

CRIMINAL JUSTICE

Disappointed Hope

Judicial Handling of Post-Election
Violence in Cote d'Ivoire

April 2016



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Cover Image: Brou Adjoua, aged 89, at the Abobo-Te Community Health Centre for treatment of a wound she suffered while fleeing fighting in Abidjan during the post-election violence, July 2011. (Nancy Palus/IRIN)

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ACRONYMS

AFJCI	Association des Femmes Juristes de Cote d'Ivoire
CCP	Code of Criminal Procedure of Cote d'Ivoire
CDVR	Commission Dialogue, Vérité et Réconciliation [Commission for Dialogue, Truth and Reconciliation]
CFI	Court of First Instance
CM	Code of Military Operation de Cote d'Ivoire
CNE	National Investigation Commission [Commission Nationale d'Enquête]
CONARIV	National Commission for the Reconciliation and Victims Indemnisation [Commission Nationale pour la Reconciliation et Indemnisation des Victimes]
CP	Criminal Code of Cote d'Ivoire
CPM	Code of Military Procedure of Cote d'Ivoire
CSE	Special Inquiry Unit [Cellule Spéciale d'Enquête]
CSEI	Special Inquiry and Investigation Unit [Cellule Spéciale d'Enquête et d'Instruction]
CSM	High Judicial Council [Conseil Supérieur de la Magistrature]
CSO	Civil Society Organization
DST	Directorate of Territorial Surveillance [Direction de Surveillance du Territoire]
EU	European Union
FCFA	African Financial Communities Franc
FDS	Defense and Security Forces [Forces de Défense et de Sécurité]
FESCI	Student and School Federation of Cote d'Ivoire [Fédération estudiantine et scolaire de Cote d'Ivoire]
FIDH	International Federation for Human Rights
FRCI	Republican Forces of Cote d'Ivoire [Forces Républicaines de Cote d'Ivoire]
HRW	Human Rights Watch
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
JPO	Judicial Police Officer
LIDHO	Ivorian Human Rights League [Ligue Ivoirienne des Droits de l'Homme]
MIDH	Mouvement Ivoirien des Droits Humains [Ivorian Human Rights Movement]
MP	Public Prosecutor's Office [Ministère Public]
NGO	Non-Governmental Organization
OFACI	Organization of Active Women of Cote d'Ivoire [Organisation des femmes actives de Cote d'Ivoire]
PEV	Postelection Violence
PNCS	National Social Cohesion Program [Programme National de Cohésion Sociale]
RFI	Radio France Internationale
SGBV	Sexual and Gender-Based Sexual Violence
UN	United Nations
UNDP	United Nations Development Programme
UNOCI	United Nations Operation in Cote d'Ivoire
USAID	United States Agency for International Development

Executive Summary

The political crisis that followed the second round of Cote d'Ivoire's November 2010 presidential election was characterized by a wave of violence involving several parties that resulted in at least 3,000 deaths. Many of the acts of violence constitute war crimes and crimes against humanity. The crisis left a sharply divided country to face the enormous challenge of justice and reconciliation.

In the years that followed, several mechanisms to investigate the crimes committed during the violence and promote reconciliation emerged: the National Investigation Commission (Commission Nationale d'Enquête, CNE), the Special Inquiry Unit (Cellule Spéciale d'Enquête, CSE), the Dialogue, Truth and Reconciliation Commission (Commission Dialogue, Vérité et Réconciliation, CDVR), the National Social Cohesion Program (Programme National de Cohésion Sociale, PNCS), some initiatives by the Ministry of Solidarity, and more recently the National Commission for the Reconciliation and Victims Indemnisation (Commission Nationale pour la Réconciliation et Indemnisation des Victimes, CONARIV).

However, to date there has been no coordination among these structures, which all function independently under the aegis of various ministries. To address the issue of reparations, the Office of the President expressed its intention to create a victims' aid fund, part of which was reportedly already made available at the start of 2015.

The CSE was created in May 2011 as a temporary body tasked with conducting judicial investigations into crimes committed during the post-election crisis (PEV). After only two years of work, it looked as if its mandate would not be renewed; but after a concerted effort by civil society in support of its continuation, it was replaced at the last minute by a permanent body in December 2013—the Special Inquiry and Investigation Unit (Cellule Spéciale d'Enquête et d'Instruction, CSEI). The organization is “in charge of investigations into serious crimes and major offenses committed at the time of the crisis following the presidential election of 2010 and all offenses connected with or related to those serious crimes and major offenses.”

PEV cases were submitted for investigation by the Public Prosecutor's Office en masse. The investigations opened at the CSEI are currently subdivided into three areas: violent crimes (crimes de sang), economic crimes, and attacks on state security. The CSEI also handles cases identified in the CNE report of July 2012. At the end of 2014, out of a total of 1,038 persons charged and 61 investigations opened by the CSEI, only two cases had gone to hearing at the Indictment Division (as required to investigate serious crimes). One case was referred to the Trial Chamber (Assize Court) in July 2013. The second case was sent back to the CSEI for further investigation.

Five years after the PEV no ordinary court case has concluded on international crimes committed in Cote d'Ivoire. The lack of a permanent court to judge those crimes partly explains the lack of real progress. Although it was announced that as of October 22, 2014, a new session of the Assize Court would sit for a 40-day period to try the case against former first lady Simone Gbagbo and 82 other officials of the previous regime accused of an "attack on state security," the trial did not start until December 26, 2014. Moreover, that case proceeded only under the general category of domestic serious crimes and major offenses called "attacks on state security" by so-called Gbagbo supporters, not for conduct amounting to international crimes.

The fact that only Gbagbo supporters have been brought to trial has led to accusations of bias. However, in late 2015 Ivorian authorities appeared to be preparing to bring to trial several close associates of President Alassane Dramane Ouattara, which would be a step toward a more balanced process.

As of December 2014, the CSEI still seemed to be experiencing operational difficulties. Its investigating judges were struggling to structure and classify cases under their review due in part to an overly broad mandate. Other difficulties derived from the complex categorization of cases (into three types of crimes) and gaps in the preliminary investigation phase, which include the failure to carry out a mapping of cases or to develop a prosecution strategy that would prioritize certain cases for investigation. Furthermore, CSEI staff (and of the CSE before it) faced not only the difficult task of familiarizing themselves with the procedures used in cases involving mass crimes but also with managing that docket given the limited existing technical and operating capacities.

The CSEI experienced other structural and financial difficulties throughout 2014 that impeded its ability to move cases forward. The enforcement orders, for example, that were supposed to accompany the 2013 presidential decree were not issued until late 2014 (June-December). In addition, the CSEI was forced to operate with a very minimal budget in 2014 given its enormous workload, a constraint that was mitigated in part when its 2015 budget returned to its 2013 level. Complicating matters further, two of the three CSEI investigating judges devote approximately half of their time to matters that have no connection to the PEV.

Another difficulty stems from an apparent strategy adopted by the Public Prosecutor that prioritizes the prosecution of crimes committed by one belligerent group, namely Gbagbo supporters, before addressing crimes committed by other perpetrators in the conflict. In fact, most of the cases that have gone forward so far concern partisans of the former president. While the Public Prosecutor has claimed that the decision was based on the need to try those already in detention, there is at least the appearance of political motivation. Since there is no clear strategy in regards to prioritization, political motives are more difficult to dispute.

Adding to the appearance of politically motivated decisions is the fact that the Public Prosecutor's Office is situated within the hierarchy of the Ministry of Justice. The separation of powers is threatened when prisoners in pretrial detention are released by executive order. Such releases occur regularly, often based on political decisions officially meant to foster reconciliation, with no discussion of their legal justification.

The military courts also have jurisdiction to adjudicate certain crimes committed during the PEV. In 2014, the sole Military Tribunal of Cote d'Ivoire had tried only four cases connected with the PEV, while five others were still being prosecuted under its jurisdiction. In fact, any new investigations must be authorized by the ministry overseeing the police and the army. Yet, no appeal can be brought against those decisions. Such barriers to the independence of civil and military jurisdictions contribute to a widespread feeling of impunity among the population, coupled with a lack of trust in government institutions.

Cote d'Ivoire accepted the jurisdiction of the International Criminal Court (ICC) in 2013. This has given rise to two cases: *The Prosecutor v. Simone Gbagbo*; and *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*. Laurent Gbagbo and Blé Goudé have been brought before the ICC by the Ivorian authorities. Both of them are in detention in The Hague awaiting trial. However, Simone Gbagbo, the former first lady, remains in Abidjan, the economic capital. Ivorian authorities have refused to transfer her to the ICC with the intention of trying her before national courts, albeit for matters not raised by the ICC.

Ivorian justice still faces many challenges in addressing crimes committed during the PEV. These include a lack of judicial independence and lack of mandatory legal representation for defendants while an investigation moves forward. There is also a need for legislative reform, relating to bail proceedings and victim and witness protection.

Other challenges concern the functioning of the national judicial mechanism in charge of responding to serious crimes, specifically the CSEI. Among those challenges this report notes the lack of political will to achieve the goals that have been set; the lack of a carefully prepared public prosecution strategy addressing all sides in the conflict; the inefficiency of disconnected investigative efforts and the urgent need for judges to adopt and implement an investigation strategy; the need to strengthen the capabilities of the judiciary; and the effect of the 2014 financial shortfall on the pursuit of CSEI investigations.

Map of Cote d'Ivoire



1. Introduction

2010-2011 Post-Election Crisis

The second round of presidential elections in Cote d'Ivoire in 2010 pitted outgoing President Laurent Gbagbo against the former Prime Minister, Alassane Ouattara. Ouattara won that round on December 2, 2010, with 54.1 percent of votes, according to the Independent Election Commission. The next day, the Constitutional Council, chaired by a person close to the former president, invalidated the election results and announced that Gbagbo had been reelected. With both sides entrenched, the two candidates took concurrent oaths on December 4, 2010.

While the United Nations was validating the result of the election,¹ the African Union and the Economic Community of West African States (Communauté économique des États de l'Afrique de l'Ouest, CÉDEAO) made attempts at mediation and asked Gbagbo to step down. However, he refused to leave office.

Over the course of the next three months, the government's defense and security forces, as well as militias and self-defense groups that had aligned themselves with the Gbagbo camp, committed various acts of violence, primarily in the economic capital, Abidjan. Radiodiffusion Télévision Ivoirienne, which was controlled by the Gbagbo government, broadcast hate speech and incited acts of violence against pro-Ouattara groups, encouraging people to report "any foreign person."²

In March 2011, to regain control of the country, Ouattara created the Republican Forces of Cote d'Ivoire (Forces Républicaines de Côte d'Ivoire, FRCI), essentially composed of the New Forces (Forces Nouvelles) of Guillaume Soro, a former rebel group that was particularly active in the north of the country from 2002 to 2007. The FRCI also committed abuses in the west of the country as well as in Abidjan.³ Laurent Gbagbo was ultimately arrested on April 11, 2011, and the election crisis ended on May 21, 2011,⁴ when Ouattara was sworn in.

After his inauguration, Ouattara faced the difficult task of rebuilding a country devastated by a conflict that had caused at least 3,000 deaths and results in thousands of victims

1 Special representative of the Secretary General for the UN Operation in Cote d'Ivoire, "Statement on the Certification of the Result of the Second Round of the Presidential Election Held on November 28, 2010," Abidjan, December 3, 2010.

2 Human Rights Watch, "They killed them as if it were nothing," 2011, 5, 120–125, www.hrw.org/fr/reports/2011/10/05/ils-les-ont-tu-s-comme-si-de-rien-n-tait

3 Especially in the region of Toulepleu, Guiglo, and Duékoué.

4 Certain human rights violations and crimes persisted until September 2012. See HRW, "Turning Rhetoric into Reality: Accountability for Serious International Crimes in Cote d'Ivoire," 2013, 30, with some abuses committed from 2011 to 2013 "attributable directly to the Ivorian State." See also UNOCI, "Rapport sur les abus des droits de l'homme commis par des Dozos en République de Cote d'Ivoire," 2013, www.onuci.org/pdf/rapportp.pdf.

of various human rights violations. At the end of the conflict, both camps were suspected of having committed serious human rights violations,⁵ war crimes, and crimes against humanity.⁶

Cote d'Ivoire's National Commission of Inquiry (Commission Nationale d'Enquête, CNE), which Ouattara created on May 20, 2011, produced a report in July 2012 showing the types of crimes committed during the PEV. At the international level, the International Criminal Court (ICC) made public three arrest warrants in connection with the Ivorian situation. The Ivorian authorities subsequently handed over Laurent Gbagbo and Blé Goudé to the ICC. But the target of the third warrant, former first lady Simone Gbagbo, was never transferred to the ICC but was instead tried and convicted on Ivorian soil and sentenced to 20 years in prison for crimes committed during the PEV.

The Legal Framework

Cote d'Ivoire adopted a new constitution in 2000 that gives international treaties and agreements legal authority above domestic laws, consistent with its monist system.⁷ Once ratified, an international treaty is integrated into the domestic legal system without the need for any further action for its provisions to be enforceable in domestic law. Consequently, treaties may be invoked directly before Ivorian courts.

The 2010 Constitution follows international human rights law and humanitarian law and recognizes Cote d'Ivoire's adherence to the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981.⁸ Cote d'Ivoire is a party to the four Geneva Conventions of 1949 and the two International Covenants on Civil and Political, Economic and Social Rights as well as all the relevant additional Protocols.

Before the PEV, on November 30, 1998, Cote d'Ivoire signed the Rome Statute of the International Criminal Court. On April 18, 2003, the President of the Republic at that time, Laurent Gbagbo, recognized the ad hoc jurisdiction of the ICC.⁹ On February 15, 2013, Cote d'Ivoire finally ratified the Rome Statute, thereby making its provisions directly applicable in Cote d'Ivoire.

Despite the country's ability under the monist system to apply the Rome Statute directly, Ivorian judges rely mainly on the provisions of the national Criminal Code, the Code of Criminal Procedure, the Code of Military Operation, and the Code of Military Procedure to adjudicate serious crimes that occurred during the PEV. Although the Criminal Code contains three articles defining crimes relevant to international crimes—genocide, crimes against the civilian population, and crimes against prisoners of war¹⁰—their definitions only partially reflect the crimes under the Rome Statute.¹¹ Crimes against humanity is not

5 HRW, "They killed them as if it were nothing," 4. This is the lowest number conceivable. The CNE's report cited 3,248 violations of the right to life; other reports cite thousands of additional deaths.

6 HRW, "Turning Rhetoric into Reality: Accountability for Serious International Crimes in Cote d'Ivoire," 2013, 27.

7 Law No. 2000 – 513 of 08/01/2000. Art 87: "Duly ratified treaties or agreements shall have, as of their publication, an authority greater than that of laws, subject to its application by the other party, for each treaty or agreement."

8 The Preamble of the Constitution of 2000 "proclaims its adherence to the rights and freedoms as defined in the Universal Declaration of Human Rights of 1948 and in the African Charter on Human and Peoples' Rights of 1981."

9 Declaration under article 12-3 of the Rome Statute, April 18, 2003, www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf. The Office of the President of Cote d'Ivoire then confirmed that it accepted the jurisdiction of the ICC on December 14, 2010. Letter confirming the acceptance of the jurisdiction of the ICC, December 14, 2010, www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/o/ReconCPI.pdf. The first chapter of the Constitution also contains 22 articles on individual rights and freedoms.

