

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

Developments concerning the International Criminal Court and other international criminal tribunals

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DEVELOPMENTS CONCERNING THE INTERNATIONAL CRIMINAL COURT (ICC) AND OTHER INTERNATIONAL CRIMINAL TRIBUNALS

I. The International Criminal Court (ICC)

1. The Rome Statute of the International Criminal Court (the Rome Statute) currently has 123 State parties. Since the last meeting of the CAHDI, no new instruments of ratification, acceptance or approval were deposited.

2. Since the last meeting of the CAHDI, there has been no new ratifications of the two amendments to the Rome Statute of the International Criminal Court, adopted at the Review Conference of the Rome Statute held in Kampala (Uganda) from 31 May to 11 June 2010 (the so-called "Kampala amendments"). The amendment to Article 8 of the Rome Statute has been ratified/accepted by 36 States¹, while the amendments on the crime of aggression have been ratified/accepted by 35 States².

3. The amendment adopted by the Parties at the 11th plenary meeting of the Assembly of States Parties to the Rome Statute in The Hague (Netherlands) on 26 November 2015, to repeal Article 124 of the Rome Statute (transitional provision with regard to the ICC's jurisdiction concerning war crimes), will enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited by seven-eighths of them. So far, Norway (1 July 2016), Finland (23 September 2016), the Slovak Republic (28 October 2016), the Netherlands (20 March 2017), Portugal (11 April 2017), Austria (22 September 2017), France (19 March 2018), Italy (13 April 2018), Croatia (27 April 2018) and Romania (14 June 2018) have deposited their instruments of acceptance with regard to this amendment³.

4. As regards the latest judicial activity at the ICC, since the last CAHDI meeting:

- On 12 March 2018, Jordan appealed⁴ the Chamber's earlier decision⁵ in the case [The Prosecutor v. Omar Hassan Ahmad Al Bashir](#) finding that Jordan had failed to comply with its obligations by not arresting and surrendering the Sudanese President Omar Al-Bashir when he was in the country in March 2017. On 29 March 2018, the Appeals Chamber invited observations from the United Nations and Regional Organisations (specifically the African Union, the European Union, the League of Arab States and the Organization of American States), ICC States Parties and Professors of International Law, on legal questions raised by Jordan. Furthermore, on 25 May 2018 the Appeals Chamber invited submissions from the competent authorities of the Republic of Sudan and Mr Omar Hassan Ahmad Al Bashir on the legal questions raised by Jordan in its appeal. This will be the first time that the Appeals Chamber will consider the matter of a referral to the Assembly of States Parties and the United Nations Security Council of a State Party's non-compliance.
- On 8 June 2018, in the case [The Prosecutor v. Jean-Pierre Bemba Gombo](#), the Appeals Chamber reversed the [decision](#) of the Trial Chamber III from 21 March 2016, and decided, by majority, to acquit Jean-Pierre Bemba Gombo from the charges of war crimes (murder, rape and pillaging) and crimes against humanity (murder and rape). On 13 June 2018, the Board of Directors of the [Trust Fund for Victims at the ICC](#) informed the President of the Assembly of States Parties of its unanimous decision, following Mr Bemba's acquittal

¹ See [Amendment to article 8 of the Rome Statute of the International Criminal Court](#), Kampala, 10/06/2010.

² See [Amendments on the crime of aggression to the Rome Statute of the International Criminal Court](#), Kampala, 11/06/2010.

³ See, [Amendment to article 124 of the Rome Statute of the International Criminal Court](#), The Hague, 26 November 2015.

⁴ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Decision on Jordan's request for leave to appeal, 21 February 2018.

⁵ ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09. Decision on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, 11 December 2017.

decision, to accelerate the launch of a programme under its assistance mandate. The assistance programme will be provided in the form of physical and psychological rehabilitation, as well as material support, for the benefit of victims and their families in the Central African Republic.

