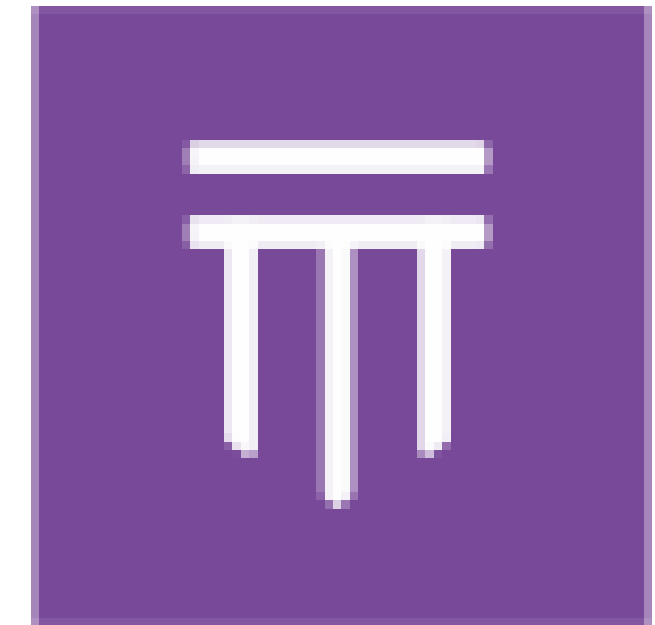


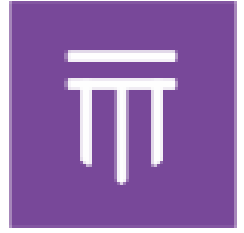
Brno, 29 September 2021

International criminal tribunals II.



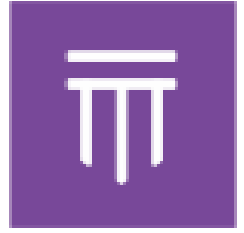
JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová



II. Generation: Ad hoc Tribunals

- Nuremberg legacy?
 - partly
 - Unique experience of post-war Germany
 - War tribunal, not judicial tribunal



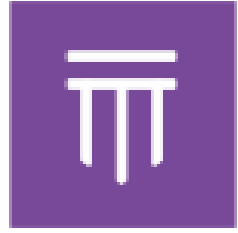
Eichmann case

A shift in legitimacy:

Traditionally, the territorial state, where crimes happened, is best suited to hold criminal prosecution

Why?

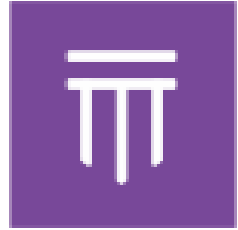
- Access to evidence, witnesses, security
- Problem: post-conflict environment
- Collaps of domestic judiciary? NO



ICTY

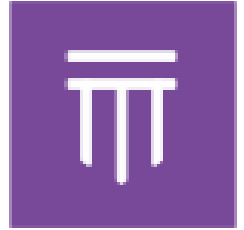
- Resolution UN SC 827
- Legitimacy: UN Charter, Head VII
- Aim: to prosecute persons bearing the core responsibilities for grave violations of international humanitarian law on the territory of former Yugoslavia FROM 1 January 1991
 - i.e. open mandate
- Reasonings
 - international community unsure how to tackle the Balkan conflict
 - created *during the conflict* -> The Hague
- Prosecution will lead to peace and stability





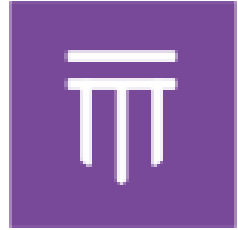
ICTY

- Will to repair the damage done by UN inactivity and weak reaction
 - 80s and 90s spirit, fear of intervention commitments
 - 1991 cease fire btw Croatia and Serbia – unsuccessful
 - UN informed about HL violations by at least 20 countries – SC poses embargo on arm trade
 - Economic sanctions
 - UNPROFOR in Bosnia nad Croatia
 - Resolution 764: obligation of countries to comply with requirements of international humanitarian law and Geneva conventions
 - Resolution 780: Committee of experts
- Preliminary report of 1993 demonstrates risk of ethnic cleansing and suggest in international tribunal (x domestic courts)
 - Bosnia and Croatia wants to use OSCE
 - Federal YUG against
- Resolution 827 - unanimous