10 Articles 137, 138 and 139 of the Criminal Code, respectively.

11 The constituent elements of crimes and the modes of liability of these three provisions of the Criminal Code do not correspond entirely to the provisions of the Rome Statute. For example, the crime of genocide under article 137 is broader than that defined in the Rome Statute and in the Convention on the Prevention and Punishment of the Crime of Genocide of January 12, 1951. In the Criminal Code it includes "the intent to destroy . . . a political group partially or totally." The Criminal Code also does not provide for command responsibility, as the Rome Statute does.

included.¹² Ivorian law also allows for a statute of limitations on crimes that may amount to serious crimes, contrary to the Rome Statute.¹³

On January 14, 2015, the government adopted two legislative bills amending the Criminal Code and the Code of Criminal Procedure, seeking to align their provisions with the Rome Statute.¹⁴ They eliminated the death penalty, the statute of limitations for serious crimes, and made a number of other amendments to integrate further provisions from the Rome Statute. Parliament must now review the bills.¹⁵

Methodology

With the support of the European Union, the International Center for Transitional Justice (ICTJ) is carrying out a project titled “Creating a culture of sharing: Strengthening the national response to international crimes in the Democratic Republic of Congo and in Cote d’Ivoire.” The project seeks to gain an understanding of the current situation and take stock of proceedings brought and judgments issued in the judicial handling of the PEV in Cote d’Ivoire.¹⁶ This paper looks at the existing legal and political challenges within the domestic proceedings and suggests possible solutions.

The analysis in this report is based on a desk review of the legal framework set in place in the aftermath of the PEV and information gathered by an ICTJ consultant during a field mission in Abidjan from June 21 to July 2, 2014, where most of the judicial actors responsible for PEV cases are located.¹⁷ During that mission, the consultant talked to key actors within the judicial system, including attorneys, judges and the Public Prosecutor’s Office, investigating judges, court clerks, police officers, public authorities (at the Ministry of Justice), as well as members of civil society.

The report was then revised and supplemented with additional data obtained by ICTJ between August 2014 and October 2014, with updates added in January 2015 to reflect events in late 2014 and early 2015.

All the cases analyzed in this report are still in the investigation phase. Under the rules of criminal procedure investigations are confidential,¹⁸ so the records on these cases are not

12 The definition of a crime against humanity includes the contextual element of a generalized or systematic attack on the civilian population, independent of the nexus of war. The definition of crimes against the civilian population (Criminal Code, Art. 138) is the closest Ivorian provision to the crime against humanity. However, article 138 provides only for underlying crimes causing “serious harm to the physical integrity of civilian populations or to their intellectual or moral rights,” which apply only “in time of war or occupation.” According to one investigating judge of the CSEI consulted on October 20, 2014, judges also have the option to base their work on international customary law when judging crimes against humanity.

13 The Prosecutor General explains that each international crime that is prosecuted based on the provisions of the national criminal code (for example, Criminal Code, arts 137, 138 and 139) will be subject to the statute of limitations provided in the Criminal Code—which for “serious crimes” is 10 years from the time they were committed or 10 years from the first investigative act.

14 Abidjannet, “Press release of the Council of Ministers of January 14, 2015” January 15, 2015, <http://news.abidjan.net/h/520577.html>.

15 To date, ICTJ has not had access to the texts; therefore, it cannot take a position on whether those provisions are consistent with the Rome Statute.

16 Several reports have been written on the topic, mainly the latest reports published by HRW, “Turning Rhetoric into Reality: Accountability for Serious International Crimes in Cote d’Ivoire,” published in April 2013, www.hrw.org/eng/node/114477/section/1; and by FIDH in collaboration with LIDHO and MIDH, “Cote d’Ivoire, The Fight Against Impunity at a Crossroad,” October 2013, www.fidh.org/La-Federation-internationale-des-ligues-des-droits-de-l-homme/afrique/cote-d-ivoire/14159-cote-d-ivoire-la-lutte-contre-l-impunite-a-la-croisee-des-chemins; and “Cote d’Ivoire, Choosing between Justice and Impunity,” December 2014, www.fidh.org/La-Federation-internationale-des-ligues-des-droits-de-l-homme/afrique/cote-d-ivoire/16629-cote-d-ivoire-choisir-entre-la-justice-et-l-impunite

17 This is the case with the military courts, the Assize Court, the Indictment Chamber, the Office of the Prosecutor General, and the Public Prosecutor of Abidjan as well as the CSEI and most of the attorneys who appear before these courts.

18 Article 11 of the Code of Criminal Procedure provides: “Except in cases in which the law provides otherwise, and without prejudice to the rights of defense, the proceeding during the inquiry and the investigation shall be confidential. Any person who is involved in that proceeding shall be bound by professional confidentiality”

public.¹⁹ Given the sensitive political climate, ICTJ has kept the identities of the judicial professionals who contributed information for this report confidential so that they would feel free to express their opinions.

¹⁹ Only judges and court clerks in charge of the cases against the accused, the defendants and their attorneys, as well as persons who have joined the proceedings as civil parties have access to the content of criminal records at this stage in the proceeding. ICTJ has not had access to them. This explains some of the difficulties of giving an exhaustive report of the current situation.

2. Criminal Procedure: Special Inquiry and Investigation Unit

In Cote d'Ivoire, crimes that were committed during the PEV by individuals who did not have the status of soldiers²⁰ are tried by courts of ordinary law,²¹ specifically the assize courts,²² in accordance with the ordinary rules of the Code of Criminal Procedure. These are:

	Procedural stage	Primary Actors
1.	The police or gendarmerie opens an investigation based on a complaint ²³ filed by a victim or public prosecutor.	Victim; Public Prosecutor
2.	Preliminary investigation	Public Prosecutor; Judicial Police Officers (JPO) who are, under the ordinary procedure, police officers assigned to the Office of the Prosecutor
2.	The Public Prosecutor requests that an investigating judge open an official investigation.	Public Prosecutor
3.	The investigating judge conducts the investigation and pronounces the charges against the accused. ²⁴	Investigating judge
4.	The conclusions of the investigating judge are then communicated to the Public Prosecutor's Office. ²⁵	Investigating judge
5.	The investigating judge supplements or finalizes the investigation based on a request from the Public Prosecutor.	Public Prosecutor's Office
6.	At the close of the investigation, the investigating judge can either dismiss the proceedings or determine that allegations constitute a crime and instruct the Public Prosecutor to send the case to the Prosecutor General of the Court of Appeals. ²⁶	Investigating judge

20 Armed forces personnel are to be tried by the Military Tribunal, pursuant to article 9 of the Code of Military Procedure, www.geneva-academy.ch/RULAC/pdf_state/Military-Penal-Procedure-Code.pdf

21 The judicial system consists of nine Courts of First Instance and three Courts of Appeal harboring the Assize Courts, one Supreme Court and one Constitutional Council.

22 The courts of assize are impermanent courts composed of three professional judges (one chief judge and two judges) and a people's jury composed of nine persons, three of whom are alternate jurors.

23 Under the Code of Criminal Procedure, court proceedings are initiated by the victim's complaint and the inquiry by the police or gendarmerie. Most cases related to the PEV were initiated by arrests and investigations, with only a few initiated by a victim's complaint. Interview with CSEI JPOs on June 26, 2014 and investigating judges on June 25 and June 26, 2014.

24 In the specific case of PEV, judges under the authority of the CSEI are being investigated.

25 By a "communication order," article 175 of the Code of Criminal Procedure.

26 Code of Criminal Procedure, Art. 181. Article 185 of the CCP allows the Public Prosecutor, in criminal matters, to invoke orders of the investigating judge before the Indictment Division.

7.	Referral to the Indictment Chamber of the Court of Appeals. ²⁷	Prosecutor General
8.	The Indictment Chamber conducts a mandatory second investigation. ²⁸ The Chamber rules on the orders and decisions issued by the investigating judge. It may refer the case back to either the investigating judge or a judge of the Indictment Chamber for additional investigation. ²⁹	Indictment Division
9.	Decision of case dismissal ³⁰ or of referral of the case before the assize court. ³¹ In case of referral, the assize court becomes the final trial jurisdiction.	Indictment Division ³²
10.	Decision not open to appeal. ³³	Assize Courts

From the CSE to the CSEI

On June 24, 2011, a ministerial order created the CSE,³⁴ a unit “in charge of conducting the judicial investigation into the events that occurred in Cote d’Ivoire since December 4, 2010.”³⁵ It was initially given a 12-month mandate. The CSE carried the hopes of the international community and Ivorian civil society for a mechanism that could not only hold people accountable for violations and provide justice for victims but that could also foster national reconciliation.

The CSE started its investigative work in the summer of 2011, and its mandate was renewed in 2012. At the end of its second term in September 2013, before any trial had yet been held or even scheduled based on CSE investigations, the Justice Minister announced the termination of the CSE.³⁶

Some Ivorian civil society organizations, international nongovernmental organizations, justice ministries, and members of the donor community active in strengthening the rule of law in Cote d’Ivoire tried to convince the government of the need to maintain the CSE. Finally, a presidential decree signed in 2013 established the CSEI, which continued the CSE in modified form. The CSEI is “in charge of investigations into serious crimes and major offenses committed at the time of the crisis following the presidential election of 2010 and all offenses connected with or related to those serious crimes and major offenses.”³⁷

Positive Consequences of the 2013 Decree

The 2013 presidential decree granted expanded powers to the CSEI and put it on a stronger legal basis than under the earlier ministerial order.³⁸ Under the decree, the CSEI is to—

27 CCP, Article 194.

28 CCP, art. 191. The Indictment Division does not require the presence of the parties nor of their attorneys. CCP, Articles 195-230.

29 CCP, art. 205.

30 CCP, art. 212.

31 CCP, art. 214.

32 The Indictment Chamber of the Court of Appeals holds session at least once a week.

33 An appeal for cassation before the criminal section of the Judicial Division, Criminal Section, of the Supreme Court is always possible but it rules only on issues of form and on whether the proceeding meets constitutional and statutory requirements.

34 Order No. 020/MEMJ/DSJRH/MEF of June 24, 2011, bearing Creation, Organization, Powers, and Functioning of a Cellule Spéciale d’Enquête regarding the Postelection Crisis [“Interministerial Order 2011”].

35 *Ibid.*, Art. 2.

36 Press release, www.raidh-ci.org/documentations/reports08-11/COMMUNIQUE-DE-PRESSE-RAIDH-LIDHO-MIDH-APDH-COVICI.pdf

37 Decree No. 2013-93 of December 30, 2013 [hereinafter “Presidential Decree 2013”], Art. 2, bearing creation, powers, composition and functioning of the CSEI. Official Journal of the Republic of Cote d’Ivoire, Decree No.2013-915 du Decembre 2013 portant creation, attributions, composition et fonctionnement de la Cellule Speciale D’enquete et D’Instruction. This decree repeals the Ministerial Order of June 24, 2011, establishing the Special Investigation Unit, the mandate of which had ended on December 30, 2013.

38 “An Interministerial Order does not have the same rule-making weight as a formal law or a presidential decree.

- Have a permanent existence, thereby gaining stability and legal security³⁹
- Rely on the permanent availability of CSEI investigating judges who “may not take part in proceedings other than those under the jurisdiction of the [CSEI]”⁴⁰
- Receive funds from the general budget of the state, as well as the budget of the Ministry of Justice, thereby affording it greater financial independence
- Change its name from CSE to CSEI, putting emphasis not only on its powers of inquiry but also its investigatory powers

The CSEI's jurisdiction is broader than its predecessor's. While the CSE was mandated “to conduct judicial investigation into the events that occurred in Cote d'Ivoire since December 04, 2010,”⁴¹ the new decree gives the CSEI the power to investigate “serious crimes and major offenses” in addition to “all offenses connected with or related to those serious crimes and major offenses.”⁴² Although the two mandates are similar, the language of the presidential decree is more expansive, favoring a broader interpretation.⁴³

Regretably, the 2013 decree, like the order creating the CSE, does not expressly grant the CSEI exclusive jurisdiction to investigate events that occurred during the PEV.

Although the decree was an excellent sign of political willingness to combat impunity, several months passed before the decrees and enforcement orders necessary for implementing it were issued.⁴⁴ For instance, although most members of the CSEI had been selected by January 2014, the Ministry of Justice did not issue the decree appointing them until June 2014.⁴⁵

Composition and Functioning of the CSEI

Public Prosecutor's Office

The CSEI is under the authority of the Public Prosecutor at the Court of First Instance (CFI) of Abidjan-Plateau,⁴⁶ who may delegate his or her power to the Assistant Prosecutor at the CFI of Abidjan, who is also a member of the CSEI. Since April 2014, when the two Deputies of the Prosecutor took office, there have been four CSEI members performing the functions of the Public Prosecutor's Office “under the authority of the Prosecutor General.”⁴⁷ The Public Prosecutor was appointed by presidential decree on the recommendation of the Justice Minister.⁴⁸ The Justice Minister also appoints the Deputies assigned to the CSEI.⁴⁹

Unlike the investigating judges, there is no provision requiring prosecutors who are CSEI members to be assigned solely to CSEI work.

As such, questions have been raised as to the authority of the CSE to investigate cases outside of Abidjan.” See HRW, “Turning rhetoric into reality,” 2013, 50, www.hrw.org/reports/2013/04/04/turning-rhetoric-reality

39 The CSE's mandate needed to be renewed every 12 months, whereas the CSEI was created to be permanent and to address, in the long term, cybercrimes, crimes of terrorism and other transnational crimes. Interview with the senior investigating judge, July 22, 2014.

40 Presidential Decree 2013, Art. 6

41 Interministerial Order 2011, Art. 2.

42 Presidential Decree 2013, Art. 2.

43 The CSEI has interpreted its mandate broadly to include any act to destabilize the security and policy of the government. That interpretation does not lead to prioritized handling of serious postelection crimes. These observations derive from interviews with a UNOCI member on April 9, 2014.

44 Decree No. 226/CPMGDSMJ/DSJ of June 2, 2014, bearing Appointment of the members of the Cellule Spéciale d'Enquête et d'Instruction [“Decree No. 226 of June 2, 2014”]. Order No. 579/MJDHLP/MPMEF/MPMB of December 12, 2014. Order No. 202 MP/MPMEF/DGTCP/DEMO of September 12, 2014. See also Annex 1.

45 Decree No. 226 of June 2, 2014. Similarly, the financial controller was finally appointed in September 2014. Until then, the Administrative and Financial Director of the Ministry of Justice acted as Finance Coordinator of the CSEI.

46 Presidential Decree 2013, Art. 4.

47 Presidential Decree 2013, Art. 5.

48 Law No. 78-662 of August 4, 1978, Art. 5, on the status of the judiciary.

49 Presidential Decree 2013, Art. 11.

Investigative sections

Like the CSE before it, the CSEI has three Investigative Sections, each composed of one investigating judge and at least two court clerks. The 8th, 9th and 10th Investigative Sections at the CFI of Abidjan-Plateau have been reassigned permanently to the CSEI. One of the three investigating judges is a woman.

The Justice Minister appoints the investigating judges following approval of the High Council of the Judiciary.⁵⁰ The investigating judge of the 8th Section, who has been assigned to PEV cases since April 2013, is also the Senior Member at the CFI of Abidjan-Plateau and, thus, the head of investigating judges in Cote d'Ivoire. While he does not have any special authority within the CSEI,⁵¹ his status as Senior Member gives him strong moral authority and stature within the hierarchy. The two other current investigating judges were integrated into the CSEI in October 2013, replacing two judges previously assigned to the CSE.⁵²

Although the law states that investigating judges are to work exclusively on PEV cases the reality is quite different.⁵³ While the judges' offices are within the CSEI, not at the courthouse, the senior investigating judge continues to work much of the time from his office in the Abidjan-Plateau Courthouse. Given his status as a senior CFI member, he cannot dedicate all of his time to prosecuting CSEI cases.

