

## In the ICC's shadow, a reincarnation of tribunals?

**Every few weeks, it seems, a call sounds to establish a tribunal for mass-atrocity crimes. The most recent example is Syria, for which UN war crimes investigators this month urged the international community to set up a new court. Failure to get Syria referred to the International Criminal Court (ICC) by the UN Security Council, with its deep-seated divisions, has clearly driven the search for alternatives.**

The ICC was created to prosecute select high-ranking perpetrators and is subject to unequivocal restrictions on ability to intervene. But in 2002 when the court opened its doors as the first permanent institution for global justice, tribunals – with their limitations in temporal and geographic scope – seemed bound to become a thing of the past. The tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) are expected to close in 2015 and 2017, respectively; the Special Court for Sierra Leone (SCSL) shut down in 2013.

The first decade of the ICC, however, has convinced many that it cannot be the sole institution for international justice. Additional mechanisms are needed to bridge the ‘impunity gap’ left when national systems cannot manage otherwise. It is therefore unsurprising that recent months have witnessed a resurgence in the idea of UN-backed tribunals.

### **The limitations of national courts**

In the Central African Republic (CAR), where a conflict between Muslim and Christian rebels broke out in 2012, the transitional government is currently discussing a draft law to set up a ‘special’ tribunal – a hybrid court mixing national and international law. In January, a United Nations commission tasked with investigating grave crimes there called for the establishment of just that.

An international mechanism is deemed necessary because the CAR government “simply does not have the resources nor the political incentive” to fund the justice-seeking process, Philip Alston, a member

of the UN inquiry, told journalists. Domestic institutions are no option because national judges would lack objectivity, he added. An investigation into war crimes in CAR that the ICC opened in 2014 has so far resulted in nothing concrete.

Elsewhere, national courts are often fraught with challenges due to the complexity of the cases, says Mark Ellis, executive director of the International Bar Association (IBA). “Even for international courts, undertaking war crimes trials is an arduous endeavor. But for post-conflict states, the process can be near impossible,” he explains.

Experiences from Uganda, where the government created an International Crimes Division (ICD), show that national authorities are struggling to provide effective justice [JIT-176]. Local and international analysts agree that the ICD’s potential to prosecute is checked by Uganda’s amnesty law, while human rights organizations have reported on its underfunding.

The ICC, as a court of last resort, rarely offers an alternative, finds Hague-based researcher Iva Vukusic. “The ICC focuses on the most responsible, the very few from a given conflict,” she says. Ellis would agree, noting: “The ICC was never designed to be the only, nor even the primary, court dealing with international crimes.”

In other cases, such as Syria, the ICC simply has no mandate. “In those circumstances, a court, such as the ICTY or ICTR or a court modeled on the SCSL, could be set up,” Vukusic offers.

### **The special effect of special courts?**

But for neither CAR nor Syria [JIT-169] is there clarity or consensus on exactly what should be established or, for that matter, who should do it. The ICTY and the ICTR were created by Security Council resolution, and both faced challenges to their legitimacy, explains Mia Swart, an international law professor at the University of Johannesburg. The best way forward for possible new tribunals would be mixed national-international, SCSL-like so-

lutions, with consent of the governments, Swart says. “It should be run partly by the state and partly by the UN,” she says, stressing the importance of local input.

Patryk Labuda of the Geneva Academy of International Humanitarian Law and Human Rights also expresses general doubts about new such tribunals. “The knee-jerk reaction shouldn’t be to propose hybrid courts wherever there is an ‘impunity gap’,” Labuda says. More critical thought should go into when and under which circumstances they may work. “Otherwise, we are left with a mirage of justice: you think you see it, you think it’s close to fruition, only to later discover that the court will never come into being.”

To reconcile the desires for international involvement and a body seen as legitimate, Ellis proposes mixed mechanisms hovering between the spheres of national and international courts. Specifically, he advocates for domestic prosecutions with international involvement – for example, by including international judges, prosecutors and defence attorneys in specialized national chambers. Such a constellation would ensure that judicial systems and trials keep consistent with national needs and international standards of independence and fairness, believes Ellis. Currently flourishing examples include the Bosnian internationalized chambers [JIT-169].

