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# BLUEPRINT FOR A SINGLE RESIDUAL MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

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## Executive Summary

Three decades after the United Nations Security Council (UNSC) established the first *ad hoc* international criminal tribunal under Chapter VII of the Charter of the United Nations (UN), attention has turned to whether, and how, to consolidate the core residual functions of existing and future *ad hoc* and hybrid tribunals under a single institution. Such a consolidated institution could benefit the international community by encouraging convergences in understandings and applications of international law, and by ensuring a degree of continuity for tribunals regardless of their funding arrangement or political visibility, all while promoting increased organizational and cost efficiencies. This paper provides a comprehensive analysis of the costs and benefits of establishing a single residual mechanism, and discusses how different institutional models could help realize these goals.

The paper defines the tribunals' "core residual functions" as archival management, victim and witness protection, sentence enforcement, and protecting and promoting the legacies of the tribunals, and considers a prosecutorial mandate as a potential additional function. Analyzing five tribunals that have entered their residual phase, the paper examines the legal, political, and administrative considerations associated with establishing a single residual mechanism. Issues under consideration include what should be the legal means of forming the single residual mechanism (taking into account the political complications of giving the mechanism the mandate to prosecute indictees captured after the tribunal's transition into residual functions), the level of political support necessary to ensure the sustainability of the single residual mechanism, and practical questions such as which law should apply, where the mechanism should be established, how personnel should be trained, and the consolidation's impact on the populations affected by the atrocities.

The paper then explores three structural proposals for a permanent residual mechanism based on the above considerations. All proposed models would undertake the core residual functions and aim to include all *ad hoc* and hybrid tribunals currently in existence and to be formed in the future. The models vary in the extent to which they can exercise prosecutorial powers and the level of political support they would require in their establishment. The proposals include, in descending order of institutional complexity: (1) an international organization with an independent mandate to prosecute apprehended indictees, (2) an office under the UN Secretariat that would provide staff and resources to conduct trials under

the tribunals' charters using an "accordion model" that can expand personnel and capabilities as needed for prosecutions, and (3) an administrative division that would only undertake the tribunals' core residual functions. While the first model would further efforts of justice under due process by accommodating prosecution of apprehended indictees, establishing a new international organization with an independent prosecutorial mandate may be politically unviable. The second model would not have an independent prosecutorial mandate, can be more easily formed under the UN Secretariat, and would facilitate prosecutions under the tribunals' existing mandates. Its unique structure, however, would also raise complex jurisdictional and operational questions. The third model would be the least politically controversial and would provide permanent support to tribunals' residual functions, but would also require all indictees to be transferred to national jurisdictions for trial, regardless of any fairness and due-process considerations. We thus conclude that the single residual mechanism will be shaped by the policy preferences of the international community.

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# BLUEPRINT FOR A SINGLE RESIDUAL MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

## I. Introduction

One of the world’s most-wanted genocide fugitives, Fulgence Kayishema, was arrested on May 24, 2023 through a joint operation by the International Residual Mechanism for Criminal Tribunals (IRMCT) Office of the Prosecutor Fugitive Tracking Team and the South African authorities.<sup>1</sup> Kayishema had been indicted by the United Nations International Criminal Tribunal for Rwanda in 2001 on charges of genocide, crimes against humanity, and other crimes committed in the Kibuye Prefecture during the 1994 Genocide against the Tutsi in Rwanda.<sup>2</sup> In reaction to Kayishema’s arrest, IRMCT Chief Prosecutor Serge Brammertz declared: “This arrest is a tangible demonstration that [the international community’s] commitment [to the prosecution of genocide] does not fade and that justice will be done, no matter how long it takes.”<sup>3</sup> Twenty-nine years after the commission of the crimes in question, and seven years after it took over the ICTR’s mandate, the IRMCT continues to play an active role in the capture and prosecution of indicted fugitives.

Since the conclusion of the Second World War, we have lived in a world formally committed to pursuing international criminal justice. In the 1990s and 2000s in particular, the international community supported and funded the creation of numerous *ad hoc* and hybrid criminal tribunals through the United Nations. As distinct from the International Criminal Court (ICC), these tribunals are jurisdictionally and, typically, temporally limited to “determine individual criminal responsibility” for crimes committed during specific atrocities.<sup>4</sup> This memorandum focuses on five international *ad hoc* and hybrid tribunals that the

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<sup>1</sup> Press Release, *ICTR Fugitive Fulgence Kayishema Arrested*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (May 25, 2023), available at <https://www.irmct.org/en/news/ictr-fugitive-fulgence-kayishema-arrested>.

<sup>2</sup> Press Release, *ICTR Fugitive Fulgence Kayishema Arrested*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (May 25, 2023), available at <https://www.irmct.org/en/news/ictr-fugitive-fulgence-kayishema-arrested>.

<sup>3</sup> Press Release, *ICTR Fugitive Fulgence Kayishema Arrested*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (May 25, 2023), available at <https://www.irmct.org/en/news/ictr-fugitive-fulgence-kayishema-arrested>.

<sup>4</sup> Remarks by Peter Tomka, *Confronting Complexity in The Hague: The View from the Courts and Tribunals*, 106 AMERICAN SOCIETY OF INTERNATIONAL LAW AND PROCEDURE 193, 196 (2012).

United Nations has created to address crimes of significance to the international community: the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).<sup>5</sup>

The international community's commitment to prosecuting international crimes has not been without its constraints. Since the creation of the first *ad hoc* tribunals in the 1990s, experts in the field have been grappling with the question of how to conclude the tribunals' mandates now carried by the IRMCT. All five of the aforementioned tribunals have now transitioned to assuming residual functions, in most cases through a newly created entity, with the aim of carrying out the "enduring tasks of on-going legal and moral obligations" related to prosecuting crimes of significance to the international community.<sup>6</sup> While diplomatic statements often support these international tribunals' work, uncertainty about their lifespan has led to constant pressure to reduce funds and to consolidate.<sup>7</sup> The lack of a considered roadmap on how to reduce costs while still preserving the IRMCT's crucial residual work has provided arguments for critics of international tribunals. This uncertainty has also led to the premature transition of one tribunal, the Special Tribunal on Lebanon, to residual-mechanism phase, as its funding ran out before it had even begun prosecutions.

This memorandum examines the feasibility of creating a single residual mechanism that would take over the residual responsibilities of current and future *ad hoc* and hybrid tribunals after their main prosecutorial functions have concluded. The memorandum first examines the dual goals of establishing a permanent residual mechanism: promoting justice and ensuring efficiency. In the third section, the memorandum defines a single residual mechanism's core residual functions, namely, archive management, victim and witness protection, sentence enforcement, and protecting and promoting the tribunal's legacy. The fourth section reviews the five aforementioned tribunals to provide a basis to discuss the

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<sup>5</sup> See Section VII below for a brief discussion of other entities established by the United Nations to create accountability for international crimes.

<sup>6</sup> Dafna Gozani, *Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court*, 36 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW 331, 337 (2015).

<sup>7</sup> See, e.g., Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 541, 543 (2004).

benefits of, and challenges facing, a single residual mechanism. The fifth section delves into four considerations for the creation of a permanent residual mechanism: legal questions, political considerations, prosecutorial powers, and administrative concerns. The memorandum then presents three proposed models for a single residual mechanism, discussing their relative strengths and weaknesses in light of the dual-purpose perspective outlined above. The memorandum ends by addressing areas of further inquiry, such as the incorporation of other international criminal justice entities like investigative mechanisms.

Our observations below are drawn primarily from a series of conversations with nearly a dozen experts from the PILPG network with extensive experience in international criminal justice, many of whom have worked at one or more international criminal tribunals, and many of whom still engage in activities related to those tribunals' current residual mechanisms. A non-exhaustive list of consulted individuals is appended to this memorandum. We explained to the interview subjects that we would include their impressions in this memorandum on a non-attribution basis.

## **II. Why Create a Single Residual Mechanism?**

The first prosecutions of international crimes in history occurred in the aftermath of the Second World War. The Nuremberg Trial was established in Germany in 1945 as the state was in the process of reconstituting civic institutions and disengaging from its recent totalitarian past.<sup>8</sup> The Tokyo Trial followed shortly after in 1946 and was largely modeled after the German experience.<sup>9</sup> Nearly fifty years went by before the international community established other entities aimed at prosecuting atrocity crimes. The next tribunals were the ICTY and the ICTR, *ad hoc* tribunals created in the early 1990s to address the situations in the former Yugoslavia and Rwanda.<sup>10</sup> These *ad hocs* and subsequent hybrid tribunals were established when the international community perceived a need for

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<sup>8</sup> *Evolution of International Criminal Justice*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> (last visited Oct. 26, 2023).

<sup>9</sup> *Evolution of International Criminal Justice*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> (last visited Oct. 26, 2023).

<sup>10</sup> *Evolution of International Criminal Justice*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> (last visited Oct. 26, 2023).



a criminal tribunal that could tackle the prosecution of alleged perpetrators of international crimes in the context of a specific conflict.<sup>11</sup>

Many considerations can contribute to the decision to set up an international entity to punish the alleged “core international crimes” (e.g., genocide, crimes against humanity, and war crimes) perpetrated during a conflict, even when the states involved have local judicial systems in place. Domestic prosecution of atrocity crimes might be unlikely due to the political or ongoing conflict environment in the relevant state, domestic legislation perhaps lacks the proper framework to achieve individual accountability for international crimes, or the state might seek the help of the international community in its quest for justice with regards to a particular conflict in its past.<sup>12</sup> For instance, the ICTY was created while conflict still raged in the former Yugoslavia, making domestic prosecutions very unlikely.<sup>13</sup> The ECCC, by contrast, was set up several decades after the Cambodian Genocide ended, when the Cambodian government asked then-UN Secretary-General Kofi Annan and the international community to assist Cambodia in bringing to justice those responsible for atrocity crimes committed under the Khmer Rouge.<sup>14</sup>

In addition, in regions where recent conflicts have exposed deep sectarian divides across society, the involvement of international tribunals may help reduce concerns of due process. They may enhance the perceived legitimacy of any criminal proceedings by bringing in international standards for investigation and

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<sup>11</sup> *Ad Hoc Tribunals: 29-10-2010 Overview*, INTERNATIONAL COMMITTEE OF THE RED CROSS (June 29, 2010), available at <https://www.icrc.org/en/doc/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>.

<sup>12</sup> John Bellinger Bellinger III, *International Courts and Tribunals and the Rule of Law*, U.S. Dep’t State Archive (May 1, 2005), available at [https://2001-2009.state.gov/s/l/rls/73080.htm#\\_ftnrefl](https://2001-2009.state.gov/s/l/rls/73080.htm#_ftnrefl).

<sup>13</sup> ICTY MANUAL ON DEVELOPED PRACTICES, ICTY & UNICRI (2009), available at [https://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY\\_Manual\\_on\\_Developed\\_Practices.pdf](https://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf).

<sup>14</sup> Hans Corell, *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*, UNITED NATIONS (June 6, 2003), available at <https://legal.un.org/avl/ha/abunac/abunac.html>.

prosecution, as well as an impartial and skilled international staff with existing procedural and substantive expertise.<sup>15</sup>

Today, despite the existence of the International Criminal Court (ICC), conflict-specific tribunals still serve an important function. The ICC may only exercise jurisdiction over a conflict where the relevant state is a party to the Rome Statute (the treaty that established the court) or otherwise accepts the ICC's jurisdiction, or where the situation is referred to the ICC by the UNSC.<sup>16</sup> Significantly, the ICC lacks jurisdiction in most cases over the crime of aggression due to a complex jurisdictional system.<sup>17</sup> An *ad hoc* or hybrid tribunal can also more easily build regional and cultural expertise in interacting with victims and witnesses, and the tribunal's mandate can more easily incorporate aspects of domestic law and ensure the hiring of judges and lawyers who are familiar with such law.<sup>18</sup> And, while the ICC is designed to prosecute only the most-responsible actors in a given conflict, *ad hoc* or hybrid tribunals are empowered to prosecute a broader range of perpetrators, as the situation demands. Despite the important role that the ICC fills in promoting international criminal justice, *ad hoc* and hybrid tribunals will likely continue to be created as needed where the ICC would be an unsuitable venue for a given situation; and these tribunals will ultimately exist in some residual form to carry out continuing core functions (*e.g.*, archival

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<sup>15</sup> James Meernik, *Victor's Justice or the Law?: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47(2) J. CONFLICT RESOL.140 (Apr. 2003), available at <http://www.jstor.org/stable/3176164>.

<sup>16</sup> *Rome Statute*, arts. 13(b) and 15ter para. 1, available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

<sup>17</sup> For a helpful discussion of the jurisdictional system applicable to the crime of aggression under the Rome Statute, see Jennifer Trahan, *The Need to Reexamine the Crime of Aggression's Jurisdictional Regime*, JUST SECURITY (Apr. 4, 2022), available at <https://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/>.

<sup>18</sup> For example, Prosecutor Brammertz of the IRMCT recently noted that “[i]n Bosnia and Herzegovina, Croatia, and Serbia, there [were] still more than 3,000 suspected perpetrators of war crimes, crimes against humanity, and genocide to be investigated and prosecuted,” and he further highlighted that his office’s “evidence collection contains more than 11 million pages of testimony, reports and records that national prosecutors need. [The office’s] staff have expert knowledge of the crimes and the perpetrators. That is reflected in the number of requests for assistance [the office] receive[s] each year.” U.N. SCOR, 77th year, 9062nd mtg., U.N. Doc./PV.9062 (June 14, 2022), available at <https://digitallibrary.un.org/record/3977470?ln=en> (Prosecutor S. Brammertz’s remarks).

management, witness/victim protection), after they have completed their primary obligations.

The following sections explore how a single residual mechanism might best serve the international community in continuing to uphold the initial purposes of the tribunals it absorbs, while streamlining organizational and cost efficiencies. Many of the experts we talked to were initially skeptical of forming a single residual mechanism, asking whether efforts should be channeled towards consolidation in the name of cost-saving, or instead towards fund-raising in the name of promoting justice. Their criticisms pointed to a potential overemphasis on organizational or cost efficiencies, which could hamper the ability of a single residual mechanism to appropriately differentiate systems to fit the purposes of the original tribunals or to properly finance necessary programs. While we note the importance of these criticisms, we do not see the establishment of a single residual mechanism as a net negative for the goal of justice, so long as a proper balance is struck such that increased efficiencies complement the promotion of justice.

#### A. *Promotion of Justice*

As an initial point, we would like to ground the purpose of this memorandum firmly in promoting justice for the victims of the unimaginable atrocities that *ad hoc* and hybrid tribunals are established to address. While cost efficiency is a self-evident concern to political stakeholders, the importance of pursuing justice and ending impunity for international crimes is a goal that requires tireless advocacy from individuals working in the field. *Ad hoc* and hybrid tribunals work closely with victims and witnesses, build close relationships with affected communities, and demonstrate exemplary commitment to justice and preservation of peace in ways that cannot be quantified with a budget. Promotion of justice recenters the policy goals of a single residual mechanism whenever efficiency goals risk overconsolidation.

