foundations, companies, and the UN.³⁸ The largest contributors include Japan (30 percent), the United States (11 percent), Australia (11 percent), the European Union (8 percent), Germany (6 percent), United Kingdom (4 percent), Sweden (4 percent), France (3 percent), and Norway (3 percent). Donations earmarked for the ECCC are kept separate from other donor funds committed to development assistance in Cambodia.

The ECCC's budget covers the resource requirements of the judicial offices and chambers; the defense; the victims support section; and the office of administration, including salaries, non-regular staff compensation, consultant and expert fees, travel, general operating expenses, supplies and furniture, and equipment. Cambodian's contributions have also covered necessary building alternations.³⁹ Because of the ECCC's organizational structure, with international and national sides, there is unfortunately some duplication in expenditures. In addition, some have complained that administrative costs at the court are higher than at other mass crimes courts, "with roughly 30 percent" of the budget dedicated to administration.⁴⁰

The ECCC has faced financial challenges at a number of points on both the international and national sides, despite holding pledging conferences, conducting written fundraising appeals, and designating a

³⁷ ECCC (2018g).

³⁸ ECCC (2018g).

³⁹ Extraordinary Chambers in the Courts of Cambodia (2015a).

⁴⁰ Ciorciari and Heindel (2014), p. 95.

special expert tasked with developing a fundraising strategy.⁴¹ As a result, on the international side, the chambers have requested a number of subventions from the UN, including in 2016 for USD 25,151,300 and in 2015 for USD 28,983,200.⁴² The situation reached an especially low point in 2013, when the UN Secretary-General wrote to the president of the UN General Assembly alerting him that the ECCC were on the “brink of financial failure,” as well as individually to the permanent representatives of each member state. Those funding shortfalls resulted in recruitment freezes and delays in the payment of salaries, which led to a walkout by national staff in 2013.⁴³

Similarly, on the national side, the Government of Cambodia has had to expand its donor base, creating tensions with international fundraising efforts.

Special Tribunal for Lebanon

Unlike most of the other hybrid tribunals, the STL receives its funding from assessed and voluntary contributions, with clear commitments by donor states and the Government of Lebanon as to the percentage of total budget each contributes. Donor states combined provide 51 percent of the total funds and the Government of Lebanon provides 49 percent.⁴⁴ Similar to the SCSL, a management committee, composed of representatives of the tribunal’s main donors, the UN, and the Government of Lebanon, must review and approve the annual budget.⁴⁵ Under the tribunal’s rules of procedure and evidence, the STL’s president, in close consultation with the registrar, keeps the management committee informed and otherwise assists it in carrying out its oversight responsibilities.⁴⁶

As of March 2015, the following states have contributed to the STL: Australia, Austria, Belgium, Canada, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, the Russian Federation, Sweden, the Former Yugoslav Republic of Macedonia, Turkey, the United Kingdom, the United States, Uruguay and other states.⁴⁷ A few of those contributions were made in-kind, such as USD 5 million from The Netherlands toward accommodations for the court on the outskirts of The Hague.⁴⁸

Original cost estimates for the STL came in at USD 120 million for three years,⁴⁹ although the reality has been quite different. It has already spent an estimated USD 532.50 million as of 2018. Figure 5.3 presents the STL’s annual budgets.

⁴¹ UN General Assembly (2015).

⁴² UN General Assembly (2015).

⁴³ UN General Assembly (2013).

⁴⁴ Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, art. 5.

⁴⁵ UN Security Council (2007), art. 6.; see also Tolbert and Anoya (2014), pp. 212-213.

