

Howard Varney
Katarzyna Zduńczyk
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Legal Frameworks for Specialized Chambers

Comparative Studies for the Tunisian Specialized Criminal Chambers

INTRODUCTION

“On 29 December 2014, the Head of Government of Tunisia passed a decree establishing Criminal Chambers specialized in Transitional Justice within the Tribunal of First Instance of Tunis and other Tunisian cities. These Specialized Chambers, as specified in Article 8 of the law, are competent to adjudicate cases related to gross violations of human rights such as deliberate killing, rape, and any other form of sexual violence, torture, enforced disappearance, and execution without fair trial guarantees.”¹

Different countries have adopted a variety of models to prosecute the most serious past crimes, such as war crimes, crimes against humanity, and genocide. Some have opted to employ their own domestic courts and law enforcement institutions, while in others contexts the global community has² resorted to international tribunals, which have spearheaded the development of international criminal law.³

While these international efforts contributed significantly to international justice, they were resource draining and located outside the countries in which the crimes took place.⁴ To overcome these issues, a third model was developed,⁵ mainly under the auspices of the UN and international community: the so-called hybrid courts that combine domestic and international law and personnel. These bodies were generally more economical in terms of costs and situated within the countries in which the atrocities occurred.⁶

Two types of courts emerged within the hybrid category. The first has an “international legal basis and operates typically as an independent legal institution outside the [...] domestic jurisdiction” (e.g., the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon

TABLE OF CONTENTS

Introduction	1
Which Legal Framework for the Specialized Chambers?	3
Basic Principles Governing the Special Chambers	4
Jurisdiction and Applicable Law	6
Organizational Structure of Special Chambers	10
Rules of Procedure before Special Chambers	11
Cooperation and Relationship with Other State Entities	14
Internal Rules	15

¹ ICRC, National Implementation of IHL, Decree No. 2014-4555, modifying Decree No. 2014-2887 establishing Criminal Chambers Specialized in Transitional Justice, available online at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=CADD922EF4026E2AC1257EB90033CC5A&action=openDocument&xp_countrySelected=TN&xp_topicSelected=GVAL-992BU6&from=state, (last visited May 10, 2017). See also: Decree Relating to the Establishment of the Criminal Chambers Specialized in Transitional Justice within the Tribunal of First Instance of the Courts of First Instance Sitting in the Appeal Courts of Tunis, Gafsa, Gabès, Sousse, Le Kef, Bizerte, Kasserine, and Sidi Bouzid, August 8, 2014 [no. 2014-2887]; Basic Law Relating to the Establishment and Organization of Transitional Justice, December 24, 2013 [No. 2013-53] (hereinafter “TJ Law”) available at <http://www.legislation.tn/en/actualites/organic-law-n%C2%Bo-2013-53-dated-24-december-2013-i-establishing-and-organizing-transitional->, (last visited May 10, 2017).

² C. Stahn, “Tribunals Are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity,” *EJIL Talk*. (2016). Available at <https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/> (last visited May 2, 2017).

³ *Ibid.* See also: C.R. Donovan, “The History and Possible Future of International Criminal Law,” *Brooklyn Journal of International Law (BJIL)* 13 (1987): 83; Z. Bohrer, “International Criminal Law’s Millennium of Forgotten History,” *Law and History Review (LHR)* 34 (2016): 393; A. Guha, “The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law,” *Law Library Lights (LLL)* 59 (2016): 11.

⁴ L. Raub, “Positioning Hybrid Tribunals in International Criminal Justice,” *New York University Journal of International Law and Politics (NYUJILP)* 41 (2009): 1013–54.

⁵ Stahn, *supra* note 2.

⁶ *Ibid.*

ABOUT THE AUTHORS

Howard Varney is a Senior Program Adviser with the ICTJ. His areas of expertise include investigations, prosecutions, institutional reform, reparations and public interest litigation. Howard is also a practicing advocate at the Johannesburg Bar.

Katarzyna Zduńczyk is a legal professional currently working as a Rapporteur for the International Organizations project at the Oxford University Press. She specializes in criminal justice and international human rights law and has previously worked at the International Criminal Court and interned the International Center for Transitional Justice.

(STL)), whereas the second kind are “mixed domestic-international” courts that “form part of the domestic system but with adjustment in relation to the composition of staff or the applicable law” (e.g., War Crimes Chamber in Bosnia and Herzegovina (WCC BiH), Iraqi Special Tribunal (IST), War Crimes Chamber in Serbia (WCC Serbia), or Special Panels to the Dili District Court in East Timor (SPSC)).⁷ In some countries only specialized chambers were established, while in others, the specialization also involved the creation of an office of the prosecutor and other units, such as the registry and the defense.

Examples of hybrids courts and special chambers include:

- International Crimes Tribunal in Bangladesh, established in 1973 (ICTB)⁸
- The Extraordinary Chambers in the Courts of Cambodia, established in 1997 (ECCC)⁹
- The Special Panels to the Dili District Court in East Timor, established in 2000 (SPSC)¹⁰
- The Special Court for Sierra Leone, established in 2002 (SCSL)¹¹
- Iraqi Special Tribunal, established in 2003 (IST)¹²
- War Crimes Chambers in Serbia, established in 2003 (WCC Serbia)¹³
- War Crimes Chambers in Bosnia and Herzegovina, established in 2003 (WCC BiH)¹⁴
- The Special Tribunal for Lebanon, established in 2007 (STL)¹⁵
- International Crimes Division of the High Court of Uganda, established in 2008 (ICD)¹⁶
- The Guatemala Courts for High Risk Crimes, established in 2009 (GCHRC)¹⁷
- The Extraordinary African Chambers, established in 2013 (CAE)¹⁸
- The Specialized Criminal Chambers in Tunisia, established in 2014 (SCCs)

7 Stahn, *supra* note 2.

8 The International Crimes (Tribunals) Act 1973 (Act No. XIX OF 1973), July 20, 1973 available at [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/0618daaa2660e9b3c125771a00264b13/\\$FILE/International%20Crimes%20\(Tribunals\)%20Act.%201973%20\(as%20amended%20in%202009\).pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/0618daaa2660e9b3c125771a00264b13/$FILE/International%20Crimes%20(Tribunals)%20Act.%201973%20(as%20amended%20in%202009).pdf) (last visited August 26, 2017); for more information about the ICTB refer to <http://www.ict-bd.org/ict1/> (last visited August 26, 2017).

9 ECCC, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on October 27, 2004, (NS/RKM/1004/006) (hereinafter “ECCC St.”) available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last visited August 26, 2017).

10 UNTAET, Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, June 6, 2000 (hereinafter “UNTAET Reg.”) available at: <http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm> (last visited May 3, 2017).

11 Agreement between the United Nations and the Government of Sierra Leone pursuant to UNSC Res. 1315, August 14, 2000; see also Statute of the Special Court for Sierra Leone, January 16, 2002 (hereinafter “SCSL St.”) available at <http://www.rscsl.org/Documents/scsl-statute.pdf> (last visited August 26, 2017).