In many ways, however, a single residual mechanism's efficiency goal goes hand-in-hand with its goal of promoting justice. A single residual mechanism can provide a permanent home for the residual functions of current *ad hoc* and hybrid tribunals, and streamline political negotiations by providing a predetermined conclusion to these tribunals' work. It can also advocate for a nuanced approach to the treatment of different *ad hoc* and hybrid tribunals, which have different histories, legacies, relationships, and functions for their communities. Additionally, the mechanism can provide tools and procedural rules that can serve

as models for future *ad hoc* and hybrid tribunals. It can also serve as a permanent receptacle for the preservation of institutional understanding, an advocate and promoter of the legacies of *ad hoc* and hybrid tribunals, a stable budget to support the preservation of archives, and a new permanent institution in the international criminal field that can contribute to jurisprudence and visibility of atrocities suffered by communities across the world. Without a single residual mechanism to act as a designated conduit for these goals, these priorities may continue to go unrealized under the current international criminal justice system.

### *B. Increasing Efficiencies*

At first glance, the efficiency-related advantages of creating a single residual mechanism are manifold. Such a mechanism offers opportunities for streamlining both the operational costs and organizational structures of the existing *ad hoc* and hybrid tribunals, as well as creating a system into which future tribunals can easily fit. Despite these opportunities, however, nuances between tribunals might be lost if organizational efficiency is overemphasized, and promoting justice for its own sake could harm the overall project, if cost efficiencies are over-prioritized.

In theory, a single residual mechanism could improve cost efficiencies by consolidating management and protection of multiple archival systems under one team, and by minimizing expenditures on real estate for the existing residual mechanisms. An existing precedent for these principles exists in the IRMCT, which assumed the core residual functions of the ICTY and the ICTR. The IRMCT has created efficiencies in staffing by establishing one president and one registrar across both former tribunals, as well as a single roster of judges from which panels can be drawn to adjudicate matters arising from either former tribunal. The IRMCT has continued to successfully prosecute cases under such a model.

At the same time, however, the IRMCT's operations do not demonstrate that consolidation will necessarily lead to reduced spending on tribunals, and the unique circumstances leading to its creation makes it a complicated precedent for the consolidation of current and future tribunals. Today, the IRMCT still has headquarters in both The Hague, Netherlands, and Arusha, Tanzania, where the ICTY and the ICTR were based, and it retains staff with the linguistic and cultural knowledge appropriate to each former tribunal. Whether it has achieved real-estate and staffing efficiencies is therefore arguable. Additionally, although the IRMCT oversaw the successful capture of numerous fugitives wanted for international

crimes, the expense of prosecuting Rwandan suspected *génocidaire* Félicien Kabuga at the age of 88 has drawn efficiency-related criticism. Tellingly, Mr. Kabuga was declared unfit to stand trial in June 2023, and an “alternative finding procedure” that cannot lead to a conviction was ordered as a continuation of the proceedings.<sup>19</sup> The Appeals Chamber upheld the finding of incompetence but rejected the suggestion of an alternative finding mechanism.<sup>20</sup> To be truly cost-efficient, then, any single residual mechanism will also have to take into account the best ways to address its predecessor tribunals’ current cost inefficiencies and any related procedural criticisms.

The extent to which the IRMCT can provide a useful operational precedent for a more comprehensive single residual mechanism is also questionable due to the unique circumstances that gave rise to its creation. The IRMCT was established by a UNSC Resolution under the powers found in Chapter VII of the United Nations Charter to consolidate the operations of two Chapter VII tribunals, the ICTY and the ICTR.<sup>21</sup> These two tribunals were both international in nature (as opposed to hybrid courts) and operated under remarkably similar statutes that did not rely on national legislation for the most part. This enabled having a single roster of judges. As the IRMCT derives its power from Chapter VII, states have an obligation to assist the IRMCT, unlike other hybrid tribunals established through other means. As a UNSC mechanism, its budget is provided from the overall UN budget.

In contrast, tribunals with very different structures may have a far more difficult time transitioning into a single residual mechanism alongside one another. It is unclear whether consolidating hybrid tribunals with dissimilar substantive laws would allow for a single roster of judges or prosecutors, especially given the importance of domestic law in the statutes of the STL and the ECCC. Even sharing archival maintenance could prove difficult, given the unique structures and systems they were built on and the high cost of converting them all to a single system. Such a conversion could give rise to confidentiality concerns for active

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<sup>19</sup> *Prosecutor v. Kabuga*, Case No. MICT-13-38-T, Further Decision on Félicien Kabuga’s Fitness to Stand Trial, paras. 57, 59 (June 6, 2023), available at [https://www.irmct.org/sites/default/files/case\\_documents/2023-06-06-EN-Further-Decision-on-Felicien-Kabuga-Fitness-to-Stand-Trial.pdf](https://www.irmct.org/sites/default/files/case_documents/2023-06-06-EN-Further-Decision-on-Felicien-Kabuga-Fitness-to-Stand-Trial.pdf).

<sup>20</sup> *Rwanda Genocide Suspect Kabuga Should Not Face Trial, UN Judges Say*, ALJAZEERA (Aug. 7, 2023), available at <https://www.aljazeera.com/news/2023/8/7/rwanda-genocide-suspect-kabuga-should-not-face-trial-un-judges-say>.

<sup>21</sup> U.N. Charter arts. 39–51.

archives and require multiple complicated information-sharing agreements, although this might be less of a problem for “dormant” archives (e.g., the archives of the International Military Tribunal at Nuremberg, which concluded its major prosecutions decades ago in 1946). In addition, at least one expert opined that cost savings are a weak argument for the creation of a single residual mechanism because international courts are inexpensive compared to military spending and have done much good for accountability. This expert felt that the correct approach would be to advocate for spending on courts, especially when recent international developments have shown that political willpower for the creation of international courts still exists.

As a final consideration, some experts opined that keeping the residual *ad hoc* and hybrid tribunals independent of one another has real benefits. Multiple experts spoke about the important role that the continued presence of the Residual Special Court for Sierra Leone (RSCSL) in Sierra Leone has on educating the younger generations about the conflict and deterring violence in a politically unstable region—although much of this work is done out of the RSCSL’s witness/victim protection office in Freetown, while the RSCSL now shares administrative and recruitment services with the IRMCT out of co-located building space in The Hague. One expert also pointed to the fact that the RSCSL has managed to maintain a small and operationally flexible staff of around a dozen individuals, who are able to operate at half the cost of their UN-paygrade-bound counterparts at the IRMCT; the same expert further argued that the RSCSL’s autonomy prevents the tribunal’s operations and messaging from being eclipsed by those of other tribunals. This expert also noted that a single residual mechanism built on the scale of the ICC could be too big to succeed, regardless of the quality of justice it provides.

At the same time, one expert urged us to think about efficiency not only in terms of cost, and not only in the short term. Consolidation can provide residual mechanisms with consistent income, allowing their staff to focus on their core functions rather than fundraising. It can provide permanent safety and integration to archives, preserving critical records for posterity. It can also allow knowledge-sharing and preservation of institutional understanding, which can facilitate the training of new generations of experts in international criminal justice. Additionally, while consolidating the handful of tribunals currently in existence may not present many efficiencies, *future* tribunals could be established with a view to eventually be consolidated into a permanent single residual mechanism,

which could allow for smoother integration and eventually lead to efficiencies that are not currently apparent.

### III. Scope of Residual Functions

Despite differences in origin, jurisdiction, and scope, the residual issues of the various tribunals overlap. Current residual mechanisms and academic scholarship identify many of the same tasks as core residual functions.<sup>22</sup>

Core responsibilities of residual mechanisms include the following:

- *Trials for Apprehended Fugitives.* Residual tribunals are responsible for ensuring that apprehended fugitives who evaded prosecution by an initial tribunal are prosecuted either internationally or domestically. Indeed, a residual mechanism may itself prosecute an apprehended fugitive, which typically occurs only for fugitives charged with the most serious crimes or if there are concerns that the accused would not receive a fair trial if tried before a domestic court; or a residual mechanism may refer the prosecution to a national jurisdiction, which is more often the case for lower-level fugitives. If residual mechanisms did not assume this responsibility, fugitives could wait out the charges against them until the initial tribunals closed and likely would evade the possibility of punishment.<sup>23</sup> While a national court could undertake prosecution, residual mechanisms play a vital role in assisting national prosecution offices with evidence and expert knowledge of the facts pertaining to particular conflicts.
- *Victim and Witness Protection.* Judges in the *ad hoc* and hybrid international tribunals issue protective orders for victims and witnesses, sometimes in great numbers.<sup>24</sup> Protective orders range from orders requiring

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<sup>22</sup> Our discussion of common responsibilities for residual mechanisms benefits significantly from our review of Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 17 (2010).

<sup>23</sup> Dafna Gozani, *Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court*, 36 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW 331, 338–39 (2015).

<sup>24</sup> More than 2,300 ICTR witnesses and 1,400 ICTY witnesses are subject to protective orders. Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited*

the nondisclosure of identifying information and the expunging of identifying information from a tribunal's public records, to more significant responsibilities, such as the international relocation of witnesses and their families to ensure their safety. These orders are generally implemented through a tribunal's registry, though they may also come from prosecutorial offices when issued as part of an investigation and trial, such as in the case of protective orders for informants.

Residual issues stemming from protective orders include: ensuring that victims and witnesses remain informed of recent developments, such as a convicted person's release; ensuring protective orders remain effective, or arranging for a third party to do so, and revising protective orders as necessary; serving as a contact point for national governments, such as when a national immigration authority requests information as part of an asylum request by a victim or witness; and issuing a contempt proceeding if a protective order is not respected, as has been done by the ICTY, the ICTR, and the SCSL.<sup>25</sup>

- *Sentence Enforcement.* The IRMCT, which carries out the residual functions of the ICTR and the ICTY, and the RSCSL, which carries out the residual functions of the SCSL, are generally responsible for determining whether individuals convicted by these tribunals and serving out their sentences may be granted pardons, commutation of sentence, or early release when those individuals become eligible (in accordance with the rules of the cooperating national jurisdictions where they are incarcerated). In cases where the convicted person is released under the domestic laws of the enforcement state before the international tribunal grants them release, the mechanism must find a new enforcement state. Additionally, after the acquittal or release of a defendant, the mechanism may be required to find a receiving state where the individual's state of origin is not a viable option. Residual mechanisms are also generally responsible for supervising prison conditions; the ICTR, the ICTY, and the SCSL previously supervised prison

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*International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 17 (2010).

<sup>25</sup> Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 17–18 (2010).



conditions in consultation with the International Committee of the Red Cross.<sup>26</sup>

- *Archival Management.* Residual mechanisms must store and manage the “vast amounts of public and confidential records, evidence, data and other materials in paper, electronic, audio, video, physical and other formats”<sup>27</sup> that have accumulated throughout the life of a tribunal and which continue to accumulate from the mechanism’s ongoing residual responsibilities. Archives may be consulted in appeals and trials, or for victim/witness protection and sentencing enforcement. As official records, archives also serve as a mechanism’s legacy work, which includes general education about the crimes the underlying tribunal sought to address. The confidentiality of many trial records, at least for a period of time, complicates archival management, especially when offering prosecutors, registrars, staff members, other officials, and affected populations varying degrees of access.<sup>28</sup> Vast distance between the residual mechanism and the state at issue (e.g., the RSCSL’s placement in the Netherlands) can also impose difficulties because the residual mechanism must still ensure that nationals of the affected state can access the archives.<sup>29</sup>
- *Other Functions.* Besides the above core categories, residual mechanisms may have many additional responsibilities. Other responsibilities include promoting the legacy of the tribunal, such as by translating documents of the tribunal in a manner that permits members of the affected communities to review them, or by establishing channels of communication with nonprofits

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<sup>26</sup> Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 19 (2010).

<sup>27</sup> Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 20 (2010).

<sup>28</sup> Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 20 (2010).

<sup>29</sup> Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 20 (2010).

and the media.<sup>30</sup> A broader legacy approach may also include promoting the long-term positive impact of a tribunal's work through direct outreach to affected communities.<sup>31</sup> Residual mechanisms may also assist in returning the proceeds of crime, preventing double jeopardy (*non bis in idem*) in domestic proceedings, and responding to various requests made by national authorities.<sup>32</sup> And, residual mechanisms can serve the important role of preserving peace in the jurisdiction in question. As one expert has pointed out, for instance, the continued threat of prosecution by the RSCSL is a significant deterrent of violence in Sierra Leone.

The proper scope of responsibilities for residual mechanisms is a contested matter. States, in their capacity as members of the United Nations, typically conceive of a narrower set of responsibilities for a residual mechanism than do international legal staff and academics. Huw Llewellyn, of the United Nations Office of Legal Affairs and Secretariat to the UNSC's Informal Working Group on International Tribunals, noted the history of states "meeting behind closed doors, including in the Security Council informal working group," to assert that "as many as possible of the residual functions should be 'returned' to the affected states rather than transferred to a residual mechanism."<sup>33</sup> By contrast, Llewellyn observed that international law scholars and staff typically espouse a "broad approach" to the duties of a residual mechanism, conceiving of it as a "downsized tribunal" that exists "to honor the purposes for which the tribunals were established as set out in the original Security Council resolutions, i.e., (1) to bring perpetrators to justice in accordance with fair procedures, and (2) to promote peace, security,

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<sup>30</sup> Giorgia Tortora, *The Special Tribunal for Lebanon and the Discussion of Residual Mechanisms*, 104 AMERICAN SOCIETY OF INTERNATIONAL LAW AND PROCEDURE 45, 46 (2010).

<sup>31</sup> Dafna Gozani, *Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court*, 36 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW 331, 340 (2015).

<sup>32</sup> Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 22 (2010).

<sup>33</sup> Huw Llewellyn, *The Security Council's Consideration of the Establishment of Residual Mechanisms for the International Criminal Tribunals*, 104 AMERICAN SOCIETY OF INTERNATIONAL LAW AND PROCEDURE 41, 42 (2010).

and reconciliation in the affected states.”<sup>34</sup> The expense and length of service of the initial tribunals provide at least part of the reason some states demand that residual mechanisms take on fewer responsibilities. Some point to the fact that in ten years and at an estimated cost of \$250 million, the SCSL convicted and sentenced nine men,<sup>35</sup> while the ECCC took 11 years and \$300 million to convict three men.<sup>36</sup> Others counter that the SCSL tried 22 out of 23 of the people it indicted, and convicted the former Liberian President Charles Taylor for war crimes and crimes against humanity, which is a better reference in measuring a tribunal’s success.<sup>37</sup> When considering the time frame required by the core residual functions outlined above, questions of funding and finality become more fraught. Fugitives may not be apprehended for decades, and legacy and archival functions could be of indefinite scope.<sup>38</sup>

#### IV. Overview of Existing International Criminal Tribunals

##### A. *The International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and*

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<sup>34</sup> Huw Llewellyn, *The Security Council’s Consideration of the Establishment of Residual Mechanisms for the International Criminal Tribunals*, 104 AMERICAN SOCIETY OF INTERNATIONAL LAW AND PROCEDURE 41, 42 (2010).

