

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. The decision by Burundi to withdraw from the Rome Statute (notification of 27 October 2016) has taken effect on 27 October 2017.

2. Since the last meeting of the CAHDI, 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”, were ratified by Panama (6 December 2017). Both amendments have now been ratified/accepted by 35 States in total¹.

3. The amendment adopted by the Parties at the 11th plenary meeting of the Assembly of States Parties to the Rome Statute on 26 November 2015 in The Hague (Netherlands), to repeal Article 124 of the Rome Statute (transitional provision with regard to the ICC’s jurisdiction concerning war crimes), shall 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) and Austria (22 September 2017) have deposited their instruments of acceptance with regard to this amendment².

4. During its 16th session (New-York, 4-14 December 2017), the Assembly of States Parties to the Rome Statute of the International Criminal Court adopted by consensus Resolution ICC-ASP/16/Res.5 on *Activation of the jurisdiction of the Court over the crime of aggression*³ of 14 December 2017. This Resolution activates the jurisdiction of the ICC over the crime of aggression as of 17 July 2018, in accordance with paragraph 3 of art. 15^{bis} and 15^{ter} of the Rome Statute. During the same session, following the end of the mandate of six judges elected in 2009, the Assembly of State Parties elected six new judges to the Court, to serve for a period of nine years. On 9 March 2018, Judges Luz del Carmen Ibañez Carranza (Peru), Solomy Balungi Bossa (Uganda), Tomoko Akane (Japan), Reine Alapini-Gansou (Benin), Kimberly Prost (Canada) and Rosario Salvatore Aitala (Italy) were sworn in a public ceremony which took place at the seat of the Court in the Hague and subsequently, on the 11 March 2018, the judges of the International Criminal Court sitting in a plenary session elected Judge Chile Eboe-Osuji (Nigeria) as President of the Court for a three-year term with immediate effect. Judge Robert Fremr (Czech Republic) was elected First Vice-President and Judge Marc Perrin de Brichambaut (France) Second Vice-President.

5. As regards the latest judicial activity at the ICC:

- On 9 November 2017, the Pre-Trial Chamber III issued a Decision⁴ authorising an investigation regarding crimes within the jurisdiction of the Court allegedly committed in Burundi or by nationals of Burundi outside Burundi from 26 April 2015 until 26 October 2017.

¹ See, [Amendment to article 8 of the Rome Statute of the International Criminal Court](#), Kampala, 10 June 2010, and, [Amendments on the crime of aggression to the Rome Statute of the International Criminal Court](#), Kampala, 11 June 2010.

² See, [Amendment to article 124 of the Rome Statute of the International Criminal Court](#), The Hague, 26 November 2015.

³ Assembly of States Parties to the Rome Statute of the International Criminal Court, Resolution ICC-ASP/16/Res.5 (2017) on *Activation of the jurisdiction of the Court over the crime of aggression*, 16th session, 14 December 2017.

⁴ ICC, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi](#), 25 October 2017, ICC-01/17-X-9-US-Exp.

- On 20 November 2017, the Office of the Prosecutor requested the Pre-Trial Chamber authorisation to launch investigation into the situation in Afghanistan in relation to alleged crimes committed in this country in the period since 1 May 2003 as well as other alleged crimes linked to the armed conflict in Afghanistan and committed on the territory of other States Parties to the Statute since 1 July 2002⁵. The alleged crimes comprise crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network, war crimes by the Afghan armed forces and by members of the United States armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004.
- On 11 December 2017, the Pre-Trial Chamber II delivered its Decision⁶ in the case of [*The Prosecutor v. Omar Hassan Ahmad Al Bashir*](#) in the situation of Darfur (Sudan) finding that Jordan failed to comply with its obligations by not arresting and surrendering Mr Al-Bashir to the ICC while he was on Jordanian territory on 29 March 2017. The Chamber also decided to refer the matter of Jordan's non-compliance to the Assembly of States Parties of the Rome Statute and the United Nations Security Council.
- On 15 December 2017, the Trial Chamber II issued a Decision⁷ in the case of [*The Prosecutor v. Thomas Lubanga Dyilo*](#) setting the amount of Mr Thomas Lubanga Dyilo's liability for collective reparations at \$10,000,000 USD. This decision completes the Order of reparation⁸ of 3 March 2015. Mr Thomas Lubanga Dyilo was sentenced by Judgment⁹ of 10 July 2012 to 14 years of imprisonment for committing the war crimes of enlistment and conscription of children under the age of 15 and using them to participate actively in hostilities.
- On 21 February 2018, the Pre-Trial Chamber II granted Jordan's request for leave to appeal¹⁰ the Chamber's earlier decision in the context of the case [*The Prosecutor v. Omar Hassan Ahmad Al Bashir*](#) regarding Jordan's failure to comply with its obligation to arrest the Sudanese President Omar Al-Bashir when he was in the country in March 2017. The leave to appeal was granted in relation to the Chamber's conclusions on the effects of the Rome Statute, [*Security Council Resolution 1593 \(2005\)*](#)¹¹ on the immunity of President Al-Bashir and on the referral of Jordan to the Assembly of States Parties and UN Security Council. Only the appeal in relation with the assessment of President Al-Bashir's immunity based on the 1953 Convention on the Privileges and Immunities of the Arab League was denied.
- On 8 March 2018, following the 2016 Trial Chamber VII judgement in which it found the five accused in [*The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*](#)¹² guilty of various offences against the administration of justice in relation to false testimonies in the case of [*The Prosecutor v. Jean-Pierre Bemba Gombo*](#)¹³, the Appeals Chamber issued its [judgments](#) rejecting the appeals submitted by the five accused. The Appeals Chamber thereby confirmed their convictions in respect of most of the charges, however, it acquitted Mr