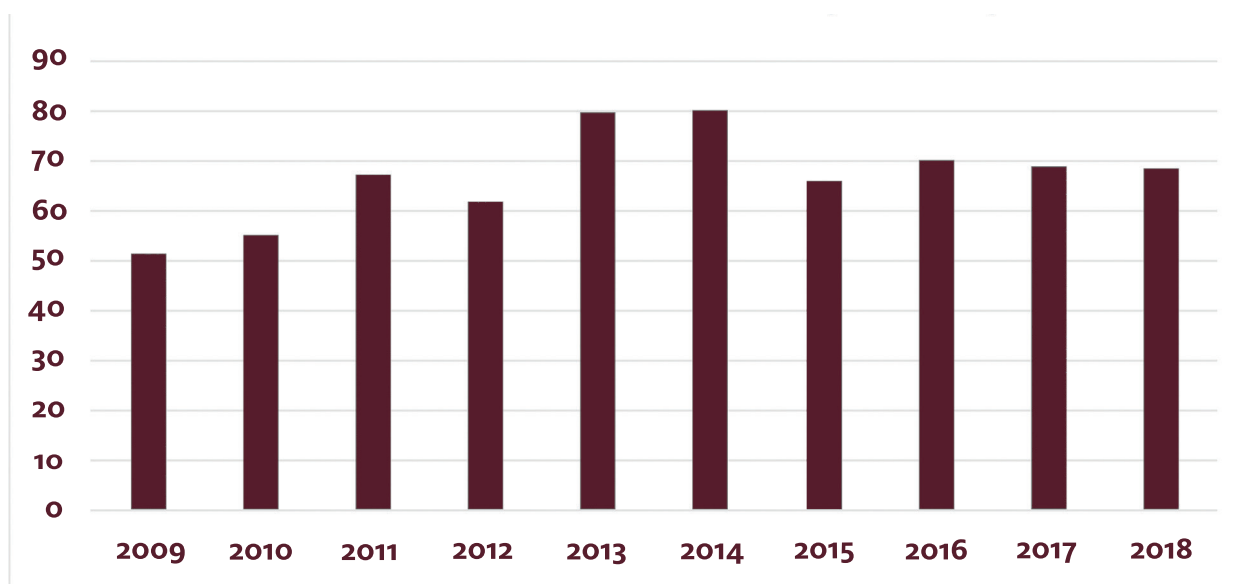
⁴⁶ Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 32(H).

⁴⁷ Special Tribunal for Lebanon (2015), p. 33.

⁴⁸ United Kingdom National Audit Office (2009), p. 4. The Tribunal eventually needed to finance renovations to the building as well.

⁴⁹ Jansen (2007).

Figure 5.3: Annual Budgets for the Special Tribunal for Lebanon in USD (Millions)



SOURCE: Annual reports of the Special Tribunal for Lebanon, years 2009-2010 through 2017-2018.

NOTE: The currency of the official budget changed from USD to EUR in 2011.”

The largest share of the tribunal’s finances goes toward personnel, including amounts needed to reimburse court officials and personnel for the taxes they pay in their home countries.⁵⁰ Security expenditures at the facilities in The Netherlands and in Beirut, Lebanon, also run high, as do the costs of translation and simultaneous interpretation.⁵¹

On many occasions during its operations, the STL has experienced funding shortfalls. In 2010, for instance, there was a shortfall of USD 13 million as a result of a drop in voluntary contributions.⁵² Lebanon has struggled to make its contribution to the court’s budget, especially amid the Syrian refugee crisis and ongoing security problems. Lebanon’s contribution to the tribunal exceeds what it spends on its own Ministry of Justice. In addition, it has faced consistent opposition from Hezbollah, and has needed to create an administrative workaround to enable it to pay its STL dues.⁵³

Bosnia and Herzegovina War Crimes Section

During its time as a hybrid court, the BiH War Crimes Section received funding from voluntary contributions made by international donors, primarily through the court’s registry. The court received the highest levels of international financial support at the beginning of its operations, for infrastructure development. Initially, a provisional budget was presented to and accepted at a donor’s conference,

⁵⁰ Tolbert and Anoya (2014), p. 222.

⁵¹ Special Tribunal for Lebanon (2011c), p. 36.

⁵² United Kingdom National Audit Office (2010), para. 3.

⁵³ Dakroub (2016).

where donors pledged EUR 16.1 million for the first two years.⁵⁴ A revised budget was then prepared and submitted on September 1, 2004.⁵⁵

Over time, the War Crimes Section received more of its funding from the BiH state budget, as its operations transitioned to national institutions. From 2010 to 2012, international support totaled approximately EUR 5 million (USD 6.65 million) per year. (International support was originally scheduled to end in 2009 but was extended through June 2013.) By the time, the transition to an entirely national court concluded, nearly USD 7 million worth of additional assets had been transferred from the section to national institutions.⁵⁶