In a system complicated by its different actors, the ICC still seems to be an institution finding its place. But its influence and authority are not necessarily bound to decrease, experts say. “The needs for justice are vast and I don’t think we should think about it as ‘competition’,” Vukusic explains, referring to the prospect of new tribunals. According to Ellis, the ICC’s sway could even be strengthened if it more actively assisted states and helped build national capacities – a concept he calls “positive complementarity”. The ICC’s ruling body, the Assembly of States Parties, has already recognized the need to develop such a strategy, but any steps to implement it are sure to take time.

## Serbia prepares for possibility of new Srebrenica trial

In a police action hailed as a major breakthrough, Serbia arrested last week eight suspects of mass killings after the fall of the Bosnian town of Srebrenica in 1995. If they face court, it will be the biggest trial for war crimes in Serbia so far.

The Serbian special prosecutor for war crimes linked the 18 March arrests to the more than a thousand Bosnian civilians who were murdered at the Kravica warehouses as part of the Srebrenica massacre, one of the bloodiest episodes of a genocide that left around 8,000 dead.

Legal proceedings against any of the eight men would constitute only the second time that Serbia brings to trial suspects of the Srebrenica killings, which local officials are reluctant to label a "genocide". At least two of the suspects were indicted in Bosnia years ago, but lived freely in Serbia as Serbian nationals.

The arrests were another sign of improved cooperation between the Bosnian and the Serbian special prosecutors for war crimes. Last year also saw a wave of cross-border arrests in with the two countries worked closely together.

Bosnian prosecutors highlighted how associations of victims' families, often highly critical of Serbia's patchy record in war crime prosecutions [JIT-161], had agreed to the suspects' prosecution in Serbia, underscoring the trust that has apparently been won in recent years. The special prosecutors for war crimes from both countries said they are committed to further cooperation.

However, the wish list of advocacy groups seeking regional prosecutions of war crimes still runs long. It often takes Serbia years to arrest suspects living on its territory who are charged or even convicted in Bosnia. The country's policy of not extraditing nationals complicates cases against those with dual citizenship. Victims associations claim that there may be hundreds of suspects who have evaded facing trial by choosing to live in Serbia. - JE

## Ivory Coast

by Christin Roby, Abidjan

# Simone Gbagbo verdict to aggravate Ivorian politics?

**The 20-year prison sentence handed to former Ivorian first lady Simone Gbagbo in Abidjan's case against her and 82 others for undermining state security is being met with intense scrutiny. Though a victory to some, many Ivorians are unsatisfied.**

Gbagbo's verdict, issued on 10 March, punishes her role in the 2010 post-election crisis in Ivory Coast, where she was accused of organizing armed gangs and disturbing public order. Her husband refused to accept defeat to current President Alassane Ouattara, leading to a five-month civil war that left over 3,000 dead.

Some locals felt a sense of closure after the ruling. Yoboueblesso resident Claude Lydie, 43, attended the trial [JIT-174] nearly every day since it opened on 26 December 2014. She claimed pro-Gbagbo militia killed many in her village during the crisis. "We have bled, we have been bruised, and that is why I came," Lydie said, "to see that justice is served. Nothing done here will bring back our people, but Mrs. Gbagbo got what she deserved for killing our family."

Others were surprised by the sentence, double the prosecutor's original suggestion. "Twenty years is just too much," said Abidjan resident Bouba Kinse, 33. "With this kind of sentence, [Gbagbo] will likely die in prison and that's harsh, especially since nothing has happened to the [pro-Ouattara supporters]."

Experts also voiced concern. "It's very disappointing after so many years that such an established judicial system delivered such a trial," said Ivorian political analyst Ange Kouassi.

West Africa researcher for Human Rights Watch Jim Wormington echoed the letdown, noting: "The Ivorian government should ensure that judges and prosecutors have the necessary support to investigate cases rigorously and should expedite vital reforms – such as a proposed law on victim and witness protection – necessary for cases involving serious human rights violations."

### Selective justice?

Such harsh sentencing and lack of prosecution of the other side have many calling this trial another example of selective justice and impunity.

Wormington sees the Ivorian justice system as setting a shaky precedent for how it may handle cases of this magnitude in the future. "The Ivorian judiciary should take meaningful and concrete steps to prosecute war crimes

and crimes against humanity committed by all sides during the 2010-2011 crisis, including forces that fought for President Ouattara," he said.

