

Chapter 8. Accountability



In the context of human rights, accountability is the ability to hold individual human rights violators responsible for their actions. Accountability mechanisms include criminal prosecutions, civil lawsuits, and non-judicial systems such as truth commissions, ombudsmen, national human rights commissions, and intergovernmental body actions. In considering whether to pursue a particular accountability mechanism, advocates should consider:

- Effectiveness of the mechanism;
- Purpose of the mechanism and potential outcomes;
- Role of victims; and
- Resources required to use the mechanism.

The effectiveness of an accountability mechanism often depends on the strength of the legal system in which it is situated. Advocates seeking to hold perpetrators of human rights abuses accountable should consider which legal system offers the best opportunity for accountability: the legal system of the country where the human rights violations occurred; the domestic laws of another country; an international tribunal; or another international mechanism.

Advocates should also consider their objectives, the types of outcomes that various accountability mechanisms can offer, and the likelihood that those outcomes will happen. Judicial mechanisms typically focus on punishing

perpetrators or compensating victims. Truth commissions generally focus on creating a public record of the human rights violations and making recommendations to governmental bodies. Ombudsmen and national human rights commissions can be uniquely situated to advance institutional reforms within government structures. Suspension or expulsion from intergovernmental organizations often targets a country's leadership, but it can have consequences for others in the country as well.

Primary accountability mechanisms: Purposes and potential outcomes

	Criminal Prosecution	Civil Lawsuit	Truth Commission	Ombudsman / National Human Rights Commission
Purpose	Punish the perpetrator, give the perpetrator and others a strong incentive not to commit similar crimes, reform the perpetrator if possible, satisfy public desire for retribution. ³⁹⁵	Provide redress for human rights violations by compelling compensation or restitution. ³⁹⁶	Investigate a pattern of human rights violations over a period of time, ³⁹⁷ encourage a divided community to heal through open dialogue. ³⁹⁸	Protect and promote human rights, ensure that human rights laws are effectively applied, protect people from rights abuses committed by public officials or institutions. ³⁹⁹
Possible outcomes	<ul style="list-style-type: none"> Perpetrator goes to jail Perpetrator performs community service Perpetrator pays a fine Perpetrator pays compensation to victim Perpetrator is stripped of citizenship, deported 	<ul style="list-style-type: none"> Perpetrator pays restitution to victim Perpetrator compensates victim for medical bills, property damage Perpetrator compensates victim for pain and suffering 	<ul style="list-style-type: none"> A final report Evidentiary record Recommendations for reform Recommendations for criminal prosecutions or other sanctions for perpetrators Recommendations for individual or community reparations for victims 	<ul style="list-style-type: none"> Conciliation or other alternative dispute resolution, possibly resulting in compensation to victim Institutional reform to prevent future human rights violations Referral to judiciary

Victim participation can be vital to the success of any accountability mechanism. But in some accountability mechanisms, such as criminal prosecutions, victims often play a subsidiary role, and participate in the process only if the prosecutor calls them as witnesses. On the other hand, a victim may be able to initiate a civil suit against a perpetrator and have greater control over the judicial process. Victim-centered processes such as truth commissions allow victims to present testimony and may give them the opportunity to confront perpetrators

³⁹⁵ William Geldart, *Introduction to English Law* (D.C.M. Yardley ed., 9th ed. 1984), 146.

³⁹⁶ *Ibid.*

³⁹⁷ Priscilla B. Hayner, *Truth Commissions: A Schematic Overview*, 88 *International Review of the Red Cross* 295, 295 (June 2006). Also available online at http://www.icrc.org/eng/assets/files/other/irrc_862_hayner.pdf.

³⁹⁸ International Criminal Court, "Reparation for Victims," accessed Jan. 8, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx.

³⁹⁹ Paulo Sergio Pinheiro & David Carlos Baluarte, *National Strategies, Human Rights Commissions, Ombudsmen, and National Action Plans* (UNDP, 2000) 2–3. Also available online at http://hdr.undp.org/sites/default/files/paulo_serjio_pinheiro_.pdf.

directly. Ombudsmen and national human rights commissions may prioritize working with the victim and perpetrator to seek a voluntary resolution of the dispute that may include compensation, an apology, or structural reforms to prevent future abuses.

The resources required to use each mechanism depend in part on whether the mechanism already exists. Most countries have judicial systems that are capable of overseeing criminal and civil prosecutions. In most countries, the government takes the lead role in pursuing criminal prosecutions. But advocates may need to lobby prosecutors to take on a case or initiate a private prosecution. Civil litigation can be expensive and time-consuming, but sometimes legal aid organizations or NGOs assist in the process. If a truth commission is already in place, participation is usually free of charge, and volunteers can assist victims in preparing their testimony. It can be expensive and time-consuming, however, to initiate a truth commission process where there is none in place. Finally, if a country has an established ombudsman office or national human rights commission, individuals can usually use these mechanisms without charge. Staff, volunteers, or civil society organizations often are available to assist victims in preparing a complaint and going through the process.

The rest of this chapter is structured according to the legal system in which the accountability mechanism is situated: the legal system of the country where the human rights violations occurred; the domestic laws of other countries; and international mechanisms such as criminal tribunals and intergovernmental organizations.

A. Accountability in the Country Where the Human Rights Violations Occurred

Activists who are concerned about grave human rights violations may automatically think about pursuing accountability with an international tribunal such as the International Criminal Court. But the country where the human rights violations occurred is often the best place to pursue accountability. Witnesses and victims may be able to participate directly, evidence may be readily accessible, and civil society can participate in and monitor the process. A domestic accountability mechanism can also take into account cultural sensitivities and can offer remedies that are in the long-term best interest of the victims and the country. Domestic procedures may be able to take action more quickly and cost-effectively than international mechanisms. And there is usually little question that a domestic court has jurisdiction to hear a case involving a human rights violation that took place in that country or a perpetrator who is a national of the country. Moreover, many international accountability mechanisms require that advocates first exhaust domestic remedies, or demonstrate that attempting to exhaust domestic remedies would be futile. So a domestic action may set the necessary groundwork for initiating a proceeding in an international forum.

If domestic courts are independent and the judiciary functions well, judicial mechanisms may offer accountability in the form of criminal prosecutions or civil lawsuits. In the alternative, many countries have national human rights institutions (NHRIs), including ombudsmen and national human rights commissions. Some countries also have anti-corruption commissions, which can be effective if the human rights violation involves corruption on the part of a police officer or government official. After periods of protracted human rights violations, some countries establish truth commissions.

If domestic mechanisms are weak, politicized, corrupt, or non-existent,⁴⁰⁰ or if the laws are insufficient to hold perpetrators accountable, activists can engage in advocacy and push for legal reform, or they can work to create new institutions or strengthen existing mechanisms.

⁴⁰⁰ International Council on Human Rights Policy, "Preface," in *Hard Cases: Bringing Human Rights Violators to Justice Abroad* (Versoix: International Council on Human Rights Policy, 1999).

In many cases, these accountability mechanisms can be mutually reinforcing. For example, after a perpetrator is found guilty in criminal court, the victim may choose to sue the perpetrator for damages. A civil order for protection can form the basis for a criminal prosecution if a perpetrator of domestic violence violates the protection order. A truth commission may uncover evidence that is later used in a criminal prosecution. And if a perpetrator is not cooperative, an ombudsman may have the authority to refer a victim's complaint to a criminal prosecutor or a civil court for further action.

i. Criminal prosecution

Many countries have enacted domestic laws to impose criminal sanctions on people who commit human rights violations. Some have also criminalized grave human rights abuses such as genocide and crimes against humanity. Most countries have ratified the Geneva Conventions and incorporated the treaties into their domestic laws. These conventions require State Parties to "promulgate national laws that prohibit and provide for prosecution and punishment of grave breaches [of the Geneva Conventions], either by enacting laws to that effect or by amending existing laws."⁴⁰¹ Some countries use the definitions of genocide, crimes against humanity, and war crimes as they are written in the Rome Statute, or incorporate the Rome Statute's definitions by reference.⁴⁰² Other countries have modified the language of the Rome Statute to reflect their own national experiences. For example, Argentina includes forced hunger as a grave violation of international law, and the Democratic Republic of Congo increased from 15 to 18 the age applicable to the war crime of forcible recruitment.⁴⁰³ If a country has not enacted such legislation, civil society organizations can lobby for such laws to be adopted.

The Geneva Conventions and the Rome Statute

The Geneva Conventions and their Additional Protocols contain critical rules prohibiting human rights violations during times of armed conflict. They protect prisoners of war, civilians, wounded soldiers, medics, and aid workers. They contain rules to deal with "grave breaches" of the conventions and call on all countries to hold violators accountable.

In 1998, the international community met in Rome, Italy, to finalize a draft statute to establish a permanent international criminal court. The Rome Statute established the International Criminal Court and defined four core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.⁴⁰⁴

Even without specific laws on the books to punish perpetrators, many countries' existing criminal laws cover human rights violations. For example, even if a country's criminal code does not expressly criminalize intimate partner violence, it may criminalize assault. A victim of domestic violence could therefore seek to hold the perpetrator accountable by pushing for criminal prosecution under existing assault laws. Perpetrators of genocide may be held accountable through multiple indictments under a country's laws that punish murder, even if the country's criminal code does not directly address the crime of genocide.

⁴⁰¹ *Analysis of the Punishments Applicable to International Crimes (War Crimes, Crimes Against Humanity and Genocide)*, in *Domestic Law and Practice*, 90 *International Review of the Red Cross*, 461, 467 (June 2008).

⁴⁰² Joseph Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Community*, Dublin: 22nd International Conference of the International Society for the Reform of Criminal Law, Jul. 2008 (paper presentation), 10 (citing Cryer and Bekou, *International Crimes and ICC Cooperation in England and Wales*, 5 *JICJ* 441-459 (2007)). Available online at: <http://www.isrcl.org/Papers/2008/Rikhof.pdf>.

⁴⁰³ *Ibid.*, 11.

⁴⁰⁴ Rome Statute of the International Criminal Court, accessed Feb. 3, 2014, <http://www.un.org/law/icc/index.html>; International Committee of the Red Cross, "The Geneva Conventions of 1949 and their Additional Protocols," accessed Feb. 3, 2014, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/>.

In 2009, for example, the Special Criminal Court of the Supreme Court of Peru found former president Alberto Fujimori guilty of grave human rights violations. He was sentenced to 25 years in prison and ordered to pay \$90,000 in reparations to the victims. Fujimori was convicted under ordinary criminal laws that were in place at the time of his crimes: aggravated murder, assault, and kidnapping.⁴⁰⁵

If a country has demonstrated a willingness to prosecute human rights violators, advocates in the country's diaspora can sometimes play an important role in pressing for extradition of the perpetrators. When Chilean authorities arrested Fujimori, "Peru's human rights community immediately mobilized to support the [Peruvian Government's] extradition request."⁴⁰⁶ The Chilean human rights community, along with international NGOs, collaborated with relatives of the victims and other Peruvian activists to organize public events and protest marches in Chile and to lobby Chilean officials with legal arguments in favor of extradition.⁴⁰⁷

Ex-post Facto Laws

Ex-post facto laws attempt to punish individuals for actions that were not crimes when the action was taken. Criminal prosecutions in these circumstances are often thrown out because they violate due process.

Domestic courts in the countries of the former Yugoslavia have taken up war crimes prosecutions from the International Criminal Tribunal for the former Yugoslavia (ICTY), discussed in Part C of this chapter. Staff from the ICTY trained the local judiciaries, gave them access to the ICTY's evidence, and transferred cases to be prosecuted domestically. The domestic court in Bosnia and Herzegovina, for example, "has indicted 77 persons for involvement in war crimes, including 11 which had been transferred from the ICTY as part of its completion strategy and has convicted 27 persons, including four

which had been transferred from the ICTY."⁴⁰⁸ The courts of Kosovo have a similar arrangement and have begun five trials. "In Serbia, 57 persons have been charged in 12 separate indictments for international crimes since 2005, of which 22 have been convicted at first instance by the War Crimes Chamber of the Belgrade District Court (although 14 of these convictions were later overturned by the Serb Supreme Court), five persons have been acquitted and the remainder of the cases are ongoing."⁴⁰⁹ In Croatia, 1428 persons have been accused between 1991 and 2006 of crimes involving international criminal law and 611 of those persons have been convicted, although a number of those convictions took place in absentia.⁴¹⁰

Criminal prosecution of human rights violators in a country's domestic courts is not always a satisfactory option. First, domestic courts might be weak or corrupt, making conviction unlikely. Moreover, if a country's legal system is weak, other countries may be unwilling to extradite human rights violators who have fled the country. Second, prosecutors may refuse to pursue a case. Governments often lack the political will to prosecute their own citizens, especially when they are high-level officials.⁴¹¹ In such circumstances, some countries' judicial systems allow individuals to pursue "private prosecutions," but these proceedings can be costly and time-consuming. Third, sentences may be too lenient.⁴¹² Fourth, defendants may be able to avoid conviction by relying on domestic amnesty laws, immunity doctrines, or other legal defenses. Finally, even if a criminal proceeding results in a

⁴⁰⁵ Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, *International Journal of Transitional Justice* 384, 400 (2009). Also available online at <http://ijtj.oxfordjournals.org/content/3/3/384.full.pdf>.

⁴⁰⁶ *Ibid.*, 395.

⁴⁰⁷ *Ibid.*, 395–96.

⁴⁰⁸ Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Community*, *supra* note 402, at 7.

⁴⁰⁹ *Ibid.*, 13.

⁴¹⁰ *Ibid.*, 14.

⁴¹¹ International Criminal Court, "Rome Statute of the International Criminal Court," accessed Jan. 8, 2014, <http://www.un.org/law/icc/index.html>.

⁴¹² Human Rights Watch, "Chile Country Summary, January 2012," accessed on Jan. 9, 2014, http://www.hrw.org/sites/default/files/related_material/chile_2012.pdf.

conviction, underlying structures that allowed the human rights violation to happen may persist, and victims may not receive reparations or other forms of redress.

Rwanda Strengthens its Legal System to Facilitate Prosecution of Genocide Perpetrators

Nations have begun taking on their own prosecution of human rights violators, sometimes acting in conjunction with the international community to bring justice. For instance, in April 1994, Rwanda plunged into genocidal chaos. It took just 100 days for 800,000 people to be massacred. In the aftermath of the tragedy, many perpetrators fled the country.

Because Rwanda had not yet formally criminalized genocide, Rwandan prosecutors could not bring cases immediately.⁴¹³ Since 1996, however, Rwandan courts have been administering justice to perpetrators of the 1994 genocide.⁴¹⁴ Perpetrators who remained in the country faced prosecution. For example, over 11,000 regional makeshift “gacaca” courts were created to prosecute lower level criminals accused of genocide.⁴¹⁵ As the International Center for Transitional Justice reports, “Nearly 800,000 Rwandans—one-fifth of the adult population—have been accused before these courts.”⁴¹⁶ These gacaca courts operated in parallel with the International Criminal Tribunal for Rwanda, discussed in Part C of this chapter.



A gacaca court in session

Initially, the international community expressed concern about the fairness of the Rwandan criminal proceedings, and many countries denied Rwandan requests for extradition of perpetrators.⁴¹⁷ Conditions have changed in the last few years. In 2011, the United States deported two genocide suspects to Rwanda.⁴¹⁸ Courts in Canada, Norway, and Sweden have also upheld extradition orders. During a trial in Britain, a prosecutor noted that these developments signaled “a sea change

in the view of the global community and the international courts” of Rwanda’s legal system.⁴¹⁹ Rwanda has worked to establish a legal system that complies with international standards, and as a result it has been able to pursue its own prosecutions of the perpetrators of the Rwandan genocide.

⁴¹³ Alison Des Forges, Timothy Longman, “Legal Responses to Genocide in Rwanda,” accessed Jan. 9, 2014, <http://faculty.vassar.edu/tilongma/justice.html>.

⁴¹⁴ Organic Law No. 08/96 of August 30, 1996, on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990, 1996 (In that year Rwanda passed Organic Law No. 08). Also available online at <http://www.preventgenocide.org/law/domestic/rwanda.htm>.

⁴¹⁵ Lara Waldorf, *Transitional Justice and DDR: The Case of Rwanda*, (International Center for Transitional Justice, June 2009). Also available online at http://ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English_0.pdf.

⁴¹⁶ *Ibid.*

⁴¹⁷ Institute for Security Studies, *Rwanda’s New Genocide Cases a Milestone for Domestic Prosecutions of International Crimes* (Feb. 9, 2012). Also available online at <http://www.issafrica.org/iss-today/rwandas-new-genocide-cases-a-milestone-for-domestic-prosecutions-of-international-crimes>.

⁴¹⁸ *US Extradites Rwandan Convicted Over Genocide*, StarAfrica.com, Dec. 22, 2011. Also available online at <http://en.starafrica.com/news/us-extradites-rwandan-convicted-over-genocide-210136.html>.

⁴¹⁹ Estelle Shirbon, *Rwandan Genocide Suspects Face UK Extradition Battle*, Reuters, June 5, 2013. Also available online at <http://uk.reuters.com/article/2013/06/05/uk-britain-rwanda-genocide-idUKBRE95417A20130605>.

Chilean Legal System Overcomes Amnesty Defenses to Prosecute Perpetrators of Enforced Disappearances



Augusto Pinochet

In 1990, dictator General Augusto Pinochet stepped down as the leader of Chile and handed power over to publicly elected president Patricio Aylwin. Human rights trials were slow to begin because of extensive protections, including amnesty declarations, that Pinochet's government had put into place before it handed over power.⁴²⁰ Courts held that because enforced disappearance is an ongoing crime, the time-limited amnesty declarations do not apply.⁴²¹

According to one NGO monitoring human rights trials in Chile, "more than three-quarters of the 3,186 documented killings and 'disappearances' under military rule have been heard by courts or are now under court jurisdiction."⁴²² "245 former security service agents had been convicted and sentenced in the final instance."⁴²³

ii. Civil litigation

If criminal prosecution is not possible or would not align with an organization's accountability goals, such as obtaining compensation for victims, civil litigation in the country where the human rights violations occurred may be another alternative. There are several kinds of civil suits that may be available. First, a victim, class of victims, or another party may bring a civil suit for damages against human rights violators. Second, a party may bring suit to seek injunctive relief, such as a court order compelling a defendant to cease certain conduct or to perform certain actions. Defendants in such cases may be governmental or non-governmental actors. Third, a victim may be able to seek a civil order for protection to restrict a perpetrator's conduct under threat of criminal penalties if the perpetrator disregards the order. In countries where it is a viable option, civil litigation can help achieve accountability for human rights abuses by providing redress for victims, stopping ongoing human rights violations, deterring future violations, and sometimes setting legal precedents on important human rights issues.⁴²⁴

⁴²⁰ Human Rights Watch, *Discreet Path to Justice: Chile, Thirty Years After The Military Coup* (Human Rights Watch, Sept. 2003). Also available online at <http://www.hrw.org/legacy/background/america/chile/chile0903.pdf>.