<sup>35</sup> Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 615, 617 (2014).

<sup>36</sup> Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, NEW YORK TIMES (Apr. 10, 2017), available at <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>. This issue is not endemic to ad hoc and hybrid tribunals alone, however. As of this report’s publication in September 2023, the ICC—a permanent court created to handle prosecutions more efficiently than its ad hoc and hybrid counterparts—notably has only presided over 10 convictions and four acquittals since its establishment in 2002, with an annual budget of €169,649,200 (approx. \$181,270,000). About the Court, International Criminal Court, <https://www.icc-cpi.int/about/the-court> (last visited Sept. 19, 2023).

<sup>37</sup> Lansana Gberie, *The Special Court for Sierra Leone Rests – For Good*, AFRICA RENEWAL (Apr. 2014), available at <https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good>.

<sup>38</sup> Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 13, 20 (2010).

*the International Residual Mechanism for Criminal Tribunals  
(IRMCT)*

The ICTY and the ICTR were created in response to the respective genocides committed in the war-torn former Yugoslavia and in Rwanda. Acting under Chapter VII of the Charter of the United Nations, the UNSC issued Resolution 827 (1993) to establish the ICTY through adoption of the Statute of the International Tribunal annexed to the Secretary-General's Report, completed pursuant to Resolution 808. Similarly, acting under Chapter VII of the UN Charter, the UNSC issued Resolution 955 (1994) to establish the ICTR through the adoption of the Statute of the International Tribunal for Rwanda annexed to the Resolution.

On December 22, 2010, acting once again under Chapter VII of the UN Charter, the UNSC issued Resolution 1966 (2010) to continue the ICTY and the ICTR as the IRMCT. The two branches of the IRMCT began operations on July 1, 2012 for the ICTR, and on July 1, 2013 for the ICTY.<sup>39</sup> Resolution 1966 adopted the Statute of the IRMCT in Annex 1 to the Resolution.<sup>40</sup> The accompanying Annex provides further details on the ICTY, the ICTR, and the IRMCT.

As of November 2023, there is currently only one ongoing case involving core crimes at the IRMCT.<sup>41</sup> That case is *Kabuga*, for which the trial began on September 29, 2022, but is suspended until completion of appeal proceedings concerning the Trial Chamber's finding that the accused was unfit to stand trial and

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<sup>39</sup> Security Council Resolution 1966, para. 1, U.N. Doc. S/RES/1966 (Dec. 22, 2010), available at <https://digitallibrary.un.org/record/695418?ln=en>.

<sup>40</sup> Security Council Resolution 1966, para. 1, U.N. Doc. S/RES/1966 (Dec. 22, 2010), available at <https://digitallibrary.un.org/record/695418?ln=en>.

<sup>41</sup> The other core crimes case that the IRMCT handled was the appeal in the case of *Stanišić and Simatović*. The Appeals Chamber delivered its judgment on May 31, 2023, dismissing Stanišić and Simatović's appeals and increasing their respective sentences to 15 years of imprisonment, see *Prosecutor v. Stanišić and Simatović*, Case No. MICT-15-96-A, Judgement (May 31, 2023), available at [https://www.irmct.org/sites/default/files/case\\_documents/IRMCT-Appeal-Judgement-Stanisic-Simatovic-ENG.pdf](https://www.irmct.org/sites/default/files/case_documents/IRMCT-Appeal-Judgement-Stanisic-Simatovic-ENG.pdf). In addition, while Mr. Kayishema was captured in May 2023 after evading arrest since 2001, he is expected to be transferred from South Africa to the IRMCT before being tried in Rwanda. See *Kayishema, Fulgence (MICT-12-23)*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, available at <https://www.irmct.org/en/cases/mict-12-23> (last visited July 3, 2023).

that proceedings should continue under an “alternative finding procedure.”<sup>42</sup> In May 2022, the Prosecutor made findings regarding the deaths of Protais Mpiranya in October 2006 and Phénéas Munyarugarama in February 2002.<sup>43</sup> Mpiranya was the last of the “major fugitives” of the ICTR.<sup>44</sup> The remaining three fugitives indicted by the ICTR remain at large, and are expected to be tried by Rwanda if and when apprehended.<sup>45</sup>

*B. The Special Court for Sierra Leone (SCSL) and the Residual Special Court for Sierra Leone (RSCSL)*

The SCSL was established in the immediate aftermath of the Sierra Leone Civil War to investigate and prosecute under international and Sierra Leonean law those persons who bear the greatest responsibility for atrocities committed. The SCSL was created by bilateral agreement in 2002 between Sierra Leone and the United Nations General Assembly pursuant to UNSC Resolution 1315, with the agreement appending the Statute of the Special Court for Sierra Leone and calling

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<sup>42</sup> Office of the Prosecutor, *Office of the Prosecutor Presents Opening Statement in Kabuga Case*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (Sept. 29, 2022), available at <https://www.irmct.org/en/news/office-prosecutor-presents-opening-statement-kabuga-case>; see also *Prosecutor v. Kabuga*, Case No. MICT-13-38-T, Further Decision on Félicien Kabuga’s Fitness to Stand Trial (June 6, 2023), available at [https://www.irmct.org/sites/default/files/case\\_documents/2023-06-06-EN-Further-Decision-on-Felicien-Kabuga-Fitness-to-Stand-Trial.pdf](https://www.irmct.org/sites/default/files/case_documents/2023-06-06-EN-Further-Decision-on-Felicien-Kabuga-Fitness-to-Stand-Trial.pdf).

<sup>43</sup> Office of the Prosecutor, *ICTR Fugitive Protais Mpiranya Confirmed Dead*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (May 12, 2022), available at <https://www.irmct.org/en/news/ictr-fugitive-protais-mpiranya-confirmed-dead>; Office of the Prosecutor, *IRMCT Prosecutor Confirms Death of Fugitive Phénéas Munyarugarama*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (May 18, 2022), available at <https://www.irmct.org/en/news/irmct-prosecutor-confirms-death-fugitive-pheneas-munyarugarama#:~:text=Following%20a%20comprehensive%20and%20challenging,where%20he%20was%20also%20buried.>

<sup>44</sup> Office of the Prosecutor, *ICTR Fugitive Protais Mpiranya Confirmed Dead*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (May 12, 2022), available at <https://www.irmct.org/en/news/ictr-fugitive-protais-mpiranya-confirmed-dead>.

<sup>45</sup> U.N. SCOR, 77th year, 9062nd mtg., U.N. Doc./PV.9062 (June 14, 2022), available at <https://digitallibrary.un.org/record/3977470?ln=en> (Judge Agius’s remarks); UNITED NATIONS, *Searching for the Fugitives*, available at <https://www.irmct.org/en/cases/searching-fugitives> (last visited July 3, 2023).

that statute integral to the agreement.<sup>46</sup> Sierra Leone accordingly enacted ratifying domestic legislation.<sup>47</sup> The SCSL was dissolved with the consent of Sierra Leone and the UN in 2013.<sup>48</sup> The RSCSL was created in 2010 by bilateral agreement between Sierra Leone and the UN pursuant to UNSC Resolution 1315 (2000),<sup>49</sup> with Sierra Leone once again enacting domestic legislation to ratify the agreement.<sup>50</sup> The RSCSL became operational in 2014.<sup>51</sup> Termination of the RSCSL can be effected by consent of the UN and Sierra Leone.<sup>52</sup> The accompanying Annex provides further details on the SCSL and the RSCSL.

As of November 2023, there is one outstanding RSCSL indictee, who is considered officially at large, although some evidence suggests he is dead.<sup>53</sup> If the indictee were ever apprehended, the RSCSL would make every effort to refer the case to a national tribunal before undertaking its own prosecution.<sup>54</sup> The Appeals

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<sup>46</sup> *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Jan. 16, 2002, 2178 U.N.T.S. 13 (2002), available at <http://www.rscsl.org/Documents/scsl-agreement.pdf>.

<sup>47</sup> *Special Court Agreement (2002) Ratification Act* (Sierra Leone, 2002), available through the Supplement to Sierra Leone Official Gazette, Vol. 130, No. 2 (Mar. 7, 2002) (as amended) at <https://www.rscsl.org/Documents/SCSL-ratificationact.pdf>.

<sup>48</sup> *As Tribunal Closes, UN Chief Hails Achievements in Ensuring Accountability in Sierra Leone*, UN NEWS (Dec. 31, 2013), available at <https://news.un.org/en/story/2013/12/459002>.

<sup>49</sup> *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Residual Special Court for Sierra Leone* (Jan. 16, 2002), available at <http://www.rscsl.org/Documents/scsl-agreement.pdf>.

<sup>50</sup> *See Residual Special Court for Sierra Leone (Ratification) Act, 2011* (Sierra Leone, 2011), annexing *Statute of the Residual Special Court for Sierra Leone* (Sierra Leone, 2002), available through the Supplement to Sierra Leone Official Gazette, Vol. 143, No. 6 (Feb. 9, 2012) at <http://www.rscsl.org/Documents/RSCSL-Act.pdf>.

<sup>51</sup> *As Tribunal Closes, UN Chief Hails Achievements in Ensuring Accountability in Sierra Leone*, UN NEWS (Dec. 31, 2013), available at <https://news.un.org/en/story/2013/12/459002>.

<sup>52</sup> *Residual Special Court for Sierra Leone (Ratification) Act, 2011* art. 16 (Sierra Leone, 2011), annexing *Statute of the Residual Special Court for Sierra Leone* (Sierra Leone, 2002), available through the Supplement to Sierra Leone Official Gazette, Vol. 143, No. 6 (Feb. 9, 2012) at <http://www.rscsl.org/Documents/RSCSL-Act.pdf>.

<sup>53</sup> “SPECIAL COURT FOR SIERRA LEONE, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, available at <http://www.rscsl.org> [<https://web.archive.org/web/20230226155822/http://www.rscsl.org/> (archived Feb. 26, 2023)] (see discussion of AFRC Chairman Johnny Paul Koroma under the section heading “The Special Court Trials”).

<sup>54</sup> *Statute of the Residual Special Court for Sierra Leone* art. 7(1) (Sierra Leone, 2002), annexed to *Residual Special Court for Sierra Leone (Ratification) Act, 2011* (Sierra Leone, 2011),

Chamber of the RSCSL is responsible for appeals from convictions in the Trial Chamber or from the prosecution on a list of specified grounds.<sup>55</sup>

C. *The Extraordinary Chambers in the Courts of Cambodia (ECCC)*

The ECCC, a hybrid court established to investigate and prosecute crimes committed by the Khmer Rouge during the Cambodian genocide in the 1970s, was created by bilateral agreement between the UN and Cambodia and ratifying domestic legislation, in accordance with UN General Assembly Resolution 57/228B (2003).<sup>56</sup> The accompanying Annex provides further details on the ECCC.

An addendum entered into by both Cambodia and the UN in August 2021, and ratified by Cambodian domestic legislation, provides that the ECCC is to be converted to residual functions for a period of three years upon completion of proceedings, including appeals before the Supreme Court Chamber.<sup>57</sup> Thus, no separate residual entity is created—instead, the existing court will transition to exclusively handle residual functions. A list of residual functions are specified in the relevant agreement.<sup>58</sup>

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available through the Supplement to Sierra Leone Official Gazette, Vol. 143, No. 6 (Feb. 9, 2012) at <http://www.rscsl.org/Documents/RSCSL-Act.pdf>.

<sup>55</sup> *Statute of the Residual Special Court for Sierra Leone* art. 21(1) (Sierra Leone, 2002), annexed to *Residual Special Court for Sierra Leone (Ratification) Act, 2011* (Sierra Leone, 2011), available through the Supplement to Sierra Leone Official Gazette, Vol. 143, No. 6 (Feb. 9, 2012) at <http://www.rscsl.org/Documents/RSCSL-Act.pdf>.

<sup>56</sup> General Assembly Resolution 57/228B, art. 2, U.N. Doc. ARES/57/228B (May 13, 2003), available at <https://www.refworld.org/docid/403b4e5b2.html> (draft agreement attached); *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of Amendments as Promulgated on 27 October 2004* (NS/RKM/1004/006) (Oct. 27, 2004), available at [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

<sup>57</sup> *Addendum to the Agreement Between the Royal Government of Cambodia and the United Nations Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers* art. 2 (Aug. 11, 2021), available at <https://eccc.gov.kh/sites/default/files/legal-documents/Addendum.pdf>.

<sup>58</sup> *Addendum to the Agreement Between the Royal Government of Cambodia and the United Nations Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea on the Transitional Arrangements and the Completion of*

As of November 2023, the ECCC had no outstanding indictees and no remaining cases; the judgment in the last proceeding, an appeal concerning Khieu Samphân, was pronounced by the Supreme Court Chamber of the ECCC on September 22, 2022.<sup>59</sup>

#### D. *The Special Tribunal for Lebanon (STL)*

The International Independent Investigation Commission (IIIC) was created in 2005 by UNSC Resolution 1595, with the approval of the Lebanese government, to investigate the assassination of former Lebanese Prime Minister Rafik Hariri in Beirut two months earlier. This resolution was not issued under the UNSC's Chapter VII powers. The IIIC enjoyed the full cooperation of the Lebanese authorities. The STL was created in 2007 by UNSC Resolution 1757 under Chapter VII, which adopted an agreement signed by the Lebanese Government on January 23, 2007, and by the United Nations on February 6, 2007. Following the adoption of the agreement, the IIIC's operations and assets were transferred to the STL. The accompanying Annex provides further details on the STL.

On July 1, 2022, in large part due to a lack of funding following the worst economic crisis in Lebanon's history, the STL "entered a residual phase in order to preserve its records and archives, safeguard residual obligations to victims and witnesses, and respond to requests for information from national authorities," despite the fact that it had not yet apprehended any indicted persons and had only conducted trials *in absentia*.<sup>60</sup> The UN and the STL agreed that the residual functions "will be performed under a dormant structure which would maintain the current legal framework, including the Agreement and the Statute of the Special Tribunal."<sup>61</sup> The UN and STL also agreed that residual activities would be mostly

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*Work of the Extraordinary Chambers* art. 2 (Aug. 11, 2021), available at <https://eccc.gov.kh/sites/default/files/legal-documents/Addendum.pdf>.

<sup>59</sup> *Prosecutor v. Khieu Samphân*, Case No. 002/19-09-2007-ECCC/SC, Summary of the Appeal Judgment in Case 002/02 (E.C.C.C. Sept. 22, 2022), available at [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F76.1\\_EN.PDF](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F76.1_EN.PDF).