12 Statute of the Iraqi Special Tribunal adopted by the Iraqi Governing Council on December 10, 2003 (hereinafter “IST St.”) available at <http://web.archive.org/web/20071013130404/www.iraq-ihl.org/en/staute.html> (last visited August 26, 2017).

13 Law on the Organization and Competences of the Government Authorities in War Crimes Proceedings, Official Gazette of the Republic of Serbia No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009 (hereinafter “Law on WCC in Serbia” available at http://arhiva.mpravde.gov.rs/images/Law%20on%20the%20organisation%20and%20competences%20of%20the%20government%20authorities%20in%20war%20crimes%20proceedings_180411.pdf (last visited August 26, 2017); for further information on the War Crimes Prosecutions in Serbia see: OSCE, *War Crimes Proceedings in Serbia (2003–2014)*, available at: <http://www.osce.org/serbia/194461?download=true> (last visited August 26, 2017).

14 Law on Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No. 49/09 (hereinafter “Law on Courts in BiH” available at http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.48_Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf (last visited August 26, 2017); see also: <http://www.sudbih.gov.ba/> (last visited May 3, 2017); *Encyclopaedia of Transitional Justice*, Volume 3, “War Crimes Chamber of the Court of Bosnia-Herzegovina,” available online at http://uir.ulster.ac.uk/24701/1/War_Crimes_Chamber_of_the_Court_of_Bosnia-Herzegovina.pdf, (last visited May 3, 2017).

15 Agreement between the United Nations and the Lebanese Republic pursuant to UNSC Res. 1664, March 29, 2006; see also Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757, May 30, 2007 available at: <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal> (last visited August 26, 2017).

16 Section 6 of The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011 available at: <http://www.judiciary.go.ug/data/smnu/18/International%20Crimes%20Division.html> (last visited August 26, 2017).

17 Decreto Número 21-2009, Ley de Competencia Penal en Procesos de Mayor Riesgo (hereinafter “Guatemala Law”)

18 Agreement between the African Union and the Republic of Senegal, Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between June 7, 1982 and December 1, 1990 (hereinafter “CAE St.”) available at <http://www.chambresafraicaines.org/pdf/accord%20UA-Senegal%20Chambres%20afraicaines%20extra%20Aout%202012.pdf> (last visited August 27, 2017).

- The Kosovo Specialist Chambers, established in 2015 (KSCs)¹⁹
- Special Criminal Court in Central African Republic, established in 2015 (SCCCAR)²⁰
- Special Jurisdiction for Peace in Colombia, established in 2017 (SJP)²¹

Tunisia has adopted a purely domestic model. It established the Specialized Criminal Chambers (SCCs) under national law within the courts of first instance, and the SCCs have exclusive jurisdiction over the crimes in question. While the 2013 Basic Law on Transitional Justice (hereinafter “TJ Law”) provides for the establishment of the SCC, it lacks specific provisions regulating their organization and functioning.

There is no blueprint to establishing special chambers. The details in respect of jurisdiction, structure, and rules of evidence and procedure change from one example to another. This briefing paper will provide an overview of such components.

WHICH LEGAL FRAMEWORK FOR THE SPECIALIZED CHAMBERS?

The legal framework governing special chambers and their internal rules is critical to the success of the initiative; it constitutes the pillars on which stands every specialized, hybrid, or international court.²² Poorly framed laws and internal rules can retard the operations of these special chambers.

What essential elements should be covered in a law or decree governing a special chambers? A comparative analysis of the statutes of hybrid tribunals and special chambers suggests that typically these include:²³

- A. Basic principles governing the special chamber
- B. Jurisdiction and applicable law
- C. Organizational structure, often including the chambers, the office of the prosecutor (including an investigation department), and the registry
 - Provision is invariably made for three chambers: pretrial, trial and appeal.
 - The office of the prosecutor normally leads the investigations and carries out the prosecutions.
 - The registry normally provides administrative and logistical support to the chambers and the office of the prosecutor and provides legal defense to indigent accused and legal support to victims.
- D. The procedure to be adopted at the different stages before the special chambers: investigation, pretrial, trial, and appeals

19 Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, August 3, 2015 (hereinafter “KSC St.”) available at <https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office-3-aug-2015> (last visited August 26, 2017).

20 Basic Law No. 15/003 Relating to the Establishment, Organization and Functioning of the Special Criminal Court in Central African Republic, June 3, 2015, available at https://www.fidh.org/IMG/pdf/loi_organique_portant_cre_ation_organisation_et_fonctionnement_de_la_cps.pdf (last visited August 26, 2017).

21 Adopted into Law in 2017 see *Aprobado acto legislativo que crea el Sistema Integral de Verdad, Justicia, Reparación y No Repetición* (2017) available at <http://es.presidencia.gov.co/noticia/170328-Aprobado-acto-legislativo-que-crea-el-Sistema-Integral-de-Verdad-Justicia-Reparacion-y-No-Repeticion> (last visited August 27, 2017); for more information see <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/Paginas/PR-Sistema-integral-de-Verdad-Justicia-Reparacion-y-no-Repeticion.aspx> (last visited August 27, 2017).

22 ICTY, *Development of Local Judiciaries* available online at <http://www.icty.org/en/outreach/capacity-building/development-local-judiciaries> (last visited May 11, 2017).

23 See *supra* notes 8-21. For further information regarding the structure of the above mentioned special chambers see: M. P. Scharf, “The Iraqi High Tribunal,” *Journal of International Criminal Justice (JICJ)* 5 (2007): 258; S. Mark, “Coming to Terms with Its Past—Serbia’s New Court for the Prosecution of War Crimes,” *Berkeley Journal of International Law (Ber. JIL)* 22 (2004): 165; O. Martín-Ortega, “Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina,” *International Criminal Law Review (ICLR)* 12 (2012): 589; S. Rajan, “Domestication of International Criminal Law: International Crimes Tribunal of Bangladesh, A Case Study,” *ISIL Year Book of International Humanitarian and Refugee Law (ISILYHRL)* 12-13: 132. In addition, see: Hague Institute for the Internationalisation of Law, *General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework* (2011) available online at: http://www.hiil.org/data/sitesmanagement/media/IEF_Brochure_241011.pdf (last visited May 8, 2017).

- E. Cooperation and relationship with other judicial and state entities
- F. Internal rules

Basic Principles Governing the Special Chambers

A statute of special chambers often includes provisions that might be referred to as the basic principles governing the special chambers. These basic principles have included the following.