Since the trial opened, Ouattara has promised justice against both sides. To date, none from his camp have appeared in court.

With just eight months until the next presidential election, Kouassi worries that without balanced justice "the old story will come again."

Yacouba Doumbia, president of the Ivorian Movement of Human Rights, believes that with tensions still high from the crisis, the ruling may reignite simmering political divisions. "This verdict, at the heart, will have a negative impact on the state of the country," he said. "It is important to work to research the truth and discuss the infractions and make this a fair outcome for all."

But analyst Kouassi believes nothing inside a courtroom can truly liberate those who lost loved ones. "This prosecution won't be justice, it won't bring reconciliation because the issues are bigger than the word reconciliation. And that's the biggest challenge facing the government," he said.

### Wanted by the ICC

Along with the former first lady, her son, Michel Gbagbo, was sentenced to five years in prison. Two members of the former first couple's security detail received 20-year sentences. Others punished, including Ivorian Popular Front party president Pascal Affi N'Guessan, were given two-year suspended sentences.

Mrs. Gbagbo's defence lawyers have filed for an appeal to the High Court of Cassation, seeking a ruling on the validity of her sentence on the basis of legal procedure.

Meanwhile, the International Criminal Court (ICC) has an outstanding request for Ivorian authorities to transfer her to The Hague, where she is to answer for other alleged crimes during the post-election violence. "Mrs. Gbagbo was convicted only of crimes against the Ivorian state, not for the killings and rape that constitute the crimes against humanity for which she is to be tried by the ICC. The many victims of these crimes still await justice," said Wormington.

Her husband, Laurent Gbagbo, has been held at the ICC detention facility since November 2011, with a trial [JIT-162] expected to begin in July.

## UN report: Islamic State may be guilty of genocide, Iraq should join ICC

The Islamic State (IS) is perpetuating heinous human rights violations in Iraq and members of the jihadist movement may be guilty of genocide, war crimes and crimes against humanity, says a UN report released last week. Its author, the High Commissioner for Human Rights, recommends Iraq join the International Criminal Court and accept its jurisdiction "over the current situation".

That situation is graphically chronicled in the 51-page document, much recalling news headlines from August concerning the slaughter of Yazidis. The ethnic minority in northern Iraq practise a syncretic religion, reportedly leading IS to call them "devil-worshippers" and massacre those who refuse conversion – their deaths now estimated "in the thousands".

Bullet point by bullet point, the commissioner outlines "killing" and "acts that caused [Yezidis] serious bodily or mental harm", which could be considered underlying acts for genocide – defined as the whole or partial destruction of a racial, religious or ethnic group. Occurring between June 2014 and February 2015, the incidents detail men brought to ditches and "summarily executed", "clear patterns of sexual and gender-based violence" and young escapees' accounts of gun and rocket training and forced viewings of filmed beheadings. One youth described being told: "You will do this when you will go to jihad for the Islamic State; you are an Islamic State boy now."

"Christians, Turkmen, Sabea-Mandean, Kaka'e, Kurds and Shi'a" are additional possible victims of crimes against humanity and war crimes, says the report. Allegations that chlorine gas was used during a fatal attack on 300 Iraqi soldiers "require further investigation".

Based on in-depth interviews with over 100 victims and witnesses, the findings also suggest that Iraqi security forces and groups allied to defeat IS, which is also called ISIL and ISIS, may have breached international humanitarian and human rights law. During one operation, witnesses recollected militia violently forcing Sunni civilians from their homes and shouting: "You are all ISIL."

Released during the Human Rights Council's March session, the report has reaffirmed global condemnation of IS. But many are wondering: what now?

"What are you going to do with the report and, more broadly, what are people going to do about the [other] abuses in Iraq?" Nadim Houry, deputy director of Human Rights Watch's Middle East and North Africa division, tells IJ. "ISIS has been committing horrendous crimes, but really there have also been other actors and they should not be let off the hook." - KH

## Chad

by Nathalie Magnien, N'Djamena

# Landmark trial against Habré henchmen ending

**After a 26-year wait and a four-month trial that saw victims finally confront alleged criminal accomplices of former dictator Hissène Habré [IJT-170], a Chad court is expected to deliver its ruling on 25 March. Judges will decide the fate of the 21 accused, facing charges of torture, murder, illegal arrest and arbitrary detention.**

During their closing arguments, lawyers of civil parties read a list of dozens of names found in the archives of the Directorate of Documentation and Security (DDS), the political police during the Habré regime. All were prisoners. And for all of them, the word "deceased" appears on administrative documents drawn up during their imprisonment. No traces were found of many others who were apprehended between 1982 and 1990. After their arrest – usually in the middle of the night and without any legal grounds – they simply vanished, their bodies never to be found.