While the investigating judge of the 9th Section works full-time on PEV cases, the investigating judge of the 10th Section devotes almost half of his time to cases unrelated to the PEV.⁵⁴ Given these realities, the possibility of completing investigative work within a reasonable timeframe seems very doubtful.

Judicial police officers

The CSEI has 10 Judicial Police Officers (JPO) who come either from the Judicial Police or the national gendarmerie.⁵⁵ Two of them are women. All 10 have been working at the CSEI since the end of August 2014.⁵⁶

According to the 2013 decree, the officers "are at the disposal of the CSEI"⁵⁷ and placed "under the direct authority of the Public Prosecutor."⁵⁸ However, as was learned, once a case enters the investigatory stage, the JPOs execute the directives and orders of the investigating judges, not the Public Prosecutor.⁵⁹

Administrative Secretariat

The Administrative Secretariat operates under the responsibility of the Public Prosecutor. It is currently composed of one judge who is in charge of administrative matters, including the management of personnel, equipment, and other routine administrative tasks at the CSEI.⁶⁰

50 Ibid.

51 Interview with senior investigating judge, June 25, 2014.

52 Given the complexity of the cases in question, the replacement of two investigating judges of the CSE by the investigating judges of the 9th and 10th Sections had a deleterious impact on the continuity and efficacy of the investigation.

53 Presidential Decree 2013, Art. 6.

54 The 10th Section has 18 cases connected with the PEV and a similar number that bear no relation to the PEV. Interview with members of the Public Prosecutor's Office at the CSEI, June 25, 2014.

55 According to Decree No. 226 of June 2, 2014, five are from the police and five from the gendarmerie.

56 In July 2014, only four JPOs were truly active within the CSEI, and all were men.

57 Presidential Decree 2013, Art. 8. It is the Prosecutor, and, therefore, the Ministry of Justice, which becomes the exclusive referrer and not the original authority (i.e., the Defense Ministry or the Ministry of the Interior).

58 Presidential Decree 2013, Art. 7.

59 Interview with CSEI JPOs, August 28, 2014. Presidential Decree 2013, Art. 7, also provides that JPOs "shall accomplish the missions that are entrusted to them by the Public Prosecutor and the investigating judges."

60 Presidential Decree 2013, Art. 10. The Administrative Secretary has the rank of sub-director of central administration.

Processing of data collected by the CSEI

A database, set up by a private information technology company, is updated by a computer specialist specifically assigned to the CSEI. That database—access to which varies depending on the staff's job-level within the CSEI—makes it possible to search and consult information by the alleged perpetrator, defendant, victim, type of offense, location, and date, among other fields.⁶¹ It also allows for cross-referencing of information.

Financing the CSEI

Although the CSEI currently receives funds from the state budget,⁶² it experienced operating difficulties⁶³ in 2014 because of uncertainty during the budgeting process.⁶⁴ The 2014 budget had been prepared in expectation of the CSE's closure and then adopted before the 2013 presidential decree had created the CSEI. Consequently, the funding received by the CSEI in 2014 was insufficient.

After the financial difficulties of 2014, the annual budget allocated to the CSEI was increased for 2015.⁶⁵

The legal knowledge of CSEI members

The members of the CSE and CSEI (all members of the Ivorian judiciary) were assigned to the CSEI by the various hierarchies involved at the time of the CSEI's creation. They all have received official training at the national level in their basic functions, although the judicial system of Cote d'Ivoire has never in its history had to process this many cases for such serious crimes.

To strengthen the capabilities of active CSEI members, specific training in the handling of international crimes and in techniques for conducting complex inquiries has been provided by some outside actors.

Inquiries and Investigations at the CSEI

Gaps in preliminary inquiries and the immediate lack of prosecutorial strategies

When the CSE's inquiry and investigation work began in 2011, it was a time of great euphoria, but also widespread disorganization.⁶⁶ No prosecution strategy had been defined by the Public Prosecutor's Office; and prosecutions were not properly engaged, sometimes from the very beginning when cases were being processed.⁶⁷

Initially, a large number of preliminary inquiries were conducted by agents⁶⁸ of the Directorate of Territorial Surveillance,⁶⁹ which required further investigation.⁷⁰ As a result, the inves-

61 Interview with the database system administrator, June 25, 2015.

62 2014 Budget, Section 17: Ministry of Justice, Human Rights and Public Liberties, Title 2: Ordinary Expenses, 101.

63 The administrative secretariat cites, among other things, the need to maintain and purchase equipment, including laptops for the judges and JPOs during the last quarter of 2014.

64 While the budget reserved for the CSE in 2013 was 500 billion CFA Francs, the budget in 2014 was 200 billion CFA Francs. Interview with the Public Prosecutor, August 6, 2014.

65 The 2015 budget was 500 billion CFA Francs, www.budget.gouv.ci/fr/accueil

66 Interviews with the Public Prosecutor and the Prosecutor General, June 24, 2014, and the senior investigating judge, June 25, 2014.

67 Interview with an investigating judge, June 25, 2014.

68 The 2013 Presidential Decree does not provide that inquiries into the PEV be exclusive to the CSEI.

69 The DST is one departments of the National Police of Cote d'Ivoire which has permission to monitor the country's entries and exits and to provide political, economic, social, and cultural information to the government. In connection with cases suspected to be an attack on state security, it would seem that the DST has been particularly involved in the initial inquiries and that it was the DST that sent those cases to institutions with jurisdiction, including the investigating judges. Apparently the DST was handing over individuals who had come to its attention in connection with its own inquiries and investigations to the judicial authorities. Cases of mistreatment in order to obtain confessions and poor detention conditions have been denounced by human rights organizations.

70 The Public Prosecutor had to open new investigations and mobilize the investigating judges. Interview with the Public Prosecutor, October 10, 2014.

investigating judges of the CSEI had to face a large number of cases that were ill-conceived at the preliminary investigation stage. Because Ivorian criminal law requires investigating judges to investigate all the facts submitted to them in the Prosecutor's request to investigate, investigations were extremely difficult. Some people, for example, found that acts were investigated twice as part of different cases with some involving the same perpetrators,⁷¹ thereby increasing the CSEI's workload.

The Public Prosecutor does not appear to have defined a prosecutorial strategy or undertaken a mapping of the crimes that had been committed. Consequently, the Public Prosecutor apparently did not prioritize some prosecutions over others, but rather submitted all cases to investigating judges.⁷² Investigations were not grouped according to perpetrator, location, or type of victim. Instead, until mid-2013 any new investigation was simply added to an existing case, with no consideration of whether the facts were connected.⁷³ As a result, today it is possible to find a single case involving 15 sub-cases concerning different events and crimes with up to 120 defendants.

Classification and distribution of cases within the CSEI

The Public Prosecutor's Office has classified PEV cases into three categories:

1. Cases involving "violent crimes," including those resulting in death and bodily injury (crimes against civilian populations, rapes, assault and battery, etc.)⁷⁴
2. Cases involving "economic crimes" and other offenses that are economic and financial (theft, gang theft, looting, etc.)⁷⁵
3. Cases of "crimes involving an attack on state security," which encompass any act that may have sought to destabilize the authority of the state, including as part of a conspiracy⁷⁶

After initially distributing the cases geographically, the Investigative Sections then attempted to distribute the cases by type, assigning each type to a section: the 8th Section is in charge of violent crimes, the 9th Section is in charge of attacks on state security,⁷⁷ and the 10th is in charge of economic crimes.⁷⁸

The specific case derived from the report of the National Investigation Commission

In addition to the three categories of crime, there is a 4th category that includes all acts and perpetrators identified in the report of the National Investigation Commission (Commission Nationale d'Enquête, CNE). Indeed, after the report was sent to the Ivorian government, an investigation was opened in November 2012 at the Public Prosecutor's Office. While the acts and perpetrators mentioned in the CNE's report had already been addressed by other cases under investigation, the CSE investigated them separately. This has continued at the CSEI.

⁷¹ The Public Prosecutor had to open new investigations and mobilize the investigating judges. Interview with the Public Prosecutor, October 10, 2014.

⁷² Interview with Public Prosecutor, August 29, 2014.

⁷³ Interview with senior investigating judge, June 25, 2014.

⁷⁴ FIDH, MIDHO and MIDH, "Cote d'Ivoire, The Fight Against Impunity at a Crossroad," October 2013, 14. As a civil party, FIDH has access to the contents of some of those cases and has reported the following counts of indictment for violent crimes, among others: "Serious crimes committed against the civilian population, genocide, attacks on individual freedoms, assassination, murder, rape, intentional bodily injury, death threats, assault and battery, tribalism, and xenophobia."

⁷⁵ Ibid. In the category of economic crimes, generally the following offenses were investigated: "pillage; destruction or degradation of perishable goods, merchandise and equipment; theft; gang theft; extortion of money; intentional destruction of tangible and intangible assets; complicity; collusion; conspiracy, and attempts to commit any of these offences."

⁷⁶ Ibid. More precisely the offenses "attacks, conspiracy and other offences against State, organised armed gangs, participation in an insurrectional movement, and disturbing public order."

⁷⁷ In addition to the so-called "CNE case."

⁷⁸ The 8th Section also has an overall supervisory role as well as involvement in the advancement of the case resulting from the CNE report.

In July 2014, 20 individuals were reportedly prosecuted in connection with the CNE's report.⁷⁹ The offenses included violent crimes, economic crimes, and attacks on state security. A CSEI judge of inquiry (juge d'instruction), Josiane Essiene, of the 9th Chamber, is assigned to investigate those cases. Her investigations, which are ongoing, include crimes committed by all sides to the conflict. For now they have led to the indictment of eight pro-Ouattara militaries. Essiene has benefitted from trainings conducted by ICTJ since the CSEI's establishment in 2014. However, it must be noted that the CNE's report is the only official document that identifies crimes committed by all factions involved in the PEV.

The CSEI investigating judge is not allowed to use the information and testimony gathered by the CNE. Instead, the CSEI merely maintains a list of alleged perpetrators with no established connection to acts under investigation. It also has a list of testimony from anonymous victims, but the transcripts of that testimony have reportedly not been forwarded to the CSEI,⁸⁰ nor has it received the addendum to the CNE's report, which has not been made public.⁸¹

Status of CSEI Proceedings

According to the figures produced by the CSEI,⁸² 61 investigation proceedings have been conducted or are still currently in progress, with 1,038 individuals charged in the four years since the PEV.⁸³

The Investigation chambers phase

Investigations are already complete for most cases at the 9th Investigative Section. Most of these concern attacks on state security⁸⁴ and acts identified in the CNE's report.⁸⁵ Eight cases have been referred to the Indictment Chamber,⁸⁶ one has been dismissed for prosecution,⁸⁷ and another is being reviewed by the Indictment Chamber.⁸⁸ Two other cases have been tried.⁸⁹ In total, there are approximately 10 cases still under investigation at the 9th Section.

As pointed out earlier, the two other Investigative Sections, the 10th and 8th,⁹⁰ do not seem to abide by the rule of exclusivity and, instead, continue to investigate cases that have no connection with the PEV. That would partially explain the backlog in investigations and the fact that very few cases have reached the trial phase or even the Indictment Chamber phase.

79 Interview with CSEI court clerks, July 1, 2014.

80 Interview with a CSEI member, June 26, 2014.

81 According to the Public Prosecutor, documents in the addendum to the CNE report are at the Ministry of Justice, which probably would be willing to authorize access to them. The problem is that the CSEI does not have sufficient resources to review these documents were it to claim them. Interview with Public Prosecutor, August 29, 2014.

82 See Annex 3. The figures provided by the CSEI date from April 2014; therefore, they may have changed considerably due to the updating of the database and real progress in the cases since then.

83 Of the 1,038 defendants, 517 were reportedly subject to pretrial detention at some point in the proceeding. See Annex 3.

84 Of 21 cases, 18. Of these, 2 concerned economic crimes and just 1 concerned violent crime. See Annex 3.

85 Interview with investigating judge, June 26, 2014.

86 Of these, three cases are reportedly resolved and awaiting judgment in the Criminal Court and documents for two cases should be sent back to the Indictment Division.

87 Case concerning the death of Zara Abidi, a UNOCI member who reportedly died from a stray bullet.

88 The Public Prosecutor's Office case against Santou Djiro.

89 Jurisdiction over the case of General Dogbo Blé was declined in favor of the military jurisdiction (See Annex 5). The case concerning Jean-Louis Blanc, the manager of the fleet of automobiles of the Office of the President, was judged by the Criminal Court.

90 Notably, Simone Gbagbo was also prosecuted for violent crimes. The case was assigned to the 8th Investigation Office. On February 6, 2012, the Public Prosecutor sent three initiating applications to the investigating judges of the 8th, 9th and 10th Investigative Sections containing allegations of crimes against her. Those applications led to the opening of three investigations against Simone Gbagbo (and 16 other persons): one proceeding before the investigating judge of the 8th Section; one proceeding before the investigating judge of the 9th Office; and one proceeding before the investigating judge of the 10th Section. These open cases were subsequently reassigned to the investigating judge of the 8th Section by virtue of a decision issued on February 13, 2013. For a report on those proceedings, see Decision on the objection to admissibility raised by Cote d'Ivoire as to the case concerning Simone Gbagbo, ICC-02/11-01/12-47-Red-tFRA, December 11, 2014, paras. 51–52 and 55, www.icc-cpi.int/iccdocs/doc/doc1882724.pdf

The Indictment Chamber phase

When addressing PEV cases, the Indictment Chamber has performed two judicial functions:⁹¹

1. As a mandatory second level of investigation, two cases have been referred to it:
 - In June 2013, a case categorized as an “attack on state security” involving 90 accused; on July 10, 2013, the Chamber issued a decision of referral to the Assize Court for 83 of the accused, including Simone Gbagbo.
 - In June 2014, another case alleging “attacks on state security” that caused the death of six Nigerian peacekeepers. The Indictment Chamber has since reviewed that case and issued an order referring the case to the 9th Section for further investigation.⁹²
2. As a jurisdiction reviewing appeals from the decisions of investigating judges, the Indictment Chamber has regularly reviewed appeals related to decisions of conditional release or petitions made by the parties or their counsel for joinder of proceedings.⁹³

Assize Court

Only one PEV case has reached this stage of the proceedings. It involves “attacks on state security,” which was referred to the Indictment Chamber in 2013,⁹⁴ and concerns Simone Gbagbo and other figures close to the former administration. The trial began on December 26, 2014, and ultimately ended in a verdict of guilty against Gbagbo; 18 of the 78 co-accused who were tried alongside Ms. Gbagbo were acquitted and discharged. The 61 other co-defendants were convicted and sentenced to various penalties.

Under the Code of Criminal Procedure, the Assize Court is not a permanent court, but is instead required to sit at each Court of First Instance (CFI)⁹⁵ every three months.⁹⁶ After holding no sessions since the early 2000s, it only resumed regular sessions in May 2014.⁹⁷ Although this is a positive sign for criminal justice in Cote d'Ivoire, the first “Assize sessions” seem to have been improvised and lacked ambition in the types of cases they processed. Although 250 cases were on the agenda of the first session, none of them were PEV cases.⁹⁸ Some cases involving the crime of rape⁹⁹ and violent crimes have reportedly been tried, but the alleged acts occurred after the PEV. Moreover, it became apparent that some judges assigned to the sessions had never participated in any Assize trials before and were not familiar with the applicable procedures.