<sup>60</sup> See SPECIAL TRIBUNAL FOR LEBANON, available at <https://www.stl-tsl.org/en/home/donor> (last visited July 3, 2023).

<sup>61</sup> U.N. Secretary-General, Letter dated Sept. 7, 2021 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2021/796 (Sept. 15, 2021), at 2, available at <https://digitallibrary.un.org/record/3940905?ln=en>; see also Special Tribunal for Lebanon, *13th Annual Report (2021-2022)*, 10-15, available at <https://www.stl->



limited to archival management, responding to national authorities and requests for information, and victim and witness support and protection. Though the STL would retain legal authority for judicial functions, there would not be “ongoing judicial or investigative activity in the residual phase, unless circumstances would necessitate[.]”<sup>62</sup> The STL has since provided notice to its former staff and to victims and witnesses that it would “cease all operational activity and close at the end of 2023 following the completion of its mandate” after which time “it will no longer be possible to contact the STL.”<sup>63</sup>

## V. Overview of Main Considerations

Through extensive research and interviews conducted with a varied group of international criminal law experts, four main considerations were identified as bearing the most weight in determining whether and how to establish a single residual mechanism: (1) legal issues, (2) political issues, (3) the mechanism’s mandate and scope of duties, and (4) administrative issues. A discussion of these considerations, and relevant concerns, follows.

### A. *Legal Issues*

A tribunal’s formation method can impact the process through which it is dissolved, succeeded, or otherwise transformed. The tribunals established in the past or currently in existence were formed through a variety of mechanisms within the UN system. The ICTY, the ICTR, the IRMCT, and the STL were established by the UNSC under its Chapter VII powers, while the ECCC, the SCSL, and the RSCSL were formed through bilateral agreements between the UN and the relevant state without the aid of a UNSC resolution under Chapter VII of the UN Charter. Resolutions adopted by the UNSC under Chapter VII are unique in that

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[stl.org/sites/default/files/documents/annual-reports/STL\\_13th\\_Annual\\_Report.pdf](https://www.stl-tsl.org/sites/default/files/documents/annual-reports/STL_13th_Annual_Report.pdf) (general discussion of transition to residual activities, including dormant structure).

<sup>62</sup> U.N. Secretary-General, Letter dated Sept. 7, 2021 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2021/796 (Sept. 15, 2021), at 2, *available at* <https://digitallibrary.un.org/record/3940905?ln=en>. It appears there is only one ongoing case before the STL, the *Ayyash Case*, and that case has been stayed since June 2021 as the STL awaits direction from the UNSC, in light of the STL’s lacking the funds necessary to complete its mandate. *Ayyash Case (STL-18-10) – Key Developments*, SPECIAL TRIBUNAL FOR LEBANON, *available at* <https://www.stl-tsl.org/en/the-cases/stl-18-10/key-developments> (last visited July 3, 2023).

<sup>63</sup> *Notice to Former Staff*, SPECIAL TRIBUNAL FOR LEBANON, *available at* <https://www.stl-tsl.org/en/notice-to-former-staff> (last visited Oct. 10, 2023).

they are immediately binding on UN member states under international law. As such, a new, overriding resolution under Chapter VII would be required for the succession of an entity formed by a UNSC resolution under Chapter VII powers. Conversely, unilateral action by the UNSC or other UN entities, such as the UN General Assembly (UNGA), is likely not sufficient to effect the succession of a hybrid tribunal to a single residual mechanism. Consent of the state party would be necessary in such an instance.

### 1. Issues Arising from a Tribunal's Mode of Creation

As discussed in greater detail below, the international community has several options to choose from in creating a single residual mechanism. These options entail utilizing different instruments through which the new entity would be established, which in turn impacts whether and which existing residual entities may transfer their functions to the new single residual mechanism. Among the options that both our research and interviews have yielded are (1) an initiative carried by the UN's Secretary-General to form an administrative entity under the UN Secretariat, (2) a UNGA resolution, or (3) a UNSC resolution. However, certain considerations should be taken into account when assessing each of these options, many of which were noted by experts we interviewed:

- The IRMCT and the STL were legally established through UNSC resolutions acting under the UN Charter's Chapter VII powers. As such, a superseding UNSC resolution is required to make modifications to the IRMCT and the STL's mandates or to validly transfer their functions to a new residual mechanism. In addition, although the STL was established by the UNSC, the resolution adopted the agreement between the government of Lebanon and the Secretary-General, and the government of Lebanon (including the courts and political entities) is deeply intertwined with the functions of the STL. For example, when the STL transitioned to residual status, it did so with an agreement between the UN and Lebanon.<sup>64</sup> For this reason, Lebanon's consent would likely be required to effect any transfer of its activities to a newly formed single residual mechanism.
- In the cases of the ECCC and the RSCSL, because Cambodia and Sierra Leone were parties to the agreements establishing the original tribunals, the

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<sup>64</sup> See generally U.N. Secretary-General, Letter dated Sept. 7, 2021 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2021/796 (Sept. 15, 2021), at 2, available at <https://digitallibrary.un.org/record/3940905?ln=en>.

UN cannot unilaterally modify the agreements or transfer the functions of these tribunals to a single mechanism without violating the rights of the states under these agreements. This is true regardless of the mode of creation selected, be it an administrative unit under the UN Secretariat, or UNGA or UNSC resolutions—Cambodia and Sierra Leone’s consent would be required.

- Contrary to UNSC resolutions passed under Chapter VII powers, UNGA resolutions are not binding. Consequently, obligations of cooperation similar to those found in the ICTY, the ICTR, and the IRMCT’s statutes would have limited weight. Those obligations include providing assistance in locating, arresting, detaining, and surrendering accused persons.<sup>65</sup> However, UNGA member states could enter into cooperation agreements with the single residual mechanism to support its work.

Given these considerations, a transfer of duties from the existing residual mechanisms to a single residual mechanism would require (1) a UNSC resolution acting under Chapter VII powers, as well as (2) separate agreements with Cambodia, Sierra Leone, and Lebanon. Alternatively, amendments could be made to the tribunals’ original constituting documents to enable the transfer of some of the existing tribunals’ functions (for instance, those administrative in nature).

## 2. Issues Relating to the Differing Statutes and Applicable Law

At first glance, the IRMCT provides a valuable blueprint of the legal requirements for transferring the residual functions of tribunals created by a UNSC resolution where the UNSC was acting under its Chapter VII powers. Since both the ICTY and the ICTR were established by this means, the UNSC was required to adopt further resolutions to make changes to the tribunals’ original statutes to align their requirements with those of the IRMCT. For instance, the UNSC adopted Resolution 1503 in 2003, amending the ICTR Statute to allow the prosecutor to be appointed by the UNSC via nomination by the Secretary-General, consistent with the nomination structure in the IRMCT Statute.

That said, the ICTY and the ICTR’s succession into a single IRMCT did not present many of the difficulties that would arise in attempting to merge the existing residual entities into a single residual entity that could also absorb the residual

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<sup>65</sup> See, e.g., Security Council Resolution 1966, art. 28, U.N. Doc. S/RES/1966 (Dec. 22, 2010), available at <https://digitallibrary.un.org/record/695418?ln=en>.

functions of any future tribunal or investigative mechanism. As previously discussed, the ICTY and the ICTR were markedly similar to each other, not only in their formation, but also in their international character and substantive law. They applied international criminal law governed by very similar statutes, adopted similar procedural rules, and did not have obligations to appoint judges or prosecutors with connections to the states in question. Therefore, harmonization of the tribunals' statutes posed few issues, if any, and state consent with respect to such harmonization was not a concern.

A greater range of difficulties would arise from the potential absorption of the IRMCT, the RSCSL, the ECCC, and the STL into a newly created entity aiming to serve the residual needs of future tribunals and investigative mechanisms, in addition to those of existing entities. Such difficulties would be administrative (e.g., rules for appointing judges or other officers of the court) and would also relate to the applicable substantive and procedural legal frameworks. However, any difficulties with consolidating the existing tribunals' procedural rules might be temporary for a single residual mechanism. If the single residual mechanism adopts its own procedural rules, efforts can be made to align the procedural rules of future tribunals with those of the mechanism, which would facilitate their transition.

*Substantive Law.* As is explained below, a number of models could be adopted for the new single residual mechanism. If the single residual mechanism retained prosecutorial powers, the mechanism would be responsible for activities governed by the laws of numerous jurisdictions, since not all existing residual entities apply purely international standards. For example, the STL applies the substantive law of terrorism as defined under Lebanese law, as there is no accepted definition of terrorism under international law. If the single residual mechanism took over the STL's prosecutorial mandate, the mechanism would be required to apply Lebanese domestic criminal law to any prosecutions that arose, which could be challenging for judges with no pre-existing familiarity with Lebanese law. In addition to the STL, the RSCSL and the ECCC's statutes also include the application of domestic criminal law in certain respects. That said, it is unlikely that future proceedings would require reference to Sierra Leonean or Cambodian criminal law, given the substantial completion of their proceedings.

Principles of equitable treatment would require the single residual mechanism to apply the same substantive law to a fugitive brought before it that was applied to those prosecuted by the initial tribunal. This has been the practice

in the *Kabuga* case, which the IRMCT began prosecuting as part of its responsibilities to continue the jurisdiction of the ICTR. The Second Amended Indictment charged Mr. Kabuga in accordance with the original ICTR Statute.<sup>66</sup> In effect, the single residual mechanism would act as a U.S. federal court does when sitting in diversity jurisdiction. In such cases, the *Erie* doctrine states that a U.S. federal court must apply state substantive law, while still applying U.S. federal procedural law.<sup>67</sup>

Certain legal staff, including prosecutors, have worked for more than one of the tribunals and residual mechanisms currently in existence or established in the past and are, as a result, familiar with the substantive law of multiple tribunals.<sup>68</sup> Recruiting such staff could ease the single residual mechanism's initial choice-of-law burdens. Some experts have suggested that future tribunals would likely adopt the Rome Statute's definition of core crimes, which would somewhat alleviate the issue of reconciling multiple tribunals' substantive laws in the single residual mechanism.

*Procedural Law.* The IRMCT provides precedent on the choice of procedural law, as well. The statute annexed to the UNSC resolution establishing the IRMCT gave the judges of the IRMCT the authority to determine the IRMCT's rules of procedure, so long as those rules accorded with the statute itself.<sup>69</sup> The

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<sup>66</sup> *Prosecutor v. Kabuga*, Case No. MICT-13-38-PT, Prosecution's Second Amended Indictment (Mar. 1, 2021), available at <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Indictment/NotIndexable/MICT-13-38/MRA26499R0000637420.pdf>.

<sup>67</sup> See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>68</sup> For example, Brenda Hollis has served in prosecutorial roles in the ICTY, the ECCC, and the SCSL, as well as in the RSCSL. See *Appointment of New International Co-Prosecutor*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, available at <https://www.eccc.gov.kh/en/articles/appointment-new-international-co-prosecutor> (last visited July 3, 2023). Serge Brammertz, who serves as prosecutor of the IRMCT, also served as prosecutor for the ICTY, and was involved in the International Independent Investigation Commission (IIIC) that conducted investigations in Lebanon prior to the creation of the STL. See *Prosecutor*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, available at <https://www.irmct.org/en/about/principals/prosecutor> (last visited July 3, 2023).

<sup>69</sup> Security Council Resolution 1966, art. 13, U.N. Doc. S/RES/1966 (Dec. 22, 2010), available at <https://digitallibrary.un.org/record/695418?ln=en>.

IRMCT established its procedural rules,<sup>70</sup> and the arrest warrant and indictment in the *Kabuga* case adopted these procedural rules.<sup>71</sup>

In line with IRMCT precedent, the single residual mechanism's statute could grant it similar authority to develop its own set of procedural rules, based on international standards. The establishment of a governing set of procedural rules for the single residual mechanism could cause new tribunals to adopt, at their creation, the single residual mechanism's procedural rules for any residual activities, easing any subsequent transfer. As explained above, this development would reflect the *Erie* doctrine in U.S. law where a federal court applies federal procedural law while applying state substantive law.

On the other hand, if a future *ad hoc* or hybrid tribunal adopts distinct procedural laws to comply with the procedural laws of the affected nation(s), then principles of equitable treatment would require the residual mechanism to apply the originating tribunal's specific procedural law. The ECCC applies Cambodian procedural law, and the STL incorporates certain aspects of Lebanese criminal procedure law. Though the agreement between the United Nations and Cambodia transitioning the tribunal to residual status did not address procedural law directly, the clear implication is that the same Cambodian procedural law will apply to residual activities.<sup>72</sup> When the residual activities of a hybrid tribunal with a state party are transferred to a single residual mechanism, the single residual mechanism will almost certainly need to continue to apply the state's procedural law.

### *B. Political Considerations*

International, national, and organizational politics constrain options to consolidate the residual activities of the *ad hoc* and hybrid international criminal

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<sup>70</sup> International Residual Mechanism for Criminal Tribunals Rules of Procedure and Evidence, U.N. Doc. MICT/1.Rev.7 (Dec. 4, 2020) (as amended), *available at* <https://www.irmct.org/sites/default/files/documents/MICT-1-Rev-7-en.pdf>.

<sup>71</sup> *Prosecutor v. Kabuga*, Case No. MICT-13-38-PT, Order on the Procedure of the Conduct of the Trial (Feb. 14, 2022), *available at* <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Order/NotIndexable/MICT-13-38/MRA26661R0000657821.pdf>.

<sup>72</sup> *See Addendum to the Agreement Between the Royal Government of Cambodia and the United Nations Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers art. 2* (Aug. 11, 2021), *available at* <https://eccc.gov.kh/sites/default/files/legal-documents/Addendum.pdf>.

tribunals. From a broad perspective, experts relayed differing views on the general support *ad hoc* and hybrid tribunals receive internationally. Some believed the war in Ukraine has invigorated international support, while some pointed to the deadlock in the UN Security Council as precluding support for the creation of a new residual entity, albeit one that only aims to consolidate existing entities.

More specifically, the possibilities for consolidating residual activities of existing entities are constrained by the perspectives and political support of key parties, which might in turn depend on the form consolidation takes.

### 1. Political Support of Key Parties

*The UNSC.* The UNSC will need to consent to any transfer of authority for consolidation of the residual activities handled by the IRMCT.<sup>73</sup> As the IRMCT was created by the UNSC’s Chapter VII authority, any reform must also stem from that authority. Experts noted that Russia, as a permanent member of the UNSC, may prevent the unanimous consent necessary for changes to the IRMCT. The Russian government has said in the past that, in its view, the IRMCT has been biased against Serbia and should conclude its operations.<sup>74</sup> Russia has also opposed other UN international criminal justice activities, including the creation of an independent investigative mechanism for Syria.<sup>75</sup> Perhaps most significantly, experts noted that Russia is likely to block any efforts related to prosecution for violations of international law, out of concern that such efforts may increase the possibility that Russian citizens will be prosecuted in relation to the war in

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<sup>73</sup> Interviews revealed that more limited administrative changes, such as archival information-sharing agreements, are unlikely to require UNSC consent.