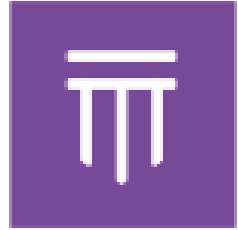
ICTY

- Material jurisdiction
 - Grave violations of Geneva conventions
 - Customs and rules of war
 - Genocide
 - Crimes against humanity (without relation to war)
- But what law??
- Primacy before domestic courts



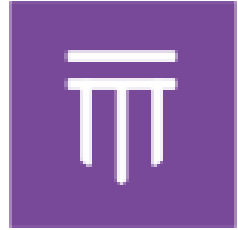
ICTY – criticism (the voice of the victims?)

- Legitimacy
 - UN Charter: presumes establishment by GA, not SC
 - Reply: *Tadić* case (1995)
- Fairness
 - Majority of accused: Serbs
- Seat: Hague
 - Language barrier
 - Lack of cooperation with states on capturing the accused
 - No police apparatus
 - Too lengthy trials
 - Majority of accused: Serbs
 - Overall low effectiveness
- 1999: jurisdiction broadened to cover also conflict in Kosovo
- Did it fail the role of deterrence?



Tadić case

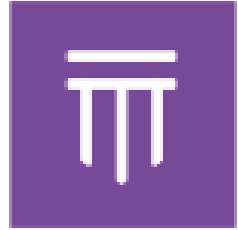
- - Duško Tadic – former politician, member of paramilitary forces supporting the attack on the district of Prijedor
- Convicted of CAH, grave breaches of Geneva Conventions, violations of customs of war
- 20 years of imprisonment
- Arrested by German police in Munich, 1994
- Appeal:
 - Is ICTY legitimate in its exercise of jurisdiction? (SoP argument)
 - Can ICTY evaluate its own jurisdiction?
 - the tribunal, in the international context, must assert its own jurisdiction within the bounds of the council that forms it
 - It does not have the power to determine the validity of its establishment by the Security Council