⁵ ICC, [Request for authorisation of an investigation pursuant to article 15](#), 20 November 2017, ICC-02/17-7-Conf-Exp.

⁶ 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.

⁷ ICC, [*The Prosecutor v. Thomas Lubanga Dyilo*](#), case no. ICC-01/04-01/06, Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu, 15 December 2017.

⁸ ICC, [*The Prosecutor v. Thomas Lubanga Dyilo*](#), case no. ICC-01/04-01/06-3129, 3 March 2015.

⁹ ICC, [*The Prosecutor v. Thomas Lubanga Dyilo*](#), case no. ICC-01/04-01/06-2901, 14 July 2012.

¹⁰ 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.

¹¹ UN Security Council, [Security Council Resolution 1593 \(2005\)](#), 31 March 2005, S/RES/1593 (2005).

¹² ICC, [*The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*](#), case no. ICC-01/05-01/13, 19 October 2016.

¹³ ICC, [*The Prosecutor v. Jean-Pierre Bemba Gombo*](#), case no. ICC-01/05-01/08, 21 March 2016.

Bemba, Mr Kilolo and Mr Mangenda of the charge of presenting evidence that a party knows is false or forged (Article 70(1)(b) of the Rome Statute). The convictions and acquittals in relation to the five accused are now final.

- On 8 March 2018, the Appeals Chamber [judgment](#) confirmed, for the most part, the Reparations Order in the case [The Prosecutor v. Germain Katanga](#)¹⁴ in which the Trial Chamber awarded reparations to 297 identified victims amounting to \$1,000,000 USD. The Appeals Chamber rejected Mr Katanga's appeal indicating that, in principle whether other individuals may also have contributed to the harm is irrelevant. In relation to the appeal brought by the Office of Public Counsel for Victims on behalf of five applicants who claimed reparations for transgenerational harm suffered on account of their parents' experience during the attack, the Appeals Chamber decided to remand the matter to the Trial Chamber for it to assess anew the question of the causal nexus between the crimes for which Mr Katanga was convicted and the psychological harm and whether they should be awarded reparations.
- On 8 March 2018, the Appeals Chamber [judgment](#) confirmed, for the most extent, the Reparations Order in the case [The Prosecutor v. Ahmad Al Faqi Al Mahdi](#)¹⁵. On 27 September 2016, Trial Chamber VIII found Mr Al Mahdi guilty of the war crime consisting in intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in June and July 2012 and sentenced him to nine years' imprisonment. On 17 August 2017, Trial Chamber VIII issued a Reparations Order concluding that Mr Al Mahdi was liable for 2.700.000€ in expenses for individual and collective reparations for the community of Timbuktu to be implemented by the Trust Fund for Victims. In its judgement, the Appeals Chamber confirmed the reparations order and concluded that applicants for individual reparations should be able to contest before the Trial Chamber the Trust Fund's decision on their eligibility for individual reparations. The Appeals Chamber also underlined that the Trial Chamber may also review the assessment by the Trust Fund for Victims *motu proprio*. The Appeals Chamber moreover found that, although individual reparations requests may be considered without disclosing the identities of the applicants to Mr Al Mahdi, their identities will be disclosed to the Trust Fund for Victims.

II. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations Mechanism for International Criminal Tribunals (MICT)

6. On 31 December 2017, the International Criminal Tribunal for the former Yugoslavia (ICTY) was formally closed after 24 years of activities. All remaining functions were handed over to the United Nations Mechanism for International Criminal Tribunals (MICT). The CAHDI followed the developments concerning the ICTY since its creation in 1993 by [Resolution 827 \(1993\)](#) of the United Nations Security Council. During its 5th meeting (Strasbourg, 16-17 March 1993), the CAHDI held an exchange of views on different legal aspects of the upcoming ICTY¹⁶. Since the 6th meeting of the CAHDI (Paris, 13-14 September 1993)¹⁷, the topic has regularly been addressed during the CAHDI meetings.

7. The latest developments at the ICTY and the MICT were as follows:

- On 22 November 2017, the Trial Chamber I of the ICTY delivered its Judgement¹⁸ in the case of [The Prosecutor v. Ratko Mladić](#). Mr Ratko Mladić, Commander of the Main Staff of the Army of the Bosnian-Serb Republic between 1992 and 1995, was found guilty of

¹⁴ ICC, [The Prosecutor v. Germain Katanga](#), case no. ICC-01/04-01/07, 7 March 2014.

¹⁵ ICC, [The Prosecutor v. Ahmad Al Faqi Al Mahdi](#), case no. ICC-01/12-01/15, 27 September 2016.

¹⁶ Document CAHDI (93) 3, para. 41-58.

¹⁷ Document CAHDI (93) 17, para. 54-55.

¹⁸ 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](#).

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. Mr Ratko Mladić filed a motion seeking an extension of time to file his notice of appeal against this ICTY Trial Judgment before the MICT Appeals Chamber. On 21 December 2017, the pre-appeal judge partly granted the motion for an extension of time and ordered that any notices of appeal in this case be filed within 120 days of the issuance of the ICTY Trial Judgement, and no later than 22 March 2018.

- On 29 November 2017, the Appeals chamber of the ICTY delivered its judgment in the case of *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*¹⁹. The Appeals Chamber reaffirmed almost all the convictions as well as the sentences of the convicted. The case concerned six high-level leaders of the Bosnian Croat wartime entity Herceg-Bosna and the Croatian Defence Council who were convicted on 29 May 2013 by judgement²⁰ of Trial Chamber III to sentences of 10-25 years of imprisonment for crimes against humanity, violations of the laws or customs of war, and grave breaches of the Geneva Conventions committed between 1992 and 1994. This case was the last one before the ICTY. During the public pronouncement of the Appeal Judgment, Mr Slobodan Praljak took poison, which caused his passing thereafter. The ICTY requested an independent investigation by the Dutch Authorities, which is currently on-going as well as an independent expert review. On 29 December 2017, the [independent expert review](#) was presented to the Registrar.
- On 13 December 2017, the appeal hearings in the case of *Prosecutor v. Vojislav Šešelj* started in front of the Appeals Chamber of the MICT. By judgement of 31 March 2016, the ICTY Trial Chamber III acquitted Mr Vojislav Šešelj of all charges, namely crimes against humanity and violation of laws or customs of war. This judgment was appealed by the Prosecution by notice of 2 May 2016.

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

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

- On 11-12 December 2017, hearings before Pre-trial Chamber for *Case 004/1* against Ms Im Chaem took place. The International Co-Prosecutor had filed an appeal before the Pre-Trial Chamber against the closing order²¹ issued by the Office of the Co-Investigating Judges on 22 February and 10 July 2017, in which the case was dismissed for lack of personal jurisdiction of the ECCC. In the view of the Office of the Co-Investigating Judges, Ms Im Chaem could not be considered as a “senior leader” or as a person “most responsible”, as shown by evidence, and thus would fall outside of the scope of the personal jurisdiction of the ECCC²².
- On 13 February 2018, the Pre-Trial Chamber issued its [decision](#) regarding the request of the International Co-Prosecutor to look into the allegations of sexual violence in Prison No. 8 and in Bakan District within the context of *Case 004*²³. This request was filed in the form of an Appeal to the previous Impugned Decision of the International Co-Investigative Judge (4

¹⁹ ICTY, *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*, case no. IT-04-74, Appeals chamber judgment, 29 November 2017, [Vol. I](#), [Vol. II](#), [Vol. III](#).

²⁰ ICTY, *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*, case no. IT-04-74, Trial judgement, 29 May 2013, [Vol. 1/6](#), [Vol. 2/6](#), [Vol. 3/6](#), [Vol. 4/6](#), [Vol. 5/6](#) and [Vol. 6/6](#).