Rationale behind Establishment

The WCC BiH were created “in order to ensure the effective exercise of the competencies of the State of Bosnia and Herzegovina and the respect of human rights and the rule of law in the territory of this State.”²⁴

Location within the Institutional Structure of the Judiciary

In Kosovo the “Specialist Chambers shall be attached to each level of the court system in Kosovo: the Basic Court of Pristina, the Court of Appeals, the Supreme Court and the Constitutional Court.”²⁵

Principles of Liability

Many statutes include provisions related to individual accomplice liability. In this regard, as per the ECCC Statute, “any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.”²⁶

Statutes of special chambers have also provided for command responsibility. The regulation establishing the SPSC in East Timor stipulated that any act committed by subordinates did not exclude “his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”²⁷

Statute of Limitations

Some statutes provide for the non applicability of statute of limitations. The East Timorese regulation stipulates that crimes of genocide, crimes against humanity, war crimes, and crime of torture are not subject to any statute of limitations.²⁸ Moreover, many statutes explicitly exclude official position or capacity as a bar to prosecution.²⁹ Some statutes also specifically rule out any amnesties and pardons.³⁰ In this regard, the ECCC statute reads:

“The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.”³¹

24 Article 1 Law on Courts in BiH; Article 1 ECCC St. reads as follows: ‘The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations [...]’; article 1(2) KSC statute stipulates: “Specialist Chambers within the Kosovo justice system and the Specialist Prosecutor’s Office are necessary to fulfil the international obligations undertaken in Law No. 04/L-274, to guarantee the protection of the fundamental rights and freedoms [...], to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo [...]”

25 Article 3 KSC St.; *see also*, e.g., article 10 of the Law on WCC in Serbia: “The Higher Court in Belgrade shall establish a War Crimes Department (hereinafter: the Higher Court Department) to proceed in the cases involving criminal offences referred to in Article 2 of the present Law.”; Article 1(1) UNTAET Reg.: “Pursuant to Section 10.3 of UNTAET Regulation No. 2000/11, there shall be established panels of judges (hereinafter: “panels”) within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences.”

26 Article 29 ECCC St; Article 16(1)(a) KSC St; Article 6(1) STL St.

27 Section 16 UNTAET Reg.; *see also*: Article 29 ECCC St and Article 16(1)(c) KSC St.

28 Section 17 UNTAET Reg.; *see also*: Article 4 ECCC St.

29 Article 29 ECCC St, Section 15 UNTAET Reg.; Article 16(1)(b) KSC St.

30 *See e.g.* Article 10 STL St.: “An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”

31 Article 40 new ECCC St; *see also*: Article 18 KSC St.

Principles of Criminal Law

Some statutes explicitly refer to certain principles of criminal law. In this regard the SPSC regulation devotes an entire chapter to this topic, titled

“General Principles of Criminal Law,” which includes provisions relating to: *ne bis in idem*,³² *nullum crimen sine lege*, *nulla poena sine lege*,³³ individual criminal responsibility, superior’s responsibility, and many others.³⁴

Independence of Judiciary and Appointment of Judges

Independence of the judiciary is a core principle of any state based on the rule of law. In modern democracies it means that “both the judiciary as an institution and the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the executive, the legislature or any other inappropriate sources.”³⁵

When dealing with the most serious and controversial cases from the past, a special chamber, free from political influence or interference, can build confidence in the judicial process. Statutes generally include provisions to uphold this principle when dealing with the composition of the court and the appointment of judges.

Article 14 of the International Covenant for Civil and Political Rights (ICCPR), which provides that everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal, applies with equal force to specialized chambers.³⁶ In this regard, judges, prosecutors, investigators, and defense lawyers should have access to adequate training to enable them to carry out their functions.³⁷

In terms of the TJ Law, article 8 states that the SCCs in Tunisia “shall consist of judges chosen among judges who have never participated in trials of a political nature, and who will receive special training in the field of transitional justice.” Many statutes of other special chambers also include guarantees for their independence. In this regard the KSCs Statute reads as follows: “The Specialist Chambers Judges shall be independent in the performance of their functions. They shall sit on Specialist Chambers matters in their individual capacity.”³⁸

In this context, the law establishing special chambers should also set out the procedure for the nomination and appointment of judges.³⁹ Usually, the appointment of judges needs to be “carried out according to objective and transparent criteria based on proper professional qualification.”⁴⁰ Under the UN Basic Principles on the Independence of the Judiciary, “[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.”⁴¹

32 Nobody shall be twice tried for the same offence (double jeopardy).

33 The principle “no crime or penalty without a law.”

34 Part III UNTAET Reg.; see also Article 9 STL St; Article 17 KSC St.

35 OHCHR in cooperation with The International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*, “Chapter 4, Independence and Impartiality of Judges, Prosecutors, and Lawyers,” available online at <http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf>, at 115 (last visited April 26, 2017); for a good explanation of the essential conditions of judicial independence see OHCHR, *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 to September 6, 1985 and endorsed by General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985 (1985), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (last visited April 26, 2017).

36 OHCHR, *Human Rights in The Administration of Justice*, *ibid*, at 139.

37 *Ibid*, at 133.

38 Article 31(1) KSC St.; see also Chapter IV ECCC St. incl. Article 10 new, which stipulates that judges “shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.” See also Section 23 UNTAET Reg.; Article 27 KSC St.

39 For appointment of judges see e.g., Section 23(1) UNTAET Reg.; UNTAET Regulation No. 1999/3, Section 10.3 of UNTAET Regulation No. 2000/11 and Sections 22 and 23 of the present regulation.; Article 24(2) Law on Courts in BiH: “The President of the Court, after consultation with the international Registrar, shall assign judges of Section I and Section II of the Criminal and Appellate Divisions to any Chamber, or Panel. Section I and Section II Panels shall be composed of both national and international judges.” Article 13(3) STL St: “The judges shall be appointed for a three-year period and shall be eligible for reappointment.”

40 Central Council of the International Association of Judges, *The Universal Charter of The Judge*, available online at <https://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/> (last visited April 26, 2017); see also e.g. Articles 26-28 KSC St.; Articles 10-10a Law on WCC in Serbia.

41 OHCHR, *Basic Principles on the Independence of the Judiciary*, available at <http://www.ohchr.org/EN/ProfessionalInterest/>

Rights of the Accused

The scope of the rights of accused persons differs between international and hybrid tribunals.⁴² The ECCC Statute details a list of rights of the accused and entrenches the principle of presumption of innocence.⁴³ It further states that “in determining charges against the accused, the accused shall be equally entitled to minimum guarantees, in accordance with Article 14 [ICCPR].”⁴⁴ Similarly, article 21 of the KSCs statute contains a long list of the rights of the accused.⁴⁵ On the other hand, the regulation establishing the SPSC in Easter Timor did not explicitly set out the rights of accused persons but included principles of *ne bis in idem* and *nul- lum crimen sine lege* as well as the grounds for excluding criminal responsibility.⁴⁶

Other Rules for the Functioning of the Special Chambers

Some statutes also regulate aspects such as the sitting of the court,⁴⁷ its budget,⁴⁸ languages used,⁴⁹ and the interpretative guidelines of the applicable law.