91 Interview with Chief Judge of the Indictment Division, June 30, 2014.

92 Case “Public Prosecutor’s Office against Santou Djiro & associates.” ICTJ has not been able to confirm the date of these arguments or the date of the order of referral for additional inquiry.

93 This held true in the case of Simone Gbagbo. Her attorneys had requested the joinder of various proceedings in progress against her. The Indictment Division granted that motion by a decision on February 15, 2013, emphasizing that “therefore, in the interest of proper administration of justice, since the facts show a linkage of connection and indivisibility, it is proper to resolve conflicts of jurisdiction by ordering the removal of cases from the judges of the 9th and 10th Sections in favor of the judge of the 8th to continue the investigation.”

94 According to the criminal law procedure, the decision to refer the case to the Assize Court was communicated to the Prosecutor General by the Indictment Chamber. Interview with the Chief Judge of the Indictment Division, June 30, 2014. At the time this report was written, however, this decision was not yet in the public domain although it was mentioned in the public version of “the response of the Prosecutor’s Office to the challenge of Cote d’Ivoire on the question of admissibility of the case of Ms. Simon Gbagbo” on April 9, 2014, www.icc-cpi.int/iccdocs/doc/doc1792827.pdf

95 CCP, Arts. 232 and 234.

96 CCP, Art. 235.

97 The decision to resume the Assize Court was probably motivated in part by the desire to reassure international observers about the progress of the judicial handling of serious crimes in Cote d’Ivoire.

98 Assises sessions were organized in the three venues of the country’s Courts of Appeal in Abidjan, Daloa, and Bouaké. Interview with an international expert based in Cote d’Ivoire, June 24 and 28, 2014.

99 Under Ivorian law, the offense of rape falls under the jurisdiction of the Assize Court: see Criminal Code, Art. 354, which characterizes it as a felony; and CCP, Art. 214, which requires the Indictment Chamber to refer the case to the Assize Court. Because no session has taken place in recent years, rape cases sent to court proceedings were either left unpunished or were often recharacterized as indecent assaults or attempted rape so the criminal courts could try them.

The criminal courts for other offenses (misdemeanors)

Some CSEI investigations have identified cases involving misdemeanors or cases involving crimes that were requalified as such by the Public Prosecutor's Office at the end of the investigation. These cases have been referred to the criminal court in charge of trying misdemeanors.¹⁰⁰ In June 2014 the Public Prosecutor estimated that 12 CSEI cases would be referred once a week starting in July.

Profiles of Prosecuted Perpetrators

Available figures show an overall average of 78 percent civilian defendants versus 22 percent military defendants.¹⁰¹ According to the senior investigating judge, there are three discernable levels and types of perpetrators among the cases brought:

- Leaders of the two military groups that allegedly instigated and ordered the abuses (which constitute approximately 10 percent of prosecuted persons).
- Heads of political and military groups who relayed those orders. They are reportedly mid-level officers. They are also said to constitute around 10 percent of the alleged perpetrators.
- Militia members from the armed wings of the groups. These are alleged to be the actual physical perpetrators. They constitute about 80 percent of the persons being prosecuted.¹⁰²

Types of Investigative Acts Performed

Most of the actions and orders taken by the investigating judges seem to have taken the form of hearings of the accused, either as court appearances or as witness hearings. Letters rogatory are also used frequently whenever an act requires the investigating judge to travel.¹⁰³ Indeed, until July 2014, investigating judges virtually never went into the field, believing they were not in the best position to perform the necessary acts.¹⁰⁴ Things have been changing since September 2014, and investigating judges are starting to travel occasionally, accompanied by their court clerks and/or a member of the Public Prosecutor's Office.¹⁰⁵

In 2011 and 2012, when the distribution of cases among the various Investigation Offices was still done geographically, many of the field visits to the territories by investigating judges and JPOs took the form of town hall meetings in the presence of JPOs. We can cite at least 40 towns that received such visits to gather testimony.¹⁰⁶ In 2014, the JPOs performed "more targeted" work dressed in civilian garb and using "unmarked cars" to assure discretion."¹⁰⁷

In addition, we found that some investigations are delayed because of the need to enlist experts who in some cases charge high amounts for their services and demand payment before

100 Code of Criminal Procedure, Art. 214, section 3 and 370.

101 Figures also dating from April 2014. See Annex 2. Other available data from June 2014 cite even lower figures: 1,025 defendants, including 156 soldiers and 869 civilians, for a ratio of 85 percent to 15 percent.

102 Interview with senior investigating judge, June 25, 2014.

103 Criminal letters rogatory are an instrument by which a judge of any court may delegate his powers to another judge of that court or to another investigating judge or to a judicial police officer when he himself is unable to perform those acts. Ivorian law provides for delegations in articles 151 et seq. of the CCP.

104 Interview with two CSEI investigating judges, June 25 and 26, 2014.

105 Interview with Public Prosecutor, August 28, 2014.

106 8th Section: Koumassi, Marcory, Treichville, Port Bouet, Noe, Aboisso, Bonoua, Tiapoum, Adiake, Assinie Mafra, Bassam, Boundiali, Katiola; 9th Section: Man, Biankouman, Logouale, Divo, Lakota, Bouafle, Zuenoula, Seguela, Mankono, Kani; 10th Section: Toumodi, Taabo, Adzope, Aelepe, Abengourou, Agnilekro, Boudoukou, Bouna, Assuefry, Daoukro, Dimbokro, M'Bahiakro, Cocody, Bingerville, Plateau, Adjame. Interview and submission of documents by CSEI JPOs, June 26, 2014.

107 The official CSEI vehicles have government license plates. Interview with JPOs, August 28, 2014.

issuing their conclusions.¹⁰⁸ Moreover, the state can also be delayed in making its payment to experts.¹⁰⁹

Preventive Detention and Conditional Release of Defendants

Under Ivorian law, a detainee may not normally be held in preventive detention for more than 18 months in total for a criminal charge.¹¹⁰ However, the law creates an exception for persons suspected of certain crimes, including violent crimes,¹¹¹ who may be held in preventive detention indefinitely, as long as the investigating judge issues a detention order every four months.¹¹²

Preventive detention periods have regularly been extended in PEV cases.¹¹³ Most actors concede that these extensions occur without a statement of grounds¹¹⁴ or with a delay in their formulation.¹¹⁵ Nevertheless, they deem that the extensions are largely decided by the investigating judge, following the request of the Public Prosecutor, according to the regular procedure.¹¹⁶ Those orders remain open to heavy criticism because they are rarely based on specific criteria that would justify prolonged deprivations of liberty.¹¹⁷

It is also necessary to consider the merits of decisions to conditionally release defendants. Although some releases were justified for health reasons,¹¹⁸ waves of releases occurred under the influence of the government supposedly in the interest of facilitating reconciliation.¹¹⁹ On several occasions, for instance, releases occurred after negotiations between the government and the Front Populaire Ivoirien (FPI), the party of former President Gbagbo, and other political parties. The Public Prosecutor, under instructions from the Minister of Justice,¹²⁰ has requested the releases for political reasons.¹²¹

The authorities also maintain that the conditional release of suspects helps remedy the prolonged waiting times that the accused face in pretrial detention, especially given the accumulated backlog at the Assize Court. This approach, however, benefits the current government, because the continued threat of being sent back to prison induces the accused to keep a low profile in political life once released provisionally. Although the release decisions do not appear to contain guarantees that the defendant will appear for trial, the vast majority of defendants are coming forward, based on available reports.

108 This is true across specialties, whether finance or banking, psychiatry, or in forensic medicine. Severe shortages of specialists in Cote d'Ivoire only make matters worse. There are only two or three experts who are qualified for court proceedings involving the type of forensic medical analysis needed in Cote d'Ivoire. One forensic medical expert opinion for an autopsy was reportedly billed at about 400,000 CFA Francs. Interview with a military judge, June 30, 2014; and a CSEI investigating judge, June 25, 2014.

109 Interview with CSEI investigating judges, August 21, 2014.

110 CCP, Art. 138: "In all other cases, in correctional matters and in criminal matters, the accused may not be detained for longer than six months or longer than eighteen months, respectively."

111 CCP, section 3, Art. 138: "However, the provisions indicated in sections 1 and 2 above do not apply to violent crimes"

112 CCP section 4, Art. 138: "In all these cases, preventive detention is ordered for a period of four months. After that time period, if further detention seems necessary, the investigating judge may extend it by an order specially stating the reasons for it, issued based on submissions, and also stating the reasons, from the Public Prosecutor. Each extension may be ordered for a period of up to four months only."

113 See Annex 4.

114 Interview with UNOCI members, June 27, 2014; and with an international expert based in Cote d'Ivoire, June 28, 2014. See also CCP, Art. 138.

115 Interviews with several defense attorneys, June 25 and 27, 2014.

116 Interviews with investigating judges, June 26, 2014; a technical advisor of the Ministry of Justice, June 24, 2014; a defense attorney, June 27, 2014; and a CSO, June 23, 2014.

117 Interviews with a UNOCI member, June 27, 2014; defense attorneys, June 25, 2014; and an international expert based in Cote d'Ivoire, June 28, 2014.

118 Interview with an investigating judge, June 26, 2014.

119 Abidjan.Net, "Cote d'Ivoire: Libération d'une cinquantaine de pro-Gbagbo dont Jean Yves Dibopieu," May 31, 2014, <http://news.abidjan.net/h/499113.html>

120 Law No. 78-662 dated August 4, 1978, Art. 7, bearing status of the judiciary ("The Judiciary Act").

121 CCP, Art. 140. The investigating judge has five days to rule.

3. Judicial Handling of PEV Cases by the Military Jurisdiction

The military jurisdiction is also involved in providing a national judicial response to serious crimes committed during the PEV. Five cases were pending before the Military Tribunal at the time of writing; three cases have already been resolved.¹²²

Jurisdiction of the Military Tribunal

Under the Code of Military Procedure, the Military Tribunal has jurisdiction over when and if those being prosecuted for the same offense have military status.¹²³ In addition to members of the armed services, the military also includes the police and gendarmerie forces. Consequently, if one of the accused is a civilian, the Military Tribunal loses its jurisdiction to the civilian courts. The other military accused will then be incorporated into the referral to the civilian court.

Applicable Law and Procedure Before the Military Jurisdiction

The Military Tribunal is a single court¹²⁴ that has national jurisdiction and sits in assize sessions.¹²⁵

The Military Prosecutor's Office is directed by the Military Prosecutor, who is assisted by two Deputies. Three Investigation Offices investigate the cases referred to them by the Military Prosecutor's Office. A second-level Chamber only hears appeals from the decisions of the military investigating judge. There is, therefore, no automatic second-level investigation, as in the civilian jurisdiction. Instead, when the investigation is completed the Prosecutor's Office issues a final request to the investigating judge, who orders a referral to the tribunal or dismisses the case, without the possibility of appeal. The conclusions of the investigation are presented during trial, and the Prosecutor's Office has the opportunity to maintain or change its position.

The Military Tribunal applies relevant provisions from the Code of Criminal Procedure, the Code of Military Criminal Procedure, the Criminal Code (insofar as it concerns military offenses),¹²⁶ the 1995 Code of Military Service,¹²⁷ and the statutes of the national police.

¹²² See Annex 5.

¹²³ Code of Military Procedure (CMP), Arts. 9 and 10.

¹²⁴ Originally three courts were to be established. As of now only one court is functional.

¹²⁵ A military jury sits in assize sessions and consists of five members, four military assessors who are not attorneys (either by training or function) and a chairman of the jury who is a civilian judge. The chairman is generally a chief justice of a division of the Court of Appeal or a judge on the Court of Appeal. CMP, Arts. 17 and 18.

¹²⁶ Criminal Code, Arts. 435-502: offenses that seek to have the perpetrator evade his military obligations, offenses against honor and duty, offenses against discipline, and abuses of authority and failures to follow orders.

¹²⁷ Act No. 95-695 of 7 September 1995, on the Code of Military Service.

Challenges Hampering the Judicial Response to PEV Crimes

The Ivorian justice system faces numerous challenges in responding to crimes committed during the PEV. Some are specific to the mechanisms that were put in place in response to that crisis, while others have to do with the functioning of the judicial system as a whole. To establish an appropriate judicial response, all of those challenges must be taken into account.

4. General Challenges to the Function of the Ivorian Judicial System

Lack of Independence of the Judiciary and the Separation of Powers

Cote d'Ivoire's democracy is founded on a formal separation and balance of powers between the branches of government,¹²⁸ with the judiciary officially independent from the executive and legislative branches under the 2000 Constitution.¹²⁹ However, there is much in law and practice that calls into question the actual independence of the judiciary.

Statutory texts permit interference by the executive authority

- **The President's oversight role:** The constitution gives the President of the Republic an oversight and supervisory role with regard to the judiciary, which seems to contradict the separation of powers. Pursuant to the constitution, "the President of the Republic shall be the guarantor of the judiciary's independence. He shall chair the High Council of the Judiciary."¹³⁰ This is problematic because the High Council of the Judiciary (HCJ) "recommends judges for appointment and promotion" and "rules as a disciplinary council over court judges and the public prosecutor's office."¹³¹ It is the national body that is supposed to guarantee the independence of the judiciary.
- **Judicial appointments:** The new constitution reinforces the judiciary's independence. While previously the Minister of Justice recommended judges for appointment to high-level courts as Chief Justices of the Courts of Appeal and trial courts,¹³² the HCJ now has that power. The decree appointing court judges now must conform to the opinion of the Council.¹³³ However, for those constitutional advances to be implemented, an organic law must be enacted.¹³⁴ In the meantime, the old provisions remain in force,¹³⁵ as shown by the appointment of CSEI judicial personnel.
- **Judicial promotions:** Judges advance in their career based on a system of evaluations and grades¹³⁶ Many, however, are critical of that system, which leaves much room for arbitrariness and does not sufficiently guarantee judges' independence. Judges are left to depend on the approval of their im-

128 See Preamble to the Constitution, which states its "adherence to democratic values," including "the separation and balance of powers."

129 Constitution, Art. 101. Article 41 states: "The President of the Republic shall be the exclusive holder of executive power."

130 Constitution, Art. 104. Pursuant to article 106, the Council "shall meet upon notice from and under the Office of the President of the Republic to examine all matters concerning the Independence of the Judiciary." Article 104, The President of the Republic is the guarantor of the independence of the magistrature. He presides over the Superior Council of the Magistrature. http://abidjan.usembassy.gov/ivoirian_constitution2.html

131 Constitution, Art. 106.

132 1978 Judiciary Act, article 5: "Appointments to the various positions in the two levels of judicial hierarchy are made by decree upon nomination from the Garde des Sceaux, i.e., the Minister of Justice and, for court judges, after opinion from the High Council of the Judiciary."

133 Constitution, Art. 106, section 2 et seq.: "Chaired by its vice-chair, the High Judicial Council shall:

134 Constitution, Art. 107: "an organic law shall determine the conditions of application of the provisions concerning the [HCJ]."

135 Constitution, Art. 130: "Until other Institutions are put in place, the established Institutions shall continue to exercise their functions and powers pursuant to current laws and regulations." That means that the 1978 law on the status of the judiciary still applies.

136 See decree No. 78-697 of August 24, 1978, issued for the application of law 78-662 of August 4, 1978, bearing status of the judiciary.

www.ictj.org

mediate superiors or other political, regional, or ethnic considerations in the grading system, which consequently have a major impact on promotions.