²¹ ECCC, case file no. 004/1/07-09-2009-ECCC-OCIJ, [Closing Order \(Disposition\)](#)

²² ECCC, case file no. 004/1/07-09-2009-ECCC-OCIJ, [Closing Order \(Reasons\)](#)

²³ ECCC, case file no. 004/07-09-2009-ECCC-OCIJ PTC52, Public Redacted Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action regarding sexual violence at Prison No.8 and in Bakan District, 13 February 2018, D365/3/1/5.

September 2017) in which the request to investigate the above mentioned allegations *inter alia* was denied. In the Appeal, the International Co-Prosecutor submitted that International Co-Investigating Judge had violated his obligation to investigate, erred in law and denied the right of the International Co-Prosecutor to be heard. The Pre-Trial Chamber in its decision dismissed the Appeal as it did not find any failure in the investigation of the allegations or any legal error on the part of the International Co-Investigating Judge.

IV. Special Tribunal for Lebanon (STL)

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

- On 18 October 2017, the Appeals Chamber issued a [Decision](#)²⁴ on 15 interlocutory questions submitted by the Pre-Trial Judge. 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 7 February, the Prosecutor completed the presentation of evidence in the Case of [Ayyash et al](#)²⁵ marking the conclusion of the prosecution case. 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)

10. Since the last CAHDI meeting, there were no new developments concerning the Residual Special Court for Sierra Leone (RSCSL).

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

11. On 10 June 1999, the UN Security Council passed Resolution 1244²⁶ 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. To this end, Kosovo* was placed under the United Nations Interim Administration Mission (UNMIK) and the NATO-led peacekeeping force KFOR was authorised. 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*²⁷ of February 2008 and the Council Decisions of June 2010, 2012, 2014 and 2016²⁸.

* 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.

²⁴ STL, case file no. STL-17-07/I/AC/R176bis.

²⁵ STL, *The Prosecutor v. Ayyash et al*, case file no. STL -11-01.

²⁶ 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).

²⁷ [Council Joint Action 2008/124/CFSP](#) of 4 February 2008 on the European Union Rule of Law Mission in Kosovo*, EULEX KOSOVO*.

²⁸ [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 and [Council Decision 2016/947/CFSP](#) of 14 June 2016 amending and extending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo*, EULEX KOSOVO*.

12. 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. This report alleged that the Kosovo* Liberation Army held these Serbian and Albanian Kosovars prisoners in secret locations in northern Albania before they were disappeared. Moreover, this Report concluded that, during the period immediately after the end of the armed conflict, before international forces had been able to take control of the region, there were many indications that organs had been removed from prisoners in Albania for illegal transplants abroad.

13. Based on the allegations of this Council of Europe Parliamentary Assembly Report, the European Union in September 2011 established a [Special Investigative Task Force](#) (SITF), an autonomous entity that derives its jurisdiction and legal authority from the *European Union Joint Action*²⁹. In May 2012, the Albanian Parliament adopted a law on cooperation with the SITF allowing it to conduct an independent criminal investigation into the allegations contained in the Council of Europe Report, as well as other crimes connected to those allegations. To reinforce the independence and confidentiality of the process, the SITF consisted exclusively of international staff. In 2014, the SITF announced that the evidence investigated was of sufficient weight to file an indictment.

14. To address these allegations, on 3 August 2015, following the [Exchange of Letters](#) between the President of Kosovo* and the High Representative of the European Union for Foreign Affairs and Security Policy in 2014, 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). This law established their mandate: 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.

15. The *Specialist Chambers* and the *Specialist Prosecutor's Office* have their seat in The Hague, the Netherlands. They are of temporary nature, with a specific mandate and jurisdiction and they 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*.

16. The *Specialist Chambers* are attached to each level of the court system in Kosovo*; Basic Court, Court of Appeals, Supreme Court and Constitutional Court. They will function according to relevant Kosovo* laws as well as customary international law and international human rights law. They comprise of the Chambers and the Registry.

17. Judges, President and Vice-President are appointed by the Head of the EU Common Security and Defence Policy Mission by recommendation of an independent Selection Panel, which consists of two international judges with substantial experience in international criminal law and a third international appointee.

18. The *Specialist Prosecutor's Office* is an independent office for the investigation and prosecution of the crimes within the jurisdiction of the *Specialist Chambers*.

* 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.

²⁹ [Council Joint Action 2008/124/CFSP](#) of 4 February 2008 on the European Union Rule of Law Mission in Kosovo*, EULEX KOSOVO*.

19. 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 within the subject matter jurisdiction of the *Specialist Chambers*. The *Specialist Prosecutor's Office* acts independently from the *Specialist Chambers* and all other prosecutors in Kosovo*.

20. To date (12 March 2018), no indictment procedures before the *Kosovo* Specialist Chambers* have been initiated.

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