<sup>74</sup> Russia has said that the IRMCT “lives according to its own rules and is not planning to wrap itself up” and has failed to hold relevant parties accountable for the bombing of Serbia.

*Mechanism for Closed Rwanda, Former Yugoslavia Criminal Tribunals Ready to Transition from Operational Court to Residual Institution, President Tells General Assembly*, UNITED NATIONS MEETINGS COVERAGE AND PRESS (Oct. 19, 2022), available at <https://press.un.org/en/2022/ga12459.doc.htm> (statements by Gennady V. Kuzmin, Russian Federation).

<sup>75</sup> Russia has attempted to remove references to the International, Impartial, and Independent Mechanism for Syria (IIIM) from UN program planning resolutions. See *Fifth Committee Approves \$3.4 Billion Programme Budget for 2023, Permanent Shift from Biennial to Annual Cycle, Concluding Main Part of Seventy-Seventh Session*, UNITED NATIONS MEETINGS COVERAGE AND PRESS (Dec. 30, 2022), available at <https://press.un.org/en/2022/gaab4414.doc.htm>.

Ukraine.<sup>76</sup> That the consolidation of residual activities conducted by existing entities would not provide any new authority to potentially prosecute Russian citizens is unlikely to cause Russia to abandon its current posture of general opposition to international criminal justice efforts.

*States That Are Parties to the Agreements Establishing Hybrid Tribunals.* States that are parties to the agreements establishing hybrid courts will need to consent to changes to those courts. As a number of experts mentioned, the RSCSL has already partially consolidated its activities with the IRMCT. That history could suggest that Sierra Leone may approve of further consolidation. Indeed, the IRMCT partially provides personnel to the RSCSL and the two entities share an administrative platform (*e.g.*, shared office space and payroll support). Lack of funds has led the STL to cease core investigative and prosecutorial activities, so Lebanon may view consolidation as a manner by which the STL may continue in some form, especially if consolidation offers funding and thus potential for future prosecutions. On the other hand, the ECCC is the most nationally integrated of the hybrid courts, and experts were skeptical of the extent to which Cambodia would permit an international entity to take over residual activities in the interest of consolidation. One expert suggested that the Cambodian government would be reluctant to give up control of the ECCC's archives, because it views the archives as important to controlling the manner by which the public views the underlying atrocities the ECCC was set up to address.

*International Criminal Justice Entities.* The perspectives of international criminal justice entities and their staff also constrain possibilities for consolidation. Multiple experts stressed the political sway that tribunal staff may have over efforts to consolidate residual activities. Some experts expressed concern that consolidation would negatively impact a tribunal's fulfillment of its responsibilities, especially to victims, and would negatively impact the employment of current staff—concerns that could sway UN and state parties considering consolidation. Additionally, Karim A. A. Khan, the chief prosecutor of the International Criminal Court, recently stated that the ICC should undertake the prosecution of any crimes arising out of the war in Ukraine within the ICC's jurisdiction, rather than creating a new *ad hoc* or hybrid tribunal, arguing that “we

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<sup>76</sup> See, *e.g.*, *Russia Slams French Support to Ukraine War Tribunal*, TIME TURK (Dec. 2, 2022), available at <https://www.timeturk.com/en/russia-slams-french-support-to-ukraine-war-tribunal/news-65546>.



should avoid fragmentation, and instead work on consolidation.”<sup>77</sup> Although future tribunals will likely be established to prosecute crimes that fall outside of the ICC’s jurisdiction, the ICC may consider an entity that has a permanent prosecutorial mandate over similar international crimes as those within its own jurisdiction as an effort to fragment the field. The consideration of prosecutorial capacity for a single residual mechanism is discussed in the following subsection (Section V.C).

## 2. Political Impacts Stemming from the Form of Consolidation

Consolidation of residual activities can take a variety of forms, and while these forms differ in their political valence, some general considerations broadly apply:

*Prosecutorial Powers.* Multiple experts pointed to any inclusion of prosecutorial powers in a consolidating mechanism as politically fraught. A permanent entity with ongoing prosecutorial discretion across jurisdictions, even if that authority is constrained by an original tribunal’s founding documents, holds authority that some states may view as threatening national sovereignty and that the ICC may view as conflicting with its own jurisdiction. This issue is examined further in the following section (Section V.C).

*Funding.* Multiple experts stressed the political impacts of the finances of any consolidation. For example, if consolidation is funded through default contributions by UN members and combines all current tribunals, UN members will be forced to pay for tribunals that were once voluntarily funded, which could engender resistance to consolidation. By contrast, evidence that consolidation will lead to cost savings would likely engender support.

*Manner of Proposal.* Multiple experts pointed to the manner by which any consolidation is proposed as having significant political impact. For example, if a UN member from the Global South proposes consolidation as a cost-saving measure, it may reduce tensions between Russia and Western member states that seek prosecutions related to the war in Ukraine. Experts also suggested that it might also be politically beneficial for UN legal staff to propose consolidation after a period of consideration. The chronology of reform can also impact the

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<sup>77</sup> Molly Quell, *ICC Prosecutor Opposes EU Plan for Special Ukraine Tribunal*, ASSOCIATED PRESS (Dec. 5, 2022), available at <https://apnews.com/article/russia-ukraine-war-crimes-netherlands-the-hague-ursula-von-der-leyen-9e83e1107064ef6e9c375576b998373a>.

acceptance of consolidation. For instance, first consolidating the residual activities of certain existing hybrid courts, and then merging that consolidated entity with the IRMCT, may increase the ultimate likelihood that consolidation of all existing special courts is accepted.

### C. *Considerations of Mechanism's Mandate*

A perennially controversial consideration for a single residual mechanism concerns whether—and, if so, to what extent—it would retain prosecutorial powers. All experts consulted conceded that any single residual mechanism would have to retain, at a minimum, some post-conviction capabilities, such as review of petitions for sentence repeals, handling of contempt proceedings, and victim- and witness-protection issues. However, considerable debate existed around granting full prosecutorial powers to a single residual mechanism for the prosecutions of apprehended fugitives (or, in the case of the STL, in the event of identifying and apprehending the perpetrators who were tried *in absentia*).

The consulted experts universally agreed that the political support of member states for a single residual mechanism may increase if the single residual mechanism only enjoys truly residual prosecution capabilities, rather than continuing the original tribunals' ability to conduct trials and appeals. But while some argued that full prosecutorial powers would be necessary for a single residual mechanism to function at all, others emphasized that additional prosecutions could be transferred to national courts, subject to monitoring and potential reassignment of jurisdiction if due process and other procedural safeguards were insufficient. One interviewee argued that a single residual mechanism might even provide support, training, and supervision to national courts handling transferred prosecutions, without involving the single residual mechanism in the prosecutions directly; another, meanwhile, cautioned that transferring prosecutions to national courts can create concerns of due process, citing transfers in the Balkans as a successful example with procedurally fair safeguards, and transfers in Rwanda as a far more fraught framework. As another expert mentioned, hybrid international tribunals are often established to ensure accountability of perpetrators where the national jurisdiction is unwilling or unable to prosecute. Accordingly, the justice system of the national jurisdiction may still not be able or willing to carry out prosecutions after the transfer of the tribunal into the residual phase.

Even those who advocated granting full prosecutorial powers to any single residual mechanism conceded that additional processes might be necessary to

facilitate such powers. One expert proposed the creation of a committee that would ratify any proposed prosecutions through the single residual mechanism. Another advocated for the development of an “accordion” structure that would allow the mechanism to scale up its hiring of pre-vetted judges, prosecutors, and investigators on an expedited basis if a prosecution became necessary, using designated funding, although another expert noted the practical difficulty of getting roster judges to pause their lives elsewhere for several years to handle a prosecution. Budget issues may also arise from the uncertainty surrounding the precise moment where drastically more significant financial support might become necessary under such an “accordion” model. The timing of the single residual mechanism’s exercise of such prosecutorial powers also became a subject of debate, with one expert arguing that a single residual mechanism could obtain prosecutorial powers only after it had gained acceptance under a narrower mandate within the international community. And multiple experts suggested that, if a single residual mechanism continued the original tribunals’ powers to issue indictments and conduct prosecution proceedings, then it should only indict those “most-responsible” individuals whose prosecutions would be more controversial to conduct in national courts.

The experts presented several varying views on what process should determine the point at which future tribunals would transfer their functions to the single residual mechanism. One expert laid out a very clear set of universal criteria that would qualify an existing tribunal for transfer to the single residual mechanism: (1) completion of all trials and direct appeals; (2) no arrests within the previous year; and (3) completed transfer of any outstanding indictees to national courts that can offer fair trials. Another suggested, as a minimal requirement for transfer, that the investigations phase have concluded, so that the single residual mechanism would not need to bring any new charges against indictees. A UNGA resolution could be passed to establish a standardized “trigger” for an *ad hoc* or hybrid tribunal to transfer its powers to the single residual mechanism, while as previously discussed, a parallel Chapter VII resolution would have to be passed by the UN Security Council for the IRMCT and the STL. But others did not agree that any such trigger should be based on a single qualitative threshold, established within the single residual mechanism’s statute, to determine when a future tribunal has sufficiently concluded its duties. In fact, one expert described trying to create a standardized trigger as being tantamount to “handcuffing yourself,” given the discretion needed to accommodate differing situations on which we have little to no visibility today.

Numerous experts noted the necessity of allowing future tribunals to define their own conditions for transfer to a single residual mechanism within their establishing statutes. The governing documents establishing a tribunal already determine a number of its aspects, including its dissolution. UN and member-state practice could evolve to provide in a tribunal's establishing documents a threshold or method to determine when that particular tribunal's responsibilities would be transferred to the single residual mechanism. If a hybrid tribunal, these establishing documents would almost certainly provide for the consent of the state party. For its part, the single residual mechanism's governing documents would provide that it would accept responsibilities after a tribunal provided for the transfer of its responsibilities based on its own governing documents. However, in such instances, a single residual mechanism might want to retain the ability to approve assumption of an existing *ad hoc* or hybrid tribunal's functions; the transfer of functions would thus depend on the bilateral approval of both the concluding tribunal and the continuing single residual mechanism. Other experts proposed that a UN office—such as the Office of the Secretary-General—provide consent for any such transfer, instead of the single residual mechanism itself, which might increase the perceived legitimacy of the determination.

Of the five tribunals discussed in this paper, three tribunals—the ICTY, the ICTR, and the SCSL—have already seen their duties transferred to a residual mechanism; and two—the ECCC and the STL—recently saw their mandates converted to residual activities.<sup>78</sup> While the IRMCT has to date seen significant prosecution activity, it has largely completed this work and “is actively planning its future as a true residual institution” with a focus on the entity’s “mandate under Article 28(3) to assist national jurisdictions to continue the accountability process for international crimes committed in Rwanda and the former Yugoslavia.”<sup>79</sup> The STL could potentially bring about prosecution proceedings should fugitive indictees who were tried *in absentia* be captured and thus tried anew, or if voluntary funding is received in order for the Special Tribunal to continue the

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<sup>78</sup> The ECCC's activities are set to be converted to residual functions upon completion of its proceedings; the judgment in the last proceeding, an appeal concerning Khieu Samphân, was pronounced by the Supreme Court Chamber of the ECCC on September 22, 2022. *See* footnote 57. The Special Tribunal for Lebanon entered a residual phase on July 1, 2022, as noted. *See* footnote 63.

<sup>79</sup> Press Release, *Prosecutor Serge Brammertz Addresses the United Nations Security Council*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (June 12, 2023), available at <https://www.irmct.org/en/news/prosecutor-serge-brammertz-addresses-united-nations-security-council-4>.

proceedings that were ongoing up until mid-2022. These considerations should be carefully examined when selecting a model (and scope of duties) for any new single residual mechanism.

#### *D. Administrative Considerations*

Our numerous conversations with experts have revealed a number of administrative challenges associated with a potential single residual mechanism, some of which may be resolved more easily than others. Virtually all consulted experts agree that the least-controversial form of a single residual mechanism would be a mechanism that only consolidates the management and protection of archives. Any such archival consolidation would require appropriate handling of files and evidence to ensure that there are no chain-of-custody issues; this would entail proper evidentiary storage, maintenance, and access for protecting witnesses, and placement of the archives outside of the site of conflict. Experts noted that all future tribunals admitted to a single residual mechanism should digitally archive at the time of collection as a best practice, and that current tribunals should digitally archive everything as soon as possible to facilitate easier management and protection. One expert also noted that an archival-only entity could be handled through information-sharing agreements between existing tribunal archives, even if this would not necessarily increase the cost efficiency of maintaining these archives. As noted earlier in Section II.B discussing efficiency of a single residual tribunal, however, converting all existing archives to one system could be very costly and time-intensive, and even information-sharing would have to take into concern considerations around confidentiality of victim/witness statements for any “active” archive connected to a court still conducting prosecutions or engaging in victim/witness protection.

Experts also noted some thornier issues concerning administration. One expert pointed out that consolidation of current residual mechanisms into a single residual mechanism would displace the staffs of those current residual mechanisms, and care must be taken in ensuring that such staffers can be moved to comparable positions within the United Nations, to avoid conflicts with the staffers’ national governments. Others pointed out the difficulty of obtaining a budget and staffing adequate to handle prosecutions, if and when they should arise before a single residual mechanism, with one expert suggesting an “accordion model” that builds contingent funding into the single residual mechanism’s statute and allows it to rapidly hire judges, prosecutors, and registrars as needed. According to another expert, including a defense office in the structure of the

mechanism from the start could allow international criminal defense counsel to better advocate for defendants' rights during prosecutions, and to protect fairness and due process. This expert stressed the importance of placing the defense office on equal footing to the prosecutor's office. This suggestion is explored in more depth below in Section VI.B.

As the section on efficiency (Section II.B) noted, there are inevitable limitations on the degree to which some roles in a single residual mechanism could be consolidated, given the deep cultural, linguistic, and sometimes legal knowledge required of practitioners within any given *ad hoc* or hybrid tribunal. The experts diverged on the extent to which they believed a single residual mechanism would require judges, prosecutors, defense counsel, and investigators from the former tribunal to handle related matters arising before a single residual mechanism. Some thought anyone who took the time to delve into the statute governing the case would be well-equipped to handle matters, especially if a single residual mechanism did not handle prosecutions and mostly dealt with issues like contempt and sentence enforcement. As they pointed out, precedent from the International Criminal Court has demonstrated investigators' and prosecutors' ability to transition across factual sets without much previous regional knowledge. Others felt that core staffing for a single residual mechanism should consist of individuals with experience from at least two different tribunals, who have shown the ability to operate across different tribunals' statutes. Some felt that a very small staff from any given former tribunal could investigate and prosecute a limited number of core crimes, with other staff providing additional support; or, experts could be brought onto teams using short-term contracts to ensure cultural and linguistic competence, especially for the purposes of safeguarding defendants' rights. Similarly, one expert noted that investigations that are currently "hibernating" usually require only two or three staff members each, to ensure that the underlying evidence does not diminish in quality (e.g., finding new key witnesses to replace any who pass away), and that this model might be easily achievable for the purposes of a single residual mechanism. A different expert proposed a more ambitious model in which any *ad hoc* or hybrid tribunals transferring their functions to a single residual mechanism could do so through a transitional period of six to 12 months, during which core personnel from the transitioning tribunal could assist the transfer process and train single-residual-mechanism staff appropriately for managing matters arising from the tribunal; after the transition period, an advisory council of individuals from the former tribunal's registry, prosecution team, defense team, etc., could be available on a voluntary or limited-contract basis to provide continuing guidance. The adoption of any of these models would be highly

dependent on the overall form of the single residual mechanism, and especially on the extent of its prosecutorial powers.