The prosecutor's office has its own budget, which is recommended by the chief prosecutor to the High Judicial and Prosecutorial Council and then included in a proposed budget for BiH. The chief prosecutor has the right to attend and to defend the proposal at the sessions of the Parliamentary Assembly and its relevant committees whenever budgetary matters affecting the prosecutor's office are discussed or decided.⁵⁷ Funding of the prosecutor's office is largely dependent on the Ministry of Justice and its revenue, with considerable international aid provided as well.⁵⁸

Other organs of the BiH War Crimes Section received support as well. The criminal defense section (Odsjek krivicne odbrane) received capacity-building assistance from the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights War Crimes Justice Project.⁵⁹ As part of that project, 32 support staff were also embedded in BiH's justice institutions to "bolster capacity in key areas, including prosecutorial analysis and legal research."⁶⁰

Similar to the STL and SCSL, a management committee was established to oversee the budgeting process. The composition of that committee changed somewhat over time, although the registrars of the court and the prosecutor's office and the chief financial officer were a constant presence.

Disaggregated figures for the court's war crimes functions, without the budget for ordinary crimes, organized crimes, economic crimes, and corruption, are not available. It is therefore difficult to ascertain what the War Crimes Section alone has spent. That said, the annual reports for the prosecutor's office and the BiH state court give a sense of the extent of the outlays. Table 5.2 presents the overall executed budget of the BiH prosecutor's office, and Table 5.3 presents the court's overall budget. Table 5.4 presents the total international contribution by year.

⁵⁴ Donors pledged EUR 16.1 million for the first two years of the War Crimes Chamber at the donor's conference held in October 2003. See Office of the High Representative, War Crimes Chamber Project (2014).

⁵⁵ Office of the High Representative, War Crimes Chamber Project (2004), p. 8.

⁵⁶ Assets include both tangible and intangible assets totaling over EUR 5 million. Court of Bosnia and Herzegovina, Registry (2012), p. 13. In addition, the Organization for Security and Co-operation in Europe (OSCE) provided additional support in the form of a War Crimes Capacity Building Project that continued until December 2017. That legacy project served to strengthen the capacities of prosecutors, judges, defense counsel, legal staff, witness support officers, and investigators through a program of "training events on a variety of topics, including investigation skills, legal drafting and evidence review, and prosecuting for conflict related sexual violence." Organization for Security and Co-operation in Europe (2017).

⁵⁷ Law on the Prosecutor's Office of Bosnia and Herzegovina, art. 9.

⁵⁸ Bergsmo et al. (2010), pp. 31-32.

⁵⁹ Court of Bosnia and Herzegovina, Registry (2012), p. 23.

⁶⁰ Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (2015).

As with other hybrid tribunals, the bulk of the funds were usually allocated to cover staffing costs, although these numbers decreased as the court shifted to a completely domestic entity and international staff left.⁶¹

Table 5.2: Executed Budget of BiH Prosecutor's Office in USD

YEAR	BUDGET
2004	(not provided)
2005	1,461,650
2006	1,731,320
2007	3,008,040
2008	3,989,290
2009	4,258,130
2010	4,749,500
2011	5,748,850
2012	5,578,900
2013	6,314,720
Total	36,840,400

SOURCE: Official annual reports of the BiH's office of the prosecutor, years 2012 and 2013.

NOTE: The exchange rate used in this table was 0.5101446 and was based on the rate published on Oanda.com on December 31, 2012.

Table: 5.3: Approved Total Budget by Year for the Court of BiH in USD

YEAR	APPROVED BUDGET
2004	2,207,590
2005	2,855,200
2006	3,530,950
2007	5,502,400
2008	6,993,420
2009	7,092,010
2010	8,238,060
2011	8,169,970
2012	9,499,390
2013	10,604,300
Total	64,693,290

⁶¹ Court of Bosnia and Herzegovina, Registry (2012), p. 77.