- On 19 July 2018, Trial Chamber II issued its decision on the alleged transgenerational harm suffered by five applicants for reparations on account of their parents' experience during the attack, in the case of [The Prosecutor v. Germain Katanga](#)⁶, after the matter was referred to it by a [judgment of the ICC Appeals Chamber](#). Trial Chamber II dismissed the requests for reparations made by these applicants, finding that they had not established to the requisite standard of proof the causal nexus between the psychological harm they had personally suffered and the crimes of which Mr Katanga was convicted.
- On 20 July 2018, Pre-Trial Chamber I [decided](#) to postpone the commencement of the confirmation hearing in the case [The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#) to 6 May 2019 (the hearing had been initially scheduled to take place on 24 September 2018). Having considered the submissions and requests of the parties, as well as a number of factors, the Chamber considered it appropriate, in the interests of the proceedings in general, to postpone the confirmation of charges hearing. The purpose of the confirmation of charges hearing is to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. If the charges are confirmed, the case will be transferred to a Trial Chamber. Mr Al Hassan was transferred to the ICC on 31 March 2018 following a warrant of arrest issued by the Chamber for war crimes and crimes against humanity.
- The closing statements in the case of [The Prosecutor v. Bosco Ntaganda](#) took place on 28-30 August 2018 before Trial Chamber VI. Bosco Ntaganda, former alleged Deputy Chief of the General Staff of the *Force Patriotiques pour la Libération du Congo* [Patriotic Force for the Liberation of Congo], is accused of 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and five crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population) allegedly committed in 2002-2003. His trial opened on 2 September 2015.
- In the case [The Prosecutor v. Dominic Ongwen](#), an alleged former brigade commander of the Sinia Brigade of the LRA, an armed group, is charged with crimes against humanity and war crimes in Uganda between 2002 and 2004. The trial opened on 6-7 December 2016, resumed on 16 January 2017, and is scheduled to continue on 18 September 2018. 4,107 victims have been granted the right to participate in the proceedings

II. The United Nations Mechanism for International Criminal Tribunals (MICT)

5. The United Nations Mechanism for International Criminal Tribunals (MICT) continues the jurisdiction and essential functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) after the completion of their respective mandates.
6. The latest developments at the MICT were as follows:

⁶ ICC, *The Prosecutor v. Germain Katanga*, case no. ICC-01/04-01/07.

- On 22 March 2018, both parties in the case [The Prosecutor v. Ratko Mladić](#) filed their notices of appeal against the ICTY judgment⁷ of November 2017, whereby Ratko Mladić, Commander of the Main Staff of the Army of the Bosnian-Serb Republic between 1992 and 1995, was found guilty of genocide, crimes against humanity and violations of the laws or customs of war committed by Serb forces in Sarajevo, Srebrenica and 15 other municipalities during the conflict in Bosnia and Herzegovina and was sentenced to life imprisonment.
- On 11 April 2018, the Appeals Chamber rendered its judgment in the case of [Prosecutor v. Vojislav Šešelj](#), reversing Šešelj's acquittals of 31 March 2016 and convicting him for instigating deportation, persecution (forcible displacement) and other inhumane acts as crimes against humanity, as well as for committing persecution, as a crime against humanity. The Appeals Chamber sentenced Šešelj to 10 years of imprisonment but the sentence was declared served in view of the credit to which Šešelj was entitled under the Rules of Procedure and Evidence for the time he spent in detention in custody of the ICTY pending trial.
- On 20 April 2018, the Appeals Chamber ordered both parties to submit a list of the evidence and witnesses they propose to introduce at a future review hearing in the case [Prosecutor v. Augustin Ndirabatware](#). On 20 December 2012, Trial Chamber II of the ICTR convicted Ndirabatware of incitement to commit genocide, instigating and aiding and abetting genocide, and rape as a crime against humanity, in Rwanda in 1994. In June 2017, the Appeals Chamber granted Ndirabatware's request for review of the appeal judgment.
- On 23 and 24 April 2018 took place the appeal hearing in the case of [The Prosecutor v. Radovan Karadžić](#), against the ICTY Trial Chamber Judgement of 24 March 2016 which had found Karadžić guilty of genocide, crimes against humanity and violations of the laws or customs of war, sentencing him to 40 years of imprisonment.

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

7. Since the last CAHDI meeting, the latest developments at the Extraordinary Chamber in the Courts of Cambodia (ECCC) were as follows:

- On 28 June 2018, the Pre-Trial Chamber unanimously concluded to the existence of various procedural defects, in particular with regard to the evidentiary assessment and the undue delay in concluding the judicial investigation Chamber in [Case 004/1](#) against Ms Im Chaem. The International Co-Prosecutor had filed an appeal before the Pre-Trial Chamber against the closing order⁸ issued by the Office of the Co-Investigating Judges, in which the case was dismissed for lack of personal jurisdiction of the ECCC⁹. The five judges came to different conclusions regarding the merits of the appeal and as four out of five votes are required to overturn a Co-Investigating judges' decision, the decision affirming that the ECCC have no jurisdiction over Im Chaem shall stand, which eventually concludes case 004/1.
- On 16 August 2018, the Co-Investigating Judges issued two separate closing orders in the [case 004/02](#), against Ao An, due to a disagreement about whether Ao An is subject to the ECCC's personal jurisdiction as a senior leader or one of the persons most responsible for crimes committed during the period of Democratic Kampuchea. The National Co-Investigating Judge is of the view that Ao An does not fall under the ECCC's personal jurisdiction under either category and dismisses the case against Ao An for that reason. The International Co-Investigating Judge is of the view that Ao An is subject to the ECCC's

⁷ ICTY, *The Prosecutor v. Ratko Mladić*, case no. IT-09-92, Trial judgment, 22 November 2017, [Vol. 1/5](#), [Vol. 2/5](#), [Vol. 3/5](#), [Vol. 4/5](#).

