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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, with the latest accession, by Kiribati, on 26 November 2019.
2. Since the last meeting of the CAHDI, there have been one ratification and one acceptance of the amendments on the crime of aggression, by Italy and Sweden, with a total of ratifications/acceptations by 43 States.¹ The other amendment to the Rome Statute adopted at the Review Conference held in Kampala (Uganda) from 31 May to 11 June 2010 (the so-called “Kampala amendments”), regarding Article 8, has been ratified/accepted by 43 States², Italy and Sweden having ratified or accepted the amendment since the last meeting of the CAHDI.
3. The amendment to Article 8 of the Rome Statute adopted in New York on 14 December 2017, concerning “weapons which use microbial or other biological agents, or toxins”, that entered into force on 2 April 2020, has so far been ratified/accepted by twelve States (Croatia, the Czech Republic, Latvia, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Norway, Romania, the Slovak Republic, Sweden and Switzerland). The other amendments to Article 8, adopted at the same date and which also entered into force on 2 April 2020, concerning “weapons the primary effect of which is to injure by fragments undetectable by x-rays in the human body”, and “blinding laser weapons” have so far been ratified/accepted by ten States (Croatia, the Czech Republic, Latvia, Luxembourg, the Netherlands, New Zealand, Norway, Romania, the Slovak Republic and Switzerland).³
4. The amendment to Article 8 of the Rome Statute concerning “intentionally using starvation of civilians” adopted in The Hague on 6 December 2019, that entered into force on 14 October 2021, has so far been adopted by eight States, with one ratification and one acceptance since the last meeting of the CAHDI (Liechtenstein and Romania).⁴
5. 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, 17 States (Andorra, Austria, Belgium, Croatia, France, Finland, Italy, Latvia, Liechtenstein, the Netherlands, Norway, Portugal, Romania, the Slovak Republic, Slovenia, Sweden and Switzerland) have deposited their instruments of acceptance/ratification with regard to this amendment.⁵
6. The [Assembly of States Parties](#) to the Rome Statute of the International Criminal Court (“the Assembly”) held its twentieth session from 6 to 10 December 2021 in The Hague. The Assembly elected two Deputy Prosecutors: Ms Nazhat Shameen Khan (Fiji) and Mr Mame Mandiaye Niang (Senegal), for a nine-year term commencing on 8 March 2022. The Assembly held its General debate and two thematic plenary sessions: one on cooperation and one on the Review of the International Criminal Court and the Rome Statute system. The Assembly adopted five resolutions by consensus on: the programme budget for 2022, cooperation, the Review of the International Criminal Court and the Rome Statute system, the outcome of the work of the Study Group on Governance on

¹ See, [Amendments on the crime of aggression to the Rome Statute of the International Criminal Court](#), Kampala, 11/06/2010.

² See, [Amendment to Article 8 of the Rome Statute of the International Criminal Court](#), Kampala, 10/06/2010.

³ See, [Amendments to Article 8 of the Rome Statute of the International Criminal Court \(Weapons which use microbial or other biological agents, or toxins\) \(Weapons the primary effect of which is to injure by fragments undetectable by x-rays in the human body\) \(Blinding laser weapons\)](#), New York, 14/12/2017.

⁴ See, [Amendment to Article 8 of the Rome Statute of the International Criminal Court \(Intentionally using starvation of civilians\)](#), The Hague, 6 December 2019.

⁵ See, [Amendment to Article 124 of the Rome Statute of the International Criminal Court](#), The Hague, 26 November 2015.

recommendations of the Group of Independent Experts, and strengthening the International Criminal Court and the Assembly of States Parties. The Assembly also adopted the 2022 programme budget of the Court totalling €154,855,000 and a staffing level of 976. The twenty-first session of the Assembly will be held from 5 to 10 December 2022 in The Hague.