Table 5.4: Total International Contribution for the Hybrid Tribunal in BiH in USD

YEAR	BIH COURT	PROSECUTOR'S OFFICE
2004	97,525	58,409
2005	3,019,850	2,787,270
2006	3,417,220	4,085,880
2007	2,818,720	3,590,990
2008	2,926,020	3,864,540
2009	2,526,800	3,173,530
2010	1,814,260	1,855,230
2011	1,464,600	2,135,640
2012	1,149,160	1,973,500
Total	19,234,155	23,524,989



Sierra Leoneans watch television coverage of the Special Court for Sierra Leone on the day of the Charles Taylor verdict, April 26, 2012. The Special Court's outreach and public affairs section sponsored the outdoor event, which took place at the site of mass graves near the village of Mathiri in Port Loko District, Sierra Leone. (SCSL)

Conclusion

This report describes the experiences of establishing and implementing a hybrid tribunal or mixed chambers in five contexts. Hybrid tribunals blend national justice practices and international expertise and bring together national and foreign legal professionals, who together apply international human rights law and fair trial norms in a domestic legal process vested with the authority and jurisdiction to address impunity. These hybrid mechanisms can encourage new and enhance existing cooperation among states and within the broader international community in the enforcement of international criminal law. Their success can also galvanize efforts to raise funds to finance all these activities.

In many of the countries where hybrid courts are created, state institutions are largely in a state of collapse and resources are limited. Years of war have often left the national court systems severely weakened or nonoperational. The local judiciary often lacks the capacity to investigate and try cases, especially cases involving international crimes, and can rarely provide the minimum guarantees of impartiality that are needed to render justice fairly. In these contexts, hybrid tribunals may offer one of the only feasible judicial options for achieving accountability for mass crimes and a degree of justice for victims.

Given the reality of the situation on the ground, establishing a hybrid tribunal gives rise to numerous challenges at almost every stage, from startup, to the initiation of investigations, to prosecutions, and ultimately to trial, judgment, and sentencing. Adequate funding, from the tribunal's earliest phases onward, and a well-defined prosecutorial strategy for deciding what cases to pursue and when are particularly important. Proximity and local feedback at each step of the way can also help strengthen the court's legitimacy among victims, victims' groups, and the general population.

To ensure that hybrid courts operate as effectively as possible, a number of basic protocols should be in place. There must be rigorous standards for selecting staff. In particular, these standards should establish minimum criteria for judges and prosecutors that ensure they are capable of rendering justice in a fair and competent way and are independent and free of political influence. These criteria should also require, wherever possible, that judges and prosecutors have experience in criminal law and humanitarian law and a minimum level of professional seniority. The recruitment process should be transparent and should be implemented in an efficient manner to avoid delays in investigations and trials. Positions should be well compensated in order to attract the best professionals. (This principle should apply to investigators, registry staff, and other support staff.)

Prosecutors should have the freedom to establish a prosecutorial strategy that fulfills the mandate of the tribunal. The court should provide robust witness protection and support services that guarantee the safety and well-being of witnesses and victims, since their participation is vital. The court should rely on diverse funding sources, which offer some protections against various networks that may be building up in and around the court and that fuel cronyism and corruption.

Above all, the court must have the support of the country's population, political actors, and judiciary. Broad cooperation and collaboration during negotiations around the establishment of a hybrid tribunal can help to build that support. With broad support from both national authorities and the international community, a hybrid justice mechanism can address impunity, expand the reach of justice, and provide important lessons for the international criminal justice and transitional justice fields.

Appendix A

AFRC Case Involving Alex Tamba Brima, Ibrahim Bazy Kamara, Santigie Borbor Kanu

INITIAL INDICTMENTS	TRIAL OPENS	PROSECUTION RESTS	TC DECISION ON MOTION OF DISMISSAL	DEFENSE OPENS	DEFENSE CLOSES	CLOSING ARGUMENTS	JUDGMENT
March 7, 2003: Alex Tamba Brima May 29, 2003: Ibrahim Bazy Kamara September 16, 2003: Santigie Borbor Kanu	March 7, 2005 Lasts eight months	November 21, 2006 Called 59 witnesses	March 31, 2006	June 5, 2006	October 26, 2006 Called 87 witnesses	December 7-8, 2006 Trial Chamber sat for 176 trial days.	June 20, 2007 Three defendants found guilty. Sentenced on July 19, 2007 Appeals Chamber upheld convictions February 22, 2008

NOTE: The indictment filed against Johnny Paul Koroma (and Interpol's red notice) still remains outstanding, although he has been declared dead.