⁴²¹ Fannie Lafontaine, *No Amnesty or Statute of Limitations for Enforced Disappearances: The Sandoval Case Before the Supreme Court of Chile*, *Journal of International Criminal Justice* 409–84 (2005). Also available online at http://www.academia.edu/2476878/No_Amnesty_or_Statute_of_Limitation_for_Enforced_Disappearances_The_Sandoval_Case_before_the_Supreme_Court_of_Chile.

⁴²² Human Rights Watch, *World Report 2012: Chile*, <http://www.hrw.org/world-report-2012/chile>

⁴²³ *Ibid.*

⁴²⁴ Richard J. Wilson and Jennifer Rasmusen, *Promoting Justice: A Practice Guide to Strategic Human Rights Lawyering*, *International Human Rights Law Group* 51, 60 (2001). Also available online at http://www.globalrights.org/site/Docserver/PJ_3-4.pdf.

Amparo

Many Latin American countries have a specific judicial remedy—called a writ of *amparo*—for the protection of constitutional rights. Article 25 of the American Convention on Human Rights recognizes the right to an *amparo* remedy:

“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

For more information on *amparo* proceedings, consult Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (2008), and Axel Tschentscher & Caroline Lehne, *The Latin American Model of Constitutional Jurisdiction: Amparo and Judicial Review*, http://www.servat.unibe.ch/jurisprudencia/lit/Amparo_SSRN.pdf.

Civil society organizations that are considering litigation as a human rights strategy should consider:⁴²⁵

- **Potential consequences.** If courts are corrupt or have a negative view of human rights, litigation could be unsuccessful. Moreover, unsuccessful litigation could set a negative precedent for future cases. And in some cases, litigants could face retribution or other adverse consequences for taking a case to court.
- **Costs.** Potential costs may include court costs and legal fees, as well as the cost of preparing evidence for trial. Some jurisdictions may allow a prevailing party to recover legal fees, and sometimes attorneys will agree to take on a case *pro bono* or on a contingency basis. But in some cases a party that brings a lawsuit and loses may be ordered to pay the other side’s legal fees and other expenses. If funds are limited, groups may want to consider whether there is another forum in which those funds could go further and result in a broader impact.
- **Objectives.** Different legal systems or types of lawsuits may offer different potential remedies, and the decisions of some courts may have a broader or narrower effect than others. Moreover, if an organization or individual wants to bring an individual communication to an international or regional human rights mechanism (see Chapters 9 and 10), those mechanisms often require exhaustion of domestic remedies. So even if domestic litigation does not offer a promising outcome, it may be worthwhile to go through the process in order to preserve the option of pursuing other remedies at a later time.

Consult an Attorney

Each country’s civil justice system is different, so advocates should consult with a local attorney to determine whether civil litigation could be a viable means to address their human rights concerns.

***Amici curiae*—“Friends of the court”**

Civil society groups and individuals may try to shape the outcome of litigation without initiating their own lawsuits. Many domestic courts and regional human rights mechanisms (see Chapter 10) have procedures to recognize an individual or group as an *amicus curiae*, or “friend of the court.” Attorneys who represent the parties to a case generally focus on the facts and arguments that are most beneficial to their clients. But a case may have broader implications for other people or groups not participating directly in the litigation. An *amicus curiae* can highlight these broader concerns by submitting an *amicus*

⁴²⁵ Ibid., 24–29.

curiae brief to the court identifying relevant legal arguments, factual evidence, or other documentation. Sometimes a party to a case will recruit civil society organizations, professors, or law school clinics to submit supportive *amicus* briefs.

Impact litigation

One potential avenue for remedying human rights violations is “impact litigation.” Impact litigation, sometimes referred to as strategic litigation, can be defined as “selecting and bringing a case to the courtroom with the goal of creating broader changes in society.”⁴²⁶ Impact litigation is therefore designed to have an impact beyond the actual outcome of the case. Organizations may decide to engage in impact litigation as part of a broader campaign on a human rights issue. Impact litigation can be used to:

- Amend law or policy that violates international human rights norms;
- Identify gaps between domestic legal standards and international human rights standards; or
- Ensure that laws are correctly applied and enforced.⁴²⁷

Impact litigation has been used for many years in the United States and other countries to advance civil rights, women’s rights, the rights of indigenous peoples and other minorities, the rights of prisoners, the rights of children, housing rights, and many other issues. Impact litigation has led to momentous legal decisions related to free speech, school integration, and gay rights, for example. But, like any legal strategy, impact litigation holds potential risks as well as benefits.

Potential Benefits of Impact Litigation	Potential Risks of Impact Litigation
<ul style="list-style-type: none"> • Win a desired outcome for the client or group of clients • Set an important precedent • Achieve change for similarly situated people • Spark large-scale policy changes • Empower clients • Raise awareness • Encourage public debate • Highlight the lack of judicial independence or fairness on a given issue • Provide an officially sanctioned platform to speak out on an issue when the government may be trying to silence voices on that issue 	<ul style="list-style-type: none"> • Burden the client with a protracted and complicated process • Provoke political backlash • Risk client safety, especially if client belongs to a marginalized group • Privilege political or strategic goals over goals of the individual client • Set a bad precedent • Undermine judiciary by highlighting lack of independence or power on a given issue • Expend valuable resources on a case that may be very difficult to win

Regardless of the broader goals, the client’s interest must be paramount in any litigation process. An organization considering impact litigation must make full disclosures to the client about the process, the risks, and the likelihood of success.

Civil society organizations should consider whether impact litigation is appropriate

Effective impact litigation requires that many variables align in the right way and at the right time. Impact litigation is more than a simple legal case—it is an entire strategy and involves assessing the characteristics of the client,

⁴²⁶ Child Rights Information Network, *Children’s Rights: A Guide to Strategic Litigation*, by Patrick Geary (2009), 6. Also available online at http://www.crin.org/docs/Childrens_Rights_Guide_to_Strategic_Litigation.pdf.

⁴²⁷ Barbara Bedont and Mona Nekoara, “Public Policy Advocacy: Strategic Litigation and International Advocacy,” Stanhope: Public Interest Law Initiative and Columbia University Budapest Law Center, Aug. 20, 2003. (PowerPoint presentation, presented by Ed Rekosh), http://www.essex.ac.uk/armedcon/story_id/000698.pdf.

the legal issues, media interest, partnerships with other groups, costs, timing, and other factors. The following are some key questions to consider before starting litigation:⁴²⁸

- Is there a legal issue involved that exemplifies or relates to a broader social problem?
- Is it possible for a court decision to address the problem effectively?
- Are the cause and the key issue in the case easy to understand for the media and the general public?
- What are the client's goals and how can the lawyer help the client clarify those goals?
- What level of commitment does the client have to achieving the goals?
- Beyond litigation, are there other methods of achieving the client's goals? Are other methods more or less likely to be effective?
- What are the strengths and weaknesses of the client's case? What are the strengths and weaknesses of the opposition's position? What are the legal claims and how strong are those claims on the merits, within the system, and in public opinion?
- Who are the opponents and what is the estimated level of commitment to that opposition? Who are their supporters?
- Who else has an interest in the issue and what are those interests? Will they support the client's position?
- Will those with an interest be willing to work together on reaching a solution? Are other actors with a less defined interest able to support the issue?
- How difficult will it be to prove the case? How costly will it be?
- Is there an alternative or compromise that will meet the needs of both sides? Is exploration of other avenues an option?
- How likely is it that the court will look favorably on the action?
- What political repercussions will follow a win or loss in court?
- Is the legal theory clear and simple, and is the remedy easy to implement?

There also are some specific questions to consider when bringing a case on behalf of a group of similarly situated victims, often called a "class action":⁴²⁹

- Are the interests of the individual members of the group complementary or conflicting?
- Is there a benefit to a group claim rather than multiple individual claims?
- Does the group have a recognized leader or procedures for making decisions as a whole? How are decisions for the group reached?
- Is the group complete? Are key members of the group missing? Why? Will their absence affect the claim?

A critical consideration in human rights cases pivots on how the courts respond to and interpret international law in the jurisdiction. A given case may focus on asking the courts to enforce international law domestically, or it may involve framing a violation of domestic law as a violation of international human rights, or it may push the boundaries of both.

Ethical considerations unique to impact litigation

One of the defining features of impact litigation is that broader policy goals drive the litigation. In some cases, these broader goals may conflict with the interests of an individual client. This possibility raises important ethical considerations that must be extensively examined and discussed with the client from the beginning of the litigation. In particular, Richard Wilson and Jennifer Rasmusen emphasize that if the litigation is unlikely to

⁴²⁸ Wilson and Rasmusen, *Promoting Justice: A Practice Guide to Strategic Human Rights Lawyering*, *supra* note 424, at 61–62; Child Rights Information Network, *Children's Rights: A Guide to Strategic Litigation*, *supra* note 426, at 8.

⁴²⁹ Wilson and Rasmusen, *Promoting Justice: A Practice Guide to Strategic Human Rights Lawyering*, *supra* note 424, at 62.

succeed but there are reasons to pursue it nonetheless, there are some critical questions that must be explored:⁴³⁰

- Should the lawyer encourage the client to continue the case despite a low likelihood of success?
- Will the client willingly sustain a long appeals process if necessary?
- Does the organization have sufficient financial support to see the case to conclusion?
- Can the case be presented to an international human rights body?
- If the particular court is likely to be adverse, is it possible to change venue?
- Do the potential auxiliary benefits of a failure outweigh the burden of litigation the client faces?
- What extra-legal work can be done to support the case? Will such efforts undermine the judicial process? Will such efforts create a sustainable change?
- Does the lawyer have a duty to explain the overall strategy to the client regardless of whether it affects his or her case? Is it ethical to fail to inform the client of an auxiliary reason for the strategy? Is there ever a justifiable reason for a client to be kept uninformed of the strategy?

Procedural considerations for impact litigation

Courts have formal rules of procedure that govern when, where, and how cases can be brought. Generally, cases must be filed within a certain amount of time after the human rights violation arose. These time limitations are called a “statute of limitations” and they can vary based on the particular human rights violation and based on the applicable local laws. Advocates must understand the statutes of limitation for a particular claim before investing too much time and energy into an impact litigation strategy.

Procedural rules also control who can bring a case to court. In U.S. courts, for example, only an individual or entity that has been directly harmed can bring a case to court, although in some cases groups may be able to bring claims on behalf of their members.

Procedural rules can also draw cases out for many years. Protracted litigation may have positive or negative consequences from a strategic standpoint, and often it is very difficult to predict how long litigation will last. In particular, if advocates anticipate losing the case but plan to bring an appeal, they should prepare for a lengthy litigation campaign.

Logistical considerations for impact litigation

Impact litigation requires two key logistical components: (1) an experienced lawyer or legal team to represent the client; and (2) funding to cover the costs associated with the case. Both of these components can seem like insurmountable barriers, especially if an organization has never engaged in litigation before. But there are many ways to find an effective lawyer and to raise funds to cover costs. In some countries, lawyers make a commitment to do *pro bono* work as a certain percentage of their legal practice. Depending on the type of case and the jurisdiction, advocates may find that there is a network of *pro bono* lawyers who are experienced in handling such work. *Pro bono* attorneys in one country can assist a lawyer bringing a lawsuit in another country by researching relevant laws and drafting arguments. Also, advocates may be able to draw on the support of law schools that have legal clinics to handle impact litigation.⁴³¹ Depending on the applicable laws, attorneys may agree to take on a case on a contingency basis. The best strategy is to reach out to organizations that have experience with impact litigation in the country. Many organizations in the United States and internationally have extensive experience with conducting impact litigation on various human rights issues, including the American Civil Liberties

⁴³⁰ Wilson and Rasmusen, *Promoting Justice: A Practice Guide to Strategic Human Rights Lawyering*, *supra* note 424, at 63.

⁴³¹ Child Rights Information Network, *Children’s Rights: A Guide to Strategic Litigation*, *supra* note 426, at 30–31.

Union, the Center for Constitutional Rights, the NAACP, and INTERIGHTS. Lawyer networks, such as bar associations, and legal aid organizations may also have experience with impact litigation. If an organization is considering impact litigation, the first step should be gathering input from these or similar groups.

Pro bono Legal Representation

Pro bono publico is a Latin phrase meaning voluntary or reduced-rate professional work undertaken as a public service. The legal profession in some countries, including the United States and the United Kingdom, has a strong tradition of *pro bono* work. And international law firms based in these countries may extend their *pro bono* work to other countries where they have offices. In some countries, however, legal professionals do not engage in *pro bono* work or do so only sporadically.

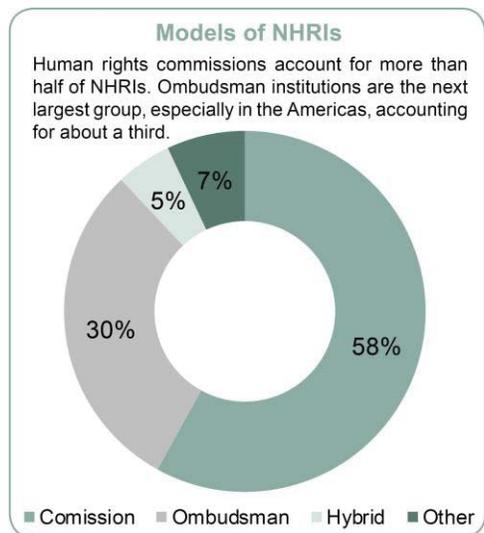
- For information about global *pro bono* opportunities and resources, barriers to *pro bono* work, and other considerations, consult *A Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions* (August 2012), prepared by the law firm Latham & Watkins LLP for the Pro Bono Institute: <http://www.probonoinst.org/wpps/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf>.
- The Pro Bono Institute provides resources, training, and technical support for attorneys and law firms interested in *pro bono* work, and features a Global Pro Bono Project: <http://www.probonoinst.org/>.
- The Public International Law and Policy Group (PILPG) is a non-profit, global *pro bono* law firm that provides free legal assistance to developing countries that are emerging from conflict: <http://publicinternationallawandpolicygroup.org/>.

iii. National Human Rights Institutions

National human rights institutions (NHRIs) are governmental bodies with a constitutional or legislative mandate to protect and promote human rights.⁴³² They are part of the government apparatus and are funded by the government, but they operate and function independently from government.⁴³³ NHRIs play an important role in ensuring that internationally accepted human rights standards result in improved enjoyment of human rights on the ground within their respected countries. They may take the following forms:

- Human rights commission;
- National ombudsman; or
- Commission focused on particular rights, such as non-discrimination.⁴³⁴

Today there are over 100 NHRIs around the world.⁴³⁵ These institutions vary considerably in terms of “mandate and mode of



⁴³² International Coordinating Committee for National Human Rights Institutions (ICC), “Roles and types of NHRIs,” accessed Jan. 15, 2014, <http://nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx>.

⁴³³ Office of the High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles, and Responsibilities* (New York and Geneva: United Nations, 2010), 13. Also available online at http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.

⁴³⁴ International Coordinating Committee for National Human Rights Institutions (ICC), “Roles and types of NHRIs,” *supra* note 432.

⁴³⁵ International Coordinating Committee for National Human Rights Institutions (ICC), “A brief history of NHRIs,” accessed Jan. 15, 2014, <http://nhri.ohchr.org/EN/AboutUs/Pages/HistoryNHRIs.aspx>.

establishment” and in the “willingness of the State concerned to be subjected to human rights standards.”⁴³⁶

Ombudsman offices that deal only with citizen complaints about maladministration, without an express mandate to address human rights matters, are not NHRIs. Moreover, some NGOs have the word “commission” in their name, but an NGO is not an NHRI.⁴³⁷

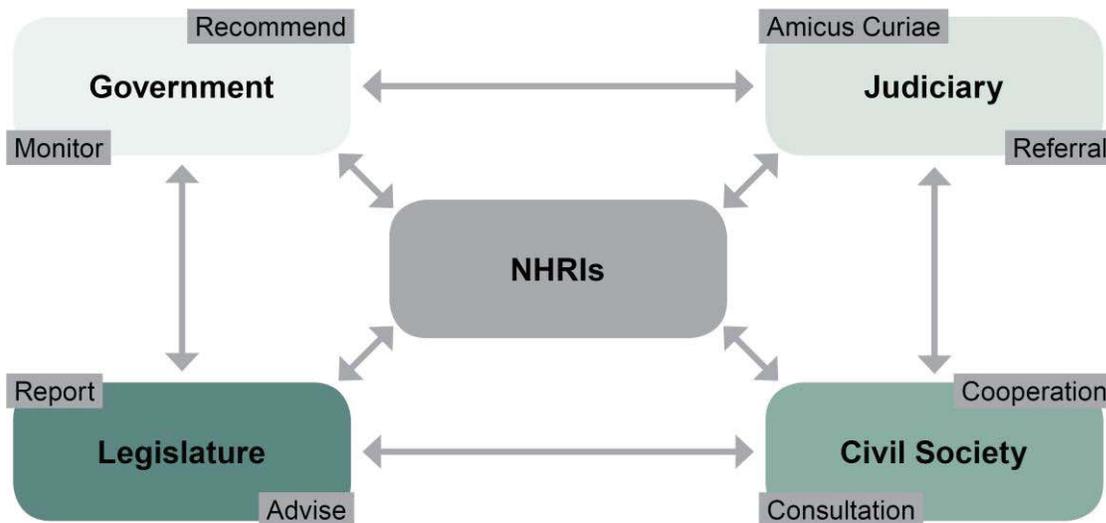
a. Function of NHRIs

Regardless of form, NHRIs play a key role in linking international and domestic human rights systems. They serve multiple functions including:

- Monitoring their government’s human rights policy in order to detect shortcomings and recommend and facilitate improvement;
- Promoting and educating about human rights in order to inform and engage the public; and
- Receiving, investigating, and resolving complaints from both individuals and groups on alleged human rights violations.⁴³⁸

NHRIs fulfill these functions at different levels in both government and civil society:

Functions of National Human Rights Institutions



Source: Adapted from *OHCHR-UNDP Toolkit for Collaboration with National Human Rights Institutions*, p. 4. OHCHR. (December 2010) http://www.unssc.org/web2/free_resources/UNDP-OHCHRToolkit/index.html

NHRIs can be a valuable component of a country’s human rights protection and accountability framework. Most governments recognize and publicly acknowledge the importance of protecting human rights, but the government

⁴³⁶ Chris M. Peter, “Human Rights Commissions in Africa: Lessons and Challenges,” in *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, ed. Dr. Anton Bösl and Dr. Joseph Diescho (Namibia: Konrad Adenauer-Stiftung, 2009). Also available online at http://www.kas.de/wf/doc/kas_16347-1522-2-30.pdf?090512114605.

⁴³⁷ Office of the High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles, and Responsibilities*, *supra* note 433, at 15.

⁴³⁸ Office of the High Commissioner for Human Rights, *OHCHR-UNDP Toolkit for Collaboration with National Human Rights Institutions* (New York and Geneva: United Nations, December 2010), 4. Also available online at http://www.unssc.org/web2/free_resources/UNDP-OHCHRToolkit/pdf/UNDP-UHCHR-Toolkit.pdf.

itself is often the perpetrator of human rights abuses. An ombudsman or human rights commission can function as an independent and neutral office that examines and investigates possible human rights violations.