The 50 civil parties participating in the trial comprise direct victims claiming to have been illegally arrested, detained and/or tortured in prison as well as indirect victims who lost loved ones under similar circumstances.

### "Coercive machinery"

In his closing argument on 3 March, the prosecutor emphasized that all the accused were part "of a coercive machinery called 'the Direction of the Documentation and Security'". He demanded a life sentence of "hard labour" – which simply translates to life in prison because inmates are not forced to work – for five accused, including Saleh Younous, DDS director from 1983 to 1987, and Mahamat Djibrine, a former coordinator known as 'El Djonto'. For others, he sought "hard labour" sentences ranging between five and 20 years. Citing inadequate evidence for convictions, the prosecution requested acquittals for six accused, including the last DDS director, who ran the force for three months until the regime collapsed in 1990.

In their closing remarks a few days later, defence lawyers held that their clients were not guilty, citing insufficient proof and pointing out contradictions in the civil parties' declarations. All dozen lawyers for the 21 accused have called for their clients'

acquittal and immediate release. "We are not here to put the DDS on trial," said Alain Kagonbé, an attorney for several defendants, including Younous. "Crimes were committed. People were arrested, illegally detained and killed. Torture was carried out. But there is no irrefutable proof that our clients were personally responsible."

Kagonbé described Younous as a civil servant with an exemplary career up until his arrest in 2013. He also argued that the case should not be brought forward because the first charges were lodged in 2000, over 10 years after the alleged crimes took place. Djibrine's attorney, Sobdibé Zoua, requested that the entire trial be disqualified. Insisting that his client did not get a fair trial, Zoua recalled the contested jury selection process in November, after which nothing happened to address the contestation and the six original jurors were left intact.

### Habré trial inching closer

While the verdicts were being prepared in this case, the trial of Habré himself was cleared to start before the Extraordinary African Chambers (EAC) in Dakar. Since judges ruled in February [IJT-176] that there was enough evidence to proceed, the EAC has been awaiting selection of the three judges who will hear the case. The trial is expected to start within three months of their appointment.

The EAC had requested the extradition of Younous and Djibrine so they could stand accused alongside their former president, but Chad refused [IJT-168], insisting instead on a local trial. Sources close to the Dakar case say the EAC prosecutor's team keeps a close eye on developments in N'Djamena. Still, it remains uncertain what, if any, impact Wednesday's rulings will have on the Habré case.

On conclusion of the N'Djamena trial, the president of the court offered the 21 accused an opportunity to say some last words. A few expressed regret for having been part of the DDS. Some mentioned Habré, saying that he was the one who gave the orders and nobody could act without his knowledge – the DDS was created in 1983 by a presidential decree. Yet all maintained having a clear conscience and said they had confidence in the justice system.

# The International Criminal Court's quest for scientific evidence

**The prosecution of the International Criminal Court (ICC) has been struggling with getting the evidence it needs from witnesses [JT-176]. But by focusing on collecting scientific evidence, it hopes to build stronger cases. Still, experts warn there is no quick fix.**

In no less than seven of 22 ICC cases in which they ruled on evidence, judges found the evidence insufficient and worthy of dismissal altogether, thereby leaving the cases to collapse. The most dramatic was that against President Uhuru Kenyatta of Kenya, where prosecutors relied on witnesses who withdrew and/or lied and had to deal with massive threats to witnesses [JT-172].

Acknowledging judges' wishes in its strategic plan for 2012-2015 [JT-172], however, the Office of the Prosecutor (OTP) pledges to improve "its capabilities to collect other forms of evidence in addition to witness statements, in particular scientific evidence". This includes information gleaned from computers, phones, emails, internet postings, social media, financial data, photos, audio records, videos, GPS data from cellular devices and satellite images.