Jurisdiction and Applicable Law

An important element always included in statutes of special chambers deals with their jurisdiction. Typically, jurisdiction will include temporal, territorial, personal, and subject matter jurisdiction.⁵⁰

Jurisdiction

a) Temporal Jurisdiction: The temporal jurisdiction itself must naturally cover the period of the crimes sought to be addressed by the body. ICTR’s authority covered the period January 1, 1994, to December 31, 1994.⁵¹ ICTY’s jurisdiction ran from a period beginning on January 1, 1991,⁵² whereas ICC “has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute.”⁵³

Hybrid tribunals and special chambers also share a temporally limited jurisdiction.⁵⁴ By way of example, the IST has authority to adjudicate over quite a broad period—thirty-five years—whereas the ECCC has jurisdiction over crimes that happened over just three years.⁵⁵ In Tunisia, the TJ Law provides for the jurisdiction *rationae temporis*⁵⁶ of the Truth and Dignity Commission (TDC) by stipulating that its “work shall cover the period extending from 1 July 1955 up to the issuance of [TJ Law].”⁵⁷ However, it does not impose a similar temporal restriction on the

Pages/IndependenceJudiciary.aspx (last visited April 21, 2017); OHCHR, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (2008): 7, available online at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>, (last visited May 10, 2017).

42 See Hague Institute, *supra*, note 23, 69–74, which refers, *inter alia*, to the rights of the accused to self-representation; and the right to freely choose any counsel who is on the list of counsel.

43 Article 35 new ECCC St.

44 Articles 33 new and 35 new ECCC St.

45 See also Article 21 KSC St.

46 Sections 10, 11 and 19 UNTAET Reg.

47 Article 43 new ECCC St.

48 Article 5 Law on Courts in BiH; Article 44 new ECCC St.

49 Article 45 new ECCC St; Article 3 Law on Courts in BiH; Article 20 KSC St.

50 See e.g., Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2014); A. Cassese, *International Criminal Law* (2013); Kolb, *Droit International Pénal* (2009).

51 Statute of the International Criminal Tribunal for Rwanda pursuant to UNSC Res. 955, November 8, 1994 (hereinafter “ICTR St.”) available at http://legal.un.org/avl/pdf/ha/ictr_EF.pdf (last visited August 26, 2017).

52 Statute of the International Criminal Tribunal for the Former Yugoslavia pursuant to UNSC Res. 827, May 25, 1993, (hereinafter “ICTY St.”) available at <http://www.icty.org/en/documents/statute-tribunal>, (last visited April 26, 2017);

53 Rome Statute of the International Criminal Court 1998, 2187 UNTS 3 (hereinafter “ICC St.”) available at https://www.icc-cpi.int/nr/rdonlyres/e9a9eff7-5752-4f84-b94-0a655eb30e16/o/rome_statute_english.pdf (last visited August 26, 2017).

54 Raub, *supra* note 4. Special Chambers and hybrid tribunals are a clear example of this, because they were set to adjudicate crimes committed in very specific periods.

55 Article 1 IST St. states that tribunal has jurisdiction over the crimes committed by Iraqis during the Ba’athist regime, which lasted from July 1968 to May 2003; Art. 1 ECCC St.: “The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”; Article 1 SCSLSt.: “The Special Court shall, except as provided in subparagraph (2), have the power 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 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”

56 Temporal jurisdiction.

57 Article 17 TJ Law.

SCCs. Given the fact that TJ Law states that TDC shall refer cases to the SCCs,⁵⁸ it follows that the SCCS must, at the least, enjoy jurisdiction over gross human rights violations and international crimes committed from July 1, 1955 until the adoption of TJ Law.

b) Territorial Jurisdiction: Territorial jurisdiction, which determines the spatial limits of a court's authority, constitutes an element present to various extents in statutes of both international and hybrid tribunals as well as in special chambers.⁵⁹ For example, the KSCs Statute stipulates that the KSC “shall have jurisdiction over crimes within its subject matter jurisdiction which were either commenced or committed in Kosovo,”⁶⁰ while the GCHRC has jurisdiction over crimes of high risk committed within the territory of Guatemala.⁶¹ A similar provision was included in the Law on WCC in Serbia.⁶² In East Timor, on the other hand, the SPSC regulation provides for universal jurisdiction over crimes of genocide, war crimes and crimes against humanity, and torture, while for sexual offences and murders, the territorial jurisdiction was limited to crimes committed within East Timor only.⁶³

c) Personal Jurisdiction: Statutes normally restrict the range of defendants or accused who can be prosecuted.⁶⁴ In this respect, the SPSC regulation in East Timor specifies that the SPSC “shall have jurisdiction over natural persons pursuant to the present regulation.”⁶⁵ The personal jurisdiction of the ECCC was confined to the senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of laws during the period in question.⁶⁶ Another feature limiting the scope of the personal jurisdiction refers to the age of the defendant. In this regard, the SCSL Statute excluded the prosecution of minors under the age of 15, and the ICC statute excluded prosecutions in respect of those under 18 years.⁶⁷ Lastly, the criminal corporate responsibility in international criminal law has been debated but has not featured in the statutes of most international bodies as well as special chambers, with the exception of the STL statute.⁶⁸

d) Subject Matter Jurisdiction: Subject matter jurisdiction concerns the offences to be prosecuted. Statutes of special chambers and courts have framed the offences by relying either on national or international law. Some of them refer only to international crimes (e.g., genocide, crimes against humanity, war crimes, torture, enforced disappearance) and serious domestic crimes (e.g., sexual offences, murder, or organized crime), while others also include economic crimes (e.g., pillage or extortion) or transnational crimes (e.g., terrorism). A statute normally defines the crimes falling within its jurisdiction by either incorporating a definition prescribed by international law or by referring to domestic law. Examples include:

- i. The WCC of BiH exercises jurisdiction over criminal offences defined in the criminal code and other laws of BiH,⁶⁹ including crimes of genocide, crimes against humanity, and war crimes.⁷⁰ Moreover, in certain circumstances the court also has jurisdiction over criminal offences prescribed in the Laws of the Federation of BiH, the

58 Article 8 and 42 TJ Law.

59 Article ICTR St.: “The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens [...]”; Article 1 ICTY St.: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia [...]”; See also Article 1 SCSL St and Article 1 CAE St.

60 Article 8 KSC St.

61 Article 3 Guatemala Law.

62 Article 3 Law on WCC in Serbia.

63 Sections 1(3), 2(2) and (3), 4–7 UNTAET Reg.

64 See: Article 5 ICTR St; Article 6 ICTY St; Article 25 ICC St; Article 1 SCSL St; Article 1 STL St.

65 Section 14(1) UNTAET Reg.; see similar Article 9(1) KSC St.

66 Article 1 ECCC St.

67 See Article 7 SCSL St. and Article 26 ICC St.

68 See Rule 60bis Rules of Procedure and Evidence of the Special Tribunal for Lebanon, STL-BD-2009-01-Rev.9, March 20, 2009 available at https://www.stl-tsl.org/images/RPE/RPE_EN_April_2017.pdf (last visited September 25, 2017). While interpreting Rule 60bis the Rules of Procedure and Evidence of the Special Tribunal for Lebanon found that in case of contempt, term “person” refers to both natural and legal persons. See Redacted Version of Decision in Proceedings for Contempt with Orders In Lieu of Indictment, *Akhbar Beirut S.A.L. Ibrahim Mohamed Al. Amin*, The Contempt Judge, STL-14-06/1/CJ/, January 31, 2014, §18–28.