In countries with both an ombudsman and a human rights commission, the ombudsman's mandate often focuses on public administration, and the human rights commission independently investigates and addresses alleged human rights abuses.

b. International Standards and Accreditation for NHRIs

Because NHRIs vary greatly in authority and structure, the Center for Human Rights convened an international workshop in 1991 to develop minimum standards for these bodies.⁴³⁹ Known as the "Paris Principles," these standards were subsequently adopted by the UN General Assembly and provide measures against which NHRIs can be assessed as to their ability to effectively fulfill their role. Standards include the need for: a broad-based mandate; guarantees of independence; autonomy from government; pluralism of members and staff; adequate powers of investigation; and adequate resources.⁴⁴⁰

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) accredits NHRIs based on their compliance with the Paris Principles.⁴⁴¹ The committee uses three levels of accreditation, each of which affords members a different level of participation in the international system.⁴⁴²

- **"A" Voting members** comply fully with the Paris Principles. NHRIs with "A" status can participate as full voting members in the international and regional work and meetings of NHRIs. They may also hold office in the ICC Bureau. They may participate in sessions of the UN Human Rights Council and may take the floor under any agenda item.
- **"B" Observer members** are not fully compliant with the Paris Principles or have not submitted sufficient documentation for the ICC to make an accreditation determination. NHRIs with "B" status may participate as observers in the international and regional work and meetings of NHRIs. They cannot vote or hold office within the ICC Bureau. The United Nations does not give them NHRI badges, and they do not have the right to take the floor during sessions of the UN Human Rights Council.
- **"C" Non-members** do not comply with the Paris Principles. NHRIs with "C" status have no rights or privileges with the ICC or in UN forums. They may, at the invitation of the ICC, attend ICC meetings.

As of February 2013, 69 NHRIs are accredited with "A" status.⁴⁴³ See Appendix H for a list of these NHRIs.

Regional NHRI Networks

Regional and subregional NHRI networks and associations are an important complement to the international system. Regional NHRI networks have the right to participate in the UN Human Rights Council as observers and to engage with its various mechanisms. They also enable NHRIs from the same region to meet and discuss issues of common concern.

⁴³⁹ Office of the High Commissioner for Human Rights, *Fact Sheet No. 19: National Institutions for the Promotion and Protection of Human Rights* (United Nations, Apr. 1993), appendix. Also available online at <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf>.

⁴⁴⁰ Asia Pacific Forum, "What are national human rights institutions?" accessed Jan. 15, 2014, <http://www.asiapacificforum.net/establishment-of-nrhi/what-is-an-nhri>.

⁴⁴¹ UN Office of the High Commissioner for Human Rights, OHCHR and NHRIs, <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

⁴⁴² International Coordinating Committee for National Human Rights Institutions (ICC), ICC Sub-Committee on Accreditation (SCA), accessed Jan. 15, 2014, <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Pages/default.aspx>.

⁴⁴³ UN Office of the High Commissioner for Human Rights, OHCHR and NHRIs, <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

The Network of African National Human Rights Institutions: www.nanhri.org

The Network of National Institutions for the Promotion and Protection of Human Rights in the Americas: www.americaddhh.org

The Asia-Pacific Forum of National Human Rights Institutions: www.asiapacificforum.net

The European Network of National Institutions for the Promotion and Protection of Human Rights: www.scottishhumanrights.com/international/eurochair

For a global directory of NHRIs, consult the website of the International Coordinating Committee for National Human Rights Institutions: nhri.ohchr.org/EN/Contact/NHRIs/Pages/default.aspx.

c. Types of NHRIs

Ombudsmen

An ombudsman is typically a public sector entity responsible for supervising conduct of government officials and agencies.⁴⁴⁴ “The Ombudsman is an independent governmental official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints.”⁴⁴⁵

And if a country’s judicial system is difficult to use, the Ombudsman system can be a more accessible alternative because “its form is not rigidly fixed and can be varied to suit the characteristics and needs of each country.”⁴⁴⁶ Moreover, in many countries, if “[e]xisting mechanism[s]—courts, legislatures, the executive, administrative courts, and administrative agencies—are not sufficient to cope with the grievances of the aggrieved . . . [t]he Ombudsman system provides an informal, independent, and impartial public official who, with relative speed and without cost to the complainant, investigates, with access to governmental records, and recommends relief when the complaint is justified.”⁴⁴⁷

An ombudsman system may also be a good alternative when a country’s judiciary lacks independence. In El Salvador and Guatemala, for example, the “ombudsman’s office was established in settings in which it would have been sheer fantasy to imagine the judiciary playing its assigned role in the separation of powers. . . . [El Salvador and Guatemala’s] judicial systems are politically dependent and dominated by the political environments in which they are embedded.”⁴⁴⁸ Because the governments of both countries had a history of authoritarianism, “[t]he relative failure of judicial reform . . . accentuated the role that the ombudsman might play in protecting human rights and pressuring the public authorities to be answerable to the law.”⁴⁴⁹ In El Salvador, the law establishing the ombudsman office “empowers the institution to defend a long list of human rights, and specifies that all public officials must cooperate fully with its inquiries and respond to its recommendations.”⁴⁵⁰ The ombudsmen’s offices in both countries have given individuals a means to help curb human rights violations.

⁴⁴⁴ Linda C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Leiden, The Netherlands: Koninklijke Brill NV, 2004), 2.

⁴⁴⁵ Bernard Frank, *The Ombudsman and Human Rights*, 22(3) *Administrative Law Review*, 467 (Apr. 1970).

⁴⁴⁶ *Ibid.*, 491.

⁴⁴⁷ *Ibid.*, 491.

⁴⁴⁸ Michael Dodson and Donald Jackson, *Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala*, 46(4) *Latin American Politics and Society*, 2 (Winter 2004).

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

One limitation of an ombudsman's office is that the ombudsman does not typically have enforcement power. "A hallmark of the ombudsman is that the office does not have the power to make decisions that are legally binding on the administration—the executive/administrative branch is free to implement, in whole or in part, or ignore the ombudsman's recommendations."⁴⁵¹ In some cases, the ombudsman may be able to encourage human rights progress in other ways. If, in response to an individual's complaint, an ombudsman completes an investigation and concludes that the government has acted inappropriately, "some ombudsmen may enter into informal negotiations or mediation with the government department concerned to try to persuade the government to accept and implement [their] recommendations."⁴⁵² The ombudsman system is compulsory for the governing body,⁴⁵³ so the Ombudsman may be able to negotiate for progressive human rights solutions.

Human Rights Commissions

There are several differences between a traditional ombudsman and a human rights commission. First, the Ombudsman is one individual with a team of support staff. Human rights commissions, on the other hand, are multi-member committees that often encompass a wide range of social groups and political leanings. Second, ombudsmen typically carry out their mandate using an individual complaint and investigation system. Human rights commissions have a specific mandate that may include research, documentation, training, or education on human rights issues. Human rights commissions also may be established to handle more specific duties, such as issues relating to minority populations, refugees, children, women, or disenfranchisement. Some, but not all, human rights commissions also receive and act on individual complaints.

d. NHRIs and Civil Society

As independent entities established by the government, NHRIs occupy a unique place between government and civil society, often serving as a bridge between rights-holders and responsible authorities. "[NHRIs] link the responsibilities of the State to the rights of citizens and they connect national laws to regional and international human rights systems."⁴⁵⁴ Because NHRIs do not have a defined constituency or vested interest, they are ideally situated to provide a balanced message on human rights issues. They can also encourage dialogue and facilitate cooperation between rights-holders and the government by providing a neutral meeting point.

NHRIs rely heavily on civil society participation to carry out their mandates to monitor and investigate human rights issues and to educate the public. In general, civil society can support the work of NHRIs by enhancing their effectiveness and deepening their public legitimacy, ensuring they reflect public concerns and priorities, and giving them access to expertise and valuable social networks.⁴⁵⁵

Civil society can engage with NHRIs in many ways:

- **NHRI Formation.** If a country does not have an NHRI, civil society can be instrumental in advocating for one and in helping to create one through meaningful consultations with the government. Such consultations should be broad-based, including a diverse range of civil society groups and other stakeholders. Government should ensure that the outcomes of these consultations are incorporated into the design and mandate of an NHRI. If a country has an NHRI with less than "A" status, civil society can advocate for improvements to the NHRI and better compliance with the Paris Principles.

⁴⁵¹ Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, *supra* note 444, at 18.

⁴⁵² *Ibid.*, 16.

⁴⁵³ *Ibid.*

⁴⁵⁴ Office of the High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles, and Responsibilities*, *supra* note 433, at 13.

⁴⁵⁵ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (Versoix, Switzerland: ICHRP, 2005), 15. Also available online at <http://www.ohchr.org/documents/publications/nhrien.pdf>.

- **Monitoring.** Civil society can monitor the effectiveness of an NHRI by submitting reports on the NHRI's performance to the International Coordinating Committee of National Institutions for Promotion and Protection of Human Rights. For a checklist for assessing conformity with the Paris Principles, consult page 50 of *National Human Rights Institutions: History, Principles, Roles, and Responsibilities*: http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.
- **Membership.** NHRIs should have independent and diverse membership, representative of the society's social, ethnic, and linguistic composition. Appointment mechanisms should be open and transparent. Many NHRI appointment procedures allow civil society organizations to nominate members and include representatives from a broad cross-section of civil society groups on the selection panel.⁴⁵⁶
- **Formal and informal consultation.** To ensure formal diversity, an NHRI may have an advisory board nominated by, or broadly representative of, civil society organizations. Moreover, NHRIs should consult regularly with civil society to better understand what the public wants and needs. Civil society should proactively engage with the NHRI and use formal and informal means to improve access to the government's policymaking process.
- **Complaints.** Civil society can assist victims of human rights violations in accessing NHRI resources and can support them through the process of filing a complaint. Making a complaint to an NHRI is usually a straightforward process, and no attorney is needed. Many NHRI offices have staff who can assist with completing the necessary forms. If a country has both an ombudsman and a human rights commission, it is important to determine which NHRI is the most appropriate accountability mechanism for a particular human rights violation. Advocates should know, however, that if they have already raised the same complaint in litigation, the NHRI will typically refrain from considering the matter. Approaching the ombudsman or human rights commission first, however, does not preclude a person from later bringing a court action.⁴⁵⁷
- **Outreach.** Civil society can facilitate an NHRI's outreach by establishing or making use of networks to spread awareness of the NHRI's role and functions as a mechanism for redress and by providing education to the public on the role of the NHRI.
- **National Human Rights Action Plan.** Many governments establish a national human rights action plan outlining a strategy to implement obligations under human rights instruments. Governments often consult NHRIs when developing these strategies. The NHRI may also develop its own plan to promote respect for human rights. In either case, civil society can consult with the NHRI as the strategies are being drafted and can work with the NHRI, the government, and other stakeholders to develop time-bound, benchmarked objectives.
- **Active partnership.** Civil society organizations can also help implement some NHRI programs and activities. Civil society can provide expertise and a bridge into communities that may distrust the NHRI, perceiving it to be a body representing the government. Strategic alliances establishing a rational division of labor between civil society organizations and the NHRI can make both parties more effective.⁴⁵⁸

⁴⁵⁶ Ibid., 15.

⁴⁵⁷ Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, *supra* note 444, at 15.

⁴⁵⁸ Commonwealth Human Rights Initiative, *Civil Society and National Human Rights Institutions*, 13 *International Journal of Not-For-Profit Law* 5 (2011). Also available at http://www.icnl.org/research/journal/vol13iss4/special_1.htm.

Uganda Human Rights Commission Engages with Civil Society to Propose Legal Reforms to Address Domestic Violence



The Parliament of Uganda had undertaken wide consultations before drafting a proposed Domestic Relations Bill that was meant, among other things, to help protect family members from domestic violence. The Uganda Human Rights Commission, however, wanted to make sure that the draft law was subjected directly to a human rights analysis.

To assist with this analysis, the commission convened a stakeholders meeting to review the draft law carefully in light of national and international human rights standards. Stakeholders made a series of very specific recommendations on the draft legislation, identifying ways to fill gaps and otherwise improve the bill.

The assistance of stakeholders in the commission's review of the draft law not only reduced the commission's workload, but also contributed to the creation of a highly credible set of recommendations with the support of a broad cross-section of Ugandan civil society. The commission included the recommendations in its Annual Report.⁴⁵⁹

iv. Anti-Corruption Commissions

Some countries have established anti-corruption commissions to hear complaints and hold corrupt officials accountable. Scholars have identified four types of anti-corruption commissions: (1) universal commissions, which have investigative, preventative, and educational functions, and are accountable to the country's executive; (2) investigative commissions, which are also accountable to the country's executive; (3) parliamentary commissions; and (4) multi-agency commissions, which include several distinct offices that operate in tandem to fight corruption.⁴⁶⁰

If the country where the human rights violation occurred has an anti-corruption commission with investigative or prosecutorial powers, and if the human rights violation relates to a government official's misuse of power for private gain, advocates may want to consider whether to approach the commission with a complaint.⁴⁶¹ Some anti-corruption commissions allow individuals to make anonymous complaints.⁴⁶²

Many anti-corruption commissions are criticized as dysfunctional or ineffective. Some lack independence or do not have budgetary support to conduct investigations. Some do not have the authority to refer corruption cases for prosecution.⁴⁶³

v. Truth Commissions

Truth commissions are official, temporary bodies that conduct non-judicial inquiries to uncover the truth about past, widespread abuses and to encourage a community to heal through open dialogue. Truth commissions

⁴⁵⁹ Office of the High Commissioner for Human Rights, *OHCHR-UNDP Toolkit for Collaboration with National Human Rights Institutions*, *supra* note 438, at 228.

⁴⁶⁰ World Bank Institute, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?*, by John R. Heilbrunn (2004), 3. Also available online at <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Anti-Corruption%20Commissions%20by%20John%20Heilbrunn.pdf>.

⁴⁶¹ *Core Elements of Anti-Corruption Commissions: Legal Memorandum* (Aug. 2013) 1, 3. Also available online at <http://www.mreza-mira.net/wp-content/uploads/Anticorruption-Commissions-2013.pdf>.

⁴⁶² *Ibid.* 10.

⁴⁶³ World Bank Institute, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?*, *supra* note 460, at 1.

permit both victims and perpetrators to speak in front of their communities about their personal experiences and observations during the relevant time period and what they have experienced since that time.⁴⁶⁴ A successful commission aims “to understand the origins of past conflict and the factors that allowed abuses to take place, and to do so in a manner that is both supportive of victims and inclusive of a wide range of perspectives.”⁴⁶⁵

Truth commissions generally conclude with a final report describing the information gathered during the process, making factual findings, and recommending next steps for a broad range of stakeholders. A truth commission’s report can form the basis for future criminal proceedings, but it can also lead to civil remedies (such as financial reparations) and institutional reform.

Truth commissions can be less costly than criminal tribunals, but they rely heavily on the engagement of civil society as well as individual victims. Direct victim participation is essential to the process. Truth commissions can operate more quickly than formal legal proceedings, but they lack some of the procedural safeguards that enhance accuracy and impartiality in formal legal proceedings.

If a truth commission is already in place, it should be relatively easy for victims and civil society organizations to get involved in the process. Diaspora organizations may advocate for a formal role for the diaspora in the process. For example, after the Truth and Reconciliation Commission of Liberia was established, the commission signed a memorandum of understanding with The Advocates for Human Rights, giving that organization the responsibility for taking statements from Liberians in the diaspora.⁴⁶⁶

Diaspora Engagement with the Liberian Truth and Reconciliation Commission.

The Truth and Reconciliation Commission of Liberia (LTRC) was the first of its kind to make a systematic effort to engage a diaspora population in all aspects of the truth commission process. The LTRC partnered with The Advocates to facilitate diaspora involvement in outreach and education, statement taking, report writing and the first official public hearings of a truth commission ever held in a diaspora.

The Advocates and the LTRC established a Diaspora Project Advisory Committee of Liberians from across the United States to advise the process. The Advocates partnered with Liberian community organizations in the United States, United Kingdom, and Ghana to obtain input and advice about making the LTRC process as accessible as possible for Liberians in the diaspora. The LTRC public hearings held in St.



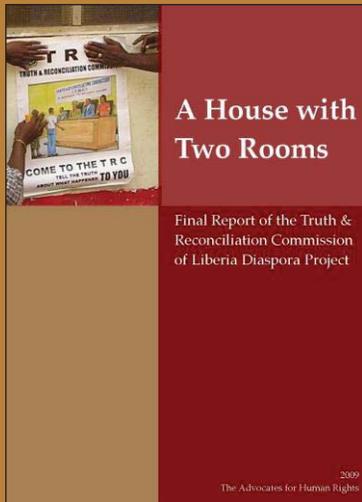
Members of the Liberian diaspora attending a training for LTRC volunteers

⁴⁶⁴ “Truth and Reconciliation Process in Argentina,” accessed Jan. 17, 2014, at 1, <http://www.advocates.ca/assets/files/presentations/The-Truth-and-Reconciliation-Process-in-Argentina.pdf>.

⁴⁶⁵ Priscilla B. Hayner, *Truth Commissions: A Schematic Overview*, 88 *International Review of the Red Cross* 295, 296 (June 2006). Also available online at http://www.icrc.org/eng/assets/files/other/irrc_862_hayner.pdf.

⁴⁶⁶ The Advocates for Human Rights, “Memorandum of Understanding,” in *A House with Two Rooms: Final Report of the Truth and Reconciliation Commission of Liberia Diaspora Project* (2009) 575–83.

Paul, Minnesota from June 10–14, 2008 also provided an important opportunity for Liberians in the diaspora to present their experiences and recommendations directly to the LTRC. The hearings were webcast live in order to make them more accessible to the public.



Between 2006 and 2009, The Advocates took statements from more than 1600 Liberians in the diaspora (approximately 9% of the total gathered by the LTRC) and recorded testimony from 31 witnesses at the public hearings. *A House with Two Rooms*, The Advocates' final report to the LTRC, documents the "triple trauma" experienced by members of the diaspora during their flight through Liberia and across international borders, while living in refugee camps in West Africa, and in resettlement in the United States and Europe. In addition, the report summarizes the views of Liberians in the diaspora on the root causes of the conflict and their recommendations for systemic reform and reconciliation.

For more information about The Advocates' work with the LTRC, see: Laura Young and Rosalyn Park, "Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation

Commission (LTRC) Diaspora Project," 3 *International Journal of Transitional Justice* 341 (2009).

If a truth commission is not yet in place, the International Centre for Transitional Justice can offer technical advice about the appropriate parameters for a commission's mandate.⁴⁶⁷ Truth commissions can be time-consuming and costly. Liberia's Truth and Reconciliation Commission, for example, was established in 2005 and concluded its work in 2009.⁴⁶⁸ The diaspora component alone required more than \$10 million in in-kind contributions and *pro bono* hours donated over a two-year period.⁴⁶⁹

vi. Legal Reform

If accountability mechanisms in a country are weak or non-existent, advocates can play an important role in the long-term development of human rights by pressing for structural reforms. If a country's judiciary lacks independence or its NHRIs are weak, for example, it may be necessary to revise the country's constitution to strengthen these institutions. Countries that are considering revisions to their constitutions typically solicit input from civil society during the process to ensure that the amendments have popular support. Civil society groups, including groups in the diaspora, should look for opportunities to participate in these consultations and give concrete recommendations. They may want to seek the assistance of *pro bono* attorneys who can examine best practices in other countries and make appropriate recommendations based on experiences elsewhere.