- **Secure tenure and rotation.** The secure tenure of court judges is provided by law.¹³⁷ However, it is plain that, in reality, judges are transferred from their courts without truly having been consulted and without having completed the task assigned to them.¹³⁸ This is the case of the Deputies of the Prosecutor and, in all likelihood, for CSEI investigating judges as well.¹³⁹
- **Hierarchical structure:** The judges of the Public Prosecutor's Office are placed under the management and supervision of their immediate supervisors and under the authority of the Minister of Justice.¹⁴⁰ Although during hearings, "they have freedom of speech"¹⁴¹ pursuant to the constitution,¹⁴² this hierarchical relationship makes their prosecutorial decisions dependent on executive authority.
- **The military jurisdiction:** The Military Prosecutor does not decide on the appropriateness of prosecutions. Instead, he or she submits a "draft prosecution opinion" to the incumbent government ministry, which then signs or declines the order.¹⁴³ Because the Ministry of Defense or Ministry of the Interior only communicates its decision to the Military Prosecutor, he or she has no obligation to make the decision public or even to convey it to the other members of the Military Tribunal. In practice, this bars any recourse or appeal against decisions.¹⁴⁴

Practices that call into question the separation of powers and the independence of the judicial system

- **The waves of conditional releases,** also characterized as "political releases," that have occurred since the PEV, are among the most glaring breaches of the separation of powers. When the Ministry of Justice asks the Public Prosecutor's Office to request releases, the Public Prosecutor's Office must obey its immediate superior. In fact, releases are often announced by the press and the Office of the President even before the investigating judges have issued the order.¹⁴⁵
- **Current selection of Public Prosecutor cases by the CSEI.** There is every reason to believe that the Ministry of Justice has played a role in identifying and approving prosecutions undertaken by the Public Prosecutor's Office, specifically through its Department of Civil and Criminal Affairs. That influence is apparent if we consider the CSEI cases in an advanced stage of proceeding, i.e., before the Indictment Chamber or the Assize Court. Those cases target only members of pro-Gbagbo forces, not individuals affiliated with the current Ouattara government, which seems to indicate that the Ministry controls the Public Prosecutor's Office.¹⁴⁶

137 Constitution, arts. 103 and 6, of the law bearing status of the judiciary.

138 UNOCI, "The organization and functioning of the judiciary system in Cote d'Ivoire," Rule of Law Section, June 2007, 45.

139 Neither the 2013 decree that established the CSEI, nor the later decree No. 226 of June 2, 2014, provides that judges attached to the CSEI may not be removed from office.

140 Judiciary Act, Art. 7.

141 Interview with the Public Prosecutor, June 24, 2014, supported by the Judiciary Act, Art. 7, and CCP, art. 33.

142 Constitution, art. 103.

143 CMP, article 3.1: "the judicial powers provided by this code shall be exercised by the authorities designated by decree." One of the mandatory reference texts is decree 74-489 of October 30, 1974: "bearing designation of the authority that shall exercise the judicial powers provided by the Code of Military Procedure." That decree designates the Ministry of Defense. Another decree designates the Ministry of the Interior.

144 Interview with a Deputy of the Military Tribunal, June 30, 2014.

145 Interviews with CSOs and NGOs active in the sector of the justice system in Cote d'Ivoire, June 23 and 26, 2014.

146 On July 6, 2015, *Jeune Afrique*, a French Africa magazine broke a story about the indictment of 20 Ivorian army officers, including 8 pro-Ouattara and former senior members of the Forces Nouvelle. Among them are Chérif Ousmane and Fofana Losseni, a.k.a., "Loss," two well-known important com'zones (zone commanders) during the PEV who now hold command positions in the Ivorian security forces. Prior to the announcement, FIDH broke the story. At a press conference in Abidjan in mid-June 2015, the NGO announced that eight military leaders close to Ouattara were to be indicted following an investigation conducted by CSEI in connection with the CNE's report. When the news broke, ICTJ first contacted the Procureur de la République, who refused to confirm the information. But the government official spokesperson has not denied it. Instead, he said that Ouattara would not interfere in the work of the judiciary. He added that it should not be surprising, especially after Ouattara had promised a fair and impartial justice in the treatment of PEV crimes.

- **Alignment of judicial personnel with the instructions of the executive.** Some members of the judicial personnel interviewed in connection with this analysis, at all levels, have intimated that they follow the instructions handed down by the government ministry that oversees their work. They cannot ignore these instructions out of concern for preserving their careers. This is confirmed by defense attorneys, who in interviews noted that investigating judges are merely “caretakers of cases, since the decisions are made by the executive.”¹⁴⁷

Obsolescence of Criminal Legislation

With the notable exception of its constitution, Ivorian law has rarely been revised. The Criminal Code dates from 1981, and the Code of Criminal Procedure dates from 1960. A fairly extensive review process of criminal legislation, however, is now underway.¹⁴⁸

Four working groups composed of members of the Ministry of Justice, professors, attorneys, and foreign experts have been tasked with proposing a preliminary legislative bill for each of the codes. The first drafts of the revised texts are to be submitted to the Ministry of Justice at the end of 2014 in the hope that they will be subsequently submitted to the National Assembly for enactment.

The necessary reforms of the Code of Criminal Procedure include:¹⁴⁹

- Control over the investigation, through prior authorizations of certain acts, and mandatory supervision of police custody
- Rigorous regulation of preventive detention, specifically the development of criteria for the authorization and prolongation of detentions, to ensure that detentions are not arbitrary and the grounds for initial or continued detention are limited and valid. Provision should also be made for allowing the appeal of detention decisions before the Indictment Chamber.¹⁵⁰ The use of indefinite pretrial detention in cases of serious crimes should be abolished.
- Reform of the Assize Court that provides for either the creation of a permanent Court at the level of the Trial Chamber and the Courts of Appeal that would not use a jury and would issue decisions stating their grounds and be open to appeal, which is not currently permitted;¹⁵¹ or limit the jurisdiction of the Assize Court to the most serious crimes in the current legislation and set up criminal chambers for other less serious crimes, which would then be removed from the jurisdiction of the Assizes.

As for the Criminal Code, one of the key reform measures should concern the proportionality and individualization of sentences and make compulsory the consideration of mitigating or aggravating circumstances. Under current law, these considerations may be taken into account during sentencing,¹⁵² but it rarely occurs.¹⁵³

Lastly, as already mentioned, in 2015 two legislative bills are expected to amend and expand the Criminal Code and the Code of Criminal Procedure to make the Ivorian criminal justice system consistent with relevant provisions in the Rome Statute of the ICC.

Respecting the Rights of Criminal Defendants

Insufficient protection of the right and access to representation by an attorney

The right of the accused to the assistance of an attorney is a fundamental component of a fair

147 Interview with a defense attorney, June 27, 2014.

148 These revision projects were undertaken over two years, in two phases. During the first phase, international experts performed a preliminary analysis of the necessary revisions, taking into account international norms. The second phase consisted of working groups. Interview with a member of the Ministry of Justice, June 24, 2014.

149 Interview with an international expert based in Cote d'Ivoire, June 8, 2014.

150 This is the case only for decisions in cases in which an investigating judge denies release.

151 CCP, arts. 359 and 362.

152 Criminal Code, arts. 114 and 115.

153 Interview with an international expert based in Cote d'Ivoire, June 28, 2014.

trial. In PEV cases, however, few defendants have had recourse to an attorney, either due to ignorance of their rights or lack of financial means during the preliminary inquiry and investigation. Nearly 80 percent of accused who have hearings before the CSEI's Investigative Sections appear without an attorney.¹⁵⁴

The Code of Criminal Procedure contains provisions regarding the right to be represented by an attorney, but they are insufficient. During the preliminary inquiry, any suspect, victim, or witness may be assisted by an attorney; and judges and JPOs must inform persons who appear before them of that right.¹⁵⁵ However, when that obligation is breached, there is no provision for reversing the court decisions that follow.¹⁵⁶ As a result, there is no incentive to ensure representation by an attorney during the inquiry phase.

During the investigation, the Code of Criminal Procedure also provides that judges and government officials must inform the accused that they may be assisted by an attorney and indicate in the transcript that the warning has been given.¹⁵⁷ This protection is granted to defendants¹⁵⁸ and civil parties.¹⁵⁹ Unlike the preliminary investigation phase, any breach of this obligation to inform the accused invalidates the acts performed as well as the ensuing proceedings.¹⁶⁰ In fact, "Unless they expressly waive such right, the accused and the civil party may only be heard or interrogated in the presence of their counsel or if counsel has been duly summoned."¹⁶¹ In these circumstances, if the investigating judge hears or interrogates an accused or a civil party outside the presence of their chosen counsel, any orders or acts are to be declared invalid.

The obligation to inform the accused of the right to counsel in the investigation cannot be sufficient to guarantee it. Inconsistently, the code does not make the presence of an attorney with the accused compulsory, nor does it provide that the state will appoint an attorney if the accused has not chosen one. The result is that defense attorneys rarely take part in the investigation phase.¹⁶²

Ultimately, the vast majority of defendants are on their own in the criminal process until the case reaches the Assize Court, at which point the Chief Justice must appoint an attorney if the accused does not designate one.¹⁶³

154 Interview with an investigating judge of the CSEI, June 26, 2014.

155 CCP, Art. 76-1: "Any person against whom there are serious and concordant indicia of participation in an offense, or who is a victim or who is called to assist in elucidating the truth, may be assisted by an attorney, during the inquiries. However, exceptionally, in locales where there is no Attorney, the person may be assisted by a relative or a friend. Judges or government officials in charge of initiating and conducting criminal proceedings must inform the person of that right. Mention of that notification and the name of any Attorney, relative or friend shall be made in the transcript."

156 CCP, article 76-5 deals with judicial acts that become void if they do not observe certain formalities: "The formalities required by new articles 76-1 section 2, 76-3 and 76-4 section 2 shall be mandatory under penalty of voidance . . ." Article 76-5 makes no reference to article 76-1 section 3, which, therefore, is not affected by this penalty.

157 CCP, art. 101, section 1 permits the investigating judge to summon before him "all persons whose deposition seems useful to him." Section 3: "The provisions of articles 76-1 sections 2 and 3... shall be applicable." CCP, art. 76-1, section 3 provides: "Judges or government officials in charge of initiating and conducting criminal proceedings must inform the person of that right. Mention of that notification and the name of any Attorney, relative or friend shall be made in the transcript," as to the possibility of being assisted by an attorney in section 1 of that same article.

158 CCP, article 112, sections 1, 2, and 3: "At the defendant's first appearance, the investigating judge shall ascertain his identity, inform him of the acts that he is charged with, and shall receive his statements. If he appears, accompanied by an Attorney, the acts required by section 1 may be accomplished only in the presence of such attorney. Otherwise, the Judge shall inform him of his right to choose counsel . . ."

159 CCP, art. 112, section 4: "A civil party who has duly joined the proceedings shall also have the right to be assisted by counsel. If the civil party appears spontaneously, accompanied by an Attorney, the civil party shall be heard in the presence of such attorney."

160 CCP, art. 170, section 1: "The provisions of articles 112 and 115 must be observed, or else the act itself and the subsequent proceeding shall be void."

161 CCP, art. 115. The legislature also specifies the formalities that the investigating judge must meet to summon the attorney chosen by the defendant and by the civil party as well as their deadlines for making the proceeding available to each of those attorneys.

162 The rare defense attorneys involved in this phase of the investigation also report "obstacles," for example the tardy summoning of the attorneys.

163 CCP, articles 274 and 317. However, it is optional again in the Criminal Court; CCP, see articles 384 and 408.

By contrast, military jurisdictions require mandatory representation as of the first appearance. If an accused lacks representation (either by a civil attorney or military defense attorney) an attorney is appointed by the court.¹⁶⁴

Defendants do not have access to legal aid

Even when defendants are informed of the right to counsel, few of them choose a defense attorney due to a lack of resources and appropriate legal aid.¹⁶⁵

While legal aid does exist in Cote d'Ivoire,¹⁶⁶ few defendants are able to take advantage of these resources. A Legal Aid Office located in the buildings of the Ministry of Justice in Abidjan generally lacks funds to cover their clients' legal expenses;¹⁶⁷ and defendants seem completely unfamiliar with the services offered by it.

When defendants are informed of these services, they sometimes confuse that office with the executive authority represented by the Ministry of Justice and, therefore, avoid using it. In addition, although the fees incurred by legal aid attorneys are supposed to be paid by the state,¹⁶⁸ it often takes many months for them to obtain reimbursement of costs and expenses. That delay affects attorneys' motivation and is an obstacle to effective legal aid.

The number of requests for legal aid increased in 2012 and then dropped in 2013.¹⁶⁹ However, the Legal Aid Office is accepting more and more requests for aid. Indeed, the number of acceptances increased threefold in 2012 and twofold in 2013 compared to previous years.¹⁷⁰ In spite of these modest improvements in the number of defendants using the office's services, these figures remain low in comparison to the workload.¹⁷¹

As long as the Code of Criminal Procedure does not require that an attorney be present for the accused during the investigation, this situation is likely to go unchanged.¹⁷² In other words, legislative reform or an overhaul of the state's legal aid program is essential.

Prolonging preventive detentions

Again, orders to extend preventive detention are often purely formal and rarely based on specific criteria. This seriously imperils the rights of the accused. Therefore, legislative amendments to strictly regulate prolonged preventive detentions are crucial to protecting defendants' rights.

Default judgments and public arguments

Since the first Assize sessions were held between May and June 2014, many judgments were issued in absentia, which is detrimental to defense rights. If the Assize Court begins trying

164 CMP, art. 69 and 70.

165 Interview with an investigating judge, June 26, 2014.

166 It is governed by Code of Civil, Commercial and Administrative Procedure, arts. 28-31.

167 Conference, "La Justice ivoirienne face à ses défis," held in Abidjan on October 28, 2014, organized by ICTJ with the assistance of the Ivorian Ministry of Justice, Human Rights and Public Liberties, in cooperation with UNDP and UNOCI, with the support of the European Union.

168 Decree of January 29, 1975, setting rates for emoluments, fees, and expenses of attorneys and bailiffs.

169 ACAT and FIACAT, "Contribution au deuxième examen de la Cote d'Ivoire. Conseil des Droits de l'Homme, 19th session, May-June 2014," September 2013, 8-9: "The department of civil and political affairs received 193 cases in 2012, 148 of which were granted. From January 8, 2013, to July 16, 2013, 95 cases were received, 84 of which were granted."

170 The average before 2012 was approximately 50 cases per year. Interview with the former President of the Bar Association of Cote d'Ivoire, June 27, 2014, and with an international expert based in Cote d'Ivoire, June 28, 2014.

171 Indeed, although the National Office of Judicial Aid provides for a survey of requests per week, reportedly there were only 14 in 2012. See ACAT and FIACAT, "Contribution au deuxième examen de la Cote d'Ivoire. Conseil des Droits de l'Homme, 19th session, May-June 2014," September 2013, 8-9.

172 Some domestic civil society organizations and intergovernmental organizations try to make up for the judicial system's financial shortcomings by assuming the costs of victims who join the proceedings as civil parties. Notably, FIDH, in collaboration with MIDH and LIDHO, is assisting around 76 victims alongside those organizations who joined the proceedings as civil parties. We can also note the involvement of the AFJCI and OFACI, which provide judicial aid in the cases of about 70 women who themselves have joined the proceedings as civil parties as victims of sexual violence during the PEV.

cases related to the PEV, the proceedings should be conducted in the presence of the alleged perpetrators. Moreover, it seems impossible to obtain a copy of the decisions issued by the Indictment Chamber from the appropriate court clerk offices.¹⁷³ This does not help foster the transparency and public nature of the arguments.