69 Article 7(1) Law on Courts in BiH.

70 Article 171-175 Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina no. 37/03 available at: <http://www.iccnw.org/documents/criminal-code-of-bih.pdf> (last visited August 26, 2017).

- Republika Srpska, and the Brcko District.⁷¹ The definitions of crimes have not been included in the statute, but the latter makes reference to definitions as contained under domestic law.
- ii. The SPSC in East Timor had exclusive jurisdiction over the crimes of genocide, war crimes, crimes against humanity, murder, sexual offences, and torture prescribed both under national and international law.⁷² While the statute included international definitions of international crimes, with regard to murder or sexual offences it referred to domestic law.
 - iii. The GCHRC in Guatemala has jurisdiction over crimes of high risk, namely: (a) genocide, (b) crimes against protected persons and objects under international humanitarian law, (c) forced disappearance, (d) torture, (e) assassination, (f) trafficking in persons, (g) kidnapping, (h) parricide, (i) femicide, and other crimes associated with organized crimes and terrorism.⁷³
 - iv. The ECCC has jurisdiction over the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia,⁷⁴ including: a.) murder, torture, and religious persecutions under domestic law⁷⁵; b) international crimes such as genocide, crimes against humanity, and war crimes (grave breaches of Geneva Conventions) under international law⁷⁶; c) destruction of cultural property under international law⁷⁷; and d.) crimes against internationally protected persons under international law.⁷⁸ The ECCC Statute does not include the definition of crimes but explicitly refers either to Cambodian criminal code or to international treaties and customary international law.
 - v. The KSCs has jurisdiction over international crimes such as crimes against humanity and war crimes as prescribed under international law and national law of Kosovo.⁷⁹ It also has jurisdiction over criminal offences under Kosovo's criminal code, where it relates to official proceedings and officials.⁸⁰ The statute includes the definitions of international crimes.

The subject matter jurisdiction of SCCs in Tunisia covers crimes pertaining to gross violations of human rights as specified in international agreements ratified by Tunisia and in the TJ Law, which among others include: deliberate killing, rape and any form of sexual violence, torture, enforced disappearance, and execution without fair trial guarantees.⁸¹ Moreover, SCCs have been entrusted in adjudicating cases referred by the TDC that relate to election fraud, economic crimes and financial corruption, misuse of public funds, and pushing individuals to forced migration for political reasons.⁸²

It should be noted that gross human rights violations (GHRV) to large extent overlap with crimes provided for under international criminal law.⁸³ Although GHRVs have not been explicitly provided for in the TJ Law, the prosecutors and judges will have to take such international crimes into account. They could, for example, reference various provisions contained in the ICC statute.⁸⁴ Regrettably, the TJ Law only lists GHRVs without defining them, which may give rise to debate over their exact meaning. Moreover, the list of GHRVs under article 8 of the TJ Law is not exhaustive, which may allow prosecutors and judges to identify further violations. Be-

71 Article 7(2) Law on Courts BiH.

72 Section 1(3), 4-7 (genocide, war crimes, crimes against humanity and torture) and Articles 8 to 9 (murder and sexual offences) UNTAET Reg.

73 Article 3 Guatemala Law.

74 Article 2 ECCC St.

75 Article 3 New ECCC St.

76 Article 4-6 ECCC St.

77 Article 7 ECCC St.

78 Article 8 ECCC St.

79 See Article 12-15 KSC St.

80 Article 6(2) KSC St.

81 Article 8 TJ Law.

82 *Ibid.*

83 A. Smeulers and F. Grünfeld, *International Crimes and Other Gross Human Rights Violations around the World* (2011): 20.

84 R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007): 61.

yond what has been specified in the TJ Law the SCCs could potentially prosecute the following crimes, based on the treaties ratified by Tunisia:

- Torture and other cruel, inhuman and degrading treatment (emphasis added)⁸⁵
- Transnational organized crime⁸⁶
- Human trafficking⁸⁷
- Recruitment of children into the armed forces⁸⁸
- Child labor⁸⁹
- Forced labor⁹⁰
- Terrorism (including financing)⁹¹
- Crimes against international protected persons⁹²
- Other forms of sexual violence⁹³
- Genocide, crimes against humanity, and war crimes⁹⁴

Applicable Law

Applicable law refers to the legal framework that judges employ when adjudicating cases before the special chambers and tribunals. While some statutes include an explicit clause referring to applicable law, others simply refer to it in the provisions related to their subject matter jurisdiction.

In this context, the SPSC regulation in East Timor specifically refers to “Applicable Law,” which includes the law of East Timor⁹⁵ as well as “where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict.”⁹⁶

85 Articles 6 and 7 of The International Covenant on Civil and Political Rights 1966 (hereinafter “ICCPR”), 999 UNTS 171 (ratified by Tunisia on the March 18, 1969); United Nations Optional Protocol to the Convention against Torture 2002, 2375 UNTS 237 (Tunisia acceded June 29, 2011); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (hereinafter “CAT”) (ratified by Tunisia on the September 23, 1988) available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (last visited September 25, 2017).

86 United Nations Convention against Transnational Organized Crime 2000, 2225 UNTS 209 (Tunisia signed December 13, 2000 and ratified June 19, 2003).

87 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2237 UNTS 319 (Tunisia signed December 13, 2000 and ratified July 14, 2003); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2241 UNTS 507 (Tunisia signed December 13, 2000 and ratified July 14, 2003).

88 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts 2000, 2173 UNTS 222 (Tunisia signed April 22, 2002 and ratified January 2, 2003); Convention on the Rights of the Child 1989 (hereinafter “CRC”), 1577 UNTS 3 (Tunisia signed February 26, 1990 and ratified January 30, 1992).

89 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999, 2133 UNTS 161 (Tunisia ratified February 28, 2000); CRC, *ibid.*

90 Convention concerning Forced or Compulsory Labour 1930, 39 UNTS 55 (Tunisia ratified December 17, 1962); Abolition of Forced Labour Convention 1959, 320 UNTS 291 (Tunisia ratified January 12, 1959).

91 International Convention for the Suppression of the Financing of Terrorism 1999, 2178 UNTS 197 (Tunisia signed November 2, 2001 and ratified June 10, 2003); OAU Convention on the Prevention and Combating of Terrorism 1999 (Tunisia signed July 14, 1999 and ratified November 13, 2001); Protocol to the OAU Convention on the Prevention and Combating of Terrorism 2004 (Tunisia ratified December 18, 2007).

92 International Convention on the Prevention and Punishment of Crimes Against International Protected Persons 1973, 1035 UNTS 167 (Tunisia signed May 15, 1974 and ratified January 21, 1977).

93 ICCPR, *supra*, note 85; CAT, *supra*, note 85; Optional Protocol to the Convention on the Elimination of Discrimination against Women 1999, 2131 UNTS 83 (Tunisia accessed September 23, 2008).