Some experts also saw the creation of a single residual mechanism as a general opportunity to develop what one termed a “repository of best practices and lessons learned” in the pursuit of international criminal justice. In addition to actively maintaining archives, supervising victim/witness protection, and pursuing any given prosecutorial functions, a single residual mechanism could act as a knowledge database that creates trainings and advisory documents that draw from the cumulative experience of those who have worked within all of the single residual mechanism’s former *ad hoc* and hybrid tribunals.<sup>80</sup> Discussions of the ultimate form of any single residual mechanism should consider the potential of the single residual mechanism to act as such a “repository” to at least some extent.

## **VI. Structural Proposals**

In this section, we offer three institutional designs that took shape in our discussions with the experts. These proposed structures are models through which we discuss the feasibility and favorability of a permanent single residual mechanism. These institutional designs are presented in descending order, from the most ambitious and institutionally complex to the least. All of the models are designed to address the core residual functions explained above, namely (1) management of archives, (2) victim and witness protection, (3) enforcement of sentences and contempt orders, and (4) continuing the legacy of the tribunals they succeed. Although the current goal of the mechanism would be to consolidate the existing *ad hoc* and hybrid tribunals to the greatest extent possible, these models are also designed to incorporate the residual functions of future internationalized tribunals as well. Or, if the political will to consolidate the current *ad hoc* and hybrid tribunals does not materialize, any of the institutions described can be established for the sole purpose of consolidating future tribunals. As described above, each existing *ad hoc* or hybrid tribunal has unique features in its formation, substantive law, relationship with the state(s) from which the conflict originated, and role in the current or former conflict. Given these divergences, it may not be possible to unite the residual functions of all the existing tribunals under the same

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<sup>80</sup> One expert proposed the creation of an academy for training new international criminal law practitioners and judges, staffed on a part-time and volunteer basis by former practitioners before the *ad hoc* and hybrid tribunals; however, while related to the single residual mechanism, the academy would not be integrated into its functions.

institution. The proposals below discuss how different institutional design choices could affect the consolidation of existing and future tribunals. Each proposal has advantages and disadvantages from efficiency and promotion-of-justice perspectives, and each is affected by the legal, political, prosecutorial, and administrative concerns outlined above. The models are not intended to be preclusive, but rather to facilitate further discussion.



Model	Key Features	Means of Establishment	Staff	Key Considerations
Standalone Residual Mechanism (SRM)	Prosecutions for individuals indicted by pre-transitioned tribunals; sentencing appeals; contempt proceedings; victim/witness protection; external outreach to communities; archival maintenance. SRM could either adopt existing tribunal structures, or harmonize structures to one model upon transfer.	UNSC resolution under Chapter VII powers if absorbing the IRMCT and STL, plus amendments (via Chapter VII resolution for IRMCT and STL) to pre-existing tribunals' constituting documents; or UNGA resolution if IRMCT and STL are excluded.	Registrar; Offices of the Prosecutor and the Defense; standing roster of judges; victim-/witness-protection unit; archivists.	Pros: Coordination with other UN agencies could lower costs; reliable funding ensured through UN budget.  Cons: Political pushback and/or stonewalling from UNSC or UNGA members at time of establishment.
Office of Residual Tribunal Affairs (ORTA)	Prosecutions for individuals indicted by pre-transitioned tribunals; sentencing appeals; contempt proceedings; victim/witness protection; external outreach to communities; archival maintenance. Substantive law would come from tribunals' statutes; procedural rules would be uniform. Prosecutions would be facilitated through as-needed hiring off of standing rosters ("accordion model"), and might only be possible if the transferring tribunal retains a prosecutorial mandate under its statute.	Established under the UN Secretariat's Office of Legal Affairs (OLA); this may require authorization by either UNSC or UNGA resolution, as well as possible amendments to pre-existing tribunals' constituting documents prior to transfer.	Permanent: Victim-/witness-protection unit; archivists.  "Accordion" staff (roster-based, hired as needed); Registrar; Offices of the Prosecutor and the Defense; judges.	Pros: Establishment within OLA means potentially fewer political (voting) roadblocks; benefits from stable financing through OLA budget; "accordion model" saves costs of maintaining active trial staff.  Cons: UNSC or UNGA may still need to grant Secretariat authority to establish ORTA and facilitate "accordion model"; funding of "accordion model" could stress Secretariat's budget; indictees may make jurisdictional and/or due-process challenges.
Residual Affairs Oversight Division	Sentencing appeals; contempt proceedings; victim/witness protection; external outreach to communities; archival maintenance.	Division under UN umbrella.	Victim-/witness-protection unit; archivists.	Pros: Least politically controversial option, given lack of prosecutorial powers.  Cons: Apprehended indictees would have to be transferred to national jurisdictions for trial.

### A. *Standalone Residual Mechanism*

The first institutional design proposal is a standalone international organization, hereafter referred to as the Standalone Residual Mechanism (SRM). The SRM would have an independent legal entity status under its charter, a bespoke organizational structure, and an institutional budget. The SRM's main goal would be to continue the core residual functions of the current and future *ad hoc* and hybrid tribunals that are transferred to the institution, including managing the tribunals' archives, overseeing victim- and witness-protection programs within the tribunals' jurisdictions, hearing challenges to sentences, and conducting contempt proceedings. Perhaps most importantly, however, the SRM would have an independent mandate to prosecute apprehended individuals who were indicted by the tribunals before the transfer of their residual duties to the SRM, and to hear appeals arising out of the tribunals' work. As a result, the SRM would have a Registrar, Offices of the Prosecutor and of the Defense, a witness protection unit, and a standing roster of judges on a permanent basis.

The SRM model envisions the establishment of an entirely new international organization, which can be an expensive and politically ambitious exercise. However, building an entity from the ground up also provides flexibility to negotiate its terms, including its charter, structure, and budget, to meet the needs of the current and future *ad hoc* and hybrid tribunals. Additionally, establishing a new organization would reaffirm the international community's commitment to international criminal justice. The initial political buy-in can lend legitimacy to the entity, and allow it to exert influence to ensure nations' cooperation. The SRM could enter into agreements with stakeholders to ensure the orderly transition of tribunals' mandates, thereby becoming a new member of the international criminal justice community. The SRM's independent prosecutorial mandate could also preempt the jurisdictional challenges that could be brought to the second model described in the following section (Section VI.B).

At the same time, the logistical and political challenges of establishing a new international entity can be prohibitive. As discussed previously, transferring the mandates of the IRMCT and the STL to the SRM would require UNSC resolutions passed under the UN Charter's Chapter VII powers. UNSC members may not be in favor of a new actor in the international criminal justice space. Creating a new international entity can also be expensive, and states may not be inclined to commit to a permanent budget for such an entity. However, if successful, the SRM could be an efficient solution that contributes to international criminal justice by

providing a dependable final location for existing and future tribunals' residual mandates and by preserving the tribunals' legacy after their main functions are complete, while also streamlining costs and organizational structures.

*Formation.* The establishment of an SRM poses significant upfront political and economic challenges. As an initial matter, transferring existing tribunals' prosecutorial mandates to the SRM will require amendments to the tribunals' constitutive documents, which means obtaining consent from the parties to its constituting agreements in the case of hybrid tribunals. In the case of the IRMCT and the STL, as noted earlier, any such amendments will require UNSC resolutions under Chapter VII powers. Members of the UNSC may object to the SRM's potential prosecutorial mandate and oppose its establishment. Since the formation of *ad hoc* and hybrid tribunals do not require UNSC resolutions, the prosecutorial jurisdiction of a future *ad hoc* or hybrid tribunal could conceivably reach citizens of UNSC members, whose mandate could then be transferred to the SRM as the tribunal enters residual functions. Such a possibility may lead the permanent UNSC members to veto any resolution that would establish, enable, or empower the SRM, which could require the exclusion of the IRMCT and the STL from the mechanism. Additionally, for the prosecutorial mandates of the STL, the SCSL, and the ECCC to be transferred to the SRM, the UN and the states in question (Lebanon, Sierra Leone, and Cambodia, respectively) would be required to negotiate amendments to the tribunals' statutes. Politically, this approval process will be challenging. For highly nationalized courts such as the ECCC, the state may be hesitant to sign over the prosecutorial and other powers of the tribunal to an international entity outside of its sovereign reach. These political challenges, however, could abate over time if the transfer mechanism for future tribunals' residual functions to the SRM is included in the tribunals' constitutive documents from their inception. The SRM can provide clarity about the time frame and trigger for future tribunals' transition into the residual phase, reducing associated political friction during the tribunal's establishment.

The establishment of the SRM could also be achieved through a UNGA resolution, if the IRMCT and the STL were left out of the permanent SRM. The UNGA has authority to "establish such subsidiary organs as it deems necessary for the performance of its functions"<sup>81</sup> and "may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a

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<sup>81</sup> U.N. Charter art. 22.

Member of the United Nations.”<sup>82</sup> The UNGA also “shall [. . .] make recommendations for the purpose of [. . .] assisting in the realization of human rights and fundamental freedoms,”<sup>83</sup> and “may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.”<sup>84</sup> Establishing the SRM through an UNGA resolution would bypass the political difficulty posed by the UNSC permanent members’ veto power, but would still require the endorsement of at least half the states represented in the UNGA. Obtaining such a diplomatic consensus could be time-consuming and lead to compromises tailored to different states’ wishes. Additionally, establishing the SRM through the UNGA would mean that the IRMCT and the STL would be left outside of the SRM structure.

*Administration.* Although the SRM can be established within or outside of the UN system, the former option could lower the upfront administrative costs of establishing a new international organization. The UN is a party to all *ad hoc* and hybrid tribunals under review, and has the means and expertise to continue monitoring the residual functions of the tribunals through an organization under its umbrella. The SRM could work in conjunction with other specialized UN agencies, including special political missions and human rights monitoring

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<sup>82</sup> U.N. Charter art. 11(2). Past tribunals have been created after the relevant national government issued a letter to the UN to request the creation of a tribunal, and either the UNSC or the UNGA accordingly issued a resolution for the UN Secretary-General to examine the situation and submit a report on the creation of such a tribunal. In the case of the ECCC, the UNGA issued a resolution to the Secretary-General; in the case of the SCSL, the resolution was issued by the UNSC. See Hans Corell, *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*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, available at <https://legal.un.org/avl/ha/abunac/abunac.html> (last visited July 3, 2023); *Statute for the Special Court for Sierra Leone*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, available at <https://legal.un.org/avl/ha/scsl/scsl.html> (last visited July 3, 2023). In this situation, however, we believe it most likely that a member state would submit the issue to the UNGA directly, pursuant to Article 11(2).

<sup>83</sup> U.N. Charter art. 13(1)(b).

<sup>84</sup> U.N. Charter art. 14. Prof. Rebecca Barber provides a helpful analysis of the powers of the UNGA in Rebecca Barber, *The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document*, ASIA PACIFIC CENTRE FOR THE RESPONSIBILITY TO PROTECT (Apr. 2021), at 7–12.

organizations, to explore efficiencies and advance the tribunals' residual work and legacies. If established within the UN system, the SRM could benefit from the UN's operational and administrative structure, archival systems, and real estate. The professional staff of the SRM could be supplied through the protocols and systems established by the UN.

Being part of the UN system could also provide a model for the SRM's funding. UN core functions and certain UN specialized agencies receive contributions assessed to all member states according to their ability to pay, which provides a reliable source of funding. Other UN agencies, including the UN Children's Fund (UNICEF) and the UN Development Programme (UNDP), rely on voluntary contributions left to the discretion of individual member states. As the IRMCT is established through the UNSC's Chapter VII powers, its funding is assessed to member states through a yearly approval process through the UNGA. The Secretary-General, the Board of Auditors, and the Advisory Committee on Administrative and Budgetary Questions provide a proposed budget report for the IRMCT to the UNGA, which passes a resolution outlining the yearly appropriations and net contributions assessed on member states for the year in question.<sup>85</sup> A majority of the *ad hoc* and hybrid residual mechanisms currently in existence, however, rely on voluntary contributions, which can present inefficiencies in the functioning of the mechanisms. Experts have informed us that the RSCSL, for instance, conducts a funding round every year, where the staff makes a case for the continued existence of the residual mechanism. Eliminating this requirement could allow the SRM staff to channel more time and resources to the continuation of their mandate (although one expert has pointed out that these funding rounds increase the visibility of the RSCSL's work and of the situation in Sierra Leone). Similarly, the STL has concluded all tribunal and residual activities due to budgetary constraints stemming from the Lebanese economic crisis. A consolidated residual mechanism would preserve the crucial residual duties of tribunals whose existence are threatened by budget cuts. Although the chances of establishing the SRM through the UNSC are slim, the SRM could follow one of the models established within the UN system to provide residual mechanisms with more stable funding.

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<sup>85</sup> See, e.g., General Assembly Resolution 75/249, U.N. Doc. A/RES/75/249 (Jan. 8, 2021), available at <https://undocs.org/en/A/RES/75/249>; General Assembly Resolution 66/240, U.N. Doc. A/RES/66/240 (Feb. 16, 2012), available at <https://undocs.org/en/A/RES/66/240>.

*Consolidation vs. Flexibility.* The SRM's constituting instrument will need to build flexibility into the SRM's charter to accommodate the national characteristics dominant in the hybrid tribunals. By design, *ad hoc* and hybrid tribunals have unique features, from the substantive law applied, to the incorporation of national procedural rules, nomination requirements, and seats. The SRM's charter can follow different models in how it prioritizes harmonization and flexibility when absorbing the residual functions of current and future tribunals. Under one model, the SRM could adopt the structures in place when the transfer occurs. For instance, the ICTY and ICTR branches of the IRMCT have separate seats in the locations of the original tribunals; Branch 1, taking over from the ICTY, is in The Hague, while Branch 2, inheriting from the ICTR, is in Arusha.<sup>86</sup> The newly established entity could similarly open new branches for each absorbed tribunal and preserve much of their original functionality. This model would prioritize flexibility by maintaining the procedures, staff, and location of the original tribunal, but would not address some important concerns motivating the establishment of a residual mechanism, including cost efficiencies and consolidation.