Strengthening Laws, Protecting Victims

Victim and witness protection

Many observers point to the need for a law to ensure victim and witness protection.¹⁷⁴ The Ivorian Criminal Code and the Code of Criminal Procedure provide some general measures of protection.¹⁷⁵

The CSEI has also developed methods to protect the identity of witnesses.¹⁷⁶ Still, there are no binding measures or assistance programs that the CSEI can use to protect victims and witnesses during the preliminary inquiry and investigation phases. Further, victims and witnesses are not informed of protective measures that the court judge can take during the public phase of judicial proceedings. As things currently stand, there seems to be little to encourage victims—who are already reluctant to use the judicial system—to get involved in a legal proceeding.¹⁷⁷

A law on witness and victim protection was drafted in 2013 but was never passed into law. The Ministry of Justice, with the support of civil society organizations and international actors like ICTJ, reviewed the law and concluded that once passed and implemented, many additional challenges are likely to be faced if it is to be effectively implemented.¹⁷⁸ Indeed, these types of programs and measures are costly, and the necessary funds will have to be allocated for in the national budget.

Reparations for victims

The state may be required to grant reparation to victims when ordered to do so jointly and severally with a government official who committed crimes in the course of his or her official duties or when the state has breached its obligation to protect its citizens.¹⁷⁹

Victims who join the proceedings as civil parties may also claim damages against the accused.¹⁸⁰ Providing individual and judicial reparation to victims is costly. The very small number of criminal prosecutions for acts connected with PEV also makes this form of reparation ill-suited to large num-

173 For example, the decision of the Indictment Division dated July 10, 2013, duly cited by the ICC.

174 Conference “La Justice ivoirienne face à ses défis,” held in Abidjan on October 28, 2014.

175 Including restrictive closed-door hearings (CCP, arts. 306 and 390); residency prohibition or restriction of movement of the accused (Criminal Code, Art. 78); criminalization of direct or indirect influence on the judicial process by threatening witnesses (Criminal Code, art. 302) or tampering with them (Criminal Code, Art. 304-3); criminalization of the person making the threat under other conditions (articles 380 and 381 Criminal Code); the indirect protection afforded by investigative confidentiality to witnesses involved in the investigative phase (Criminal Code, Art. 383); and any procedural measures taken by judges, who are responsible for keeping order in the court to protect witnesses (CCP, art 391).

176 The CSEI now uses glass booths and protects the anonymity of victims during identification sessions, which was not the case when the CSEI began operating. This was the result of JPO training. In spite of this positive change, there is still a serious need for stronger victim protections at the CSEI. For example, JPOs acknowledge that they need more training in analyzing the risks faced by vulnerable witnesses to know the appropriate measures to take in their investigations. Such measures should be accompanied by a legal framework that makes it easier to implement procedures and that would require any figure—including JPOs, the Public Prosecutor’s Office, and investigating judges—to address these issues. JPOs must also be able to visit investigation sites without being seen by people with interests adverse to vulnerable witnesses. The problem is that the CSEI’s official vehicles bear government license plates. Interview with JPOs, August 28, 2014.

177 This stems from a fear of retaliation by potential perpetrators, as well as within communities. Victims face the possibility of shunning and denunciation by those who blame people who decide to testify. To cite just one example of these risks, a witness to the Nahibly massacre, a court case pending in the West, was reportedly killed under suspicious circumstances in December 2013. This case was reported on in an RFI article, www.rfi.fr/afrique/20140106-cote-ivoire-mort-temoin-tuerie-duekoue-frci-fosse-commune.

178 A two-day workshop was held in July 2014.

179 See CMP, Art. 24.

180 CCP, art. 360 et seq.

bers of victims. Therefore, states and international actors most often advocate for additional administrative reparation programs. To do so, a consensus needs to be reached around several key issues:

- the definition of a victim
- methods for establishing victim status
- the form or forms of reparation to be granted
- whether reparations will be provided on an individual or collective basis, or both

CONARIV was created by presidential ordinance in March 2015 in order to carry out the victims' reparation process alongside the PNCS. CONARIV's mandate is to produce a consolidated single list of all victims of the Ivorian crisis and supervise the implementation of the reparations program assigned to the PNCS. Initially it was asked to produce this single list by June 30, 2015, and submit a report to the government evaluating the harms suffered by victims and proposing appropriate reparation measures. (This deadline had already been postponed twice while conducting three successive phases of residual victim registration.)

On August 4, 2015, the government launched a pilot victims' compensation process targeting 4,500 victims, including relatives of 3,500 deceased and 1,000 who were seriously injured. This is being conducted concurrently by PNCS and CONARIV, in order to finalize the consolidated list of victims and the proposal of a national reparation policy to be submitted to the head of state by March 31, 2016.

The Role of Attorneys and the Importance of Developing a “Judicial Culture” of Defense

Cote d'Ivoire lacks a robust defense culture. Many defense attorneys do not fulfill their intended role as a counselor and advocate for the accused by rendering effective quality representation in proceedings before the CSEI. Moreover, the legal profession seems to be politicized, especially in PEV cases.

Disconcertingly, some defense attorneys representing accused who were recently conditionally released have admitted that they no longer file documents in those cases,¹⁸¹ despite the fact that the investigations continue and their clients are often still being prosecuted for the most serious acts. True defense work requires that attorneys prepare criminal cases by identifying flaws in the investigation and evidentiary record, and that legal defenses are available to all defendants in criminal proceeding, whether based on legislation or case law. Admittedly, there are natural impediments to defense work, especially in cases where defendants are detained in penitentiaries in unknown locations or distant parts of the country.¹⁸²

Attorneys acting on behalf of victims and civil parties seem a little more constructive, but they also show signs of low morale given the slow-moving nature of CSEI proceedings, which to date have lacked consistency in the absence of a prosecutorial strategy.

Handling of Gender-Based Violence

Gender-based violence (SGBV) was widely committed during the PEV, and many cases are currently under investigation at the CSEI, specifically in the “CNE cases.” These cases pose

¹⁸¹ Interview with defense attorneys, June 25 and 27, 2014.

¹⁸² Conference “La Justice ivoirienne face à ses défis,” held in Abidjan on October 28, 2014. According to the 2013 directory of the National Bar Association of Cote d'Ivoire [Ordre national des avocats de Cote d'Ivoire], 509 attorneys were practicing. All of them had their offices in Abidjan, leaving the rest of the country completely without legal counsel or the possibility of judicial defense.

difficulties for the investigating judges and JPOs as well as the victims and civil party attorneys who decided to bring these cases to court,¹⁸³ including:

- stigma; victims of sexual assault face an increased sociocultural burden and the fear of social rejection that their perpetrators do not
- fear of retaliation
- lack of awareness of the steps victims of sexual assault should take to preserve evidence (for example, getting a medical examination before washing)
- lack of information available to women living in rural areas
- the prohibitive cost that victims must pay for a medical certificate (50,000 CFA Francs)
- frequent reclassification of rape as a less serious crime subject to lighter penalties
- the difficulty of gathering evidence, especially when investigations take place long after the offense was committed
- the problem of identifying perpetrators when offenses are committed in groups
- ignorance of legal procedures and lack of attorneys outside of Abidjan
- victims' lack of financial resources to pursue justice
- slow court proceedings that discourage victims from filing complaints
- corrupt processes by which an accused may be released in return for money, a particular problem in rural areas

The legal support offered for SGBV includes:

- six law clinics operated in six localities by the Association des Femmes Juristes de Cote d'Ivoire (AFJCI).¹⁸⁴ Half of the clinics' clients are women. Legal information for sexual violence cases is also offered. The AFJCI also supplies attorneys for victims of sexual violence so they can join the proceedings as civil parties.
- the counseling center of the Organisation des femmes actives de Cote d'Ivoire and the SGBV observation sections set up in 42 localities by the association. In spite of its services, this organization has never been contacted by the CSEI.

The Security of Justice System Officials Working to Combat Impunity

Attacks and threats have been made against judicial personnel in numerous PEV cases.¹⁸⁵ Currently, the CSEI's security measures leave much to be desired,¹⁸⁶ and its location in a residential suburb makes its security even more difficult to guarantee. CSEI members regularly ask for stricter security measures in vain.¹⁸⁷ Consequently, judges rarely apply to work at the CSEI. Security is also an issue for attorneys and judges of the Assize Court.

¹⁸³ Interviews with Ivorian CSOs active in combatting SGBV, June 27 and 30, 2014.

¹⁸⁴ Six locales: Bouaké, Sans Pedro, Korhogo, Bonduku, Man, and Guiglo. This project (the PALAJ project) is cofinanced by the European Union Support Program in collaboration with UNDP, UNOCI, and UNICEF. See www.palaj-afjci.org. In 2015, France's Debt Reduction and Development Contract (C2D) is to assume the financing of five law clinics and three related information centers. The operation of the sixth clinic (San Pedro) is to be financed by UNICEF.

¹⁸⁵ Interview with a representative of the Ministry of Justice, December 16, 2014. In August 2012, a member of the Public Prosecutor's Office assigned to the CSEI was attacked in his home by heavily armed men. See also HRW, "Turning Rhetoric into Reality: Accountability for Serious International Crimes in Cote d'Ivoire," April 2013, 62.

¹⁸⁶ Only one or two security guards are posted outside CSEI buildings, and there is no metal detector protecting the entryway.

¹⁸⁷ Interview with an investigating judge, June 25, 2014.

4. Specific Challenges to the Judicial Response to PEV Crimes

Lack of Political Will

National level

Although President Ouattara regularly promises to end impunity and prosecute those responsible for human rights abuses committed during the PEV,¹⁸⁸ those promises remain largely unfulfilled. The reality is that, to date, the judicial response has shown a lack of political will to prosecute all perpetrators of serious crimes committed by all political camps.

One of the most telling signs of lack of political will is the struggle to maintain the CSEI. In 2014 the CSE was almost closed with no effort to advance the positive results of two years of work, before it was saved at the last minute by the CSEI's creation. Nevertheless, the two enforcement orders of the new CSEI took a long time to be adopted.

Since then, the CSEI has continued to face financial uncertainty. It operated throughout 2014 with a budget shortfall. Most CSE staff were trained in complex procedures over a period of two years, yet new officials who replaced them have not received the same training. In that sense, CSEI essentially started from scratch, despite what the CSE and its staff had already accomplished.

In addition, not enough resources have been made available to the CSEI; its capacity has been restricted. Only one CSEI investigating judge is devoted exclusively to cases related to the PEV, whereas the two other judges also handle "ordinary" cases. This arrangement is inadequate given the large investigative workload.

There also appears to be a reluctance to prosecute all perpetrators: only cases targeting members of the so-called pro-Gbagbo clans and forces have reached an advanced phase. Similarly, as discussed, waves of conditional releases, or political releases, requested by the Ministry of Justice demonstrate a partisan intent to control the administration of justice.

Approximately four years after the PEV, only one trial on the merits as part of the Simone Gbagbo case has been carried out in the Assize Court. During this trial, perpetrators were tried only for crimes and major offenses considered to be attacks on state security,¹⁸⁹ such as

¹⁸⁸ No word was said about a judicial response for combatting impunity, with the notable exception of Ouattara's televised address on August 6, 2014, in which he mentioned the need for aid for victims and reparations.

¹⁸⁹ This case includes not only charges derived from Chapter II of the Criminal Code (Crimes and misdemeanors against State Security, National Defense, and Public Security), but also Chapter III (Disturbing the peace and public tranquility), Chapter V (Offenses against the duties of their office committed by government officials), Chapter VI (Attacks on public authority and the functioning of public services), and Chapter VII (Attacks on guarantees by the State).

an attack on national defense, an attack or conspiracy against the authority of the state, or the formation of armed gangs.¹⁹⁰

Four years after the violence that led to more than 3,000 deaths, the first PEV trial did not address any serious crimes or crimes committed against persons. Concurrently, the Military Tribunal has processed only five cases, with particularly minimal results considering the magnitude of the crisis. From that, we can infer that the approval of prosecutions by the Ministry of Defense and the Ministry of the Interior constitutes a real hindrance.

International community level

The international community and the United Nations's involvement in the judicial response to serious crimes committed during the PEV has been questionable. Because the role of support for the rule of law has been withdrawn from the initial mandate of the UNOCI,¹⁹¹ the Rule of Law division of the UN peacekeeping operation was shut down in December 2014.

That situation is all the more surprising considering that at the time of the resolution amending the UNOCI's mandate, no trial for serious PEV crimes had yet begun in the ordinary courts. One of the reasons for the closure of the UNOCI Rule of Law division was that France was going to supply €23 million (15 billion CFA Francs) over three years (2014-2017) to help strengthen the judicial and penitentiary system.¹⁹² However, France's funds reserved for the "Justice and Rule of Law" sector exclude questions of transitional justice,¹⁹³ which seems to exclude the CSEI's handling of PEV crimes.

Prosecution Strategy Targeting Just One Category of Perpetrators

In the judicial handling of serious crimes, a prosecution strategy involves establishing priorities among acts to be prosecuted by the Public Prosecutor's Office.¹⁹⁴ Setting up a prosecution strategy is crucial when dealing with "systematic, massive, crimes," because it is impossible for the Public Prosecutor's Office to prosecute all cases simultaneously due to the large number of perpetrators, crimes, and victims.¹⁹⁵ Prioritization can be based on various criteria, such as the most representative cases of violence, the most serious violations, the persons most responsible, etc.¹⁹⁶

A strategy can be informal, based for instance on an internal document guiding the decisions of the Public Prosecutor's Office. All members of the Public Prosecutor's Office must be informed of the established priorities and apply them when routing cases for investigation.

If the strategy is formal it is backed by the Ministry of Justice and made public. It then offers the advantage of informing the public of the priorities set by the Public Prosecutor's Office for extraordinary crimes.¹⁹⁷

190 The charges also include: leading or participating in an armed gang, participating in an insurrectional movement, disturbing public order, collusion of government officials, rebellion, impersonating a government official, tribalism and xenophobia. "Acts provided for and punished by articles 151, 154, 155, 158, 159, 161, 164, 166, 167, 169, 224, 258, 305, new 199 and 200 of the Criminal Code," Indictment Decision, July 10, 2013, at 17.

191 UN Security Council, Resolution 2162, June 25, 2014.

192 Interview with UNOCI member, July 24, 2014.

193 The C2D Justice Project is intended to strengthen the judicial and penitentiary systems and protect human rights in Cote d'Ivoire.

194 Report of UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Pablo de Greiff, August 27, 2014 [hereinafter, "SR Report"], para. 26 (in which the Special Rapporteur distinguishes between prioritization strategies, which establish a strategic order for the investigation and prosecution of abuses, and those based on the selection of cases based on various thresholds designed to identify whether a particular case falls within a specified range for investigation or prosecution), paras. 35 and 44, www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx; and UNOHCHR, Rule-of-Law Tools for Post-Conflict States, Prosecution Initiatives [hereinafter, "OHCHR—Prosecution Initiatives"], 5–6, on the need to develop a clear strategy, www.ohchr.org/documents/publications/ruleoflawprosecutionsfr.pdf

195 OHCHR—Prosecution Initiatives, 5, 12–13.

196 SR Report, paras. 44–74.

197 OHCHR—Prosecution Initiatives, 11–12.

The Public Prosecutor's Office must then be able to explain to the public the logic behind its choice of priorities and justify the first cases that will reach the hearing phase as a result. On that basis, the Public Prosecutor's Office must establish criteria for prioritizing PEV prosecutions.