94 ICC St.; Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277 (Tunisia acceded Convention on November 29, 1956); Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 and Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 (both protocols ratified by Tunisia on August 9, 1979); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War, August 12, 1949; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (all Geneva Conventions ratified by Tunisia on May 4, 1957).

95 As specified under Section (3)(a) UNTAET Reg.

96 Section 3(1)(b) UNTAET Reg.

The KSCs “shall apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed” and in accordance with article 17(2) ECHR and article 15(2) ICCPR.⁹⁷

On the other hand, the ECCC Statute does not provide for a specific clause, but applicable law might be deduced from other provisions. The statute stipulates that law has been enacted to prosecute those most responsible for “the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia [...]”.⁹⁸ In other provisions, clauses refer to Cambodian domestic law,⁹⁹ the Convention on the Prevention and Punishment of the Crime of Genocide of 1948,¹⁰⁰ grave breaches of the Geneva Conventions of August 12, 1949,¹⁰¹ the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict,¹⁰² and the Vienna Convention of 1961 on Diplomatic Relations.¹⁰³

In this regard, the judges of the SCCs in Tunisia will be called upon to apply national legislation but also relevant international treaties ratified by Tunisia.¹⁰⁴

Organizational Structure of Special Chambers

The statute establishing the Special Chambers typically regulates its structure. While organizational structures differ among various special chambers and courts, most have some common elements, namely: the chambers, the office of the prosecutor (including an investigations department), and the registry. The registry typically assists the chambers and the office of the prosecutor as well as victims and accused. Although the statutes of international and hybrid tribunals often lack regulations for setting up an office for the defense,¹⁰⁵ best practice suggests that at the very minimum the statute or rules of procedure should include provisions authorizing legal aid and defense.¹⁰⁶

The Criminal Division of the BiH court comprises three sections, or trial chambers: Section I for war crimes; Section II for organized crime, corruption, and economic crimes; and Section III for all other crimes under jurisdiction of the court.¹⁰⁷ Sections within the Appellate Division mirror the sections in the Criminal Division.¹⁰⁸ Moreover, special departments for war crimes and for organized crime, corruption, and economic crimes have been created within the prosecutor’s office¹⁰⁹ to ensure that these crimes are investigated and prosecuted.¹¹⁰ The Special Registry supporting Sections I and II of the Court was created,¹¹¹ and special regulations for the defense have been included.¹¹² During the transitional period, judges and prosecutors included both national and international staff members.¹¹³

The KSCs have been attached to each level of the court system in Kosovo and include the Basic Court Chamber, the Court of Appeals Chamber, the Supreme Court Chamber, and the

97 Article 12 KSC St.

98 Article 1 ECCC St.

99 Article 3 new ECCC St.

100 Article 4 ECCC St.

101 Article 6 ECCC St.

102 Article 7 ECCC St.

103 Article 8 ECCC St.

104 Article 8 TJ Law.

105 M. Bohlander, *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007): 395–99.

106 See e.g., Rules 20–22 of the ICC Rules of Procedure and Evidence (hereinafter “ICC RPE”) available at: <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf> (last visited August 31, 2017).

107 Article 14(1) Law on Courts in BiH.

108 Article 16 Law on Courts in BiH.

109 Article 3(3) Law on Prosecutor’s Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, no. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04 (hereinafter “Law on Prosecutor’s Office BiH”) available at: http://www.tuzilastvobih.gov.ba/files/docs/zakoni/zakon_o_tuzilastvu_-_24_02_-_eng.pdf (last visited August 26, 2017).

110 Article 13(3) Law on Prosecutor’s Office BiH.

111 Article 17 Law on Courts in BiH. There is one Registry for Sections 1 and 2, and a Common Registry for the administration and servicing of Section III of the Criminal and Appellate Divisions and the Administrative Division. Section III deals with all other crimes under the jurisdiction of the Court (other than war crimes, organized crimes, economic crime and corruption).

112 Article 6 Law on Courts BiH.

113 Article 24(2) Law on Courts in BiH; Article 18a (1) Law the Prosecutor’s Office BiH.

Constitutional Court Chamber.¹¹⁴ Moreover, the KSCs Statute provides for the creation of the Specialist Prosecutor's Office, which has taken over the mandate and personnel of the Special Investigative Task Force.¹¹⁵ Lastly, the KSCs Statute has established a Special Registry composed of Defence Office, a Victims Participation Office, a Witness Protection and Support Office, a Detention Management Unit, and an Ombudsperson's office.¹¹⁶ Judges of the KSC are elected from the rosters of international judges.¹¹⁷

The SPSC in East Timor were established within the District Court and Court of Appeal in Dili¹¹⁸ and were comprised two international judges and one East Timorese judge.¹¹⁹ "In cases of special importance a panel of five judges composed of three international and two East Timorese judges" could preside in the Court of Appeal.¹²⁰ A separate prosecution unit to investigate and prosecute crimes before Special Panels was created.¹²¹

The Law on WCC in Serbia established the specialized WCC of the higher court in Belgrade as a court of first instance. The Court of Appeals¹²² and the Office of the War Crimes Prosecutor of the Republic of Serbia (WCPO) are the two agencies with exclusive responsibility to deal with war crimes cases. The Law on WCC in Serbia also mandated a special detention unit and a special War Crimes Investigation Service (WCIS) in the Ministry of the Interior.¹²³ The Law has also established the Assistance and Support Unit for victims and witnesses.¹²⁴

Rules of Procedure before Special Chambers

In case of international tribunals and special chambers, the general rules of procedure are usually regulated in the statute, but to get details one has to refer to the rules of procedure and evidence.¹²⁵ For example, the KSCs Statute stipulates "the Rules of Procedure and Evidence for the conduct of proceedings before the Specialist Chambers shall be adopted by the Specialist Chambers Judges sitting in plenary."¹²⁶ Four stages of proceedings are typically covered in the rules of procedure of special chambers.

Investigation

Investigations include the selection of cases, the initiation of an investigation, the investigative process, and coercive measures, such as arrest and surrender. The initiation of an investigation and the selection of cases ought to comply with the following principles:

- Equality;
- Nondiscrimination;

114 Article 3(1) and 24(1) KSC St.

115 Article 24(2) KSC St. The Special Investigative Task Force (SITF) was established in 2011 to conduct an independent criminal investigation into the war crimes and organised crime allegations contained in the Council of Europe (CoE) report of January 2011 by Senator Dick Marty titled, "Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo." The mandate of the SITF was to investigate and, if warranted, prosecute individuals for crimes alleged in the CoE report. As of September 2016, as per the Law n.05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office approved by the Kosovo Parliament in August 2015, the SITF mandate and personnel were transferred to the Specialist Prosecutors Office. See <https://www.scp-ks.org/en/specialist-prosecutors-office/sitf> (last visited September 26, 2017).

116 Article 24(1)(b) KSC St.

117 Article 26 KSC St.

118 Section 1(1) and (2) UNTAET Reg.

119 Section 22(1) UNTAET Reg.

120 Section 22(2) UNTAET Reg.

121 Hirst and Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor*, Occasional Paper, International Center for Transitional Justice (New York), (June 2005): 1: <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Justice-Abandoned-2005-English.pdf>.