If the laws in a country are not sufficiently strong or specific to hold perpetrators of human rights violations accountable, civil society can advocate for legal reform. Advocates can support ratification of the Rome Statute and ensure that their country's criminal code contains penalties for the core crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Civil society organizations can use monitoring and

⁴⁶⁷ Institute for Justice and Reconciliation, *Critical Lessons in Post-Conflict Security in Africa: The Case of Liberia's Truth and Reconciliation Commission*, by Ozonnia Ojielo, (2010) 8. Also available online at <http://www.ijr.org.za/publications/pdfs/IJR%20AP%20OP%201%20General%20Liberia%20WEB.pdf>.

⁴⁶⁸ The Advocates for Human Rights, "Chapter 1," *supra* note 466.

⁴⁶⁹ *Ibid.*, 4.

documentation tools (see Chapters 3–6) to identify other needs for legal reform. For example, most countries have criminal penalties for rape, but in some countries prosecutors do not bring charges when a man rapes his wife. Civil society groups can document the gap between law and practice and then advocate for legal reforms to ensure that all perpetrators of rape are held accountable.

B. Accountability Under the Domestic Laws of Other Countries

In some circumstances, advocates can use the legal system of one country to hold accountable people who have perpetrated human rights violations in another country. A country's legal system may allow criminal prosecution of human rights violators or civil lawsuits. In some circumstances, travel restrictions alone may provide some accountability for perpetrators.

i. Criminal Prosecution

Under most legal systems, there is a preference for prosecuting people in the jurisdiction where the alleged crimes occurred. And most legal systems recognize a presumption against one country's laws having extra-territorial effect. For these reasons, governments rarely prosecute people for human rights violations that took place in another country.⁴⁷⁰ But in some circumstances, especially if the human rights violation is particularly serious, countries will prosecute perpetrators for crimes committed in other countries or for related violations of their own laws.

a. Prosecutions for violation of immigration laws

Throughout the world, immigration authorities act as gatekeepers to identify and screen potential international criminals.⁴⁷¹ Many countries prohibit war criminals and other perpetrators of serious human rights abuses from entering their territory. The Refugee Convention of 1951 prohibits State Parties from granting asylum or refugee status to any person if "there are serious reasons for considering that [the person] has committed a crime against peace, a war crime, or a crime against humanity."⁴⁷² Visa application materials and other immigration forms often require disclosure of military training, membership in and affiliation with political groups and militias, involvement with acts of genocide, and other information that would help the government identify and refuse entrance to a suspected perpetrator. Perpetrators who omit this information can later face criminal prosecution for immigration fraud.

Ethiopians in the Diaspora Play Key Role in Criminal Conviction of Torturer for Immigration Fraud

In May 2011, outside an Ethiopian restaurant in Aurora, Colorado, former Ethiopian political prisoner Kiflu Ketema recognized a man as his former prison guard and torturer. The man insisted that Ketema had confused him with someone else. Ketema, however, was certain the man was his torturer, and he alerted U.S. Immigration and Customs Enforcement (ICE). ICE arrested the man, who later admitted to having illegally entered the United States and having been illegally naturalized there.

Alemu Worku was tried and convicted in October 2013. Even though the trial ostensibly focused on Worku's immigration infractions, the witnesses' accounts described his role as torturer in Ethiopia. Ketema and other Ethiopian-Americans testified about the torture and killings in an Ethiopian prison

⁴⁷⁰ David Petrasek, International Council on Human Rights, *Hard Cases: Bringing Human Rights Violators to Justice Abroad* (1999) 35. Also available online at www.ichrp.org/files/reports/5/201_report_en.pdf.

⁴⁷¹ Human Rights Watch, "Universal Jurisdiction in Europe: The State of Art," vol. 18 no. 5(D) *Human Rights Watch* (June 2006), 6.

⁴⁷² UN General Assembly, Convention Relating to the Status of Refugees, 1951, Art. 1(f)(a).

Worku supervised. Worku was found guilty of immigration fraud and stripped of citizenship. He may later face extradition to Ethiopia.⁴⁷³

As a result of Worku's case, more Ethiopian-Americans are collaborating to identify other suspected torturers who have immigrated to the United States and report them to ICE. They have launched a website to gather and share information: <http://yatewliid.com/>.

Immigration Authorities Around the World Rely on Diasporans to Help Track Down Perpetrators

U.S. Immigration and Customs Enforcement's Human Rights Violators and War Crimes Unit

Individuals residing in the United States can seek redress for certain violations of human rights through the U.S. Immigration and Customs Enforcement's Human Rights Violators and War Crimes Unit.⁴⁷⁴ The Unit has three missions:

- (1) to prevent the admission of foreign war crimes suspects, persecutors, and human rights abusers into the United States;
- (2) to identify and prosecute individuals who have been involved in and/or responsible for the commission of human rights abuses across the globe; and
- (3) to remove, whenever possible, those offenders who are located in the United States.⁴⁷⁵

Persons with information regarding foreign nationals who have committed war crimes or human rights abuses can contact ICE regarding these individuals and their whereabouts by calling the ICE tip line at 1-866-DHS-2-ICE.⁴⁷⁶

Danish Red Cross and Danish immigration authorities reach out to asylum seekers

The Danish Red Cross and Danish immigration authorities have jointly urged asylum seekers to help identify perpetrators of international crimes by creating a multilingual pamphlet detailing how to report information about crimes or information about a potential violator present in Denmark.⁴⁷⁷

⁴⁷³ Bruce Finley and Tom McGhee, *How an Ethiopian torturer hid in Denver for 7 years in plain sight*, Denver Post, Oct. 20, 2013, http://www.denverpost.com/news/ci_24347284/how-an-ethiopian-torturer-hid-denver-7-years; Tom McGhee, *Ethiopian Immigrant Admits Being Guard Accused of Killing Prisoners*, Denver Post, July 10, 2013, http://yatewliid.com/index_htm_files/082411_101113%20Higher%2015%20Kefalegn%20Alemu%20All%20Documents.pdf.

⁴⁷⁴ U.S. Immigration and Customs Enforcement, "The Human Rights Violators & War Crimes Unit," accessed Oct. 20, 2013, <http://www.ice.gov/human-rights-violators/>.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Human Rights Watch, "Universal Jurisdiction in Europe: The State of Art," *supra* note 471, at 6–7. In 2013, the Danish Special International Crimes Office has been merged with another prosecution office to form the State Prosecutor for Serious Economic and International Crime. The current address is Kampmannsgade 1, 1604 København v, Denmark. The new telephone number for the office is +45 72 68 90 00 and the fax is +45 45 15 01 19. Email correspondence from Andreas Myllerup Laursen to The Advocates for Human Rights, Jan. 28, 2014.

obligation either to prosecute or to extradite the perpetrator to another country for prosecution.⁴⁸³ While sometimes controversial, universal jurisdiction has been used more commonly in recent times.⁴⁸⁴

The availability of universal jurisdiction varies from country to country.⁴⁸⁵ Moreover, the decision to pursue a prosecution based on universal jurisdiction rests with the prosecutors of each country, and not with the victims, although in some countries, individuals may be able to pursue private prosecutions of human rights violators.⁴⁸⁶

Some European countries with more rigorous prosecutions under universal jurisdiction have created specialized departments to handle visa and asylum applicants who have been flagged for potential involvement in international crimes. These departments screen cases by reviewing international suspect lists and by applying specialized criteria that could signal involvement in serious human rights abuses, such as a particular previous employer. Once immigration authorities identify a suspect, they are able to transfer the case to prosecutorial authorities for further examination. Denmark, the Netherlands, and Norway have created such departments, and most universal jurisdiction prosecutions in these countries have been achieved through this immigration screening process.⁴⁸⁷

In the United States, the Human Rights and Special Prosecution Section of the U.S. Department of Justice (HRSP) prosecutes human rights violators within the jurisdiction of the United States under federal criminal statutes proscribing torture, war crimes, genocide, and recruitment and use of child soldiers.⁴⁸⁸ The HRSP works with the U.S. Department of Homeland Security and Federal Bureau of Investigation (FBI) to “identify, investigate, and prosecute alleged human rights violators.”⁴⁸⁹ The HRSP also prosecutes human rights violations falling under U.S. civil immigration and naturalization laws, as discussed in the previous section.⁴⁹⁰

Initiating a criminal prosecution

Advocates can help initiate a prosecution in a number of ways. One way is to alert and then cooperate with a country’s immigration and prosecution authorities. A second approach, available in some countries, is to submit a private complaint. In Belgium, France, and Spain, for example, nearly all universal jurisdiction cases processed in their courts have been initiated through a private complaint process. Private complaints can be brought by individual victims as well as NGOs. They can be filed directly with an investigating judge or prosecutor.⁴⁹¹

⁴⁸³ International Committee of the Red Cross (ICRC), *Analysis of the Punishments Applicable to International Crimes (War Crimes, Crimes Against Humanity and Genocide) in Domestic Law and Practice*, 90, 870 International Review of the Red Cross 467 (June 2008). Also available online at <http://www.icrc.org/eng/resources/documents/article/review/review-870-p461.htm>.

⁴⁸⁴ Joseph Rikhof, *Canada and War Criminals: The Policy, the Program and the Results*, www.isrcl.org/papers/2004/Rikhof.pdf.

⁴⁸⁵ Pearlroth, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in 27 Member States of the European Union*, *supra* note 479, at 19.

⁴⁸⁶ Petrasek, *Hard Cases: Bringing Human Rights Violators to Justice Abroad*, *supra* note 470, at 17.

⁴⁸⁷ Human Rights Watch, “Universal Jurisdiction in Europe: The State of Art,” *supra* note 471, at 6–7.

⁴⁸⁸ U.S. Dept. of Justice, “About,” accessed Jan. 16, 2014, <http://www.justice.gov/criminal/hrsp/about/>.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ Human Rights Watch, “Universal Jurisdiction in Europe: The State of Art,” *supra* note 471, at 6–8.

Victim Participation in Criminal Proceedings

In criminal proceedings, victims are often called to testify and play a critical role in presenting evidence to support a conviction. As the German representative to the Assembly of States Parties to the Rome Statute confirmed in November 2013, “[t]he fight against impunity has at its core the fate of the victims of the most serious crimes.”⁴⁹² Victim testimony can be particularly powerful before a sentence is pronounced. In Finland, the victim may recommend a sentence other than the one the prosecutor recommends. Some jurisdictions in the United States and Australia allow victims to submit Victim Impact Statements explaining how the crime has affected them and their families.

For further discussion of the roles victims can play in criminal prosecutions in various jurisdictions in Europe, see Matti Joutsen, *Victim Participation in Proceedings and Sentencing in Europe*, 3 *International Review of Victimology* 57 (1994).

Universal Jurisdiction in Action: France, the Netherlands, Norway, and Spain

- *France*: French authorities are prosecuting a case brought by the Collectif des Parties Civiles pour le Rwanda, a group of civil plaintiffs. The French prosecutor has brought charges based on a private complaint against Pascal Simbikangwa for complicity in genocide and crimes against humanity for his alleged involvement with the Rwandan genocide.⁴⁹³
- *The Netherlands*: In 2005, two Afghan nationals were convicted of war crimes and torture after attempting to enter into the Netherlands to seek asylum. A specialized agency within the Dutch Immigration and Naturalization Service referred the two men to prosecution authorities based in part on their disclosure that they had previously worked as generals in the Afghan army.⁴⁹⁴
- *The Netherlands*: In 2004, a former army officer from Zaire was convicted of torture for his participation in leading death squads in the Democratic Republic of Congo.⁴⁹⁵
- *Norway*: In 2013, Sadi Bugingo was found guilty of complicity in the premeditated killings of over 2,000 individuals of the Tutsi ethnic group during the Rwandan genocide and was sentenced to 21 years in prison.⁴⁹⁶
- *Spain*: In 2013, Spain’s top criminal court ruled that it had jurisdiction over charges of genocide that the Madrid-based Tibetan Support Committee, a diaspora group, brought against former Chinese President Hu Jintao. The court ruled that it could hear the case because one of the alleged victims bringing the case was a Tibetan monk with Spanish citizenship.⁴⁹⁷ A few months later, however, the Spanish Government suggested it might restrict courts’ use of universal jurisdiction to require that the victim be a Spanish citizen at the time of the crime.⁴⁹⁸

⁴⁹² Pascal Hector, Statement on Behalf of Germany, International Criminal Court Twelfth Session of the Assembly of States Parties (Nov. 20, 2013), 3, http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Germany-ENG-FRA.pdf.

⁴⁹³ Open Society Initiative, *Beyond Arusha: The Global Effort to Prosecute Rwanda’s Genocide*, by Karen Corrie (Apr. 17, 2013), <http://www.opensocietyfoundations.org/voices/beyond-arusha-global-effort-prosecute-rwandas-genocide>.

⁴⁹⁴ Human Rights Watch, “Universal Jurisdiction in Europe: The State of Art,” *supra* note 471, at 6.

⁴⁹⁵ Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Community*, *supra* note 402, at 21.

⁴⁹⁶ Associated Press, *Rwandan in Norway Given 21 Years in Genocide Case*, Feb. 14, 2013, <http://bigstory.ap.org/article/rwandan-norway-given-21-years-genocide-case>.

⁴⁹⁷ *Spain probes Hu Jintao ‘genocide’ in Tibet court case*, BBC News, Oct. 11, 2013, <http://www.bbc.co.uk/news/world-europe-24490004>.

⁴⁹⁸ Frank Ching, *Spain blocks Tibetan genocide suit*, China Post, Jan. 8, 2014, <http://www.chinapost.com.tw/commentary/the-china-post/frank-ching/2014/01/08/397838/Spain-blocks.htm>.

Limitations on universal jurisdiction

There are a number of limitations on the availability and desirability of invoking universal jurisdiction:

- Reluctance to Invoke Universal Jurisdiction. For practical purposes, the availability of universal jurisdiction varies greatly.⁴⁹⁹ Even countries that have universal jurisdiction legislation may allow those laws to lie dormant. Belgium, Denmark, Germany, and Spain have prosecuted cases applying universal jurisdiction.⁵⁰⁰ Cyprus, Latvia, Lithuania, and Slovakia, on the other hand, have not prosecuted cases applying universal jurisdiction.⁵⁰¹ Australia is more likely to initiate civil litigation than bring a criminal prosecution.⁵⁰²
- Prosecutorial Discretion. The decision to pursue a prosecution based on universal jurisdiction typically rests with the prosecutors in a country, rather than with the victims. In some jurisdictions, victims or NGOs may initiate private prosecutions against human rights violators, but these initiatives can be costly and complex, and courts may have the authority to reject them.⁵⁰³
- Logistics. Prosecuting crimes based on universal jurisdiction can present daunting logistical challenges, including language barriers, burdensome and costly extraterritorial investigations, and lack of prosecutorial experience with the crimes at issue.⁵⁰⁴
- Presence and Residency Requirements. At least twenty countries in Europe require the alleged perpetrator to be present in the country during various stages of the proceedings and investigations.⁵⁰⁵ Australia also requires the alleged perpetrator to be present in Australia or under Australia's authority.⁵⁰⁶ Some European countries will not initiate a prosecution unless the alleged perpetrator is a resident of the country.⁵⁰⁷
- Statute of Limitations. Most countries in Europe recognize that crimes under the Rome Statute (genocide, crimes against humanity, war crimes, and the crime of aggression) cannot be time-barred. Other crimes, however, are subject to a statute of limitations.⁵⁰⁸
- Political Manipulation. Application of universal jurisdiction can be vulnerable to politicization. Universal jurisdiction may be used as a tool to embarrass a country or, conversely, political motivations may prompt a country to spare a guilty perpetrator.⁵⁰⁹
- Immunity. Most countries recognize some form of immunity for heads of state and other top-level officials who, while acting in their official capacity, commit a crime. In some circumstances, however, that immunity is deemed waived or inapplicable. Diplomatic agents generally have personal immunity while in the country where they are posted.

⁴⁹⁹ REDRESS, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in 27 Member States of the European Union*, *supra* note .

⁵⁰⁰ Human Rights Watch, "Universal Jurisdiction in Europe: The State of Art," *supra* note , at 6-7.

⁵⁰¹ REDRESS, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in 27 Member States of the European Union*, *supra* note , at 228, 171, 175, 100.

⁵⁰² Jesuit Social Justice Centre, *Chasing Shadows: Indonesian War Criminals and Australian Law*, by Dr. Mark Burn and Kath Gibson (May 2007). Also available online at http://www.uniya.org/talks/byrne_may07-op2.html.

⁵⁰³ International Council on Human Rights, *Hard Cases: Bringing Human Rights Violators to Justice Abroad*, *supra* note 470, at 17.

⁵⁰⁴ Human Rights Watch, "Universal Jurisdiction in Europe: The State of Art," *supra* note 471, at 10.

⁵⁰⁵ Pearlroth, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in 27 Member States of the European Union*, *supra* note 479, at 23, 39.

⁵⁰⁶ Jesuit Social Justice Centre, *Chasing Shadows: Indonesian War Criminals and Australian Law*, *supra* note .

⁵⁰⁷ Pearlroth, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in 27 Member States of the European Union*, *supra* note 479, at 25.

⁵⁰⁸ *Ibid.*, 33.

⁵⁰⁹ Human Rights Watch, "Universal Jurisdiction in Europe: The State of Art," *supra* note 471, at 1–2.

ii. Civil Litigation

Individual victims and civil society organizations may be able to bring civil lawsuits against perpetrators outside of the jurisdiction where the human rights violations occurred. Advocates who are considering this option should consult the section on Impact Litigation in Part A(2) of this chapter.

In the United States, the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) form the primary basis for victims to bring civil suits against perpetrators. “The ATS and TVPA permit suits to be brought only for the most serious forms of human rights violations.”⁵¹⁰ Because of the presumption against laws having extraterritorial effect, courts generally interpret these laws narrowly. Moreover, many of the limitations on the exercise of universal jurisdiction, discussed in the previous section, also apply to ATS and TVPA suits.

Comparison of the Alien Tort Statute and the Torture Victim Protection Act ⁵¹¹		
	Alien Tort Statute	Torture Victim Protection Act
Legal provision	28 U.S.C. § 1350	Pub. L. 102-256, 106 Stat. 73
Who may bring suit?	Only non-U.S. citizens	U.S. citizens or non-U.S. citizens
Limits on conduct covered	Only specifically defined, universally accepted, and obligatory norms of international law	<ul style="list-style-type: none"> torture extrajudicial killing
Examples of conduct covered	<ul style="list-style-type: none"> torture extrajudicial killing forced disappearance crimes against humanity cruel, inhuman, or degrading treatment prolonged arbitrary detention genocide war crimes slavery state-sponsored sexual violence 	<ul style="list-style-type: none"> torture extrajudicial killing
Possible defendants	individuals, multi-national corporations	individuals acting under actual or apparent authority, or color of law, of any foreign nation

⁵¹⁰ Center for Justice and Accountability, “The Alien Tort Statute,” accessed Jan. 16, 2014, <http://www.cja.org/article.php?id=435>.