⁸ ECCC, case file no. 004/1/07-09-2009-ECCC-OCIJ, [Closing Order \(Disposition\)](#)

⁹ ECCC, case file no. 004/1/07-09-2009-ECCC-OCIJ, [Closing Order \(Reasons\)](#)

personal jurisdiction as one of the most responsible persons, and that there is sufficient evidence to indict him for the genocide of the Cham and crimes against humanity, as well as domestic offences under Cambodian law. Given the opposing closing orders, it is unclear whether the indictment will stand, should there be no super-majority upon appeal in the Pre-Trial Chamber.

IV. Special Tribunal for Lebanon (STL)

8. Since the last CAHDI meeting, the latest developments at the Special Tribunal for Lebanon (STL) were as follows:

- On 12 April 2018, the Prosecutor filed a notice of withdrawal of his request to confirm the indictment submitted on 21 July 2017, indicating his intention to re-submit a request to confirm an updated indictment to the Pre-Trial Judge at a later date. The Appeals Chamber issued a [Decision](#)¹⁰ in October 2017 on 15 interlocutory questions submitted by the Pre-Trial Judge¹¹. The questions were related to the following topics: the material element (*actus reus*) and the intentional element (*mens rea*) of the crime of criminal association under Lebanese law; the distinctive elements between criminal association and conspiracy under Lebanese law and the criteria for reviewing the indictment.
- On 13 June 2018, the Trial Chamber ordered the Prosecutor and the Legal Representatives of Victims in the case of [Ayyash et al.](#) to file their final trial briefs in July and August 2018, respectively, at the latest. The Trial Chamber will hear oral closing arguments from the parties and participating victims from 11 to 21 September 2018. This case relates to the 14 February 2005 attack which killed 22 individuals, including the former Lebanese Prime Minister Rafik Hariri, and injured 226 others. The Accused remain at large and the proceedings against them are being held *in absentia*. A judgement of acquittal or a decision dismissing the application will be delivered in court as soon as practicable.

V. Residual Special Court for Sierra Leone (RSCSL)

9. Since the last CAHDI meeting, the latest developments at the Residual Special Court for Sierra Leone (RSCSL) were as follows:

- On 28 May 2018, the RSCSL discharged the first person convicted of war crimes having completed his full sentence. Moinina Fofana, the one-time Director of War for the Civil Defence Forces, was convicted by the SCSL on five counts of war crimes and crimes against humanity. He was sentenced to a prison term of 15 years, with credit given for time served in custody since his arrest in May 2003.
- On 9 June 2018, the RSCSL granted conditional early release to convict Allieu Kondewa, who was returned to Sierra Leone from Rwanda, where he was serving a 20-year sentence for five counts of war crimes and crimes against humanity committed during Sierra Leone's civil conflict. Kondewa, the former Civil Defence Forces Initiator and High Priest, was allowed to serve the remainder of his sentence in his community in Bo, subject to strict conditions and monitoring. His full term will end in 2023. This conditional early release, the second for

* All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

¹⁰ STL, case file no. STL-17-07/I/AC/R176bis.

¹¹ On 11 August 2017, the Appeals Chamber was seized with the Pre-Trial Judge's Order submitting preliminary questions under Rule 68(G) of the Tribunal's Rules of Procedure and Evidence. Under Rule 68(G), the Pre-Trial Judge may submit preliminary questions to the Appeals Chamber. These questions may be on the interpretation of the Agreement between the United Nations and the Lebanese Republic on the establishment of the Tribunal, the Tribunal's Statute and Rules regarding the applicable law that the Pre-Trial Judge deems necessary to examine and rule on an indictment submitted for confirmation.

the RSCSL, marks further progress for the Court toward completing its mandate. Six convicted persons remain in prison, serving sentences ranging from 25 to 52 years.