122 Article 9 Law WCC in Serbia.

123 Articles 4-8 Law on WCC in Serbia.

124 Article 11, Law on WCC in Serbia.

125 See e.g., ICC St. and ICC Rules of Procedure and Evidence available at <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf> (last visited August 26, 2017); Article 40(2) KSC St. stipulating: "The Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."; Internal Rules (Rev.9) of the ECCC available at https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf (last visited August 26, 2017).

126 Article 19 KSC St.; see also Internal Rules ECCC Rev.9

- Impartiality;
- Independence;
- Sufficiency of evidence.¹²⁷

Sometimes the chief prosecutor is responsible for initiating and conducting investigations.¹²⁸ In other instances these functions are executed by other entities. According to the ECCC Statute the “Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations.”¹²⁹ While deciding on charges prosecutors typically “have to consider the gravity of offenses and the extent of perpetrators culpability.”¹³⁰

Some special chambers rely on existing national rules of procedure for initiating and conducting investigations.¹³¹ The WCC in Serbia is governed by the rules of procedure as contemplated in chapter XXXIa of the Serbian Criminal Code, unless the Law on the WCC provides otherwise.¹³²

Sometimes, the Office of the Prosecutor is in charge of both investigation and prosecution. The BiH Law provides that the special departments within the prosecutor’s office “shall inter alia undertake measures defined by law with a view to investigating and prosecuting the perpetrators [...]”.¹³³ In Serbia, two separate entities have been established: the War Crimes Prosecutor’s Office (WCPO) within the Public Prosecutor’s Office, and the War Crimes Investigative Unit (WCIU) within the Ministry of the Interior (MOI).¹³⁴ This unit in the MOI investigates under the instruction of the prosecutor and, subsequently, the competent judge.

While the statutes usually don’t cover detailed procedural regulations, some statutes of special chambers will refer to general procedural regulations. The ECCC Statute stipulates that “all investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force.” The same provision further specifies that in cases where there is no rule in an existing procedure dealing with a particular matter, or if there are some other uncertainties, the co-investigating judges may seek guidance in procedural rules established at the international level.¹³⁵

During investigations, and all other phases, prosecutors are expected to conduct themselves independently from external influences and to comply with the principle of due diligence.¹³⁶ Suspects have the right to be informed of charges against them, to be represented by legal counsel,¹³⁷ to be questioned in a language of their choice, and, where necessary, to be assisted by an interpreter.¹³⁸ Coercion and the use of force is prohibited, and interrogations must be recorded.¹³⁹

Prosecutors must have the power to question suspects, victims, and witnesses,¹⁴⁰ as well as to employ lawful powers of compulsion to secure evidence and testimony, including the issuing of an arrest warrant “based on sufficient evidence.”¹⁴¹ Prosecutors should have power to request the presence of suspects, victims, and witnesses and, if necessary, summon these persons.¹⁴² Moreover, during the investigation, prosecutors or investigators should have power to search and seize

127 Hague Institute, *supra*, note 23, 8.

128 See e.g. Article 35 KSC St.; Article 35(2)(g) KSC St.; Article 12 Law on Prosecutor’s Office BiH.

129 Article 23 new ECCC St.

130 Hague Institute, *supra*, note 23, 9.

131 See e.g. Article 4 Law on WCC in Serbia; see also Article 12(1) Law on Prosecutor’s BiH; Article 23 New ECCC St.

132 Article 13 Law on WCC in Serbia.

133 Article 12(3) Law on the Prosecutor’s Office BiH; see also Article 35 of KSC St.

134 Article 5-8 Law on WCC in Serbia.

135 Article 23 new ECCC St.

136 Hague Institute, *supra*, note 23, 11; see e.g., Article 25 ECCC St.

137 E.g. Article 24 New ECCC St.; Article 14v Law on WCC in Serbia.

138 Article 24 New ECCC St.

139 Hague Institute, *supra*, note 23, 12.

140 E.g., Article 35(2)(a) KSC St.; Article 23 new ECCC St.

141 Hague Institute, *supra*, note 23, 12–13.

142 See by way of example Article 35(2)(a) KSCs Statute.

property for evidence purposes. At the ECCC the judicial police and investigators may gather relevant evidence including documents between 6 a.m. and 6 p.m. after obtaining a written order from the co-prosecutors.¹⁴³

Pretrial Process

The process of confirming criminal charges differs among special chambers. The prosecutor typically files the indictment with the chambers, more specifically, with the pretrial chamber in charge of reviewing and confirming the indictment.¹⁴⁴ Prosecutors and/or judges have to follow certain rules and take into consideration principles such as: *res judicata*, *lis pendens*, and *iura novit curia*.¹⁴⁵

Pretrial judges of the KSCs “shall have the power to review an indictment, rule on any preliminary motions, including challenges to the indictment and jurisdiction, and make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.”¹⁴⁶ According to the ICTY RPE, preliminary motions include motions that (i) challenge jurisdiction, (ii) allege defects in the form of the indictment, (iii) seek the severance of counts joined in one indictment or seek separate trials, or (iv) raise objections based on the refusal of a request for assignment of counsel.¹⁴⁷

Trial Process

Typically the trial process follows the procedures and evidential rules provided for in domestic law dealing with criminal procedure, unless otherwise specified in the enabling statute or rules of procedure and evidence. However, the more “internationalized” chambers such as the ECCC have adopted their own specific rules of procedure.¹⁴⁸

The rules of procedure regulate how a trial is conducted, the powers of judicial officers, and the role of the prosecution, defense, and other parties.¹⁴⁹ Among the most relevant principles governing the trial are the duty to ensure the integrity of the proceedings, including a fair trial, judicial impartiality, trial without undue delay, and equality of arms.¹⁵⁰ Certain common elements relevant for trial phase follow.

a) Law of Evidence¹⁵¹: In the WCC of Serbia the evidence collected or adduced by the ICTY may, upon referral, be used as evidence in the criminal proceedings before the domestic court, provided that they have been collected or adduced in the manner provided for by the Statutes and Rules of Procedure and Evidence of the ICTY.¹⁵² Testimonies can be taken in three formats: live, written, and recorded.¹⁵³

b) Deliberation, Dissent, and Judgment: Judges’ deliberations are usually private and remain confidential until issued in a public hearing, unless such public hearing “would prejudice the interest of justice.”¹⁵⁴ Usually, simple majority decisions of the bench are valid in relation to all matters, although unanimity is preferable.¹⁵⁵ Separate or dissenting opinions must be appended to the final judgment. The final judgment, as well as all significant interlocutory decisions, must be reasoned and in writing and should be handed down within a reasonable time period.¹⁵⁶

143 Rule 50(2) ECCC Internal Rules.

144 The charges are confirmed only if the judge is satisfied that a well-grounded suspicion has been established. See e.g., Article 39(2) KSC St.; see also Rules 74-78 ECCC Internal Rules, *supra*, note 123.