CDF Case Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa

INITIAL INDICTMENTS	TRIAL OPENS	PROSECUTION RESTS	TC DECISION ON MOTION OF DISMISSAL	DEFENSE OPENS	DEFENSE CLOSES	CLOSING ARGUMENTS	JUDGMENT
Samuel Hinga Norman indicted on March 7, 2003 Moinana Fofana and Allieu Kondewa indicted three months later on June 26, 2003	June 3, 2004	July 14, 2004 75 witnesses	October 21, 2005	January 19, 2006	October 18, 2006 44 witnesses	November 28-30, 2006	August 7, 2007 found Fofana and Kondewa guilty. However, the lone Sierra Leonean judge refused to convict. May 28, 2008 Appeals chamber confirmed the judgment and increased the sentences.

NOTE: Samuel Hinga Norman died before the pronouncement of the judgment.

RUF case against Issa Hassan Sesay, Morris Kallon and Augustine Gbao

INITIAL INDICTMENTS	TRIAL OPENS	PROSECUTION RESTS	TC DECISION ON MOTION OF DISMISSAL	DEFENSE OPENS	DEFENSE CLOSES	CLOSING ARGUMENTS	JUDGMENT
Issa Hassan Sesay and Morris Kallon indicted on March 7, 2003. Augustine Gbao indicted on April 16, 2003.	July 5, 2004	August 2, 2006 76 witnesses, including 3 experts	October 25, 2006	May 3, 2007 (Sesay defense) April 10, 2008 (Kallon defense) June 2, 2008 (Gbao)	March 13, 2008 Additional testimony of Former President Kabbah on May 16, 2008, as a witness called by Sesay. Kallon case concluded May 20, 2008. June 24, 2008 (Gbao). 90 witnesses	August 4-5, 2008	February 25, 2009 Three defendants found guilty.

NOTE: Foday Sankoh's and Sam Bockarie's indictments withdrawn when confirmed dead.

Charles Taylor Case

INDICTMENT	TRIAL OPENS	PROSECUTION RESTS	TC DECISION ON MOTION OF DISMISSAL	DEFENSE OPENS	DEFENSE CLOSES	CLOSING ARGUMENTS	JUDGMENT
<p>March 7, 2003 (under seal). June 4, 2003 (indictment unveiled) March 16, 2006 (amended indictment reducing counts)</p>	<p>June 4, 2007 Charles Taylor dismissed his legal team and boycotted proceedings. Trial did not resume until January 7, 2008.</p>	<p>January 30, 2009 Witness testimony ends. Prosecution re-opened case on August 5, 2010. 100 witness testimonies.</p>	<p>May 4, 2009 the Trial</p>	<p>July 13, 2009 Charles Taylor called to testify on July 14, 2009. 20 additional witnesses.</p>	<p>November 12, 2010</p>	<p>March 9-11, 2011</p>	<p>April 26, 2012 finding Taylor guilty on all 11 counts for planning and for aiding and abetting. Charles Taylor sentenced on May 30, 2012.</p>

Appendix B

Provisions Describing Nomination Processes

Bosnia and Herzegovina War Crimes Chamber^a	<p>Announcement of Judicial and Prosecutorial Posts</p> <p style="text-align: center;">Article 26: Appointment Procedure</p> <p>The Council shall regulate the appointment procedure in its rules of procedure and may require the use of standard application material.</p> <p style="text-align: center;">Article 27: Public Announcement</p> <p>A public announcement of vacant positions, conducted by the Council, shall precede the appointment of judges, including court presidents, prosecutor and deputy-prosecutors in the Court of Bosnia and Herzegovina, Appellate Court of Brčko District, Basic Court of Brčko District and Prosecutor’s Office of Brčko District. The announcement shall be published throughout Bosnia and Herzegovina, in a manner determined by the Council.</p> <p style="text-align: center;">Article 28: Nomination Panel</p> <p>The President of the Council shall appoint a nomination panel consisting of no less than three (3) members. The nomination panel shall rank the applicants for the vacant post based upon merit, fitness, and qualifications and present its list of candidates and recommendation to the Council.</p> <p>Article 29: Competitive Examination</p> <p>The Council may conduct a competitive examination of applicants. The examination shall test the applicants’ qualifications pursuant to the criteria stipulated in Article 33 below and may inquire information on the following substantive topics:</p> <ol style="list-style-type: none">1. Constitutional law of Bosnia and Herzegovina;2. Criminal law;3. Criminal procedure;4. Civil law;5. Civil procedure;6. Administrative law and procedure;7. European Convention on Human Rights and Fundamental Freedoms and other international human rights documents, treaties and agreements to which BiH is a party;8. Ethical principles for conducting judicial or prosecutorial functions; and9. Other matters relevant to the post. <p>The competitive examination may be in the form of a written and/or an oral examination. In case a written examination is conducted, the Council shall ensure that it is carried out in a way to preserve the anonymity of the applicants.</p> <p style="text-align: center;">Article 30: Interviews</p> <p>Interviews shall assist in determining an applicant’s ability to perform judicial or prosecutorial functions.</p> <p>In case of conducting of a competitive examination, the Nomination Panel shall interview all applicants who have successfully passed the examination.</p>
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Extraordinary Chambers in the Courts of Cambodia^p