Another model would be to modify the tribunals' statutes to align with the SRM's structure when transferring their residual functions. The statute of the SRM could adopt a single, independent operational structure, set of rules and procedures, and archival system, and it could prioritize harmonization over flexibility. Under this model, the residual mechanism could have a single seat, with satellite offices to aid its work, as well as its own procedures, nomination structure for judges and prosecutors, and independent mandate that could be modified in more limited ways. While both approaches require the amendment of the tribunals' statutes to allow transfer of their prosecutorial mandate to the SRM, this approach would require significantly more changes to the statutes of the hybrid tribunals and could raise legality principle issues for any indictees apprehended after the transfer is complete. However, the approach would be more cost-efficient and streamlined, and thus could benefit the SRM's impact and sustainability as a permanent entity.

The experts we interviewed had differing opinions on whether the SRM would be a good model for a permanent residual mechanism. One expert opined that creating an institution with prosecutorial abilities would be a "tricky mandate,"

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<sup>86</sup> Security Council Resolution 1966, art. 3, U.N. Doc. S/RES/1966 (Dec. 22, 2010), *available at* <https://digitallibrary.un.org/record/695418?ln=en>.

as it would require creating a Registry, Offices of the Prosecutor and Defense, and judicial chambers on a permanent basis. Given that residual mechanisms are intended to mainly take on non-prosecutorial functions, maintaining permanent offices could be costly. Another expert, however, pointed out that, as the prosecutorial mandates of the existing tribunals have largely come to an end, the organizational structures required for prosecution can be built over time as the need arises. An expert offered that the SRM could follow a “crawl, walk, run” model, whereby the efficiencies of a flexible, independent SRM would be realized over time. As noted in Sections V.B.2 and V.C, one of the main concerns the experts raised about the SRM model is the difficulty of gathering political support for another international institution with prosecutorial powers and without inherent jurisdictional limitations. As establishing such an institution requires a majority vote of the UNGA (or UNSC resolutions, if the IRMCT and the STL are included in the SRM), the ambitious nature of the entity could prevent its realization. Additionally, some experts raised concerns about potential jurisdictional friction between the SRM and the ICC. And, one expert warned that standalone prosecutorial entities can be too big to succeed, as they lack the nimbleness, expertise, and focus of individual residual mechanisms.

#### *B. Office of Residual Tribunal Affairs under the UN Secretariat*

The second institutional design envisions a standalone department or an office established under the UN Secretariat’s Office of Legal Affairs (OLA), hereafter referred to as the Office of Residual Tribunal Affairs (ORTA). The aim of this model is to maintain the highest level of flexibility in the types of duties the ORTA can take on, while minimizing the political and legal roadblocks in its creation. Similarly to the SRM, the ORTA would take on all core residual functions of *ad hoc* and hybrid tribunals. The ORTA would have permanent staff conducting the duties of a Registrar, including negotiating with *ad hoc* and hybrid tribunals in the transfer of residual duties to the ORTA, coordinating staff and resources, establishing and monitoring on-site presence to continue victim- and witness-protection efforts, and promoting the legacies of the *ad hoc* and hybrid tribunals after the completion of their primary duties.

The ORTA model mainly aims to resolve the issue of how *ad hoc* and hybrid tribunals can retain their prosecutorial mandate over indicted individuals after a majority of the prosecutions are complete. There will inevitably be outstanding indictments after the bulk of the tribunal’s work is done, and it is unrealistic for a tribunal to continually spend resources on a full tribunal staff for

an unknown amount of time, just in case an indictee is apprehended. As the IRMCT example demonstrates, indictees can remain fugitives for decades, but referring the indictee's prosecution to a national jurisdiction can also create efficiency and justice issues.

Under what we refer to as the “accordion model,” the ORTA would *not* take on the jurisdiction and prosecutorial mandate of a tribunal, but rather would provide the roster, staff, and resources for prosecutions under the original tribunal's own statute, should the need arise. For the majority of the time, the ORTA would be responsible for continuing the tribunals' core residual functions only. If a fugitive is apprehended, the ORTA would facilitate the appointment of judges, prosecutors, and defense counsel, and provide judicial chambers and resources for the trial to be conducted under the jurisdiction of the original *ad hoc* or hybrid tribunal's statute. The model requires the ORTA to have (1) permanent staff for the core residual functions, (2) a roster of judges reflecting the appointment requirements set out under the statutes of all relevant *ad hoc* or hybrid tribunals, and (3) associations of prosecutors and defense counsel who can monitor ongoing cases, address sentencing or appeal applications, and be prepared for trial should a fugitive indictee be caught. The ORTA can also be a repository for know-how and best practices, and can have permanent legal staff advising new *ad hoc* and hybrid tribunals in their creation and operation.

Although the accordion model addresses the difficulties of prosecuting indictees after an *ad hoc* or hybrid tribunal has entered its residual phase, it also faces many hurdles. *First*, it is unclear whether the Secretary-General would have the authority to establish such an office under the OLA without either a UNSC resolution (which would be politically infeasible) or a UNGA resolution (which would require excluding the IRMCT and STL from the new structure). *Second*, it is unclear whether it would be legally possible to transfer the prosecutorial and residual functions of the existing entities to the ORTA without amending their constitutive documents or raising significant jurisdictional challenges. *Third*, without initial political buy-in, in the form of a UNSC or UNGA resolution, it is not clear whether the UN Secretariat's budget can expand to facilitate a fully staffed criminal trial without attracting inquiries and potential backlash from the General Assembly and member states.

*Formation.* The ORTA could be established under the UN Secretariat, potentially as part of the OLA. As an office under the UN Secretariat, the ORTA



would benefit from the administrative and budgetary mechanisms in place, and it could quickly begin operations under the purview of the Secretary-General.

The current divisions of the OLA conduct a variety of duties, including maintaining a database on treaty information, organizing seminars, analyzing international law,<sup>87</sup> and providing secretarial and legal research services to the UN Commission on International Trade Law<sup>88</sup> and the Intergovernmental Conference of the UN Convention on the Law of the Sea.<sup>89</sup> While the Secretary-General's mandate is largely administrative,<sup>90</sup> it may be expanded to include "other functions as are entrusted to him" by UN constituent entities.<sup>91</sup> If granted the mandate to establish a single residual mechanism, the Secretary-General would have the authority to appoint staff to parts of the Secretariat under regulations established by the General Assembly, and to make annual reports to the UNGA on progress.<sup>92</sup> As illustrated by the Secretary-General's role in the creation of the ECCC,<sup>93</sup> the Secretary-General may also carry mandates given by the UNGA to appoint a "group of experts to evaluate the existing evidence and propose further measures, as a means of [ . . . ] addressing the issue of individual accountability."<sup>94</sup> This shows that the Secretary-General is well-suited to work on the creation of the ORTA, should the mandate come from the UNGA.

A key legal question on the formation of the ORTA is whether the Secretary-General has the authority to establish such an organization within the OLA without a UNGA or UNSC resolution. On one hand, the Secretary-General serves in a leadership role within the UN, adopting and enacting agendas during

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<sup>87</sup> *Office of Legal Affairs, Treaty Section*, UNITED NATIONS, available at <https://www.un.org/ola/en/content/div-treaty> (last visited July 3, 2023).

<sup>88</sup> *Office of Legal Affairs, International Trade Law Division*, UNITED NATIONS, available at <https://www.un.org/ola/en/content/div-itld> (last visited July 3, 2023).

<sup>89</sup> *Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea*, UNITED NATIONS, available at <https://www.un.org/ola/en/content/div-doalos> (last visited July 3, 2023).

<sup>90</sup> U.N. Charter art. 97.

<sup>91</sup> U.N. Charter art. 98.

<sup>92</sup> U.N. Charter art. 98.

<sup>93</sup> See footnote 56.

<sup>94</sup> General Assembly Resolution 52/135, para. 16, U.N. Doc. A/RES/52/135 (Feb. 27, 1998), available at <https://digitallibrary.un.org/record/254857?ln=en>.

their tenure.<sup>95</sup> On the other hand, without a clear mandate and oversight by the UNGA, it is unclear whether the Secretary-General can unilaterally establish an organization that can take on the full mandates of *ad hoc* and hybrid tribunals. It may be possible, however, for the Secretary-General to appoint a minimal number of staff to an office or division assigned to develop the ORTA model, which can lay the groundwork to expand and meet the transitional needs of future tribunals with proper political support in due time.

*Administration.* As part of the UN Secretariat, the ORTA can begin operations under the Secretary-General on an expedited basis. The ORTA's constituting instrument, bylaws, rules, or statute would need to outline its duties, organizational structure, and approach to any trials it may be required to facilitate in the future. Although the tribunals' individual statutes would supply the substantive law applied in these trials, all staffing, resources, and logistics would be coordinated by the ORTA. The rules streamlining these duties could be modeled after the key documents of the UN Dispute Tribunal (UNDT), another office under the UN Secretariat. The UNDT has a statute and rules of procedure, as well as codes of conduct regulating administration of dispute resolution under the office.

The ORTA's funding would be provided from the Secretariat budget, with potential voluntary contributions from member states. The ORTA's budgetary requirements would likely be more modest than in the SRM model, as the accordion model would allow the mechanism to expand and shrink operations based on the prosecutorial needs of the residual *ad hoc* and hybrid tribunals. As one expert pointed out, however, the ORTA's budget may expand rapidly and significantly if a fugitive is apprehended and the ORTA is required to provide staff and resources for a trial. This could pose issues for the Secretariat's budget, and member states could *de facto* prevent trials by withholding the funding the ORTA needed to facilitate the trial.

*Jurisdictional Challenges.* Perhaps the biggest impediment to the accordion model is the jurisdictional challenges it could face in the event of a prosecution. As mentioned above, the ORTA's constitutive instruments will inevitably affect the procedural and administrative rules applicable to trials conducted after transfer

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<sup>95</sup> See, e.g., *Secretary-General's Action Agenda on Internal Displacement*, UNITED NATIONS, available at <https://www.un.org/en/content/action-agenda-on-internal-displacement/> (last visited July 3, 2023).

of operations. This could lead to jurisdictional and due-process challenges by the indictees prosecuted after the transfer of residual operations to the ORTA. Two experts have questioned whether a chambers staffed by the ORTA would have the competence to oversee trials under different tribunals' statutes, or if the ORTA would be required to have an independent jurisdictional mandate. If the latter, jurisdictional challenges, as noted above, may arise.

One of the advantages of the accordion model is maintaining the prosecutorial mandates of *ad hoc* and hybrid tribunals under their individual statutes, rather than transferring them to the residual mechanism. As such, the ORTA would not have an independent mandate to prosecute individuals, but rather would serve as a staffing bureau should a trial be required after a tribunal enters its residual phase. On the efficiency front, this prevents the need to maintain active rosters for registrars, judges, prosecutors, and defense counsel, and could lead to significant cost savings. The ORTA staff could consist of individuals who previously worked for the *ad hoc* and hybrid tribunals, and could maintain a lean team to advance the core residual functions. On the promotion-of-justice front, the accordion model would allow the tribunals to maintain their jurisdiction to prosecute apprehended indictees and avoid difficulties where referrals to the national jurisdiction are not possible. Maintaining the prosecutorial jurisdiction within the tribunals also makes the ORTA a more politically viable option. After a tribunal's residual functions are transferred to the ORTA, the ORTA's ability to prosecute would depend on whether the tribunal retained a prosecutorial mandate under its statute. For instance, since the IRMCT's prosecutorial mandate is dependent on periodic extensions by the UNSC, the ORTA would not have a mandate to continue prosecutions under the IRMCT Statute if the UNSC allowed the mandate to expire, even if the IRMCT's residual functions were transferred to the ORTA.

### C. *Residual Affairs Oversight Division*

The third institutional design envisions a division under the UN umbrella, hereafter referred to as the Residual Affairs Oversight Division (Oversight Division), that would exclusively manage the non-prosecutorial, core residual functions of the *ad hoc* and hybrid tribunals. In that sense, the Oversight Division model would be an administrative entity that would coordinate the consolidation of the *ad hoc* and hybrid tribunals' residual functions to the extent feasible. Given that all *ad hoc* and hybrid tribunals currently in existence have entered their residual phases, the main role of the Oversight Division would be to gather

information on the functioning of the relevant residual mechanisms, and to create the conditions whereby the residual functions can be transferred to the Oversight Division. The Oversight Division can be shaped to meet the residual mechanisms' needs and to find efficiencies through discussions and negotiations with the residual mechanisms. For instance, discussions with experts have suggested that consolidating the archival systems of the mechanisms would be quite difficult and costly. However, archival management is one of the aspects of residual mechanisms that does not have a set end date. The Oversight Division could attempt to build one consolidated archival system for all current and future tribunals if that appears sensible, or could oversee the management of the various archives in their existing forms. Similarly, the Oversight Division could absorb key personnel working in the residual mechanisms and provide headquarters and resources for their operations.

Although this model would likely be the least politically controversial, given its simplicity and purely administrative nature, several aspects of the model were criticized by the experts. *First*, as the Oversight Division is not designed to facilitate prosecutions in an internationalized tribunal, any apprehended indictees would have to be transferred to national jurisdictions for trial. This is a course of action that most tribunals have followed, but it does come with drawbacks for promotion-of-justice purposes. There is often a reason why *ad hoc* and hybrid tribunals have international characteristics: the national legal system can suffer from due-process limitations or may raise concerns that a fair trial may not be achievable in light of the particular conflict; there may not be sufficient resources; the conflict that led to the tribunal may be ongoing; or post-conflict peace could be fragile. Relying on a national jurisdiction to oversee the prosecution of those most responsible for atrocities therefore can undermine efforts of achieving justice through due process. *Second*, given that the existing residual mechanisms are already scaling down significantly, the efficiency rationale may not support this consolidation effort. For instance, the RSCSL has moved its headquarters to the IRMCT building, the SCSL archives are housed in the Dutch National Archives, and the RSCSL has a lean team of committed professionals operating with a modest budget. It is unclear whether the legal and administrative work of combining the residual functions of the current tribunals would justify creating a new division from an efficiency perspective. However, similarly to the other models, the Oversight Division could grow to house the residual functions of future tribunals, and could ensure permanent support to the core residual functions of current and future *ad hoc* and hybrid tribunals.

## **VII. Areas of Further Inquiry**

### *A. Other International Criminal Justice Entities*

Aside from those tribunals and residual mechanisms examined in this memorandum, numerous fact-finding missions, investigative mechanisms, and adjudicatory entities have been established to pursue international criminal accountability over the years, typically by or with the assistance of the United Nations. Whether it would be appropriate to include these entities in any single residual mechanism—whichever form it takes—after they complete their active mandates is a question that would merit further research. These entities share many commonalities with *ad hoc* and hybrid tribunals. Notably, these entities are in possession of significant amounts of evidence and information and could benefit from having access to a central repository. For instance, investigative mechanisms’ international teams, operating under United Nations mandates, conduct witness interviews and equip domestic courts and other entities with the materials that they will need to prosecute perpetrators of atrocities by identifying and preserving evidence. As a result, these investigative mechanisms often are also concerned with continuing victim and witness protection and archival security and management, beyond the end of the investigative mechanism’s mandate.