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

- In the case [The Prosecutor v. Dominic Ongwen](#), a hearing was held before the Appeals Chamber on 14-18 February 2022 to address the Defence's grounds of appeal relating to Mr Ongwen's conviction and sentence. A number of *amici curiae* were also invited to provide observations on the appeals and participate in the hearing. The Defence raises 90 grounds of appeal consisting of alleged legal, factual and procedural errors relating to the conviction, and 11 grounds of appeal, alleging legal, factual and procedural errors relating to the sentence. The appeal brought against the conviction is the largest ever considered by the Chamber, raising complex and novel issues. The defendant Mr Ongwen was sentenced on 6 May 2021 to 25 years of imprisonment following the Trial Judgment in which the Chamber found him guilty for a total of 61 crimes comprising crimes against humanity and war crimes, committed in Northern Uganda between 1 July 2002 and 31 December 2005.
- In the case [The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman](#), the Appeals Chamber decided unanimously, on 1 November 2021, to reject the appeal of Mr Ali Abd-Al-Rahman ("Ali Kushayb") against the Pre-Trial Chamber II decision of 17 May 2021 on the Defence's jurisdictional challenge ("*exception d'incompétence*"). In rejecting the Defence's four grounds of appeal, the Appeals Chamber highlighted, among other matters, that it found no error in the reasons given by the Pre-Trial Chamber defining a "situation" before the Court as defined in terms of temporal, territorial and in some cases personal parameters. It also found that the non-funding by the United Nations of the activities of the Court arising from a referral by the Security Council does not invalidate the UNSC resolution 1593 which referred the situation to the ICC. As for the alleged failure of the Pre-Trial Chamber to take into account the lack of the Security Council logistical and security support to the Court in Sudan, the Appeals Chamber found that the Defence had not demonstrated how this alleged error of law relates to the jurisdiction of the Court. Finally, and referring to the principle of legality, *nullum crimen sine lege*, the Appeals Chamber found that the referral of the Situation in Darfur, Sudan took place in the wake of serious violations of human rights and humanitarian law that were criminalised under international law at the time. The Appeals Chamber also found that the crimes under the Statute were intended to be generally representative of the state of customary international law when the Statute was drafted. This weighs heavily in favour of the foreseeability of facing prosecution for such crimes even in relation to conduct occurring in a State not party to the Statute. Judge Ibáñez expressed her separate views concerning this ground of appeal and while agreeing with the outcome reached by the majority, she considered that, in her view, the jurisdiction of the Court over the conduct in this case pre-dates UNSC Resolution 1593, which only triggered the Court's jurisdiction and thus there is no need to refer to any other sources of law.
- In the case [The Prosecutor v. Paul Gicheru](#), the trial opened before Trial Chamber III on 15 February 2022. Mr Gicheru is accused of offences against the administration of justice consisting in corruptly influencing witnesses regarding cases from the situation in Kenya.
- In the case [The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), the Legal Representatives of Victims made their opening statements before the judges on 8 February 2022. The Prosecution has finalised the presentation of its evidence and the Defence will present its case later this year. Mr Al Hassan is accused of crimes against humanity and war crimes allegedly committed in Timbuktu (Mali).
- In the case [The Prosecutor v. Ahmad Al Faqi Al Mahdi](#), On 25 November 2021, a panel of three judges of the Appeals Chamber, appointed to review Mr Ahmad Al Faqi Al Mahdi's

sentence decided to reduce his nine-year sentence of imprisonment by two years. The date for the completion of his sentence is set to 18 September 2022. In reaching their decision the judges considered several factors in relation to this review, including the possible social instability in Northern Mali that early release may cause, Mr Al Mahdi's prospect for resocialization and resettlement and his cooperation since he was surrendered to the ICC in September 2015. Trial Chamber VIII found, on 27 September 2016, 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.