VI. Kosovo* Specialist Chambers and Specialist Prosecutor's Office

10. On 10 June 1999, the UN Security Council passed Resolution 1244¹² establishing a framework for the resolution of the conflict in Kosovo* following the dissolution of the Socialist Federal Republic of Yugoslavia. The Resolution authorised the deployment of an international civilian and military presence that would provide an international transitional administration and security presence in the region. In April 2009, the European Union established EULEX, the European Union Rule of Law Mission to assist Kosovo* judicial authorities and law enforcement agencies in their process towards sustainability. Its legal basis lies in the *European Union Joint Action*¹³ of February 2008 and the Council Decisions of June 2010, 2012, 2014, 2016 and 2018¹⁴.

11. On 7 January 2011, the Council of Europe Parliamentary Assembly approved a Report entitled "[Inhuman treatment of people and illicit trafficking in human organs in Kosovo*](#)" (Doc.12462) which alleged that serious violations of international law had taken place in connection to the inhuman and degrading treatment to which some Serbians and some Albanian Kosovars were subjected by the Kosovo* Liberation Army. Based on the allegations of this Council of Europe Parliamentary Assembly Report, in September 2011 the European Union established a [Special Investigative Task Force](#) (SITF), an autonomous entity that derives its jurisdiction and legal authority from the *European Union Joint Action*¹⁵.

12. To address these allegations, on 3 August 2015, the Kosovo* Assembly adopted the new [Article 162 of the Kosovo* Constitution](#) and the [Law on Specialist Chambers and Specialist Prosecutor's Office](#) (Law no.05/L-053) to investigate and prosecute grave trans-boundary and international crimes which occurred during and in the aftermath of the conflict in Kosovo* in 1998, 1999 and 2000 in relation to the conduct identified in the Council of Europe Parliamentary Assembly Report of 7 January 2011.

13. The *Law on Specialist Chambers and Specialist Prosecutor's Office* gives the *Specialist Prosecutor's Office* the authority to, inter alia, request the presence of and to question suspects, victims and witnesses, collect and examine information and evidence, and take decisions on the initiation, and the continuation or termination of criminal proceedings. The *Specialist Prosecutor's Office* acts independently from the *Specialist Chambers* and all other prosecutors in Kosovo*.

14. The *Specialist Chambers* and the *Specialist Prosecutor's Office* are of temporary nature, and function in accordance with the "[Rules of Procedure and Evidence before the Kosovo* Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court](#)" adopted pursuant to Article 162(6) of the Constitution of the Republic of Kosovo* and Article 19(1) of the *Law on Specialist Chambers and Specialist Prosecutor's Office*.

15. In May 2018, Mr Pietro Spera was appointed as Ombudsperson for the *Specialist Chambers* and the *Specialist Prosecutor's Office*. The Ombudsperson has an essential role in monitoring,

¹² UN Security Council, *Security Council resolution 1244 (1999) on the deployment of international civil and security presences in Kosovo**, 10 June 1999, S/RES/1244 (1999).

¹³ [Council Joint Action 2008/124/CFSP](#) of 4 February 2008 on the European Union Rule of Law Mission in Kosovo*, EULEX KOSOVO*.

¹⁴ [Council Decision 2010/322/CFSP](#) of 8 June 2010, [Council Decision 2012/291/CFSP](#) of 5 June 2012, [Council Decision 2014/349/CFSP](#) of 12 June 2014, [Council Decision 2016/947/CFSP](#) of 14 June 2016, and [Council Decision \(CFSP\) 2018/856](#) of 8 June 2018, amending and extending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo* (EULEX KOSOVO*).

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¹⁵ See n. 13 above.

defending and protecting fundamental rights and freedoms as enshrined in the Constitution of Kosovo* for those persons interacting with the *Specialist Chambers* and the *Specialist Prosecutor's Office*. The Ombudsperson may not interfere in judicial proceedings before the *Specialist Chambers*, except in instances of unreasonable delay, but can make recommendations to the President of the *Specialist Chambers* or to the *Specialist Prosecutor* on matters falling within their functions.

16. In June 2018, the *Kosovo* Specialist Chambers* and the *Specialist Prosecutor's Office* published their [first report](#), highlighting some of the critical milestones achieved between April 2016 and February 2018. The first part of the report explains the process that led to the *Kosovo Specialist Chambers* becoming judicially operational (April 2016 – July 2017) and further major steps in building the regulatory framework and strengthening outreach (July 2017 – February 2018). The second part of the report presents the background and establishment of the *Specialist Prosecutor's Office*, highlighting its responsibility and the challenges of its work.

17. To date (28 August 2018), no indictment procedures before the *Kosovo* Specialist Chambers* have been initiated.

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