Further research into the operations and lifespans of existing investigative mechanisms will be necessary to determine whether a single residual mechanism designed for tribunals is suitable to take on their continuing functions, or whether a separate residual mechanism should be created specific to the needs of these investigative mechanisms and similar entities.

## **VIII. Conclusion**

The discussions above make clear that a perfect model for a single residual mechanism may not exist. However, the idea of a single residual mechanism holds promise that can affirmatively contribute to the promotion of justice while realizing efficiencies. Rather than providing one recommendation, we have explored various forms that such a single residual mechanism might take. These options illustrate the legal, practical, and political issues to consider for policymakers, diplomats, and other actors in the international community. The global political landscape is ever-changing, and the appetite for and viability of creating a single residual mechanism of any kind may ebb and flow. It is our hope that the research and analysis we provide above will be a fruitful point of departure

for future discussions about the wisdom, efficacy, and political and administrative feasibility of consolidating existing and future residual mechanisms.

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The Public International Law & Policy Group is a global pro bono law firm providing free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecution/transitional justice. To facilitate the utilization of this legal assistance, PILPG also provides policy planning assistance and training on matters related to conflict resolution.

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## APPENDIX 1

### Overview of Five Tribunals Currently in Residual-Mechanism Phase

	ICTY, ICTR and IRMCT (Former Yugoslavia and Rwanda)	SCSL and RSCSL (Sierra Leone)	ECCC (Cambodia)	STL (Lebanon)
Current Active Entity	Residual mechanism as of July 1, 2012 (ICTR) and July 1, 2013 (ICTY).	Residual mechanism as of 2014.	Initial tribunal conducting residual functions.	Initial tribunal conducting residual functions.
Residual Mechanism	<p>The ICTY and the ICTR were converted into a single residual mechanism: the IRMCT.</p> <p>The IRMCT was set up to be operative for an initial period of four years beginning July 1, 2012, with the progress of its work to be reviewed before the end of those initial four years and every two years going forward.</p>	<p>The Residual Special Court for Sierra Leone is currently active after the dissolution of the Special Court for Sierra Leone in 2013. Amendment and termination of the RSCSL is provided for by agreement of Sierra Leone and the UN.</p>	<p>The tribunal was converted to residual functions for a three-year period upon completion of proceedings before any chamber of the Extraordinary Chambers. The judgment in the last proceeding, an appeal concerning Khieu Samphân, was pronounced by the Supreme Court Chamber of the ECCC on September 22, 2022.</p> <p>After the three-year period, the UN and Cambodia will review progress and determine the future status of residual functions.</p>	<p>On July 1, 2022, “[t]he Tribunal entered a residual phase in order to preserve its records and archives, safeguard residual obligations to victims and witnesses, and respond to requests for information from national authorities.”</p>
Constitutive Documents	<p><u>ICTY</u>: Acting under Chapter VII of the UN Charter, the Security Council issued Resolution 827 (1993), establishing the ICTY by adopting the Statute of the International Tribunal annexed to the Secretary-General’s Report.</p> <p><u>ICTR</u>: Acting under Chapter VII of the Charter of the United Nations, the Security Council</p>	<p><u>Tribunal</u>: Created by bilateral agreement between Sierra Leone and the UNSC pursuant to UNSC Res. 1315, with the UN Statute forming an “integral” part of agreement. Sierra Leone enacted ratifying domestic legislation.</p> <p><u>Residual mechanism</u>: The tribunal’s agreement provided for its dissolution with consent of Sierra Leone and the UN</p>	<p><u>Tribunal</u>: Created by bilateral agreement between the UN and Cambodia and ratified by Cambodian domestic legislation, in accordance with UNGA Res. 57/228.</p> <p><u>Residual mechanism</u>: The tribunal’s agreement provided for its dissolution “following the definitive conclusion of these proceedings.” The tribunal was to be converted to</p>	<p><u>IIC</u>: Created in 2005 by UNSC Resolution 1595 with the approval of the Lebanese Government. This was not under Chapter VII powers but the Commission enjoyed the full cooperation of the Lebanese authorities. The mandate was extended to 2009 through successive UNSC resolutions. Operations and assets were transferred to the STL.</p>



	ICTY, ICTR and IRMCT (Former Yugoslavia and Rwanda)	SCSL and RSCSL (Sierra Leone)	ECCC (Cambodia)	STL (Lebanon)
	<p>issued Resolution 955 (1994), establishing the ICTR by adopting the Statute of the International Criminal Tribunal annexed to the Resolution.</p> <p><u>IRMCT</u>: Acting under Chapter VII of the UN Charter, the Security Council issued Resolution 1966 (2010), which adopted the Statute of the Mechanism found in Annex 1 to the Resolution.</p>	<p>(see Art. 23). The residual mechanism was created in 2010 by bilateral agreement between Sierra Leone and the UN pursuant to UN Res. 1315, with the UN statute forming an “integral” part of agreement, before dissolution of tribunal in 2013. The residual mechanism became operative in 2014.</p>	<p>residual status upon completion of proceedings by 2021, according to a bilateral agreement between Cambodia and the UN, and ratified by Cambodian domestic legislation.</p>	<p><u>Tribunal</u>: Created in 2007 by UNSC Resolution 1757 acting under Chapter VII powers. The UNSC resolution was adopted as an agreement between the Secretary-General and the Lebanese Government dated January 23 and February 6, 2007.</p> <p><u>Residual mechanism</u>: An agreement between the UN and Lebanon was described in a September 7, 2021 letter, stating that the current tribunal will operate in a dormant framework to address residual responsibilities, and outlining those responsibilities.</p>
Temporal Jurisdiction	<p><u>ICTY</u>: Between January 1991 and a date TBD by the UN Security Council.</p> <p><u>ICTR</u>: Between January 1, 1994 and December 31, 1994.</p> <p><u>IRMCT</u>: The residual mechanism continues the temporal jurisdiction of the ICTY and the ICTR.</p>	<p>Beginning November 30, 1996 with no end date specified in governing documents.</p>	<p>April 17, 1975 to January 6, 1979.</p>	<p>October 1, 2004 to December 12, 2005 or a later date decided by the Parties with consent of the UNSC.</p>
Subject-Matter Jurisdiction	<p><u>ICTY and ICTR</u>: “Serious violations of international humanitarian law.”</p> <p><u>IRMCT</u>: The residual mechanism continues the</p>	<p>“Serious violations of international humanitarian law and Sierra Leonean Law.”</p>	<p>“Crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia” under Khmer</p>	<p>The crimes associated with the February 14, 2005 attack resulting in the death of former Lebanese Prime Minister Rafiq Hariri and the death or injury of other persons. If the</p>

	ICTY, ICTR and IRMCT (Former Yugoslavia and Rwanda)	SCSL and RSCSL (Sierra Leone)	ECCC (Cambodia)	STL (Lebanon)
	material jurisdiction of the ICTY and the ICTR.		Rouge.	Tribunal finds that other attacks between October 1, 2004 and December 12, 2005 or a later date are connected to and of a nature and gravity similar to the February 14 attack, those crimes are included in the Tribunal's jurisdiction.
Personal Jurisdiction	<u>ICTY and ICTR</u> : "Natural persons" who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to" in the relevant Statute.  <u>IRMCT</u> : The residual mechanism continues the personal jurisdiction of the ICTY and the ICTR.	"Person[s] who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to" in the relevant Statute.	"Senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations" related to the court's subject- matter jurisdiction.	Expansive: "over persons" responsible for the crimes within the Court's jurisdiction.
Substantive Law	<u>ICTY</u> : - War crimes (grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war); - Crimes against humanity; and - Genocide.  <u>ICTR</u> : - Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (similar in substance to ICTY, but limited in scope to the rules that apply to non-international armed	- Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II;  - Crimes against humanity;  - Other serious violations of international humanitarian law; and  - Abuse of girls and wanton destruction of property under Sierra Leonean law.	- Violations of Cambodian 1956 Penal Code for homicide, torture, and religious persecution (with statute of limitations extended 30 years);  - Genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948;  - Crimes against humanity as defined by international law and the governing documents;  - Grave breaches of the Geneva	- Provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offenses against life and personal integrity, illicit associations and failure to report crimes and offenses, including the rules regarding the material elements of a crime, criminal participation, and conspiracy; and  - Articles 6 and 7 of the Lebanese law of January 11, 1958 on "Increasing the

	ICTY, ICTR and IRMCT (Former Yugoslavia and Rwanda)	SCSL and RSCSL (Sierra Leone)	ECCC (Cambodia)	STL (Lebanon)
	<p>conflicts); - Crimes against humanity; and - Genocide.</p> <p><u>IRMCT</u>: Each branch of the residual mechanism applies the same law as was applicable at the corresponding initial tribunal, the ICTY or the ICTR.</p>		<p>Conventions of 1949;  - Destruction of cultural property under 1954 Hague Convention; and  - Crimes against internationally protected persons under Vienna Convention of 1961 on Diplomatic Relations.</p>	<p>penalties for sedition, civil war and interfaith struggle.”</p>
Procedural Law	<p><u>ICTY</u>: Rules adopted by the judges of the tribunal.</p> <p><u>ICTR</u>: Rules adopted by the ICTY, with changes where necessary.</p> <p><u>IRMCT</u>: Rules to be adopted by the judges of the residual mechanism, the draft of which was to be based on the ICTY and ICTR’s rules of procedure.</p>	<p><u>SCSL</u>: Rules applicable at the ICTR were to apply <i>mutatis mutandis</i>, with the possibility for the judges of the SCSL to amend or adopt new rules in certain circumstances.</p> <p><u>RSCSL</u>: Rules applicable at the SCSL, with the possibility for the judges of the RSCSL to amend or adopt new rules in certain circumstances.</p>	<p>Tribunal procedural rules are in accordance with Cambodian law. If procedural law is not settled on a question, then international procedural rules may provide guidance.</p>	<p>Procedural rules developed and specific to the Tribunal, guided by the Lebanese Code of Criminal Procedure and international criminal procedure.</p>
Domestic Aspects	N/A	<ul style="list-style-type: none"> <li>- Six of 16 judges on the residual mechanism roster appointed by Sierra Leone; and</li> <li>- Sierra Leone has the right to consult on the selection of the prosecutor.</li> </ul>	<ul style="list-style-type: none"> <li>- One of two prosecutors must be Cambodian;</li> <li>- Three of five judges in initial court trial proceedings must be Cambodian;</li> <li>- Four of seven judges in appellate proceedings in the initial court must be Cambodian; and</li> <li>- Appellate proceedings must proceed through the</li> </ul>	<ul style="list-style-type: none"> <li>- One of the three judges in the Trial Chamber shall be Lebanese;</li> <li>- Two of the five judges in the Appeals Chamber shall be Lebanese;</li> <li>- One of the two alternate judges shall be Lebanese;</li> <li>- STL has concurrent jurisdiction with Lebanese</li> </ul>

	ICTY, ICTR and IRMCT (Former Yugoslavia and Rwanda)	SCSL and RSCSL (Sierra Leone)	ECCC (Cambodia)	STL (Lebanon)
			Cambodian Supreme Court Chamber.	<p>courts, and within its jurisdiction, it has primacy over the national courts of Lebanon;</p> <ul style="list-style-type: none"> <li>- An amnesty granted to any person for any crime within the jurisdiction of the STL is not a bar to prosecution; and</li> <li>- The national judicial authorities have a continuing obligation to collaborate with the STL and defer competence where requested by the STL.</li> </ul>
Status of Cases	<p>One ongoing case: The <i>Kabuga</i> trial began on September 29, 2022, but was ordered to continue under an “alternative finding procedure” following a finding that the accused was unfit to stand trial. The Appeals Chamber has upheld the finding of incompetence but rejected the suggestion of an alternative finding mechanism.</p> <p>Note: Prosecutor made findings on May 12, 2022 and on May 18, 2022, regarding the deaths of Protais Mpiranya on October 5, 2006 and Phénéas Munyarugarama on February 28, 2002, respectively. The remaining three fugitives indicted by the ICTR remain at</p>	<p>Only one outstanding indictee, who is presumed dead. If this indictee is apprehended, the residual mechanism will “undertake every effort” to refer the case to a national jurisdiction before undertaking its own prosecution.</p> <p>The residual mechanism will handle appeals.</p>	<p>No outstanding indictees.</p> <p>Last appeal concluded on September 22, 2022.</p>	<p>The residual status of the STL does not anticipate ongoing judicial or investigative activity, except as necessary.</p> <p>It appears there is only one ongoing case, the <i>Ayyash Case</i>, and that case has been stayed since June 2021, as the STL awaits direction from the UNSC in light of the STL’s lacking the funds necessary to complete its mandate.</p>

	ICTY, ICTR and IRMCT (Former Yugoslavia and Rwanda)	SCSL and RSCSL (Sierra Leone)	ECCC (Cambodia)	STL (Lebanon)
	large and are expected to be tried by Rwanda, subject to the conditions set out in the relevant referral decisions.			
Unique Features	- Established by the UN Security Council acting under Chapter VII of the UN Charter.	- Not organized under Chapter VII of the UN Charter and consequently funded by voluntary contributions.	- First tribunal with separation of national and international responsibilities with their own hiring, reporting, and administrative features.  - Greater emphasis placed on domestic control. For instance, if international staff “fail or refuse to participate” in proceedings, Cambodia may replace them with Cambodian staff.	- Trials in <i>absentia</i> ;  - First international tribunal to prosecute acts of terrorism, a notoriously difficult area of law to define in international law;  - Independent Defense Office; and  - Autonomous pre-trial judge.

**APPENDIX 2**  
List of Experts Consulted

- **Todd Buchwald** (Former Ambassador, Office of Global Criminal Justice, U.S. Department of State)
- **David Crane** (Former Chief Prosecutor, Special Court for Sierra Leone)
- **Margaret M. deGuzman** (Judge, International Residual Mechanism for Criminal Tribunals)
- **Kate Gibson** (Defense Counsel, International Criminal Court; Defense Counsel, International Residual Mechanism for Criminal Tribunals)
- **James Johnson** (Former Chief Prosecutor, Special Court for Sierra Leone)
- **Larry Johnson** (Former Assistant Secretary-General for Legal Affairs, United Nations)
- **Binta Mansaray** (Registrar, Residual Special Court for Sierra Leone)
- **Robert Petit** (Former Prosecutor, Extraordinary Chambers in the Courts of Cambodia)
- **Stephen Rapp** (Former Ambassador, Office of Global Criminal Justice, U.S. Department of State)
- **Anand Shah** (Defense and Victims' Counsel, International Criminal Court)