145 See Hague Institute, *supra*, note 23, 21–23 for the steps recommended at the confirmation stage.

146 Article 39(1) KSC St.

147 Rule 72(A) of the ICTY Rules of Procedure and Evidence, IT/32/Rev.50, July 8, 2015, available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/ITo32Rev50_en.pdf (last visited September 26, 2017).

148 ECCC Internal Rules,

149 Hague Institute, *supra*, note 23, 29–32.

150 *Ibid.*, at 29–32.

151 See Hague Institute, *supra*, note 23, 59–65 for some the relevant principles related to the Law of Evidence.

152 Article 14a Law on WCC in Serbia.

153 *Ibid.*, at 34.

154 Hague Institute, *supra*, note 23, 66; Article 34 New ECCC St.; Article 40(4) KSC St.

155 Hague Institute, *supra*, note 23, 66; Article 14 ECCC St.

156 Hague Institute, *supra*, note 23, 66.

c) **Appeals, Reviews, and Reconsideration:** Typically all accused persons have the right to appeal against a final judgment, or decision, on conviction or sentence.¹⁵⁷ In relation to the ECCC, the Extraordinary Chamber of the Supreme Court hears cases on appeal brought by the accused, the victims, or the co-prosecutors against the decisions of the trial chambers.¹⁵⁸ The Supreme Court Chamber shall make final decisions on law and fact and shall not return the case to the Extraordinary Chamber of the trial court.¹⁵⁹ Legal representatives of victims (and a bona fide owner of property adversely affected by a reparation order) have a right to appeal against reparation orders.¹⁶⁰

Accused persons should also enjoy the right to a revision of the judgment on the basis of new facts. In this regard the ECCC internal rules allow “the convicted person or, after his or her death, the spouse, children, parents, or any person alive at the time of the person’s death who has been given express written instructions from the convicted person to bring such a claim, or the Co-Prosecutors on the person’s behalf” to apply to the Chamber to revise the final judgment.”¹⁶¹

d) **Victim Issues: Participation, Protection, Reparation, and Assistance:** A separate briefing discusses the details of the principles¹⁶² related to the victim’s treatment and involvement in the process before special chambers. However, it is worth noting that the rights of victims are included in some statutes of special chambers. By way of example, the SPSC regulation stipulates that the “panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”¹⁶³ Moreover, in addition to imprisonment the KSCs may order the convicted person to make restitution or pay compensation to a victim or to victims collectively.¹⁶⁴

Cooperation and Relationship with Other State Entities

The Law on WCC in Serbia stipulates that all government authorities shall, upon the request of the WCPO or WCIU, promptly assist them through the provision of information, evidence, and/or technical advice.¹⁶⁵ The KSCs statute includes an entire chapter on this topic titled “Interaction with Kosovo Courts and Entities.”¹⁶⁶ Moreover, the ECCC’s Statute provides that “Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.”¹⁶⁷

157 *Ibid.*, at 54; see e.g. Section 1(2) UNTAET Reg.; Article 9 and 23 Law on Courts in BiH; Article 45-46 KSC St.; Articles 9-10 Law on WCC in Serbia.

158 Article 36 new ECCC St.

159 *Ibid.*

160 Hague Institute, *supra*, note 23, 56.

161 Rule 112 ECCC Internal Rules.

162 See Hague Institute, *supra*, note 23, 82–83. a.) Victims may participate in the proceedings not only as witnesses but also in their own capacity. Victim participation shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. b.) The victims’ right to participate may be limited to particular stages of the proceedings or to particular procedural steps. In limiting victim participation, the court shall consider whether the procedural stage or procedural step involves questions affecting the personal interests of the victims and is appropriate for participation. c.) Protective measures should, when needed, be adopted to protect the security, privacy, and dignity of victim participants. The protective measures must be consistent with the rights of the accused. d.) Victims of gross violations of international human rights law and serious violations of international humanitarian law have a right to reparations.

163 Section 24(1) UNTAET Reg.

164 Article 45(6) KSC St.

165 Article 7 Law on WCC in Serbia.

166 Chapter VII KSC St.

167 Article 33 New ECCC St.; see also Article 7(3)(c) Law on the Courts in BiH stipulating that the Court has a criminal jurisdiction to “decide any issue relating to International and inter-Entity criminal law enforcement, including relations with Interpol and other international police institutions, such as decisions on the transfer of convicted persons, and on the extradition and surrender of persons, requested from any authority in the territory of Bosnia and Herzegovina, by foreign States or International Courts or Tribunals.”

Internal Rules

As already mentioned, internal rules generally provide for more detailed rules of procedure for the conduct of operations of all the entities constituting the special chamber.¹⁶⁸ The internal rules may also elaborate on the topics set out in the statute.

The SPSC Regulation 2000/30 on Transitional Rules of Criminal Procedure set out the criminal procedural law under which Timorese courts, including the Special Panels, operated.¹⁶⁹ Chapter IV of the KSCs Statute, titled “Rules of Procedure and Evidence,” stipulates that such rules shall be adopted by the judges sitting in plenary as soon as possible following their appointment.¹⁷⁰ In the same chapter, the statutes provides for the making of regulations relating to the rights of victims, rights of accused, official and working languages, and protection of victims and witnesses.

The ECCC has adopted very detailed rules of procedure referred to as “internal rules.”¹⁷¹ Less detailed rules were adopted by the WCC in BiH. They include rules relating to the assignment of judges to various divisions of the court, court management and case allocation, and internal organization of the court as well as witness support, outreach, and public information.¹⁷²

168 For an overview of the Internal Rules of the Hybrid Tribunals, see: OHCHR, *Tools for Post-Conflict States*, *supra*, note 41, 7; R. Skillbeck, “Ensuring Effective Defense in Hybrid Tribunals,” 2010 *Revue Quebécoise de Droit International (RQDI)* (2011), 91; J. Cockayne, “The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals,” *Fordham International Law Journal (FILJ)* 28 (2005): 616; OHCHR, *Rule-of-Law Tools for Post-Conflict States National Consultations on Transitional Justice* (2009), available at: http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf (last visited April 26, 2017).

169 UNTAET, Regulation No. 2000/30 On the Transitional Rules of Criminal Procedure, UN Doc. UNTAET/REG/2000/30 contained 12 parts, the principal of which address: general provisions (primarily fair trial and due process rights) (Part I), criminal jurisdiction (Part II), investigations (Part III), arrest and detention (Part IV), indictment (Part V), public trial (Part VI), appeals (Part VII), and execution of orders and decisions (Part VIII). UNTAET Regulation 2000/30 was amended by UNTAET Regulation 2001/25 and it has more recently been replaced by RDTL Decree Law 13/2005 approving the Code of Criminal Procedure.

170 Article 19 KSC St.

171 See also Article 14(1) STL St. stipulating: ‘The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.’

172 Rules of the Procedure of the Court of Bosnia and Herzegovina, October 14, 2005.

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims’ dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org

The International Center for
Transitional Justice - ICTJ
Résidence Farah, Rue du Lac Huron,
Bloc B, 2ème étage, Appartement B2.1
1053 Les Berges du Lac, Tunis