⁵¹¹ Ibid.; Ekaterina Apostolova, Note, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 Berkeley Journal of International Law 640 (2010), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1396&context=bjil>.

	Alien Tort Statute	Torture Victim Protection Act
Limits on possible defendants	<ul style="list-style-type: none"> defendant must be personally served with the lawsuit while physically present in the United States defendant's conduct must have sufficient ties to the United States current heads of state have immunity 	
Other limitations	<ul style="list-style-type: none"> exhaustion of remedies might be required ten-year statute of limitations from TVPA may apply 	<ul style="list-style-type: none"> must first exhaust any adequate and available local remedies in the country where the conduct occurred ten-year statute of limitations, but equitable tolling may be available
<p><i>Note: This area of law is rapidly evolving. Advocates who are interested in these accountability mechanisms should consult an attorney or an organization that has experience litigating ATS and TVPA claims.</i></p>		

Center for Justice and Accountability and International Rights Advocates Bring Human Rights Abusers to Justice under the Alien Tort Statute and the Torture Victim Protection Act

The Center for Constitutional Rights, the Center for Justice and Accountability, and International Rights Advocates use the ATS and TVPA to bring human rights abusers to justice in U.S. courts. All three organizations recognize that these lawsuits do not result in jail time for the perpetrators. But clients and advocates have identified other reasons for using civil litigation as an accountability mechanism:

- Ending impunity;
- Letting survivors speak;
- Exposing human rights abusers;
- Deterring future abuses;
- Denying safe haven to perpetrators; and
- Building human rights law in domestic courts.⁵¹²

To learn more about the Center for Constitutional Rights, visit <http://ccrjustice.org/>, or contact the CCR at:

Center for Constitutional Rights
666 Broadway
7th Floor
New York, NY 10012
Telephone: 212-614-6464
Fax: 212-614-6499

⁵¹² Center for Justice and Accountability, "The Alien Tort Statute," *supra* note 510.

To learn more about the CJA, visit <http://www.cja.org/index.php>, or contact the CJA at:

The Center for Justice & Accountability
870 Market Street, Suite 680
San Francisco, CA 94102
center4justice@cja.org
Tel 415. 544. 0444
Fax 415. 544. 0456

To learn more about International Rights Advocates, visit <http://www.iradvocates.org/>, or contact IRAdvocates at:

International Rights Advocates
1156 15th Street NW, Suite 502
Washington, D.C. 20005
Phone: (202) 527-7997
Fax: (202) 527-7990
Toll Free: 1 (866) 594-4001
Email: info@iradvocates.org

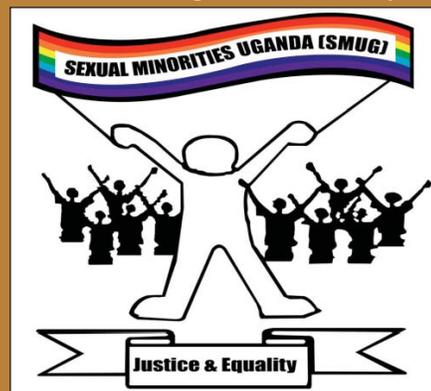
The Alien Tort Statute

The Alien Tort Statute is the primary tool for bringing a civil lawsuit in a U.S. court against the government of another country, state actors, private individuals, and corporations that have violated international law. Subject to certain limitations, plaintiffs who are not U.S. citizens may sue foreign defendants under the ATS in U.S. courts for violations of international laws committed in other nations. Courts generally recognize only limited categories of claims under the ATS: genocide, torture, summary execution, disappearance, war crimes, crimes against humanity, slavery, arbitrary detention, and cruel, inhuman, or degrading treatment.⁵¹³

Courts have construed the ATS to be limited to alleged human rights violations that have some connection to the United States.⁵¹⁴ For example, a district court allowed an ATS lawsuit brought by Kenyan nationals against Osama bin Laden to go forward because the claim related to the attack on the U.S. embassy in Nairobi.⁵¹⁵

Sexual Minorities Uganda Uses Alien Tort Statute to Sue U.S. Citizen Working to Restrict Gay Rights in Uganda

With the assistance of the Center for Constitutional Rights, a Ugandan NGO called Sexual Minorities Uganda (SMUG) filed an ATS claim against Scott Lively, a U.S. citizen who has lobbied the Government of Uganda to adopt stricter laws discriminating against Ugandans based on sexual orientation and gender identity. In *Sexual Minorities Uganda v. Lively*, the District Court for the District of Massachusetts found that the ATS applies to SMUG's claim against Lively for his conduct in Uganda targeting lesbian, gay, bisexual, and transgender



⁵¹³ Alison Bensimon, *Corporate Liability Under the Alien Tort Statute: Can Corporations Have Their Cake and Eat It Too?*, 10 Loyola University Chicago International Law Review, 199, 200 (2013).

⁵¹⁴ ABA Journal, *SCOTUS limits the Alien Tort Statute, Slowing Suits Against U.S. Companies for Action Overseas*, by Mark Walsh (Jul. 2013). Also available online at

http://www.abajournal.com/magazine/article/scotus_limits_the_alien_tort_statute_slowing_suits_against_u.s._companies_ff/.

⁵¹⁵ *Mwani v. Laden*, No. 99-125, U.S. District Court (2013) (memorandum opinion).

communities both through the legal system and through activism. The court recognized that Lively's U.S. citizenship and advocacy work in the United States constituted significant ties to the United States. The court also concluded that persecution of individuals based on their sexual orientation is a crime against humanity and violates international norms.⁵¹⁶

International Rights Advocates is one organization that is working to build capacity in the Global South for ATS-type litigation. International Rights Advocates seeks to build on existing relationships between U.S.-based organizations that conduct ATS litigation and partner organizations in other countries that have assisted with ATS cases. As International Rights Advocates notes, to date Ecuador is the only jurisdiction to support a successful outcome in an ATS-style case. *Aguinda v. Chevron Texaco* was originally filed under the ATS, but the U.S. court dismissed the case, and the case was transferred to Ecuador, where a final verdict was issued against Chevron for \$8.6 billion in damages for environmental harm and related human rights violations.⁵¹⁷

iii. Travel Restrictions

As discussed in part (i) of this section, many countries bar human rights violators from entry and prosecute individuals who lie on their immigration forms for immigration fraud. Some countries have additional immigration laws that bar visas for alleged perpetrators of certain categories of human rights violations. In some cases, travel restrictions themselves can serve as an important accountability mechanism, particularly if an alleged perpetrator is highly visible and unable to visit certain countries.

In recent years, for example, the European Union has imposed “restrictive measures” as a consequence of human rights violations in Belarus, and the U.S. Government has used visa bans as an accountability mechanism for human rights violations in Russia and India.

Belarus

After the 2010 presidential elections in Belarus, the European Union expressed concern about electoral irregularities and the government's violent crackdown on civil society, the political opposition, and the independent media.⁵¹⁸ In early 2011, the EU adopted restrictive measures targeting “those responsible for violation of international electoral standards in the presidential elections or the crackdown on civil society and the democratic opposition.”⁵¹⁹ The restrictions were later expanded to cover “those responsible for serious violations of human rights, the repression of civil society and opposition and persons or entities benefiting from or supporting the regime.”⁵²⁰ A visa ban and asset freeze apply to 232 persons, and 25 business entities are also subject to an asset freeze.⁵²¹

⁵¹⁶ *Sexual Minorities Uganda v. Lively*, No. 13-1937, U.S. Court of Appeals (2013), 1–2.

⁵¹⁷ Adina Appelbaum, International Rights Advocates, *ATS-Like Litigation Abroad: Capacity Building in the Global South*, Nov. 26, 2013. Also available online at <http://www.iradvocates.org/blog/ats-litigation-abroad-capacity-building-global-south#sthash.ebZXk0VE.dpuf>.

⁵¹⁸ European Union External Action, “Factsheet: The European Union and Belarus,” 131029/01, Oct. 29, 2013. Also available online at http://eeas.europa.eu/statements/docs/2013/131029_01_en.pdf.

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*



Protests in Minsk, Belarus in 2010

Russia

In 2011, the U.S. State Department adopted a policy to deny entry visas to Russian officials involved in the 2009 detention and death of Sergei Magnitsky, a lawyer who had been fighting a major fraud and corruption case.⁵²² In 2012, the U.S. Congress passed the Sergei Magnitsky Rule of Law Accountability Act, which bars entry to the United States for certain Russian human rights violators and also freezes any assets they have in the United States.⁵²³ The restrictions apply to individuals identified by the U.S. President, who, based on credible evidence, are “responsible for the detention, abuse, or death of Sergei Magnitsky, participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky, financially benefitted from the detention, abuse, or death of Sergei Magnitsky, or w[ere] involved in the criminal conspiracy uncovered by Sergei Magnitsky.”⁵²⁴ The restrictions also apply to persons who are “responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking . . . to expose illegal activity carried out by officials of the Government of the Russian Federation; or . . . to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, in Russia.”⁵²⁵ As of April 2013, the President of the United States has identified eighteen individuals who are subject to the restrictions in the Magnitsky Act.⁵²⁶ European officials have called for similar sanctions against Russian officials.⁵²⁷

⁵²² Andrew E. Kramer, *Russians Linked to Jail Death Are Barred From U.S.*, New York Times, July 26, 2011, <http://www.nytimes.com/2011/07/27/world/europe/27russia.html>.

⁵²³ *Obama Signs Magnitsky Bill*, Moscow Times, Dec. 17, 2012, <http://www.themoscowtimes.com/news/article/obama-signs-magnitsky-bill/473144.html>.

⁵²⁴ Russia and Moldova Jackson Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, § 404(a)(1) (2012).

⁵²⁵ *Ibid.* § 404(a)(2).

⁵²⁶ U.S. Department of the Treasury, “Magnitsky Sanction Listings,” Apr. 12, 2013. Also available online at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20130412.aspx>.

⁵²⁷ Andrew Rettman, *EU considers visa-ban-lite on Russian officials*, EU Observer, Apr. 6, 2013, <http://euobserver.com/foreign/120368>.

Activists Press for Visa Bans Targeting Sponsors of Russian Law Banning “propaganda of non-traditional sexual relations”

After the Russian Duma adopted a law criminalizing distribution of “propaganda of non-traditional sexual relations,” some Russian gay rights activists urged countries to deny visas to the law’s primary sponsors.⁵²⁸ Some civil society organizations have urged the U.S. administration to add the sponsors to the Magnitsky Act list.⁵²⁹ Canadian activists and politicians have pressed for similar visa bans.⁵³⁰



C. International Accountability Mechanisms

International criminal tribunals are expensive and complex accountability mechanisms, particularly in comparison with domestic options. But in some cases they remain the most viable option for holding perpetrators of serious human rights abuses accountable. Ad hoc tribunals have been established to respond to specific events. The International Criminal Court, on the other hand, is a permanent criminal tribunal with jurisdiction over war crimes, genocide, and crimes against humanity. If an ad hoc tribunal is not available and the ICC cannot exercise jurisdiction, advocates seeking accountability for perpetrators should consider the experiences of these international criminal tribunals in deciding whether to undertake the task of trying to establish a new tribunal.

Intergovernmental organizations such as the Commonwealth of Nations and the Council of Europe do not offer criminal accountability, but sanctions against member countries in the form of suspension or expulsion can sometimes be effective in pressing countries to respect human rights and to restore democratic governance.

i. International Criminal Tribunals

International accountability mechanisms have played a growing role in ending impunity for human rights abuses worldwide. These international mechanisms have provided a judicial avenue for addressing atrocities that would otherwise have been difficult or impossible to prosecute domestically. The most notable international accountability mechanisms include the various international criminal tribunals. Many tribunals are temporary (or “ad hoc”) and have limited jurisdiction over a specific incident or series of events. The International Criminal Court is a permanent tribunal that serves as a venue of last resort for egregious crimes that cannot be effectively and legitimately prosecuted elsewhere.

Victims and advocates who are concerned about accountability for war crimes and other grave human rights violations that are not being prosecuted in a domestic court can examine the existing international tribunals to determine whether one might be an appropriate venue for pursuing accountability. This section provides civil

⁵²⁸ Adam Taylor, *There’s a Better Way to Stand up for Gay Rights in Russia than Boycotting Vodka*, Global Post, July 30, 2013, <http://www.globalpost.com/dispatch/news/regions/europe/russia/130730/theres-better-way-stand-gay-rights-russia-boycotting-vodka>.

⁵²⁹ James Kirchick and Andras Simonyi, Foreign Policy Initiative, *Using the Magnitsky Act to Put Russian Oppressors of LGBT Citizens on Notice*, Dec. 6, 2013, <http://www.foreignpolicy.org/content/fpi-and-ctr-analysis-responding-effectively-russia%E2%80%99s-anti-gay-laws#sthash.2hxpCodd.dpuf>.

⁵³⁰ Craig Takeuchi, *Canadian Organizations Issue Open Letter to Demand Action on Russia’s Antigay Laws*, Straight.Com, Aug. 23, 2013, <http://www.straight.com/life/414491/canadian-organizations-issue-open-letter-demand-action-russias-antigay-laws>.

society organizations, victims, advocates, and laypeople with an overview of the existing mechanisms in place. It also briefly discusses the potential to create new mechanisms. Careful consideration of what each international accountability mechanism offers can allow interested parties to identify appropriate mechanisms.

For each existing tribunal, several factors are relevant to consider:

- (1) **Whether the Crimes Fall Within the Court's Jurisdiction and Mandate.** A number of international criminal accountability mechanisms already exist. Most of these tribunals have a limited mandate and narrow jurisdiction. If a victim's grievance falls within a mandate of an established tribunal, then that court may be the most effective means of seeking recourse.
- (2) **Role of Victims and Witnesses.** If an existing tribunal is an appropriate venue, then victims and victim-oriented organizations should examine the opportunities victims have to participate in the mechanism, protections and support offered to victims and witnesses, and whether the tribunal is authorized to provide victims with any remedies.
- (3) **How To Bring Charges or Make a Complaint.** If victims or civil society organizations are aware of a perpetrator who is not already a party to a proceeding in an appropriate tribunal, they should identify the procedural steps available for filing a charge or a complaint against the perpetrator.
- (4) **Public Outreach and Engagement.** Civil society is often eager to understand the proceedings in these international criminal tribunals. Many tribunals have extensive outreach programs to educate the public, share the voices of victims, and ensure that atrocities are not repeated.

a. Ad hoc Tribunals

Several international tribunals and hybrid (international-domestic) tribunals have been initiated on an ad hoc basis around the world in response to atrocities. The primary goal of most ad hoc tribunals is to prosecute the most egregious perpetrators, but some tribunals collaborate with domestic courts to pursue legal remedies for smaller scale, yet still very serious, crimes.⁵³¹

Ad hoc tribunals include the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and three hybrid tribunals: the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL).

International Criminal Tribunal for the former Yugoslavia Jurisdiction and mandate

The United Nations established the International Criminal Tribunal for the former Yugoslavia in 1993 in The Hague, the Netherlands. The ICTY's mandate is to prosecute individuals responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.⁵³² The ICTY prosecutes four types of crimes: (1) grave breaches of the Geneva Convention; (2) violations of the laws or customs of war; (3) genocide;⁵³³ and (4) crimes against humanity.⁵³⁴ The ICTY can prosecute any person who planned, instigated, ordered, committed, or otherwise aided and abetted in any of these crimes, including Heads of State or



The International Criminal Tribunal for the former Yugoslavia

⁵³¹ The ICTY, for instance, routinely cooperates with regional courts in the former Yugoslavia in prosecuting accused individuals.

⁵³² Updated Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 1, 2009. Available online at http://www.icty.org/x/file/Legal%20Library/Statute/Statute_sept09_en.pdf.

⁵³³ *Ibid.*, Art. 4 (Article 4 states, "Including conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide").

⁵³⁴ *Ibid.*, Art. 2–5.

Government.⁵³⁵ The ICTY was envisioned to prosecute “senior level” perpetrators of atrocities in the former Yugoslavia, leaving the majority of the lower level perpetrators to be prosecuted by domestic courts in the region.

Role of victims and witnesses

Over 4,500 witnesses have testified at the ICTY, and the ICTY has a dedicated independent unit, the Victims and Witnesses Section (VWS), which provides, “all the logistical, psychological[,] and protective measures necessary to make their experience testifying as safe and as comfortable as possible.”⁵³⁶ The VWS has “trained professional staff, available on a 24-hour shift basis that can help witnesses with their psycho-social and practical needs before, during and after their testimony in The Hague.”⁵³⁷

The VWS also provides security protection and privacy measures for victims and other witnesses testifying at the ICTY. Most witnesses testify in open court, but the prosecution or defense may ask the court to implement protective measures, including:

- Removing the witness’ name and/or identifying information from the ICTY’s public record;
- Modifying the witness’ voice and face in televised proceedings;
- Assigning the witness a pseudonym;
- Allowing the witness to testify in closed session; and
- Allowing the witness to testify remotely by video.⁵³⁸

Another aspect of victim participation in the ICTY is the Voice of the Victims program. The Voice of the Victims program provides audio and video coverage of victim and witness testimony that allows the outside world to understand the crimes that were committed. Victims’ stories are extremely difficult to tell, but these stories play an important role in exposing the injustices committed in the former Yugoslavia. “Many victims who testified before the Tribunal courageously related how they were either beaten, tortured, raped, sexually assaulted, forced from their homes, watched how their family members were murdered, or how they saw others fall victim to these terrible crimes.”⁵³⁹

The ICTY does not offer reparations to victims, nor are victims permitted to become involved in proceedings, unless called as witnesses by a party. Nonetheless, if the ICTY makes a factual finding essential to the merits of a case that a witness was a victim of a particular defendant, the victim can often use the decision as leverage in his or her home country to pursue reparations there.

How to bring charges

The ICTY issued its final indictments at the end of 2004 and is completing its mandate.⁵⁴⁰ While the ICTY has been largely successful in fulfilling its mandate, the vast majority of alleged perpetrators will not be tried by the ICTY. Because the ICTY prosecutes only senior level officials, part of the ICTY’s outreach strategy has been capacity-building in national jurisdictions to bolster, train, develop, and improve local legal frameworks. Through cooperative efforts between the ICTY and domestic courts in the region, local prosecutors have been granted access to the ICTY’s evidentiary and pre-trial submissions on a case-by-case basis, increasing efficiency and saving financial resources for the regional courts. The ICTY’s capacity-building program thus not only helps

⁵³⁵ Ibid., Art. 7.

⁵³⁶ United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), “Registry, Witnesses,” accessed Jan. 16, 2014, <http://www.icty.org/sid/158>.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ ICTY, “Voice of the Victims,” accessed Jan. 16, 2014, <http://www.icty.org/sections/Outreach/VoiceoftheVictims>.

⁵⁴⁰ United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), “Office of the Prosecutor,” accessed Jan. 16, 2014, <http://www.icty.org/sections/AbouttheICTY/OfficeoftheProsecutor>.

lighten an international tribunal's caseload by enabling it to focus on the most egregious perpetrators, but it also improves regional and national judicial systems.