- In the case [The Prosecutor v. Mahamat Said Abdel Kani](#), Pre-Trial Chamber II, on 9 December 2021, partially confirmed the charges of crimes against humanity and war crimes brought by the Prosecutor against Mr Said. The warrant of arrest against Mr Mahamat Said Abdel Kani also known as "Mahamat Said Abdel Kain" and "Mahamat Saïd Abdelkani" ("Mr Said") was issued under seal on 7 January 2019 for war crimes and crimes against humanity allegedly committed in Bangui (CAR) in 2013. The trial is scheduled to open on 26 September 2022.
- On 2 March 2022, the ICC Presidency assigned the [Situation in Ukraine](#) to Pre-Trial Chamber II. The Prosecutor has notified the judges of his intention to submit a request under article 15(3) of the Rome Statute seeking authorisation to open an investigation into the Situation in Ukraine with respect to alleged war crimes and crimes against humanity in Ukraine from 21 November 2013 onwards. Once the Prosecutor submits his request in accordance with the Rome Statute, it will then be for the Judges of Pre-Trial Chamber II to decide whether or not to authorise the Prosecutor to open an investigation into the Situation. The Judges will have to consider whether there is a reasonable basis to proceed with an investigation, upon examination of the Prosecutor's request and the supporting material.

II. Special Tribunal for Lebanon (STL)

8. The primary mandate of the Special Tribunal for Lebanon (STL) is to hold trials for the people accused of carrying out the attack of 14 February 2005 which killed 22 people, including the former prime minister of Lebanon, Rafik Hariri, and injured many others. The tribunal also has jurisdiction over other attacks in Lebanon between 1 October 2004 and 12 December 2005 if it is proven that they are connected to the events of 14 February 2005 and are of similar nature and gravity. The mandate also allows the tribunal to have jurisdiction over crimes carried out on any later date, decided by the parties and with the consent of the UN Security Council, if they are connected to the 14 February 2005 attack. The STL is the first tribunal of an international character with jurisdiction over the crime of terrorism in times of peace and the first to utilise trials *in absentia*.

9. Since the last CAHDI meeting, the developments at the STL were as follows:

- On 10 March 2022, in the case of [Prosecutor v. Merhi and Oneissi](#), (STL-11-01; formerly, *Prosecutor v. Ayyash et al.*), the Appeals Chamber convicted Mr Hassan Habib Merhi and Mr Hussein Hassan Oneissi for their roles in the terrorist attack on 14 February 2005 that resulted in the assassination of former Prime Minister Rafik Hariri, the killing of 21 others and injury to 226 people. On 18 August 2020, the Trial Chamber of the Special Tribunal for Lebanon unanimously convicted Salim Jamil Ayyash on all counts and sentenced him, in his absence, to life imprisonment. The Trial Chamber had acquitted Hassan Habib Merhi and Hussein Hassan Oneissi on all counts. The convictions of Merhi and Oneissi resulted from the Prosecutor's successful appeal against findings by the Trial Chamber. The Appeals Chamber found that the accused were members of the conspiracy aimed at committing the terrorist act in downtown Beirut, in the middle of the day on 14 February 2005. Both Merhi and Oneissi played a significant role immediately after the attack to shield the perpetrators from justice. Shortly after the attack, Merhi and Oneissi participated in the distribution of a video in which a fictitious group falsely claimed responsibility for the attack and ensured that the video would be collected and broadcast on Al-Jazeera television within hours of the attack. In addition to convicting Merhi and Oneissi, the Appeals Chamber concluded that a network of phones,

labelled by the Prosecution as the “Green Network”, was used to coordinate the attack. Merhi and Ayyash, both convicted by the Tribunal, were members of the Green Network. This network, found by the Appeals Chamber to be a covert Hezbollah network, was coordinated by Mustapha Amin Badreddine, who was found to be a Hezbollah Military Commander during 2004 and 2005, and who was reportedly killed in Syria in 2016.

III. Kosovo * Specialist Chambers (KSC) and Specialist Prosecutor's Office

10. The Kosovo Specialist Chambers (KSC) and Specialist Prosecutor's Office were established pursuant to an international agreement ratified by the Kosovo Assembly, a Constitutional Amendment and the Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office. They are of temporary nature with a specific mandate and jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law, which were commenced or committed in Kosovo between 1 January 1998 and 31 December 2000 by or against citizens of Kosovo or the Federal Republic of Yugoslavia.