However, no such CSEI strategy has been approved or published by the Ministry of Justice. Instead, the Public Prosecutor reports that he is working in phases—using a so-called sequential approach—and proceeding in the following order:¹⁹⁸

1. persons in detention
2. three high-level officials who were placed under house arrest at the Hôtella Pergola (today almost all those individuals have been released)
3. pro-Gbagbo partisans accused of attacks against the FRCI after the crisis had ended
4. persons involved in acts brought before the CSE or the CSEI by victims or through investigative missions of CSEI JPOs
5. alleged perpetrators who have not been imprisoned
6. any other alleged perpetrator not listed in the categories above

The national authorities justify the sequential approach by arguing that their first concern is not to leave detainees incarcerated indefinitely. They also feel that the approach makes it possible to temporarily delay the judicial response while waiting on the enactment of legislation designed to protect victims and witnesses.¹⁹⁹ However, that approach would confirm that the CSEI is prioritizing cases involving pro-Gbagbo suspects. Indeed, the first three categories seem to primarily involve partisans of the former president. In their defense, the authorities explain that “since the statute of limitations for most crimes is not close to running out, it is premature to judge the choices of the Public Prosecutor's Office.”²⁰⁰

It should be emphasized that there is no official document that confirms the list or the approach. Further, new CSEI deputies do not seem to know what criteria the Public Prosecutor's Office is using to decide whether to advance a case from the preliminary inquiry phase to investigation phase.²⁰¹ The fact that the Public Prosecutor's Office has sent all PEV cases to investigation with no prior classification points to the absence of a real strategy.

It is likely that the CSEI possesses a large amount of information incriminating forces loyal to the current power structure.²⁰² In spite of that, only cases involving pro-Gbagbo affiliates are at an advanced stage of proceeding.²⁰³ Therefore, at minimum it can be deduced that this criterion of priority forms part of the “strategy” of the Public Prosecutor's Office.

In sum, the lack of strategy creates confusion and makes it difficult to know and evaluate the priorities that the Public Prosecutor says he has followed.

198 Interviews with the Public Prosecutor, June 24, 2014, and July 2014.

199 Interview with the Public Prosecutor of Abidjan, June 24, 2014; and interview with a representative of the Ministry of Justice, July 1, 2014.

200 Interview with a representative of the Ministry of Justice, July 1, 2014: “Proceedings take time, it has only been three years . . .”; “We cannot do everything at the same time.”

201 Interview with members of the CSEI Public Prosecutor's Office, August 27, 2014.

202 This includes from transcripts in the CNE case, for example the Amadé Ourémi and Sanogo Mohamed cases.

203 Telephone interview with a member of an international NGO, August 13, 2014, who feels the Ivorian justice system is currently incapable of being impartial. Actions could be filed in the Court of Justice of the Economic Community of West African States and the ICC in the near future. For example, local and international NGOs are analyzing the possibility of bringing judicial proceedings for victims of abuses allegedly committed by forces loyal to the current president in the western part of the country.

Failure to Map Abuses

In order to define a prosecution strategy and discern investigative priorities, one must be able to distinguish *modus operandi* and identify patterns based on alleged facts by showing the nature of the crimes committed, their dates, the places where they were committed, and the identity of victims and any guilty parties.²⁰⁴ To that end, mapping abuses is essential and has long been recommended by various observers.²⁰⁵ Trainings conducted at the CSE and later the CSEI has made it possible to start mapping abuses and victims beyond those already done by the CNE.²⁰⁶ However, an obvious lack of consistency characterizes all cases under investigation.

As mentioned, very often they are not cross-referenced, either by perpetrator, geographic location, or type of victim.²⁰⁷ CSEI members acknowledge they do not rely on any cross-referencing methods to help avoid redundancies.²⁰⁸ Cases under investigation must be mapped as soon as possible to help investigating judges organize their cases. Only then can they handle the large number of serious PEV crimes.

Time Investigating Judges Spend on Misdemeanors and Less Serious Offenses

The CSEI's mandate covers a broad range of serious crimes, major offenses, and related offenses committed during the PEV.²⁰⁹ The breadth of that workload is currently encumbering investigations, especially in the absence of a prosecution strategy that prioritizes violations of international criminal law before addressing ordinary serious crimes and major offenses committed during the PEV.

Because no order of priority has been adopted, the CSEI's limited resources are being used up on inquiries, investigations, and pleadings for offenses that are much less serious than international crimes. Thus, since the summer of 2014 the judicial response to the PEV has primarily given rise to hearings concerning misdemeanors committed during that period. This limited judicial response does not accurately reflect the PEV's scale.

Involvement of the ICC

The current criminal cases underway at the ICC seem to reflect a sequential approach that prioritizes prosecutions favorable to the winners' clan. Indeed, the ICC is only prosecuting the former chief of state, his wife, and his right-hand man, and no case has been opened against a member of the pro-Ouattara camp.²¹⁰

Strategic considerations may be driving the ICC. Indeed, if the ICC was to actively prosecute cases against the Ouattara camp, it would jeopardize the government's goodwill towards the court.²¹¹ To date, the ICC has been able to rely on the Ivorian government's cooperation to conduct the investigations. Prosecuting cases involving members of the current government would jeopardize that cooperation.

Need to Train Members of the Judiciary

The new CSEI members—judges, JPOs, and court clerks who succeeded their colleagues at

204 For example, mapping can help judicial institutions see relationships between various types of offenses and a particular region, group in conflict or alleged perpetrator, or analyze the presence of certain groups of alleged perpetrators based on the chronology of the conflict.

205 HRW, UNOCI, ICTJ.

206 Notably those offered by USAID in 2013 and ICTJ in 2014.

207 Interview with CSEI investigating judges, June 25 and 26, 2014.

208 *Ibid.*

209 Presidential Decree 2013, Art. 2.

210 See Annex 6.

211 The ICC does not have coercive force; therefore, it depends on the goodwill of states to implement its mandate.

the CSE—regularly request training so they can understand the complex and technical issues posed by PEV cases,²¹² skills which no judge or JPO had the occasion or need to acquire previously. Although, they have received some essential training from international actors in investigating and prosecuting complex crimes, more is required.²¹³

Training is also needed for judges of the Assize Court, most of whom have never sat on “felony matters” and are familiar with neither Ivorian criminal law nor applicable international law. Similarly, the Public Prosecutor’s Office of the Abidjan Court of Appeal, which will be assigned to plead the CSEI’s cases before the Assize Court, lacks any experience in cases of this magnitude.

The following training needs have been identified:

- Public Prosecutor’s Office of the CSEI: mapping of crimes; prosecution strategy derived from that mapping; familiarization with the CSEI database; and training in the procedures that need to be implemented for vulnerable victims.
- CSEI Investigating Judges: mapping of crimes; development of an investigative strategy to better investigate complex cases; drafting of investigative plans based on an investigative strategy; familiarization with the CSEI database; training in procedures to be instituted for vulnerable victims; training in international law, including constitutive elements of international crimes, modes of liability, and the evidence that proves those elements, specifically the connections between crimes and indirect perpetrators; and training in the criminal psychology of perpetrators.
- CSEI Court Clerks: digitalized classification of cases; and familiarization with the CSEI database.
- CSEI JPOs: identification and organization of evidence that proves connections between crimes and indirect perpetrators; investigative plans supplementing initial investigations; familiarization with the CSEI database; and analysis of the risks incurred by vulnerable witnesses and implementation of investigative measures to protect those witnesses.
- Judges working with or at the Assize Courts: training in judicial procedures specific to the Assize Court and the holding of hearings; training in international law, specifically the constitutive elements of international crimes, modes of liability, and the type of evidence to prove these elements; training in drafting decisions; and training in procedures to be implemented for vulnerable witnesses.

Several projects resulting from international cooperation are currently underway to improve the capacity of the Ivorian judicial system.²¹⁴ These projects could improve the Ivorian justice

212 Interviews with all CSEI members questioned. Interview with the Prosecutor General at the Abidjan Court of Appeal, June 24, 2014.

213 Interviewed CSEI members who received this training unanimously felt they gained additional skills from it and a better approach to investigations and their work. Interviews with four JPOs, June 26, 2014; and two investigating judges, June 25 and 26, 2014. Training given to CSE members and later the CSEI includes technical support provided by USAID in 2012 and 2013. The training primarily consisted of techniques for legal analysis, investigations, and hearings. There was also training in victim and witness protection as well as document, database development and management, and the organization of the clerk’s office. In 2012, ICTJ also participated in attempts to develop a prosecution strategy and training on elements that constitute crimes in national and international criminal law and related modes of liability. In 2013, the ICRC gave operations training in specific exhumation techniques. Until September 2014, the UNOCI also provided support by regularly lending staff from its Rule of Law and Human Rights section. In addition, after the new CSEI team formed in August 2014, ICTJ trained its members in mapping, criminal law (modes of liability, elements of crimes), and investigative plans and strategies, among other areas.

214 In September 2014, ICTJ organized a series of workshops with new CSEI members to analyze these needs. It has provided training on criminal psychology and the procedures that should be implemented for vulnerable witnesses. ICTJ notes that another international actor needed to offer training in collecting evidence, including for SGBV, and on procedures for vulnerable witnesses once the witness protection law was enacted. Two other joint projects are in progress: 1) The ProJustice Program, a cooperative agreement signed by the Ivorian and US governments, financed by the US Agency for International Development (USAID) and implemented by Tetra Tech DPK. ProJustice is a five-year program for reform of judicial administration, transparency, accountability, and access to justice, to support improvement to judicial case management systems and to improve citizen access to the Ministry of Justice’s Public Defense fund. The program is being conducted in cooperation with the Ministry of Justice, the National Judicial Training Institute, targeted courts, and civil society organizations to strengthen training for judiciary police, magistrates, and court staff and implement measures to increase transparency and accountability in the courts.

system's ability to investigate and prosecute international crimes related to the PEV provided they meet the training needs of CSEI members and the Assize Court.²¹⁵

Inadequate Funds Raised for the CSEI

In 2014, the CSEI's budgetary problems resulted in unpaid fees for judges and government officials, lapsed vehicle maintenance, unpurchased computer hardware and office automation equipment, and a lack of support for investigations.²¹⁶ These problems could have been mitigated through the state's budgeting process. The Administrative and Financial Director of the Ministry of Justice²¹⁷ reportedly had the opportunity to defend the CSEI's interests in a budget conference to obtain additional funds requested by the CSEI against the state's other line items.²¹⁸ Similarly, the state's general operating budget could have contributed to an increase in 2014. Further, the CSEI is authorized to receive outside contributions through the Ministry of Justice.²¹⁹

See USAID West Africa, Cote d'Ivoire, Program to Improve the Delivery of Justice Services in Cote d'Ivoire, www.tetrachdpc.com/images/stories/cdi_two_pager_05_2013_eng.pdf; 2) The C2D Justice program financed by the Agence Française de Développement (AFD) seeks to achieve the following goals: to promote a high-quality judicial system by helping to strengthen the sector's human resource capacities, including in the area of commercial justice; to help promote and protect human rights and contribute to the legal protection of children and young people; and to improve everyone's access to legal services by constructing and equipping courts, Courts of Appeal and jails and correctional facilities.

215 In January 2015, the European Union program to support justice held a workshop to improve the organizational and procedural elements of Assize sessions.

216 Interview with the Administrative Secretariat dated July 1, 2014; and with the Public Prosecutor, June 24, 2014.

217 In 2014, the director was still acting as CSEI Coordinator.

218 In the amount of 500 billion CFA Francs. Interview with the CSEI Administrative Secretariat, July 1, 2014.

219 Interview with the Public Prosecutor at the CFI of Abidjan, June 24, 2014.

6. Conclusions

Since the humanitarian, political, and social upheaval that followed elections in 2010, Cote d'Ivoire has been working to rebuild. Initiatives were launched to promote reconciliation and social cohesion, bring about truth seeking, and advance accountability consistent with concepts of international justice. There was every reason to be hopeful. The country seemed willing to face its responsibilities and offer its citizens a comprehensive response to the crisis, starting by trying persons responsible for violence that caused more than 3,000 deaths.

However, more than four years after the horrible post-election crisis, Cote d'Ivoire still has not fully faced its obligation to combat impunity and provide a satisfactory response to victims. The people of Cote d'Ivoire are waiting and expect no less. The ICC has been told that Cote d'Ivoire is ready to assume its national responsibility to try perpetrators for serious crimes defined under the Rome Statute. There has been enough talk; now it is time for action.

This report sheds light on the fact that although dozens of cases have been opened and are at some level of investigation at the CSEI, the path of justice is nevertheless still long. No defendants have yet been examined by the Assize Court for international crimes committed in Cote d'Ivoire. Although the military courts have had some results they have barely scratched the surface of the problem. Moreover, in all these proceedings, there seems to be only one camp of belligerents actually being prosecuted, from the pro-Gbagbo side, leading us to fear that if there is justice one day it will likely be victor's justice.

Yet, people have been arrested, investigations are proceeding, and the abilities of judicial personnel have improved. Members of the judiciary and civil society are increasingly interested and motivated. Paradoxically, however, political will has declined, as evidenced by the massive waves of detainees who have been conditionally released back into communities as part of "political releases," putting witnesses and victims at risk.

After so much time, truth and justice cannot wait: evidence will disappear, witnesses will go silent, victims will be forgotten, and impunity will set in. The hope for a satisfactory judicial response, a hope persisting over five years, is strained. Broken promises have disappointed many actors and observers.

Holding a session of the Assize Court to try an initial CSEI case could be the beginning of changes to the status quo, so long as the rules for a fair trial are followed. We urge the government to act quickly to make that happen. Only a strong, unshakeable political will can renew trust and provide a proper response to the many victims of the post-election violence.

Recommendations

To the Government of Cote d'Ivoire

1. Assure the highest operating efficiency of the CSEI by allocating the funds, equipment, and human resources necessary for it to provide effective access to justice and by enlisting the cooperation of relevant state entities, specifically the Ministry of State in Charge of the Interior and Security, which has authority over JPOs in the Directorate of Territorial Surveillance.
2. Implement the CNE's recommendations for addressing impunity in Cote d'Ivoire by supporting the completion of investigations and proceedings already in progress.

To the Ministry of Justice

1. Ensure that decisions granting conditional release are not made based on political considerations, but accord with criteria that ensure that the right of an accused person to conditional release pending trial is respected and that decisions to grant release are made in accordance with Ivorian law and meet the limited circumstances under which such releases are permitted, including guarantees that the accused will appear for trial and not pose a danger to or interfere with any victim, witness, or other person.
2. Ensure better oversight of the JPOs by the Public Prosecutor's Office to guarantee that they conduct investigations in compliance with the Code of Criminal Procedure.
3. Design and maintain a policy and a national CSEI outreach campaign to inform the general public of the CSEI's existence and mission. That program should extend outside Abidjan and publicize CSEI proceedings and make its decisions available and easily accessible to the public. It should also educate victims on the importance of their testimony and inform them of measures recently taken by the CSEI to facilitate victim engagement.
4. Grant the CSEI access to the addenda to the CNE's report.
5. Select and appoint additional investigating judges with solid experience in the criminal justice field to investigate CSEI cases.
6. Adopt measures that protect CSEI judges from judicial rotation, at least until 2018, in order to assure the CSEI operates with the greatest possible consistency in its prosecution of international crimes.
7. Assure various types of experts, whether domestic or foreign, are available at the CSEI to assist with investigations, including those familiar with presenting persuasive evidence of military command structures and effective SGBV investigations. A limited pool of volunteer experts, and an endowed fund to pay those experts, should be created.
8. As quickly as possible initiate training programs for judges sitting in assize sessions and for the Public Prosecutor's Offices of the Courts of Appeals. The program should cover international criminal law and the specific judicial proceedings appropriate to such prosecutions.