Three national courts are handling war crimes cases related to the conflict in the former Yugoslavia: (1) the War Crimes Chamber of the Court of Bosnia and Herzegovina; (2) Regulation 64 Panels of Kosovo; and (3) The Serbian Office of War Crimes Prosecutor in Belgrade, along with the special War Crimes Panel within the Belgrade District Court.

Any individual who has information or evidence regarding an individual suspected of participating in any way in the atrocities in the former Yugoslavia should contact both the ICTY and the local jurisdiction. The ICTY may be able to offer information about whether a proceeding is already ongoing against the suspect in one of the national jurisdictions and can provide relevant evidence to the national jurisdiction.

Public outreach and engagement

The ICTY has perhaps been the most active of all the international criminal tribunals in conducting outreach activities. In addition to capacity-building initiatives with domestic courts, the ICTY participates in activities that include "work with the younger generation, grassroots communities, and the media; visits to the ICTY; and the production of a variety of information materials, multi-media website features and social media outputs. In these activities, Outreach not only informs, but also listens and encourages dialogue."⁵⁴¹ Multi-media activities include documentaries produced entitled "Sexual Violence and the Triumph of Justice" and "Crimes before the ICTY: Prijedor," and several interactive maps and factsheets. The ICTY works with schools and universities in the affected areas to detail the work of the Court and to allow interaction between students and ICTY personnel.

The ICTY publishes statements of guilt from many individuals who plead guilty before the court. These statements of guilt⁵⁴² can provide information to local communities and allow the world to hear details of the crimes committed and perpetrators' expressions of remorse.

The ICTY also began a program called Bridging the Gap, which was implemented to provide more substantive information to the areas affected by the conflict. "The one-day events, held in the towns where some of the most serious crimes took place, included candid and comprehensive presentations from panels of Tribunal staff who were directly involved in the investigation, prosecution, and adjudication of alleged crimes."⁵⁴³

For further information

To monitor the ICTY's proceedings or find more information about the ICTY, consult the court's website: www.icty.org. The court offers live webcasts of its public proceedings. Interested parties also have the opportunity to visit the ICTY in person. Trials at the ICTY are open to the public, with the exception of closed sessions, and can be viewed from public galleries in the courtrooms or from monitors in the Court's lobby.⁵⁴⁴ Individuals may use a number of social media tools to follow the ICTY. The ICTY has a Twitter account (@ICTYnews), a YouTube channel (www.youtube.com/ICTYtv), and a Facebook page (www.facebook.com/ICTYMKSJ). For information regarding witness participation, or filing charges at the national level, contact the Office of the Prosecutor, at Tel: +31 (0)70 512 8958, or E-mail: ContactOTP@icty.org.

⁵⁴¹ United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), "Outreach," accessed Jan. 16, 2014, <http://www.icty.org/sections/Outreach/OutreachProgramme>.

⁵⁴² United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), "Statements of Guilt," accessed Jan. 16, 2014, <http://www.icty.org/sid/203>.

⁵⁴³ ICTY, "Outreach," *supra* note 541.

⁵⁴⁴ United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), "Visits," accessed Jan. 16, 2014, <http://www.icty.org/sid/12>.

The ICTY is particularly noteworthy as a model for capacity-building in domestic courts. These capacity-building programs can help lighten an international tribunal's burden of prosecuting lower-level perpetrators while also improving national judicial systems. Another significant contribution of the ICTY is the prosecution of sexual crimes during international conflicts. "The ICTY took groundbreaking steps to respond to the imperative of prosecuting wartime sexual violence. Together with its sister tribunal for Rwanda, the Tribunal was among the first courts of its kind to bring explicit charges of wartime sexual violence, and to define gender crimes such as rape and sexual enslavement under customary law. The ICTY was also the first international criminal tribunal to enter convictions for rape as a form of torture and for sexual enslavement as crime against humanity, as well as the first international tribunal based in Europe to pass convictions for rape as a crime against humanity, following a previous case adjudicated by the International Criminal Tribunal for Rwanda. The ICTY proved that effective prosecution of wartime sexual violence is feasible, and provided a platform for the survivors to talk about their suffering. That ultimately helped to break the silence and the culture of impunity surrounding these terrible acts."⁵⁴⁵

UN MICT Provides Continuing Assistance to Victims from ICTY and ICTR Cases and Supervises Enforcement of Sentences

In December 2010, the UN Security Council established the Mechanism for International Criminal Tribunals (MICT) to continue the facilitation of a variety of functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) after the completion of their mandates. The MICT aims to continue "the jurisdiction, rights and obligations and essential functions" of the tribunals, and carries out the inherited functions of the ICTR from its branch in Arusha, Tanzania, and those of the ICTY from its branch in The Hague.⁵⁴⁶

A primary function of The MICT is ensuring the protection, safety and well-being of witnesses and victims in previous and ongoing cases related to the two tribunals before, during and after a witness' testimony.⁵⁴⁷ Therefore, each branch has an independent Witness Support and Protection Unit (WISP) which ensures the security of witnesses and victims through measures such as "non-disclosure of the identity of the witnesses, closed court sessions" and "the use of one-way close circuit television during testimony."⁵⁴⁸ In addition, the Arusha Branch offers medical and psychosocial support and The Hague Branch offers social and psychosocial counseling services to victims and witnesses.⁵⁴⁹

To increase public access to the nearly 1,800 documents produced by the Appeals Chamber of the ICTR and ICTY, The MICT has launched The ICTR/ICTY Case Law Database. Entries regarding pronouncements on elements of statutory crime, modes of liability and other issues can be searched for and accessed via The MICT's website at: <http://unmict.org/cld.html>.

People convicted by the ICTR and ICTY serve their sentences in a country which has signed an agreement to enforce sentences. The President of The MICT supervises the enforcement of these sentences and has the authority to grant pardons and commutations of sentences for people previously convicted by the ICTR and ICTY as well as those convicted in ongoing and future cases.⁵⁵⁰

⁵⁴⁵ UN International Criminal Tribunal for Rwanda (ICTR), "Crimes of Sexual Violence," accessed Jan. 17, 2014, <http://www.icty.org/sid/10312>.

⁵⁴⁶ The UN Mechanism for International Criminal Tribunals, "About," <http://www.unmict.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>.

⁵⁴⁷ The UN Mechanism for International Criminal Tribunals, "Witnesses," <http://unmict.org/witnesses.html>.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

⁵⁵⁰ The UN Mechanism for International Criminal Tribunals, "About," *supra* note 546.

Information on how to request protective measure assistance can be found at:

<http://www.unmict.org/requests-for-assistance.html>.

The MICT's "Policy for the Provision of Support and Protection Services and Witnesses" can be accessed at: http://www.unmict.org/files/documents/misc/mict_witness_support_policy_en.pdf.

International Criminal Tribunal for Rwanda **Jurisdiction and mandate**

The United Nations Security Council created the International Criminal Tribunal for Rwanda in response to the Rwandan Genocide of 1994. The ICTR is located in Arusha, Tanzania.⁵⁵¹ The ICTR was created "for prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994, and December 31, 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighboring States during the same period."⁵⁵² The Court not only punishes genocide, but conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.⁵⁵³



Role of victims and witnesses

Like the ICTY, victims can testify at the ICTR only as witnesses called by a party. Victims have no right of participation, nor can they receive reparations. Additionally, the ICTR also has a Witness & Victims Support Section (WVSS) which handles all matters relating to witnesses, including availing witnesses for judicial proceedings.⁵⁵⁴ A Witness Support and Protection Program focuses on the security and safety of the witness or victim. The WVSS can assist witnesses "by ensuring that witnesses testify in a safe and conducive environment while being provided with required security (protecting the privacy and ensuring the security and safety of all witnesses) and assistance (diplomatic, administrative, logistic, legal, medical, psychological especially counseling in cases of rape and sexual assaults; and any other required support within the mandate of the WVSS)."⁵⁵⁵ The WVSS provides impartial support "by developing short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their lives, property or family; by protecting them within their community as well as by implementing appropriate measures for the protection of witnesses in collaboration with Countries of residence of witnesses and where applicable within the UNHCR and other National organs."⁵⁵⁶

⁵⁵¹ ICTR, "About ICTR," accessed Jan. 16, 2014, <http://www.unict.org/>.

⁵⁵² *Ibid.*; Statute of the International Criminal Tribunal for Rwanda, 1994, Art. 1. Also available online at <http://www.unict.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf>.

⁵⁵³ ICTR, Statute of the International Criminal Tribunal for Rwanda, *supra* note 552, Art. 2(3).

⁵⁵⁴ International Criminal Tribunal for Rwanda, "ICTR Structure: WVSS Section," accessed Jan. 16, 2014, <http://www.unict.org/tabid/106/default.aspx>.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

How to bring charges

The ICTR has enacted its completion strategy, although nine accused individuals still remain at large.⁵⁵⁷ The Office of the Prosecution does not have a standardized process for individuals or NGOs to file claims or submit information and evidence.

Public outreach and engagement

The ICTR has participated in several public outreach activities. The ICTR has been particularly focused on educating children and young persons about the conflict and aftermath of the Rwandan Genocide. To this end, the Court has published an ICTR cartoon book called *100 Days—In the Land of a Thousand Hills*.⁵⁵⁸ “The goal is to create an illustrated narrative that will convey the events of the genocide at both personal and national levels to children eight years of age and above.”⁵⁵⁹ The court has also held painting and essay competitions for students. Students from Burundi, Kenya, Rwanda, Tanzania, and Uganda submitted works addressing topics of international justice, national reconciliation, and the fight against impunity.⁵⁶⁰

For further information

To learn more about the ICTR’s proceedings and events, visit the ICTR’s website: www.unict.org. For information regarding witness involvement and/or filing charges, contact one of the following offices; ICTR, Arusha Office: Tel: 255 27 250 27 4207-4211; ICTR, Kigali Office: Tel +250 84266; ICTR, The Hague Office: Tel: 31 (0)70 512 5027

Extraordinary Chambers in the Courts of Cambodia



Jurisdiction and mandate

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a hybrid international criminal tribunal created in 2001 to investigate and prosecute the senior leaders of the Khmer Rouge for serious crimes committed between 1975 and 1979.⁵⁶¹ The ECCC sits in Cambodia and uses Cambodian staff and both Cambodian and international co-prosecutors and co-investigating judges.⁵⁶² The ECCC caseload consists of four cases.

Role of victims and witnesses

Victims may file complaints, but “[c]omplainants do not participate as parties in hearings, and they are not entitled to ask the court for reparations. They may however be requested to give evidence or testify as witnesses.”⁵⁶³ After filing a complaint, the ECCC will investigate the facts contained in the complaint to determine whether they fit within an already existing case at the Court or whether the facts could possibly lead to a new case.

⁵⁵⁷ International Criminal Tribunal for Rwanda, “Case: Accused At Large,” accessed Jan. 17, 2014, <http://www.unict.org/Cases/tabid/77/Default.aspx?id=12&mnid=12>. The nine at large are: (1) Augustin Bizimana; (2) Felicien Kabuga; (3) Fulgence Kayishema; (4) Protais Mpiranya; (5) Pheneas Munyarugarama; (6) Aloys Ndimbati; (7) Ladislas Ntaganzwa; (8) Charles Ryandikayo; and (9) Charles Sikubwabo.

⁵⁵⁸ International Criminal Tribunal for Rwanda, “ICTR Structure: News, ICTR Cartoon Books,” accessed Jan. 16, 2014, <http://www.unict.org/tabid/2225/default.aspx>.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.; International Criminal Tribunal for Rwanda, “ICTR Structure: News,” accessed Jan. 16, 2014,

<http://www.unict.org/News/tabid/63/Default.aspx>.

⁵⁶¹ Extraordinary Chambers in the Courts of Cambodia, “About ECCC,” accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/about-eccc>.

⁵⁶² Extraordinary Chambers in the Courts of Cambodia, “The Co-Investigating Judges,” accessed Jan. 17, 2014,

<http://www.eccc.gov.kh/en/ocij/about>.

⁵⁶³ Extraordinary Chambers in the Courts of Cambodia, “Statement by the Co-Investigating Judges Regarding Case 003,” accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-003>.



The Extraordinary Chambers in the Courts of Cambodia

Victims may become Civil Parties to the proceedings. To become a Civil Party, a victim must be a natural person or a legal entity “who suffered physical, material[,] or psychological harm as a direct consequence of at least one of the crimes alleged against the Charged Person.”⁵⁶⁴ Civil Parties “enjoy rights broadly similar to the prosecution and the defence.”⁵⁶⁵ These rights include the right to:

- Choose a legal representative;
- Request the investigation of alleged crimes;
- Request the judges to ask specific questions to the witnesses and the accused;
- Ask the court to take measures to respect their safety, well being, dignity, and privacy in the course of their participation in the proceedings; and
- Request collective and moral reparations.⁵⁶⁶

Individuals and legal entities may apply for recognition as Civil Parties free of charge. While the deadline to apply as a Civil Party in Cases 001 and 002 has passed, interested parties may still apply to be a Civil Party in Cases 003 and 004.

Cambodian Diaspora Members Participate as Civil Parties in the ECCC

Cambodian national attorney Sam Sokong and the Center for Justice and Accountability represent 45 Civil Parties in proceedings before the Extraordinary Chambers in the Courts of Cambodia against two senior officials of the Khmer Rouge: Nuon Chea and Khieu Samphan. The officials are accused of crimes against humanity, war crimes, genocide, and crimes under Cambodian law. The civil parties include Cambodian diaspora members living in the United States.⁵⁶⁷



Chum Mey, a survivor of the Khmer Rouge's S-21 secret prison, testifies at the ECCC

How to bring charges

Any person or legal entity may file a complaint with the ECCC. They may do so by filling out a Victim Information Form and submitting it to the Victims Support Section (VSS). Legal representation can be arranged free of charge by the VSS.

⁵⁶⁴ Extraordinary Chambers in the Courts of Cambodia, “Who is eligible to become a Civil Party?,” accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/victims-support>.

⁵⁶⁵ Extraordinary Chambers in the Courts of Cambodia, “Who is eligible to become a civil party?,” accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/victims-support/civil-party-information>.

⁵⁶⁶ Ibid.

⁵⁶⁷ The Center for Justice and Accountability (CJA), “Case 002: In Brief,” accessed Jan. 17, 2014, <http://cja.org/article.php?list=type&type=449>.

Public outreach and engagement

For people residing in Cambodia interested in a weekly update on the ECCC's events, a radio program is accessible on Thursday evenings from 5:15-6:15 (local Cambodian time) on Radio National Kampuchea AM 918 KHZ and FM 105.75 MHZ. "The radio programme provides an opportunity for the public to interact with court officials and deepen their understanding of Case 002. Each programme will present highlights from the week's hearings, and featured guest speakers from the court will break down major developments in the proceedings."⁵⁶⁸ Listeners also have an opportunity to call into the show in order to express their opinions or ask questions.

The ECCC's Public Affairs Section conducts outreach trips to provinces around Cambodia. During these trips, members of the Court speak to the public, provide information regarding current proceedings, and take questions. The ECCC has also produced several outreach videos to inform the public about the mandate of the court, recent developments, and information regarding future public outreach efforts.⁵⁶⁹

For further information

The ECCC's website provides information about the court's proceedings: <http://www.eccc.gov.kh/en>. One of the best ways to monitor proceedings at the ECCC is to use the court's live webstream. The court's website features a live feed of courtroom proceedings in Khmer and French. The ECCC also makes a video archive available on its website.⁵⁷⁰ The video archive contains key moments from the proceedings, including Kaing Guek Eav's statements of apology, examination of Nuon Chea, initial hearings, and a video tour of the holding cells for the accused at the ECCC. Interested observers can also witness the proceedings in person. Observers may also follow the ECCC on Twitter (@KR Tribunal). The ECCC has a Facebook page, a YouTube channel (www.youtube.com/krtibunal), and a Flickr account (www.flickr.com/photos/krtibunal).

The form to file a complaint before the ECCC is available at: <http://www.eccc.gov.kh/en/forms>. Complainants may email their forms to vss@eccc.gov.kh or mail them to:

Victims Support Section
Extraordinary Chambers in the Courts in Cambodia
National Road 4
Chaom Chau, Porsenchey
P.O. Box 71, Phnom Penh, Cambodia

⁵⁶⁸ Extraordinary Chambers in the Courts of Cambodia, "ECCC's Weekly Radio Programme," accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/media-center/weekly-radio>.

⁵⁶⁹ Extraordinary Chambers in the Courts of Cambodia, "Outreach," accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/media-center/activities-outreach>.

⁵⁷⁰ Extraordinary Chambers in the Courts of Cambodia, "Video Archive," accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/video/archive>.

Victim Support Services at the ECCC

The ECCC's Victims Support Section has a Victim Information Form⁵⁷¹ that interested parties can complete and send to:

Victims Support Section
 Extraordinary Chambers in the Courts of Cambodia
 National Road 4
 Chaom Chau, Porsenchey
 P.O. Box 71, Phnom Penh, Cambodia
 Email: vss@eccc.gov.kh
 Telephone: 023 861 895 or 097 742 4218 (helpline)

While all information in the Victim Information Form must be filled out, of particular importance is:

- Applicant's name;
- Whether the applicant is applying to become a Civil Party because of crimes committed against a close family member; if so, include the name of the family member and the applicant's relationship to him/her;
- Applicant's contact address in Cambodia;
- Applicant's signature or thumbprint;
- All available information related to the crime or crimes which make the applicant a victim;
- Whether the applicant seeks to become a Civil Party to Case 003, Case 004, or both;
- A copy of the applicant's identity card (if available) or any other form of identification; and
- Any documents that support the information provided in the form, such as a photo of the victim (if available).⁵⁷²

Any person needing assistance completing the Victim Information Form may contact:

Documentation Center of Cambodia (DC-Cam)
 P.O. Box 1110; 66 Sihanouk Blvd.,
 Phnom Penh
 +855 (0) 23 211 875 (telephone)
 +855 (0) 23 210 358 (fax)⁵⁷³

Legal representation can be arranged free of charge by the VSS. In addition to the VSS, parties seeking legal representation may contact:

Cambodian Defenders Project
 #1 St. 50, Toul Tumpoung
 2, Khan Daun Penh, Phnom Penh
 www.cdpcambodia.org

Advocates can seek to be included on the ECCC's official list of counsel available to victims. Cambodian lawyers wishing to represent Civil Parties must be a current member of the Bar Association of the Kingdom of Cambodia and must be competent in criminal law and procedure at the international or national level. Foreign lawyers must:

⁵⁷¹ ECCC, "Forms," accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/forms>.

⁵⁷² Extraordinary Chambers in the Courts of Cambodia, "How can you apply to become a Civil Party in Cases 003 and 004 pamphlet," accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/how-can-you-apply-become-civil-party-cases-003-and-004>.

⁵⁷³ Ibid.