## Caught on camera

In 2008, the OTP for the first time seized a large quantity of digital material, computers included, following the arrest of Jean-Pierre Bemba Gombo, the former DRC vice-president and militia leader charged with atrocious crimes in the Central African Republic. Scientific evidence was already used in court

to great effect in the trial against Thomas Lubanga Dyilo [JT-171], which started in 2009. A video showing the Congolese warlord encouraging his troops, some very young-looking, was key for his conviction for using child soldiers.

The OTP now faces "an explosive growth in its access to digital data", reads its plan. That became clear when investigators started looking into Libya [JT-166] in 2011. "They were overwhelmed by the photos and videos that were being sent by NGOs," says Eric Stover, faculty director of the Human Rights Center at UC Berkeley School of Law, which has co-hosted several workshops on scientific evidence and cooperation with third parties.

But obtaining court-admissible evidence "comes with many challenges", Stover says, noting "state cooperation" in particular. Although some authorities might, for instance, agree to tap phones, other governments are less forthcoming. Kenya said it could not provide the many materials, including telecom and financial data, requested by prosecutors in the Kenyatta case; the OTP insists Kenya obstructed the investigation.

In such situations, non-state actors might be of help. Stover explains: "Scientific and digital information can pass over borders. The emails between a commander and subordinate can be sitting on a server in California, so one could seek [for example] Google's or Yahoo's cooperation. That is where the potential of this evidence lies."

## Linkage evidence

First responders play a vital role as well. Sometimes years before the ICC arrives, local NGOs document crime scenes, though they often lack expertise in collecting court-admissible evidence. That is precisely why the US-based NGO Witness offers video training to activists and citizens. "Every phone nowadays has a camera," says Kelly Matheson, who leads her organization's Video as Evidence programme.

She sees a lot of misunderstanding between human rights activists and the ICC. Some 90 percent of footage by first responders is 'crime-based' evidence of slain victims and destroyed towns. But to prove successful in court, prosecutors also needs 'linkage' evidence showing who the perpetrators are and how they connect to echelons higher up. "The

problem is that most first responders don't know what linkage evidence is," Matheson says.

Such evidence could be obtained by, for instance, filming military equipment or taping public speeches by leaders. Matheson remembers a former trainee, a Middle Eastern activist, who filmed a bomb attack in a manner that showed he understood how important context was. After the explosion, he walked a street, came to a stop, took a few shots, continued walking and kept filming. "He mapped the whole bombing scene," she recalls.

## Triangulation

Lately, the OTP has been upgrading its Scientific Response Unit to improve cyber and digital investigations. Giving a bigger picture of what took place, satellite imagery helped Stover and his colleagues locate mass graves associated with the 1995 Srebrenica massacre during forensic investigations for the Yugoslav tribunal.

Nevertheless, scientific evidence is no magic bullet. Challenges to its use include how to manage, select, verify, store and actually present it. "When you interview a witness you often get a sense of that person's actual knowledge of the alleged crime," explains Stover. "With scientific evidence, it takes extra work to ensure that it is verifiable and reliable. For example, when the OTP receives a photo it will need to ascertain who took the photo and whether it was manipulated in any way." A case in point: judges in the case against Kenyan broadcaster Joshua Sang [JT-167] declined to admit into evidence recordings of his radio programme simply because they could not be adequately sourced.

Even "video alone is never going to convict a person", says Matheson. Stover would agree. "Scientific evidence is not the be-all and end-all. To make the strongest case possible, you often need to triangulate scientific evidence to other testimonial and documentary evidence. In the end, it is best to leave no rock unturned," he says.

A first likely case in which the OTP's pledged commitment to scientific evidence will be tested is the new trial against Bemba, which is due to start soon, following the January appointment of judges to hear the case. Seized computers, phones and phone taps provide evidence allegedly showing that Bemba and a network, including two of his lawyers, bribed witnesses [JT-159].



Subscribe at  
[www.justicetribune.com](http://www.justicetribune.com)

International  
Justice Tribune

Published by  
Justice Tribune Foundation  
[info@justicetribune.com](mailto:info@justicetribune.com)

Director  
Arjen van Dijkhuizen  
[arjenvandijkhuizen@justicetribune.com](mailto:arjenvandijkhuizen@justicetribune.com)

Editor-in-chief  
Stephanie van den Berg  
[stephanievandenbergh@justicetribune.com](mailto:stephanievandenbergh@justicetribune.com)

Editors  
Janet H. Anderson  
Karina Hof