Article 10 new

The judges of the Extraordinary Chambers shall be appointed from among the currently practicing judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral

character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

Article 11 new

The Supreme Council of the Magistracy shall appoint at least seven Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least five individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint five sitting judges and at least two reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of each Chamber may, on

a case-by-case basis, designate one or more reserve foreign judges already appointed

by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

Article 12

All judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers. Each judge under this law shall be appointed for the period of these proceedings.

Article 13

Judges shall be assisted by Cambodian and international staff as needed in their offices. In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary and, with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of

Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges. Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

<p>Sierra Leone^c</p>	<p>1. The Special Court shall be composed of a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Court, the Secretary-General, or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.</p> <p>2. The Chambers shall be composed of no fewer than eight independent judges and no more than eleven such judges who shall serve as follows:</p> <p>(a) Three judges shall serve in the Trial Chamber where one shall be appointed by the Government of Sierra Leone and two judges appointed by the Secretary-General, upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;</p> <p>(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;</p> <p>(c) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.</p> <p>3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.</p>
<p>Special Tribunal for Lebanon^d</p>	<p>5.(a) Lebanese judges shall be appointed by the Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list of twelve persons presented by the Government upon the proposal of the Lebanese Supreme Council of the Judiciary;</p> <p>(b) International judges shall be appointed by the Secretary-General to serve as Pre-Trial Judge, a Trial Chamber Judge, an Appeals Chamber Judge or an alternate judge, upon nominations forwarded by States at the invitation of the Secretary-General, as well as by competent persons;</p> <p>(c) The Government and the Secretary-General shall consult on the appointment of judges;</p> <p>(d) The Secretary-General shall appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.</p>

For judiciary in East Timor**Article 8: Review of application**

8.1 Upon public announcement by the Transitional Administrator, the Commission shall receive and review individual applications of legal professionals of East Timorese origin for provisional service in judicial or prosecutorial office.

8.2 Before determining an application, the Commission shall conduct an interview with each candidate.

Article 9: Selection criteria

9.1 To apply for judicial or prosecutorial office, candidates shall submit their application directly to the Chairperson or through any UNTAET office in East Timor. The application shall contain the Commission's application form, a copy of the university diploma, and any additional documents, which may be necessary to certify relevant professional experience. The candidate shall be free to attach a letter of recommendation to the application.

9.2 It is mandatory that candidates have completed their legal training and hold a university degree in law, by a recognized university.

9.3 In addition, the Commission shall be guided by the following criteria:

Legal competence, taking into consideration academic qualifications;

Relevant experience in a legal profession or as a civil servant;

Moral integrity and standing within the community.

9.4 The candidates shall make a declaration that in case of appointment they will take residence in East Timor.

9.5 The Commission may recommend additional selection criteria to the Transitional Administrator.

Article 10: Recommendation by the Commission

10.1 Upon completion of the review process, the members of the Commission shall comment, in writing, on the applications reviewed. In case of non-consideration, the comments shall be made available to the candidate.

10.2 In selecting candidates, the Commission should strive for consensus. If this is not possible, however, the Commission may only recommend a candidate who obtained the votes of three members.

10.3 The Chairperson shall subsequently recommend the selected candidate, in writing, to the Transitional Administrator for appointment to judicial or prosecutorial office.

(continued)

Article 11: Appointment of judges and prosecutors

11.1 The Transitional Administrator shall appoint candidates to judicial or prosecutorial office, taking closely into consideration the recommendations of the Commission pursuant to section 10.3 of the present regulation.

11.2 The recommendation shall not prejudice the Transitional Administrator's final authority to reject a candidate recommended by the Commission, on grounds related to the fulfillment of the mandate given UNTAET under Security Council resolution 1272 (1999). The Transitional Administrator shall inform the Commission of such rejection in writing.