- Be a current member in good standing of a recognized association of lawyers of a United Nations member state;
- Have a degree in law or an equivalent legal or professional qualification;
- Be fluent in Khmer, French, or English;
- Have established competence in criminal law and procedure at the international or national level;
- Have relevant working experience in criminal proceedings, as a lawyer, judge or prosecutor, or in some other capacity;
- Not have been convicted of a serious criminal or disciplinary offence considered incompatible with representing a victim before the ECCC; and
- Register with the Bar Association of the Kingdom of Cambodia.⁵⁷⁴

The ECCC is notable for its procedures allowing victims to participate as Civil Parties and seek certain types of reparations. The ECCC's legal aid fund for victims also helps ensure access to the Tribunal. The ECCC's use of co-prosecutors and co-judges is a novel approach that may facilitate a stronger connection between the local population and the international tribunal, but the structure has proven problematic, and has been criticized as allowing for excessive interference from the Cambodian Government. The ECCC's prosecutions have moved slowly; some defendants have died and the prosecution of one defendant is postponed indefinitely due to the defendant's dementia.

The Special Court for Sierra Leone

Jurisdiction and mandate



The Special Court for Sierra Leone (SCSL) was mandated to, “prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.”⁵⁷⁵ The SCSL prosecuted four main types of crimes: (1) crimes against humanity; (2) violations of Article 3 common to the Geneva Conventions and of Additional Protocol II; (3) other serious violations of international humanitarian law; and (4) crimes under Sierra Leonean law.⁵⁷⁶ The SCSL was a joint effort by the Government of Sierra Leone and the United Nations.

Role of victims and witnesses

The SCSL had a Witness and Victim Support unit, but victims no longer participate in court proceedings because the appeal of the final case has concluded.⁵⁷⁷

How to bring charges

The SCSL has concluded all of its cases, with the final proceeding before the SCSL being the appeal of Charles Taylor's conviction. Charles Taylor was sentenced to 50 years imprisonment, but appealed that sentence. After Taylor's sentence was upheld on appeal in September 2013, the SCSL became the first ad hoc tribunal to complete its mandate. The SCSL will not be filing more charges or seeking more indictments.

⁵⁷⁴ Extraordinary Chambers in the Courts of Cambodia, “Legal Representation,” accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/victims-support/legal-representation>.

⁵⁷⁵ Statute of the Special Court for Sierra Leone, 2000, Art. 1.

⁵⁷⁶ *Ibid.*, Arts. 2–5.

⁵⁷⁷ Special Court for Sierra Leone, “About,” accessed Jan. 17, 2014, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx>.

Public outreach and engagement

The SCSL's Registry's Outreach and Public Affairs unit (OPA) conducted outreach activities. Its mission was to "foster two-way communication between Sierra Leoneans and the Special Court. To achieve its mission [the Outreach and Public Affairs Unit] target[ed] the general population as well as specific groups including the military, the police, students at all levels, the judiciary, prison officers, religious leaders, civil society[,] and national and international NGOs."⁵⁷⁸ The OPA conducted outreach through town hall meetings, radio programs, publications, seminars, and trainings.⁵⁷⁹

The OPA dedicated particular attention to educating children and young adults. The outreach team conducted Training the Trainer workshops and published a training manual that has been used to create School Human Rights and Peace Clubs. Outreach activities also included quiz and debating competitions organized in local schools. Eight universities in Sierra Leone host Accountability Now Clubs. The OPA provided instruction and training and the clubs "are now self-sufficient and focus on the broader issues of justice, accountability and human rights, thereby educating people in the years to come."⁵⁸⁰

The OPA conducted additional outreach programs,⁵⁸¹ including:

- Video Screenings: Video screenings of redacted trials across Sierra Leone.
- Radio & Television Programming: Programming included expert interviews and panel discussions. Rapid response programs facilitated clarification of misunderstandings and an immediate response to deliberate misinformation.
- Tours of SCSL Facilities: Elementary and secondary school students visited the Court and participated in interactive question and answer sessions.

For further information

To learn more about the SCSL's proceedings, visit the court's website: <http://www.sc-sl.org/HOME/tabid/53/Default.aspx>. The court has published video summaries of the four main actors in the SCSL: the CDF, the RUF, the AFRC, and Charles Taylor.⁵⁸² The SCSL office in The Hague, the Netherlands, can be reached at +31 70 515 9750.

The SCSL is noteworthy in several respects. First, the SCSL was the first international tribunal to indict a sitting Head of State, Charles Taylor. Disavowing Head of State immunity in international criminal tribunals is a crucial step in the administration of justice for international atrocities. In indicting Charles Taylor, the SCSL sent an important message that even a Head of State may not escape justice for committing atrocities. Second, the SCSL was the first international tribunal to convict individuals for the recruitment and use of child soldiers, and for the crime of forced marriage. Third, the SCSL was the first hybrid court, where national judges and personnel worked alongside international judges and personnel towards the administration of justice. This model can help develop the capacity of domestic courts. Finally, the SCSL was the first international tribunal to be established in the nation where the crimes took place. The SCSL's location presented an opportunity for greater connection between the court and the local population, but its location also presented logistical problems.

⁵⁷⁸ Special Court for Sierra Leone, "Outreach and Public Affairs," accessed Jan. 17, 2014, <http://www.sc-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx>.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid.

⁵⁸² SCSL, "Video Summaries," accessed Jan. 17, 2014, <http://www.sc-sl.org/PRESSROOM/VideoSummaries/tabid/122/Default.aspx>.

The Special Tribunal for Lebanon **Jurisdiction and mandate**



The Special Tribunal for Lebanon is the newest of the international criminal tribunals and has a limited focus. The STL was created to address the single incident of a terrorist bombing on February 14, 2005, that killed 23 individuals, including former Lebanese Prime Minister Rafiq Hariri, and injured others.⁵⁸³ The STL investigates and prosecutes persons who may be responsible for: (1) the attack on February 14, 2005; (2) attacks in Lebanon between October 1, 2004 and December 12, 2005, that are connected and are of a similar nature and gravity to the Hariri attack; and (3) attacks on any date after December 12, 2005, as decided by Lebanon and the United

Nations with the consent of the UN Security Council if these attacks are connected and are of a similar nature and gravity to the attack of February 14, 2005.⁵⁸⁴

Role of victims and witnesses

The STL defines a victim as, “a natural person who has suffered physical, material or mental harm as a direct result of an attack within the Tribunal’s jurisdiction.”⁵⁸⁵ An individual meeting this definition is able to apply for official victim status and may be able to receive free representation from the tribunal’s Victims’ Participation Unit.⁵⁸⁶ The application is available on the Court’s website.⁵⁸⁷

Subject to leave from the court, a victim may be able to participate in STL proceedings, usually through a legal representative. A victim’s legal representative may be permitted to make oral or written submissions, call witnesses to testify, tender other evidence, or examine witnesses.⁵⁸⁸

The STL does not have the authority to grant compensation or reparations to a victim directly, but the tribunal encourages victims to use a certified copy of a judgment of guilt in domestic proceedings seeking such compensation.⁵⁸⁹ Article 25(4) of the STL’s statute states that “[t]he judgment of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.”⁵⁹⁰

How to bring charges

The STL does not have a standardized procedure for individuals and organizations to come forward with evidence of criminal conduct. Individuals or organizations with information should contact the Office of the Prosecutor.

Public outreach and engagement

The STL is tasked with communicating its mandate to the public. “The primary goal [of this outreach] is to bring the tribunal’s work closer to the Lebanese people.”⁵⁹¹ The outreach office of the STL conducts work in Arabic, English, and French. Its activities “strive[] to make the tribunal’s work transparent and accessible. [The office]

⁵⁸³ Special Tribunal for Lebanon, “About,” accessed Jan. 17, 2014, <http://www.stl-tsl.org/en/about-the-stl/creation-of-the-stl>.

⁵⁸⁴ Special Tribunal for Lebanon, “Office of the Prosecutor,” accessed Jan. 17, 2014, <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/the-office-of-the-prosecutor>.

⁵⁸⁵ Special Tribunal for Lebanon, “Victims’ Participation,” accessed Jan. 17, 2014, <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/registry/victim-participation>.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Special Tribunal for Lebanon, “Application Form For Victims,” accessed Jan. 17, 2014, <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/registry/victim-participation/application-form-for-participating-to-the-proceedings>.

⁵⁸⁸ STL, “Victims’ Participation,” *supra* note 585.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ Statute of the Special Tribunal for Lebanon, Art. 25(4) (2006).

⁵⁹¹ Special Tribunal for Lebanon, “Outreach,” accessed Jan. 21, 2014, <http://www.stl-tsl.org/en/about-the-SH/structure-of-the-SH/registry/outreach>.

engages with specialized groups such as legal professionals, civil society organizations[,] and academic institutions in Lebanon and abroad. It does this through publications, the STL website, organizing public forums[,] and other initiatives featuring tribunal representatives and other experts.⁵⁹²

For further information

Information about the STL's proceedings is available on the tribunal's website: <http://www.stl-tsl.org/en/>. The court's website also has an Ask the Tribunal section where STL personnel answer some of the public's most frequently asked questions. Individuals in Lebanon may make an appointment to witness public hearings.⁵⁹³ The STL maintains a Facebook page (www.facebook.com/STLebanon), a Twitter account (@STLEbanon), a YouTube channel (www.youtube.com/stlebanon), a Scribd page (www.scribd.com/STLebanon), and a Flickr account (www.flickr.com/photos/stlebanon).

Individuals with information regarding criminal activity related to the STL's mandate may contact the Office of the Prosecutor at youssef6@un.org or +31 (0) 70 800 3733.

The Special Tribunal for Lebanon has several unique and progressive features that could be replicated in future tribunals. The most innovative feature of the STL is that it was established in response to what is, as compared to other international criminal tribunals, a relatively isolated act of violence. The special tribunal was formed in light of the international nature of the crime, the suspected participation of international terrorist actors, and concerns about a domestic trial. Additionally, the STL has a number of jurisdictional and procedural features that can be useful models for future tribunals. First, the STL is the first international criminal tribunal to prosecute suspects for terrorism as a distinct crime. Second, the STL is the first contemporary international court to proceed with trials in absentia. The STL has strict conditions for proceeding with trials in absentia and defense counsel must still represent the accused.⁵⁹⁴ The STL also features an autonomous pre-trial judge, as well as a defense office with status equal to that of the Office of the Prosecutor.

b. The International Criminal Court

Jurisdiction and mandate



If countries cannot or will not prosecute criminal violations in their own courts, recourse may exist with the International Criminal Court. Unlike the ad hoc tribunals, the ICC is a permanent court created to address problems as they arise throughout the world.

If an advocate's country of origin has not ratified the Rome Statute, it may be difficult to leverage the power of the ICC, due to the way the court exercises its jurisdiction. For the ICC to get involved, it must have different *types* of jurisdiction at the same time:

Substantive: The ICC is a "court of last resort" that narrowly focuses prosecution efforts on the world's most serious crimes.⁵⁹⁵ The ICC's definitions of what constitutes these "serious crimes" are provided by the Rome Statute, the governing document of the ICC.⁵⁹⁶ Article 5 of the Rome Statute defines the

⁵⁹² Ibid.

⁵⁹³ Special Tribunal for Lebanon, "Visiting the STL," accessed Jan. 17, 2014, <http://www.stl-tsl.org/en/about-the-stl/visiting-the-stl>.

⁵⁹⁴ Special Tribunal for Lebanon, "Unique Features – Trials in Absentia Are Allowed," accessed Jan. 17, 2014, <http://www.stl-tsl.org/en/about-the-stl/unique-features/trials-in-absentia-are-allowed>

⁵⁹⁵ International Criminal Court, "ICC at a Glance," accessed Jan. 17, 2014, [http://www.icc-](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx)

[cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx).

⁵⁹⁶ Ibid.

crimes the ICC may have jurisdiction over, which include genocide, crimes against humanity, war crimes, and the crime of aggression. While the crime of aggression is specifically mentioned in Article 5, the court will not have jurisdiction over a crime of aggression until 2017 at the earliest. The Rome Statute requires an additional provision regarding the crime of aggression to be amended into the Rome Statute.⁵⁹⁷

Geographic: The ICC has geographic jurisdiction if the crimes took place on the territory of or by a national of a country that is a State Party to the Rome Statute.⁵⁹⁸ A non-State Party may also make a public declaration accepting the jurisdiction of the ICC for a particular crime.⁵⁹⁹

Temporal: The Court has temporal jurisdiction “only with respect to crimes committed after the entry into force”⁶⁰⁰ of the Rome Statute on July 1, 2002. If a country becomes a party to the Rome Statute after that date, then the court may exercise jurisdiction only over crimes committed after the country became a State Party.⁶⁰¹

As of May 1, 2013, 122 countries have accepted the jurisdiction of the ICC with respect to any and all matters that may fall within the scope of crimes handled by the ICC.⁶⁰²

Even if the ICC *can* exercise jurisdiction, however, it will not necessarily do so. Advocates must consider two further admissibility factors: (a) the crimes must be of “sufficient gravity” to justify the court taking action;⁶⁰³ and (b) the country whose domestic judicial system has responsibility to investigate or prosecute the crimes must be either “unwilling or unable” to do so genuinely.⁶⁰⁴ For example, if a government undertakes formal criminal proceedings solely to shield a person from criminal responsibility, then the ICC may act on the matter.⁶⁰⁵

There are several ways that a matter may come before the ICC. First, a State Party to the Rome Statute may ask the ICC to investigate a particular matter inside its own territory. A non-member may also seek the ICC’s involvement and accept its jurisdiction with respect to one or more particular matters. The UN Security Council may refer a particular situation to the ICC as well.⁶⁰⁶



The International Criminal Court in The Hague, Netherlands

⁵⁹⁷ Rome Statute, Art. 5, pt. 2, Art. 121, 123.

⁵⁹⁸ Ibid. Art. 12(2); International Criminal Court, “The State Parties to the Rome Statute,” accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. (A current list of State Parties appears on the ICC website at www.icc-cpi.int.)

⁵⁹⁹ Rome Statute, *supra* note 597, Art. 12(3); ICC, “ICC at a Glance,” *supra* note 595.

⁶⁰⁰ Rome Statute, *supra* note 597, Art. 11.

⁶⁰¹ Ibid. Art. 11, pt. 2.

⁶⁰² ICC, “ICC at a Glance,” *supra* note 595.

⁶⁰³ Rome Statute, *supra* note 597, Art. 17(1)(d).

⁶⁰⁴ Rome Statute, *supra* note 597, Art. 17(1)(a).

⁶⁰⁵ ICC, “ICC at a Glance,” *supra* note 595.

⁶⁰⁶ International Criminal Court, “Frequently Asked Questions,” accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx.

The ICC's power to exercise jurisdiction over a matter through referral from the Security Council is a strong accountability tool, as it allows for the investigation and possible prosecution of international crimes even if the government of the country where the crimes occurred actively seeks to avoid the ICC's jurisdiction.

The prosecutor may also start an investigation on his or her own, if the prosecutor's office receives information justifying such action.⁶⁰⁷ Victims, witnesses, and civil society organizations may prompt the ICC to initiate an investigation to determine whether proceedings are warranted. The ICC's Office of the Prosecutor may initiate an investigation if it receives "reliable information about crimes involving nationals of a State Party or of a State which has accepted the jurisdiction of the ICC, or about crimes committed in the territory of such a State, and concludes that there is a reasonable basis to proceed with an investigation."⁶⁰⁸ The Office of the Prosecutor encourages individuals and NGOs to provide reliable information to the Office of the Prosecutor.⁶⁰⁹ The Office analyses all communications received and the extent of the analysis is affected by the detail and substantive nature of the information available.⁶¹⁰ After receiving reliable information regarding human rights abuses, the Office of the Prosecutor must obtain permission from the judges of the ICC's Pre-Trial Chamber to initiate an investigation.⁶¹¹

ICC Offers Limited Accommodations in Response to Pressure to Transfer and Defer ICC Cases

In 2010, the ICC prosecutor brought charges against six Kenyans identified as most responsible for the violence that erupted after that country's disputed 2007 presidential elections. Two of these six individuals are Uhuru Kenyatta and William Ruto, who were elected as President and Deputy President of Kenya in March 2013.⁶¹² Kenyan authorities have attempted to demonstrate that local courts are willing and able to prosecute the crimes stemming from the 2007–2008 post-election violence.⁶¹³ The East Africa Legislative Assembly and the African Union subsequently called on the ICC to defer prosecution of Kenyatta and Ruto until they leave office,⁶¹⁴ and the Kenyan Parliament voted to withdraw from the Rome Statute.⁶¹⁵

The ICC responded to these pressures by agreeing "to special rules for any defendant who performs 'extraordinary public duties at the highest national level.'"⁶¹⁶ These accommodations prompted a sharp response from civil society organizations and victims' advocates, who opposed the ICC's decision to "allo[w] absences from hearings or appearances via video link" for defendants like Kenyatta and Ruto.⁶¹⁷

To date, the ICC has taken 18 cases in 8 individual situation countries. These cases fall within situations in the Central African Republic, Côte d'Ivoire, Darfur, the Democratic Republic of the Congo, Kenya, Libya, Mali, and Uganda. The ICC is also currently undertaking preliminary investigations in at least seven other countries.⁶¹⁸

⁶⁰⁷ Rome Statute, *supra* note 597, at Art. 13(c), Art. 15(1).

⁶⁰⁸ ICC, "Frequently Asked Questions," *supra* note 606.

⁶⁰⁹ *Ibid.*

⁶¹⁰ ICC, "Office of the Prosecutor," accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx.

⁶¹¹ Rome Statute, *supra* note 597, Art. 15(3); ICC, "Frequently Asked Questions," *supra* note 606.

⁶¹² Press Release, All Africa, East Africa: Defer the Kenyan ICC Cases - EALA States, Oct. 24, 2013, <http://allafrica.com/stories/201310250095.html>.

⁶¹³ Allan Ngari, *Kenya's Ongoing Battle with Complementarity at the ICC*, International Criminal Court Kenya Monitor, May 16, 2012, <http://www.icckenya.org/2012/05/kenyas-ongoing-battle-with-complementarity-at-the-icc/>.

⁶¹⁴ Press Release, All Africa, *supra* note 612.

⁶¹⁵ Sabine Hoehn, *Kenya: Is ICC Withdrawal Down to Court's "lack of respect" for Kenyan Cooperation and Trial Relocation Requests?*, African Arguments, Sept. 9, 2013, <http://africanarguments.org/2013/09/09/kenya-is-icc-withdrawal-down-to-courts-lack-of-respect-for-kenyan-cooperation-and-trial-relocation-requests-by-sabine-hoehn/>.

⁶¹⁶ Marlise Simons, *International Criminal Court Wrestles with Applying Law, or Bending*, New York Times, Dec. 3, 2013, http://www.nytimes.com/2013/12/04/world/africa/as-kenyans-trial-looms-international-court-bends-for-diplomacy.html?_r=0.

⁶¹⁷ *Ibid.*

⁶¹⁸ International Criminal Court, "Situations and Cases," accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

Role of victims and witnesses

Unlike many other international tribunals, the ICC has distinct roles for victims and for witnesses. The ICC is the first international tribunal to have a role designated for victims and victims' participation throughout the investigation and trial process. Not all victims serve as witnesses at trial—in fact, few do. Similarly, many witnesses at ICC trials are not victims of the crimes being tried.