To the National Assembly

1. Adopt laws that reinforce the separation of powers and the independence of the judiciary, paying particular attention to the organic law for the High Council of the Judiciary.
2. Verify whether the pending legislation to amend the Criminal Code and the Code of Criminal Procedure are consistent with the Rome Statute; if so, ensure their passage.

3. Prioritize the promulgation of victim and witness protection legislation; victim identification and reparation measures; and protection of judges, defense attorneys, and members of juries working on sensitive cases, with the funding necessary for their effective and efficient implementation.

To the Public Prosecutor's Office in charge of the CSEI

1. Adopt a clear and objective prosecution strategy that encompasses all protagonists in the conflict and shows a willingness to prosecute all perpetrators of the PEV.
2. Continue the mapping process of incidents that occurred during the PEV to provide up-to-date information to investigating judges necessary for prioritizing cases and making cross-references essential to investigations.
3. Ensure that prosecutors who are members of the CSEI work exclusively on cases connected with the PEV.
4. Employ JPOs and investigating judges who are sufficiently trained to handle cases of SGBV, including conducting discrete investigations and adopting appropriate strategies to interview victims and continuously ensure there is sufficiently trained staff at the CSEI. Assess whether victims are more comfortable interacting with female staff and if so ensure that such staff is available and well trained.
5. Update the CSEI database to reflect all evidence (for the prosecution and for the defense) gathered by the CSE and the CSEI to date.
6. In collaboration with the Health Ministry, seek free access to a medical certificate for victims of SGBV from the medical association.

To CSEI Investigating Judges

1. Adopt an investigation strategy that maps the conduct of all parties to the conflict and develops cases according to that mapping and defensible criteria of prioritization, including that based on sufficient gravity.
2. Develop effective case management procedures allowing for the proper cross referencing of information.
3. Observe the 2013 presidential decree, which provides that investigating judges of the CSEI devote themselves exclusively to cases arising during the PEV.
4. Observe legal time limits on preventive detention and state the grounds for decisions to place and keep persons in preventive detention as well as to release them conditionally.

To Donors, Ivorian Civil Society, and International NGOs

1. Support and strengthen the capabilities of Ivorian attorneys, JPOs, and judges in the handling of cases involving SGBV.
2. Continue to strengthen the capabilities of CSEI members, particularly regarding investigations of international crimes and methods for proving those crimes.
3. Organize trainings in the law and procedures specific to international crimes for judicial staff of the Assize Courts, the Public Prosecutor's Office of the Appellate Courts, and defense attorneys.

Annex 1

CSEI Implementing Orders and Decrees

Impact of Decrees on CSEI Operations	Responsible Ministry	Provision of Relevant Decree or Order	Date et nom du décret
Appointment of an administrative secretariat	Minister of Justice	Article 10	Decree n°226 of June 2, 2014, relating to the appointment of CSEI members
Nomination of CSEI members	Minister of Justice	Article 11	Decree n°226 of June 2, 2014, relating to the appointment of CSEI members
Performance incentives and reimbursements for mission costs for CSEI staff	Minister of Justice, Minister in Charge of the Budget, and the Minister of Economy, Finance and Budget	Article 14	Order N°579 of December 12, 2014
Appointment of CSEI manager in charge of finance	Minister of Economy, Finance and Budget	Article 17	Order N°202 of September 12, 2014

Annex 2

Breakdown of Perpetrators by Investigative Sections

8th Investigative Section	
Number of Accused: 458	
Military Personnel	Civilians
92	366

9th Investigative Section	
Number of Accused: 142	
Military Personnel	Civilians
59	83

10th Investigative Section	
Number of Accused: 434	
Military Personnel	Civilians
75	359

Annex 3

Status of CSEI Proceedings

	Number of Cases	Number of Accused	Number of Detainees
Year 2011	8	308	128
Year 2012	18	524	277
Year 2013	27	137	74
Year 2014	7	65	34
Juvenile Court	1	4	4
Total	61	1038	517

Breakdown of the 61 Cases Handled by the Investigative Section Since Their Establishment within CSE

8th Investigative Section		
	Cases	Accused
Total	21	458

9th Investigative Section		
	Cases	Accused
Total	21	142

10th Investigative Section		
	Cases	Accused
Total	18	434

Figures are drawn from data provided by CSEI with consent from the Public Prosecutor, as of April 2014.

Annex 4

Breakdown of Conditional Releases by Investigative Section

8th Investigative Section				
	Legal files	Accused	Detainees	Conditional Releases
Total	21	458	210	79

9th Investigative Section				
	Legal files	Accused	Detainees	Conditional Releases
Total	21	142	98	12

10th Investigative Section				
	Legal files	Accused	Detainees	Conditional Releases
Total	18	434	291	121

Note: Figures were communicated to ICTJ by CSEI as of April 2014.

Annex 5

Proceedings Before Military Courts, as of July 2014

Case	Facts	Status of Proceedings	Information Provided By
<i>State v. Dogbo Blé et al.</i>	General Brunot Dogbo Blé is a former chief of the Republican Guard. He is charged in connection with the murder of Colonel-Major Dosso for incidents constituting genocide and other violations of physical integrity. (See below, Dogbo Blé has already been tried for kidnapping, illegal detention, and the Dosso's murder).	The General is accused, along with 113 suspects from the military and police. Pursuant to an order of severance, this case was divided into two, one for policemen (Niaoule et al.) and another for high-ranking military officers (Dogbo Blé et al.). When the information for this report was being collected both cases were still under investigation.	Interviews with members of the Military Court in Abidjan on June 30, 2014
<i>State v. Kamana Brice et al.</i>	This case concerns the bombardment of Abobo on March 17, 2011. Commander Kamana Brice is accused of having allowed the attack.	When this information was collected, the case was still being investigated. The public prosecutor's indictment was ready, but the psychiatric report was not included in the file yet.	Interviews with members of the Military Court of Abidjan on June 30, 2014
<i>State v. Tiama Yale</i>	This case concerns the murder of President Ouattara's uncle, Cissé Amara, on 21 March 2011	When this information was collected, the case was definitely closed by the Public Prosecutor's department.	
<i>State v. former members of the Republican Guard</i>	This case involves 42 individuals who were members of the former republican guard.	The investigation in this case was hampered by the dispersal of the accused to different locations around the country and the unavailability of defense counsel.	Interview with a military investigating judge on June 26, 2014
<i>State v. Dogbo Blé</i>	Case relating to the murder of Colonel-Major Dosso (see above)	This case was investigated by the Military Court, then referred to the CSE. The Military Court wanted to see the case referred to it because all of the defendants were military personnel. Nevertheless, the civil investigating judge conducted the investigation before issuing	See, in particular, "Confirmation of the sentence against the former chief of the RG," <i>Le Nouveau Courrier</i> , June 27, 2014

		a referral to the Military Court, which rendered its verdict on October 11, 2012. Dogbo Blé was found guilty of kidnapping, illegal detention, and murder of Colonel-Major Dosso and was sentenced to 15 years' imprisonment. An appeal was taken to the Supreme Court, claiming that the jurisdiction should have remained with the military court to investigate the case in compliance with public order provisions. The court upheld the conviction on June 26, 2014.	
<i>State v. Commissioner Claude Yoro et al.</i>	Ten members of the Defense and Security Forces (FDS) were prosecuted, along with others, for "failing to obey" an order by refusing to place themselves under the authority of the democratically elected president (Art 497 Penal Code). The incidents referred to in this case were also the subject of prosecution in the cases against Dogbo Blé et al. and Niaoulé et al.	On February 3, 2014, the Military Court of Abidjan ruled on the case of the 10 defendants. The court was immediately confronted with evidentiary issues that arose during the investigation. The defendants were ultimately acquitted of the only charge against them. The court found insufficient proof to convict the defendants of the charges.	Interview with a member of the Military Prosecutor's Office on June 30, 2014
<i>State v. Zadi Gohourou</i>	In this case, a policeman was accused of intentionally injuring a lieutenant and causing the death of two civilians on February 24, 2011	The charges were reclassified as attempted murder; a conviction was rendered against the defendant on April 24, 2014, for manslaughter and a sentence of 3 years was issued. The decision had not yet been written at the time this report was drafted.	Interview with the registrar's office of the Military Court on June 30, 2014
<i>State v. Seahet et al.</i>	The allegations against the accused, including the date of the offense, are not detailed in the final judgment. However, the Military Court linked this case to the 2010-2011 post-election violence.	On December 12, 2013, four military members were subjected to a prison sentence ranging from 12 months to 15 years for "illegal arrests and detention, failure to obey, murder, rape and concealment of a corpse."	Interview with a military investigating judge on June 30, 2014

Annex 6

Proceedings by the International Criminal Court

Case	Summary of proceedings	Key decisions
<i>Prosecutor v. Laurent Gbagbo</i>	<p>After the ICC opened its investigation of the situation in Cote d'Ivoire in October 2011, the court issued an arrest warrant for former President Laurent Gbagbo on November 23, 2011, and made it public on November 30, as he was handed over to the ICC by the Ivorian authorities. Under this warrant, the court believed it had reasonable grounds for charging that Gbagbo as an "indirect co-perpetrator" of crimes against humanity against civilians in Cote d'Ivoire.</p> <p>The decision for confirmation of charges was made public on June 12, 2014, concluding that Gbagbo "allegedly engaged his personal criminal responsibility on four counts of crimes against humanity perpetrated in Abidjan, Côte d'Ivoire, jointly with members of his immediate entourage and through pro-Gbagbo (...) forces or on a subsidiary basis, by instructing, soliciting or encouraging the commission of those crimes (.) : murder, rape, other inhumane acts or – on subsidiary basis – attempted murder and persecution." Gbagbo is currently being held at Scheveningen Prison, in The Netherlands, and his trial began on January 28, 2016.</p> <p>On February 15, 2013, Gbagbo contested the admissibility of the case before the ICC, highlighting that he was already prosecuted for economic crimes in Cote d'Ivoire. To support his statement, Gbagbo presented two press articles. On June 11, 2013, the court concluded that although it was proven that prosecutions for economic crimes were engaged and preliminary measures were taken before Gbagbo was handed over to the ICC, no judicial action was taken against the suspect thereafter. It is not, therefore, possible to conclude that Gbagbo "is undergoing prosecution" in Cote d'Ivoire under Article 17(1)(a) of the Rome Statute.</p>	<p>Prosecutor v. Laurent Gbagbo, Arrest Warrant: "ICC-02/11-01/11, November 23, 2011, www.icc-cpi.int/iccdocs/doc/doc1276752.pdf</p> <p>Decision confirming the charges against Laurent Gbagbo: ICC-02/11-01/11, June 12, 2014, www.icc-cpi.int/iccdocs/doc/doc1805404.pdf.</p> <p>Decision on the Defense challenge to the admissibility of the case: ICC-02/11-01/11-436-Red, June 11, 2013, www.icc-cpi.int/iccdocs/doc/doc1698338.pdf</p>
<i>Prosecutor v. Charles Blé Goudé</i>	<p>The founder of the ultra-nationalist political movement Alliance des jeunes patriotes pour le sursaut national, which unconditionally supported Gbagbo's policy from 2001, was arrested in Ghana in January 2013 and detained in Cote</p>	<p>Prosecutor v. Charles Blé Goudé, Arrest Warrant, ICC-02/11-02/11-1, December 21, 2011, www.icc-cpi.int/iccdocs/doc/doc1292069.pdf</p>

	<p>d'Ivoire before being transferred to the ICC on March 22, 2014. The court had issued an arrest warrant against him on December 21, 2011, which was made public on September 30, 2013.</p> <p>The hearing for the confirmation of charges was held from September 29 to October 2, 2014. On December 11, 2014, the Preliminary Chamber I confirmed four counts of crimes against humanity comprising murder, rape, persecutions, other inhumane acts and, on a subsidiary basis, attempted murder perpetrated in Abidjan roughly between December 16, 2010, and April 12, 2011. The chamber referred the case to a first trial chamber.</p> <p>On September 27, 2014, Blé Goudé contested the admissibility of the case on the grounds that the charges did not meet the gravity threshold under article 17(1)(d) and thus that the prosecutor should have declined the exercise of jurisdiction. On November 12, 2014, the Preliminary Chamber rejected this challenge. It found that the factual allegations against Blé Goudé together are enough to meet the gravity criteria set by the Rome Statute and justify the prosecutions carried out by the court.</p>	<p>Prosecutor v. Simone Gbagbo, Arrest Warrant, ICC-02/11-01/12-1, February 29, 2012, made public on December 22, 2012, www.icc-cpi.int/iccdocs/doc/doc1344440.pdf</p> <p>Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo": ICC-02/11-01/12-47-Red-tFRA, December 11, 2014, www.icc-cpi.int/iccdocs/doc/doc1882724.pdf</p>
<p><i>Prosecutor v. Simone Gbagbo</i></p>	<p>Simone Gbagbo was arrested with her husband, Laurent Gbagbo, in April 2011. The ICC issued an arrest warrant against her that was unsealed on November 22, 2012. She is being prosecuted as an indirect co-perpetrator for crimes against humanity on four counts: "a) murder, b) rapes and other sexual violence, c) persecution and d) other inhuman acts allegedly perpetrated in the context of post-electoral violence having occurred in the territory of Cote d'Ivoire between 16 December 2010 and 12 April 2011."</p> <p>On October 1, 2013, Cote d'Ivoire contested the admissibility of the case before the ICC on the grounds that she was already prosecuted at the national level. Pursuant to the principle of complementarity, it decided not to hand over Gbagbo to the ICC.</p> <p>On December 11, 2014, the ICC Preliminary Chamber I concluded that Cote d'Ivoire officials did not take tangible and concrete steps to determine whether Gbagbo was criminally responsible for the same conduct alleged in the case before the ICC.</p>	<p>Prosecutor v. Simone Gbagbo, Arrest Warrant, ICC-02/11-01/12-1, February 29, 2012, made public on December 22, 2012, www.icc-cpi.int/iccdocs/doc/doc1344440.pdf</p> <p>Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo": ICC-02/11-01/12-47-Red-tFRA, December 11, 2014, www.icc-cpi.int/iccdocs/doc/doc1882724.pdf</p>

	<p>Consequently, the Preliminary Chamber I rejected the challenge of inadmissibility. Based on that decision, the chamber reminded Cote d'Ivoire of its obligation to hand over Gbagbo to the ICC without delay.</p> <p>On December 17, 2014, and January 9, 2015, Cote d'Ivoire appealed the decision by the Preliminary Chamber I and requested its suspension. To date, the Appeals Chamber has rejected the application for suspensive effect and Gbagbo must be transferred or referred to The Hague.</p> <p>Gbagbo was tried with 78 co-defendants by the Abidjan Assize Court from December 26, 2014, to March 10, 2015. In the verdict of this trial, 18 of the 79 accused who appeared before the court were acquitted and discharged. The 61 other defendants were convicted and sentenced to various penalties. Gbagbo was convicted of three charges in relation to charges of crimes against the state security and sentenced on March 10, 2015, to 20 years in prison.</p>	
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