11.3 Upon appointment, the Transitional Administrator shall receive the following oath or solemn declaration from each judge and prosecutor:

"I swear (solemnly declare) that in carrying out the functions entrusted to me as a judge/prosecutor, I will perform my duties independently and impartially. I will, at all times, uphold the law and act in accordance with the dignity that the performance of my functions requires.

I will carry out my functions without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or all other status."

11.4 Upon completion of the oath, each judge and prosecutor shall submit a signed copy of the above declaration to the Transitional Administrator.

^a Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, 15/02.

^b Law on the Establishment of the Extraordinary Chambers.

^c Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 1.

^d Statute of the Special Tribunal for Lebanon.

^e UN Transitional Administration in East Timor (1999b).

Appendix C

Table C.1: Staff Breakdown at the Special Court for Sierra Leone

DATE	NUMBER OF INTERNATIONAL STAFF	NUMBER OF NATIONAL STAFF	TOTAL NUMBER OF STAFF	PERCENTAGE INTERNATIONAL/NATIONAL
As an active court				
January 17, 2005	127	160	287	44/56
December 1, 2005	136	179	315	43/57
December 31, 2006	134	172	306	44/56
February 29, 2008	163	199	362	45/55
June 1, 2008–May 31, 2009	114	168	282	40/60
April 30, 2010	72	124	196	37/63
March 31, 2011	44	41	85	52/48
May 31, 2012	43	36	79	54/46
May 31, 2013	40	37	77	52/48
As a residual mechanism				
2014	35	15	50	70/30
2015	29	28	57	51/49
2016	25	28	53	47/53
2017	26	25	51	51/49

SOURCES: Official annual reports issued by the Special Court for Sierra Leone and its Residual Mechanism from 2005 through 2017.

Table C.2: Staff Breakdown at the Extraordinary Chambers in the Courts of Cambodia

DATE	NUMBER OF INTERNATIONAL STAFF	NUMBER OF NATIONAL STAFF	TOTAL	PERCENTAGE INTERNATIONAL/NATIONAL
2011	168	311	479	35/65
2012	176	292	468	38/62
2013	169	283	452	37/63
2014	159	182	341	47/53
2015	162	185	347	47/53
2016	160	185	345	46/54
2017	158	183	341	46/54
2018 projected	131	160	291	45/55
2019 projected	85	130	215	40/60

SOURCES: Official budget reports issued by ECCC from 2004 through 2018.

Table C.3: Staff Breakdown at the Special Tribunal for Lebanon

YEAR	TOTAL NUMBER OF STAFF	LEBANESE STAFF	BEIRUT OFFICE STAFF	PERCENTAGE MALE/FEMALE	NUMBER OF COUNTRIES REPRESENTED
2009-10	276 (10% Lebanese)	27	Not yet open	36/64	59
2010-11	334	n/a	63	35/65	62
2011-12	362 (14% Lebanese)	50	62	40/60	62
2012-13	393 (14% Lebanese)	54	66	41/59	59+
2013-14	394 (15% Lebanese)	58	60	41/49	60+
2014-15	447 (14% Lebanese)	64	60	46/54	63+
2015-16	456 (15% Lebanese)	69	64	46/54	64+
2016-2017	434 (15% Lebanese)	69	67	45/55	64
2017-2018	415 (16.4% Lebanese)	68	64	45.5/54.5	65

SOURCE: Official annual reports of the Special Tribunal for Lebanon, years 2010-2011 through 2017-2018.

Appendix D

Table D.1: Total Budget Allocation for the Special Court for Sierra Leone in USD

Date	Allocation
1 July 2002-30 June 2003	19,407,120
1 July 2003-30 June 2004	32,534,571
1 July 2004-30 June 2005	29,963,680
1 July 2005-31 December 2006	42,435,600
2007	36,003,900
2008	36,124,200
2009	28,385,150
2010	22,993,200
2011	16,013,400
2012	15,423,800
2013	13,078,840
2014	2,128,700
2015	3,454,000
2016	3,596,300
2017	2,980,500
Total expenditure	304,522,961

SOURCE: The budget figures were reported by the finance and budget officer of the Residual Special Court for Sierra Leone. See also Wierda and Triolo (2012), p. 125.

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