Victims can get help from two different types of lawyers: Legal Representatives of Victims (LRVs), who are lawyers admitted to practice before the ICC but are not employed by the ICC; and the ICC's own Office of Public Counsel for Victims (OPCV).⁶²⁰ Typically, the LRVs work with victims in the field, keep victims updated on the progress of proceedings, and present the views and interests of victims to the court. The OPCV assists the LRVs from The Hague.⁶²¹

Individual victims must apply for recognition as victims before the ICC.⁶²² The application process is somewhat different in each case, but there is a standardized form that the court has used in some cases.⁶²³

After the prosecutor has initiated proceedings, the ICC gives victims at least two potential roles to play. First, the ICC enables victims to present their views and observations before the court. Through a legal representative, "victims are entitled to file submissions before the Chambers of the Court at the pre-trial stage, at trial, and during the appeals process."⁶²⁴

Second, ICC judges may order perpetrators to compensate victims if a defendant is found guilty.⁶²⁵ The Court has discretion to grant reparations individually or collectively.⁶²⁶ If the Court opts to grant collective reparations, reparations may be paid through the Trust Fund for Victims (TFV) or through an inter-governmental, international, or national organization.⁶²⁷ The TFV also has an assistance mandate, which operates separately from judicial reparation orders. As part of this mandate, the TFV provides assistance in the form of community development funds to victims of crime under the ICC's jurisdiction. Full information is available at the TFV website, located at www.trustfundforvictims.org.

Not all victims serve as witnesses at trial. Similarly, many witnesses at ICC trials are not victims of the crimes being tried. But the ICC takes measures to "protect the safety, physical and psychological well-being, dignity, and privacy of [both] victims and witnesses."⁶²⁸ Article 67 of the Rome Statute provides for public hearings as a right of

International Court of Justice



The International Court of Justice at The Hague handles cases between countries, not individuals.⁶¹⁹

⁶¹⁹ Rome Statute of the International Criminal Court, accessed Jan. 21, 2014, <http://www.un.org/law/icc/index.html>.

⁶²⁰ International Criminal Court, "Office of Public Counsel of Victims," accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/office%20of%20public%20counsel%20for%20victims/Pages/office%20of%20public%20counsel%20for%20victims.aspx.

⁶²¹ International Criminal Court, "Legal Representatives of Victims," accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/legal%20representation/Pages/legal%20representatives%20of%20victims.aspx.

⁶²² ICC, "Participation of victims in proceedings," accessed Jan. 21, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/participation%20of%20victims%20in%20proceedings.aspx.

⁶²³ International Criminal Court, "Victims' Forms," accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/forms.aspx.

⁶²⁴ ICC, "Participation of victims in proceedings," *supra* note 622.

⁶²⁵ International Criminal Court, "Victims and Witnesses," accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx;

International Criminal Court, "Victims and Reparations," accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx.

⁶²⁶ ICC, "Victims and Reparations," *supra* note 625.

⁶²⁷ *Ibid.*

⁶²⁸ Rome Statute, *supra* note 597, Art. 68 (1).

the accused, but Article 68(2) allows for any part of the proceedings to occur *in camera*⁶²⁹ or for the presentation of evidence to be done by electronic or other special means.

How to bring charges

The Office of the Prosecutor encourages individuals and organization with reliable information “to submit information in English or French, the working languages of the Court. Arabic, Chinese, Russian, and Spanish are also official languages of the Court. Where information is submitted in a language other than these, the Office will endeavor to obtain informal translations where possible.”⁶³⁰ Information about alleged crimes can be submitted to:⁶³¹

International Criminal Court
Office of the Prosecutor: Communications
Post Office Box 19519
2500 CM The Hague
The Netherlands.
otp.informationdesk@icc-cpi.int
Fax: +31 70 515 8555

Public outreach and engagement

The ICC has a public outreach program aimed at informing the public about the court’s proceedings. This “outreach programme has been created to ensure that affected communities in situations subject to investigation or proceedings can understand and follow the work of the Court through the different phases of its activities.”⁶³² Additionally, “[p]rogrammes and approaches are also adapted to particular circumstances, such as the phases of the judicial process, the context of operations and the specificities of target groups. The outreach programme conducts meetings with target groups and uses radio and other media to reach the public at large.”⁶³³ The ICC currently has specialized public outreach campaigns in the Central African Republic, Darfur, the Democratic Republic of the Congo, Kenya, and Uganda. These campaigns often involve an ICC field office in the locality to provide information to the public.

For further information

The ICC’s website contains more information about the ICC’s proceedings: www.icc-cpi.int. The ICC’s website also hosts a Legal Tools Project that “aspires to equip users with the legal information, digests, and software required to work effectively with international criminal law.”⁶³⁴ This project “seeks to serve as a complete virtual library on international criminal law and justice . . . [and] comprises the largest online collection of relevant documents and legal digests available through the Case Matrix Collection.”⁶³⁵ The website’s audiovisual gallery can assist individuals and organizations that want to monitor the court. The website video streams public hearings on its website, allowing interested parties to watch actual court proceedings with a 30-minute delay.⁶³⁶ An

⁶²⁹ Meaning “in private.”

⁶³⁰ International Criminal Court, “Office of the prosecutor section: Submit information on alleged crimes,” accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/siac/Pages/default.aspx.

⁶³¹ *Ibid.*

⁶³² International Criminal Court, “Outreach,” accessed Jan. 29, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx.

⁶³³ *Ibid.*

⁶³⁴ International Criminal Court, “Basic Legal Texts,” accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/Pages/legal%20tools.aspx.

⁶³⁵ *Ibid.*

⁶³⁶ ICC, “Audiovisual gallery,” accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/audiovisual%20gallery/Pages/audio%20video%20gallery.aspx.

interested party who is in The Hague may also attend hearings in person. The court has a gallery open to the public, and seats are filled on a first-come, first-served basis. The Office of the Prosecutor, “in partnership with the Sanela Diana Jenkins Human Rights Project at UCLA School of Law, has launched the Human Rights & International Criminal Law Online Forum, promoting open discussion on complex issues of international criminal law faced by the OTP.”⁶³⁷ The Forum’s website is: UCLALawForum.com.

Observers may use a number of social media tools to follow the International Criminal Court. The ICC has a Twitter account (@IntlCrimCourt), a YouTube channel (www.youtube.com/IntlCriminalCourt), a Flickr account (www.flickr.com/photos/icc-cpi), and a Facebook page (www.facebook.com/groups/icc.cpi). The Coalition for the International Criminal Court is an NGO that tracks everything that happens at the ICC. It has Twitter accounts in English (@_CICC), French (@_CICC_fr), and Spanish (@_CICC-SP). For further information, visit www.iccnw.org.

Online Form

The ICC has an online form that individuals and organizations can use to submit messages on any topic to the court: http://www.icc-cpi.int/NR/rdonlyres/3A5C243C-761C-447B-8330-88A6E343789A/144107/OPCVFormContrib_En.doc

How to Qualify as a Legal Representative of Victims

Attorneys who want to serve as a Legal Representative of Victims (LRV) before the ICC must meet the criteria set by the Rules of Procedure and Evidence and the Regulations of the Court.⁶³⁸ To qualify for admission before the ICC, candidates generally must demonstrate:

- The United Nations Security Council created the International Criminal Tribunal for Rwanda in response to the Rwandan Genocide of 1994. The ICTR is located in Arusha, Tanzania.⁶³⁹ The ICTR was created “for prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994, and December 31, 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighboring States during the same period.”⁶⁴⁰ The Court not only punishes genocide, but conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.⁶⁴¹ Established competence in international or criminal law and procedure;
- At least ten years’ relevant experience in criminal proceedings, whether as a judge, prosecutor, advocate, or similar capacity; and
- Excellent knowledge of and fluency in at least one of the working languages of the Court (English or French).⁶⁴²

Counsel also must not have been convicted of a serious criminal or disciplinary offence relevant to the nature of the office of counsel before the Court.⁶⁴³

Candidates wishing to be included in the List of Counsel must submit several standardized forms to the

⁶³⁷ ICC, “Office of the Prosecutor,” *supra* note 610.

⁶³⁸ International Criminal Court, “Defence,” accessed Jan. 17, 2014, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/defence/Pages/defence.aspx.

⁶³⁹ ICTR, “About ICTR,” accessed Jan. 16, 2014, <http://www.unictr.org/>.

⁶⁴⁰ *Ibid.*; Statute of the International Criminal Statute for Rwanda, 1994, Art. 1. Also available online at <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf>.

⁶⁴¹ ICTR, Statute of the International Criminal Statute for Rwanda, *supra* note 552, Art. 2(3).

⁶⁴² ICC Rules of Procedure and Evidence, Art. 22(1).

⁶⁴³ ICC, “Defence,” *supra* note 638.

Registrar, as well as supporting documentation, such as a birth certificate, identity card, and detailed curriculum vitae.⁶⁴⁴ Once a candidate is admitted to the List of Counsel, he or she may be selected by any victim or group of victims in the future to provide legal assistance in relation to proceedings before the court.

The ICC's strongest feature is that it has preexisting jurisdiction over many international crimes. Another strength is that the ICC can, under Article 13 of the Rome Statute, exercise jurisdiction over crimes committed on the territory of a country that is not a party to the Rome Statute. Article 13 jurisdiction requires authorization from the UN Security Council—approval that is often difficult to obtain.⁶⁴⁵ But governments that are most likely to commit atrocities are also the ones that are most unlikely to accept the court's jurisdiction, and the nature of those atrocities and the threat of impunity may sometimes spur Security Council action.

c. Considerations for Setting up a New Tribunal

If no applicable ad hoc tribunal exists and the ICC does not have jurisdiction to prosecute a perpetrator, advocates might consider the prospect of setting up a new tribunal. Creating a temporary ad hoc tribunal to respond to a specific event or period of conflict is an extremely expensive⁶⁴⁶ and time-consuming option. With the ICC in place, there is little political will at the international level to establish a new court. It is nearly impossible to set up such a tribunal without significant and ongoing sources of financial support. If funding is available, advocates should take into account several considerations, challenges, and best practices from other tribunals that can provide guidance in determining whether it is feasible to establish an appropriate ad hoc accountability mechanism.

- (1) *Location of the Mechanism*: The Special Court for Sierra Leone (SCSL) was the first international tribunal to be established in the country where the crimes took place. The court's location presented an opportunity for greater connection and engagement between the court and the local population, but the location also presented practical problems. Security threats and safety concerns may dissuade advocates from pressing for a locally placed tribunal. Future tribunals will have to weigh the costs and benefits of locating the court in the country where the conflict occurred.
- (2) *Type of Court*: The SCSL was the first hybrid court, where national judges and personnel worked alongside international judges and personnel towards the administration of justice. The hybrid experience in the ECCC has prompted mixed reviews. Future tribunals should consider whether the value of cultivating connections between the tribunal and the national judiciary, and between international and national staff, warrants the added risk of politicization and delay.
- (3) *Victim and Witness Involvement and Available Remedies*: The ICTY and ICTR have faced criticism for not facilitating sufficient victim participation. Other tribunals, including the ECCC and the ICC, have given victims a more active role as participants, and have made reparations available in some circumstances.
- (4) *Scope of Jurisdiction*: The ICTY, ECCC, SCSL, and ICTR were all created in direct response to widespread and systematic crimes committed over a protracted period, while the STL was created to respond to a single act of terrorism. The tribunals with a broader jurisdictional mandate were forced to concentrate their efforts on prosecuting the most serious criminal offenders, while lower level perpetrators either faced a different accountability mechanism or escaped prosecution altogether. The ICTY's capacity-building program helped ensure that lower level officials could still be held accountable. This program also helped local jurisdictions become more adept at handling the prosecution of domestic crimes. The STL has been criticized for devoting significant resources to a single incident affecting a small group of individuals.

⁶⁴⁴ Ibid.

⁶⁴⁵ Russia, for example, is unwilling to recommend ICC action with regard to Syria.

⁶⁴⁶ International Criminal Tribunal for the former Yugoslavia, "The Cost of Justice," accessed Jan. 17, 2014, <http://www.icty.org/sid/325>. (The Budget at the ICTY for 2012-2013 was \$250,814,000.)

- (5) *Timeline*: Tribunals can be time-consuming. As time passes, evidence may become lost or damaged, witnesses' memories may fade, and perpetrators may flee or become incapacitated. The ECCC, for instance, was created in 2001 to address criminal events occurring between 1975 and 1979. Several of the accused died prior to or during proceedings,⁶⁴⁷ and the ongoing prosecutions of the remaining elderly defendants have encountered additional medical and logistic obstacles.

ii. Suspension from Intergovernmental Organizations

a. Commonwealth of Nations

The Commonwealth of Nations is an intergovernmental organization of 53 member states. The Commonwealth Ministerial Action Group has the authority to suspend member states from the Councils of the Commonwealth, or from the Commonwealth itself, if they engage in "serious or persistent violations" of the Commonwealth's 1991 Harare Declaration,⁶⁴⁸ such as abrogating their duty to have a democratic government.⁶⁴⁹ Members that are suspended from the Councils do not have representation at meetings of Commonwealth leaders.

Members that are fully suspended from the Commonwealth also are barred from participating in Commonwealth sporting events, such as the Commonwealth Games, and from participating in the Commonwealth's technical assistance program.⁶⁵⁰

The Commonwealth suspended Pakistan after a coup in 1999, and again after the country declared a state of emergency in 2008. Nigeria and Zimbabwe have also been suspended.⁶⁵¹

In recent years, suspension has had the most striking consequences for Fiji. Fiji was first suspended from the Councils of the Commonwealth in 2000, when a coup imposed a constitution contrary to Commonwealth principles. In 2006, after another coup, the Commonwealth suspended Fiji for a second time, subsequently expanding the sanction to a full suspension in 2009.⁶⁵² In 2012, the Commonwealth determined that "Fiji could not be reinstated into the Commonwealth until it had restored democracy by holding elections and addressed pressing human rights and legal issues."⁶⁵³ "Fiji's suspension had significant economic and diplomatic ramifications for the island nation after some foreign powers began to see the country as a 'rogue state,' resulting in a significant drop in aid and other assistance."⁶⁵⁴ Fiji's refusal to hold free and fair elections also prompted Australia and New Zealand to impose travel sanctions against the ruling military leaders and their families, and to press the UN secretariat to discontinue allowing Fiji soldiers to take part in UN peacekeeping operations.⁶⁵⁵ Fiji's suspension has also had significant ramifications for some sports fans. After winning medals at each of the first



Map of the Commonwealth countries

⁶⁴⁷ ECCC, "Key Events," accessed Jan. 17, 2014, <http://www.eccc.gov.kh/en/keyevents>.

⁶⁴⁸ Heads of Harare Government, The Harare Commonwealth Declaration, 1991. Also available online at <http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf>.

⁶⁴⁹ Commonwealth Network, "Withdrawals and Suspensions," accessed Jan. 17, 2014, <http://www.commonwealthofnations.org/commonwealth/commonwealth-membership/withdrawals-and-suspension/>.

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Fiji suspended from Commonwealth*, BBC News, Sept. 1, 2009, <http://news.bbc.co.uk/2/hi/8231717.stm>.

⁶⁵² *Ibid.*

⁶⁵³ *Fiji to remain suspended from Commonwealth*, One News, Apr. 17, 2012, <http://tvnz.co.nz/world-news/fiji-remain-suspended-commonwealth-4836761>.

⁶⁵⁴ Neil Merrett, *Fiji: a case study in the realities of Commonwealth suspension*, Minivan News, Apr. 24, 2012, <http://minivannews.com/politics/fiji-a-case-study-in-the-realities-of-commonwealth-suspension-36068>.

⁶⁵⁵ *Ibid.*

three Sevens Rugby competitions at the Commonwealth Games, Fiji was suspended from all play in the 2010 and 2014 games.⁶⁵⁶ As of January 2014, the full suspension remains in place.⁶⁵⁷

Gay Rights Advocates Set Sights on Commonwealth

Sexual conduct between consenting adults of the same sex is illegal in 41 of the 53 Commonwealth countries.⁶⁵⁸ In the run-up to the November 2013 meeting of Commonwealth Heads of Government in Sri Lanka, human rights activists held a protest outside the Commonwealth's Secretariat office in London, and called on Prime Minister David Cameron to raise the issue of LGBTI rights during the meeting.⁶⁵⁹ Civil society groups from throughout the Commonwealth called for Commonwealth leaders to "take action to stop widespread human rights abuses against LGBTI people."⁶⁶⁰

For further information, see Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change, Human Rights Consortium, Institute of Commonwealth Studies (2013), <http://commonwealth.sas.ac.uk/publications/house-publications/lgbt-rights-commonwealth>.

b. Council of Europe



The Council of Europe can also suspend and expel member states.⁶⁶¹ Article 3 of the Statute of the Council of Europe requires members to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."⁶⁶² "Any member of the Council of Europe which has seriously violated the provisions laid down in Article 3 may be suspended from its rights of representation and may be asked by the Committee of Ministers to withdraw from the organisation. If the state does not agree to the request, the Committee may decide that the state has ceased to be a member of the Council as from such date as determined by the

Committee."⁶⁶³ Russia was suspended from the Council of Europe's assembly in 2000 and 2001 because of alleged human rights violations in Chechnya.⁶⁶⁴ In 2013, some observers called for the Council of Europe to suspend Azerbaijan for its failure to hold democratic elections and protect human rights.⁶⁶⁵

⁶⁵⁶ Nick Butler, *Scotland to face New Zealand as Glasgow 2014 rugby sevens draw made*, Inside the Games, Jan. 14, 2014, <http://www.insidethegames.biz/sports/summer/rugby-sevens/1017845-scotland-to-face-new-zealand-as-glasgow-2014-rugby-sevens-draw-made>.

⁶⁵⁷ *Fiji suspended from Commonwealth*, BBC News, *supra* note 651.

⁶⁵⁸ Helen Davidson, *Homosexuality Illegal in 41 out of 53 Commonwealth Countries – Report*, The Guardian, Nov. 10, 2013, <http://www.theguardian.com/world/2013/nov/10/homosexuality-illegal-in-41-out-of-53-commonwealth-countries-report>.

⁶⁵⁹ Scott Roberts, *David Cameron Urged to Raise LGBT Rights at Commonwealth Summit*, Pink News, Nov. 14, 2013, <http://www.pinknews.co.uk/2013/11/14/david-cameron-urged-to-raise-lgbt-rights-at-commonwealth-summit/>.

⁶⁶⁰ *Human rights groups report damns treatment of LGBTIs across Commonwealth*, ILGA Asia, Nov. 11, 2013, <http://ilga.org/ilga/en/article/omSCaKK19a>.

⁶⁶¹ CVCE, *Withdrawal, Expulsion and Suspension of a Member State of the Council of Europe* (Sept. 11, 2012) http://www.cvce.eu/content/publication/2006/1/9/f9b31f98-f1a1-407c-97ad-7e92363117fd/publishable_en.pdf.

⁶⁶² Statute of the Council of Europe, Art. 3. Also available online at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

⁶⁶³ CVCE, *Withdrawal, Expulsion and Suspension of a Member State of the Council of Europe*, *supra* note 661, at 2.

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Azerbaijan and the Council of Europe*, The Economist, Mar. 22, 2013, <http://www.economist.com/blogs/charlemagne/2013/03/azerbaijan>.

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