11. Since the last CAHDI meeting, the latest developments at the KSC were as follows:

- In the case of [Specialist Prosecutor v. Salih Mustafa](#), the trial commenced on 15 September 2021 with the opening statements of the Specialist Prosecutor and the Victims' Counsel. On 4 February 2022, the Specialist Prosecutor's Office (SPO) closed its case. On 23 February 2022, the Panel denied the Defence motion to dismiss the charges against the accused pursuant to Rule 130 of the KSC Rules of Procedure and Evidence. The Defence case is scheduled to commence on 22 March 2022, preceded by the presentation of evidence by Victim's Counsel on 21 March.
- In the case of [Specialist Prosecutor v. Pjetër Shala](#), the Specialist Prosecutor's Office filed, as strictly confidential and ex-parte, its pre-trial brief on 28 January 2022. The Pre-Trial Judge had previously admitted one individual as a victim participating in the proceedings. The confirmed indictment alleges that Mr Shala is responsible, under various forms of individual criminal responsibility, for the war crimes of arbitrary detention, cruel treatment, torture and murder committed in the context of and associated with a non-international armed conflict in Kosovo. The alleged crimes with which Mr Shala is charged took place between approximately 17 May 1999 and 5 June 1999 against persons detained at the Kukës Metal Factory (Albania) allegedly used by the Kosovo Liberation Army.
- In the case of [Specialist Prosecutor v. Hashim Thaçi et al.](#), following their arrests by the Specialist Prosecutor, Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi were transferred to the Detention Facilities of the Kosovo Specialist Chambers (KSC) in The Hague on 4 and 5 November 2020. The indictment against the four accused, as confirmed by the Pre-Trial Judge, states that the crimes charged were committed from at least March 1998 through September 1999 and took place in several locations across Kosovo as well as in Kukës and Cahan, in Northern Albania. They were allegedly committed by members of the KLA against hundreds of civilians and persons not taking part in hostilities. The indictment alleges that the four accused are individually criminally responsible, pursuant to various forms of criminal responsibility for crimes, which were committed in the context of a non-international armed conflict in Kosovo and were part of a widespread and systematic attack against persons suspected of being opposed to the KLA.
- In the case of [Specialist Prosecutor v. Hysni Gucati & Nasim Haradinaj](#), the closing statements are scheduled to take place from 14 until 18 March 2022. The indictment against

* 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.

the accused states that between at least 7 and 25 September 2020, on the occasion of three press conferences and other broadcasted events, as well as through further dissemination, Gucati and Haradinaj revealed, without authorisation, information protected under the law of the Specialist Chambers, including the identifying details of certain (potential) witnesses. Gucati and Haradinaj also made disparaging accusations and remarks against (potential) witnesses and repeatedly expressed their intention to undermine the Specialist Chambers. The trial commenced on 7 October 2021.

IV. Extraordinary Chambers in the Courts of Cambodia (ECCC)

12. The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established pursuant to an international agreement between the UN and the government of Cambodia in June 2003, following a law passed by the Cambodian government establishing the Chambers in 2001. They are of temporary nature with a specific mandate to try crimes of genocide, crimes against humanity and war crimes, as well as other crimes under the law of Cambodia, which were committed during the period from 17 April 1975 to 6 January 1979.

13. Since the last CAHDI meeting, the latest developments of the ECCC were as follows:

- On 20 December 2021, the National and International Co-Investigating Judges unanimously ordered [Case 003](#) to be archived. The Supreme Court Chamber of the ECCC dismissed, by decision of 17 December 2021, the International Co-Prosecutor's request to send the case against Meas Muth to trial holding that the Pre-Trial Chamber's joint disposition did not unanimously find the Indictment valid, even though every Judge of the Chamber individually made that finding. The Supreme Court Chamber concluded that the absence of a definitive and enforceable indictment and of transmission of the case file to the Trial Chamber justified terminating the case before any determination could be made regarding Meas Muth's guilt.
- On 29 December 2021, the Co-Investigating Judges ordered case file [Case 004](#) to be sealed and archived, clarifying that the case is terminated in the absence of a definitive and enforceable indictment. The Supreme Court Chamber dismissed, by decision of 28 December 2021, the International Co-Prosecutor's request to send the case against YIM Tith to trial.