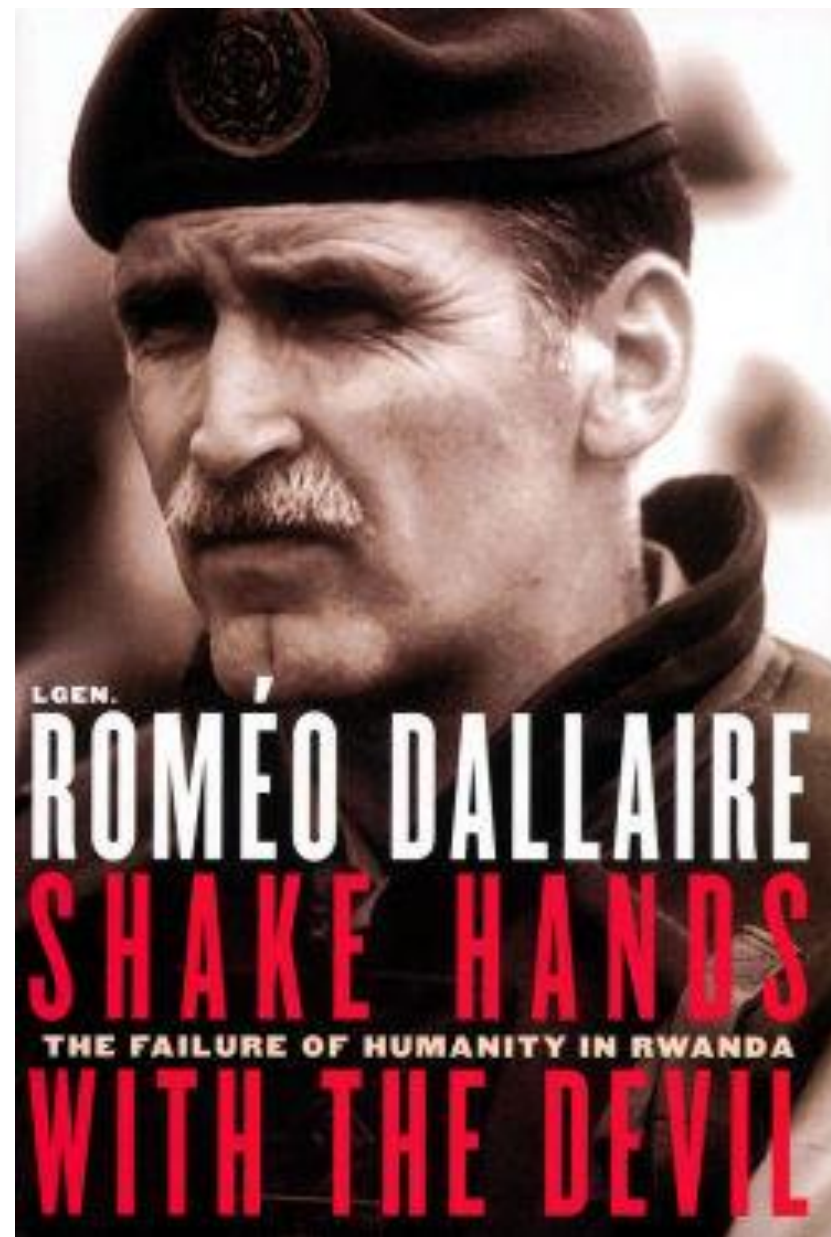
ICTY - criticism

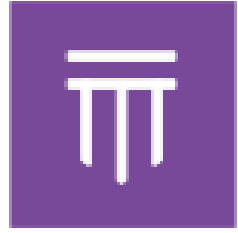
Positive perception of the role and potential of ICTY in respective countries (2001)

Serbia	8 %
Kosovo	83 %
Bosnia	51 % (but, the most trust-worthy among international institutions)
Montenegro	24 %
Croatia	21 %



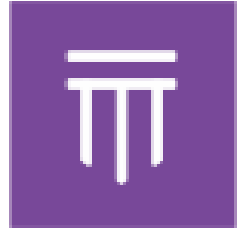
II. Generation: International criminal tribunal for Rwanda (ICTR)





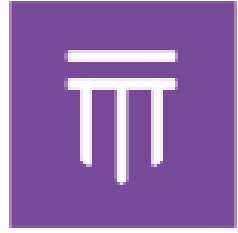
II. Generation: International criminal tribunal for Rwanda (ICTR)

- The first ad hoc international tribunal to adjudicate on **an internal conflict**
- Adopted by UN Resolution 955 (1994)
 - Rwanda is the only country against
 - Joined office of prosecutor
 - Arusha
 - Time jurisdiction: 1994
 - Aim to prosecute members of Rwanda freedom front



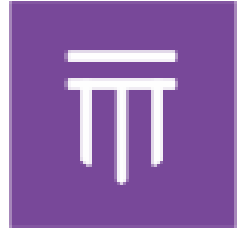
II. Generation: International criminal tribunal for Rwanda (ICTR)

- Background
- Problematic engagement of international community
 - X genocide
 - Hutu v Tutsi conflict
 - Fear of commitments v public pressure
- Expert committee investigation the genocide – confirms the planned genocide and recommends establishment of ICTR
- Position of Rwanda's government
 - turn after UN expert committee suggesting to extend the ICTY jurisdiction
- *Ubuntu?*
 - *Role of priests in the genocide*
 - *Low legitimacy of domestic courts*
 - *lack of capacity*



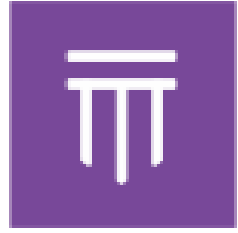
II. Generation: International criminal tribunal for Rwanda (ICTR)

- Rwanda's government issues
 - proposal to extend the ICTY jurisdiction
 - temporary jurisdiction: 1994
 - joint office of Prosecutor and Appeal Court
 - Seat in Arusha
 - death penalty
 - Carla del Ponte's role: members of RLF (radical Tutsies)

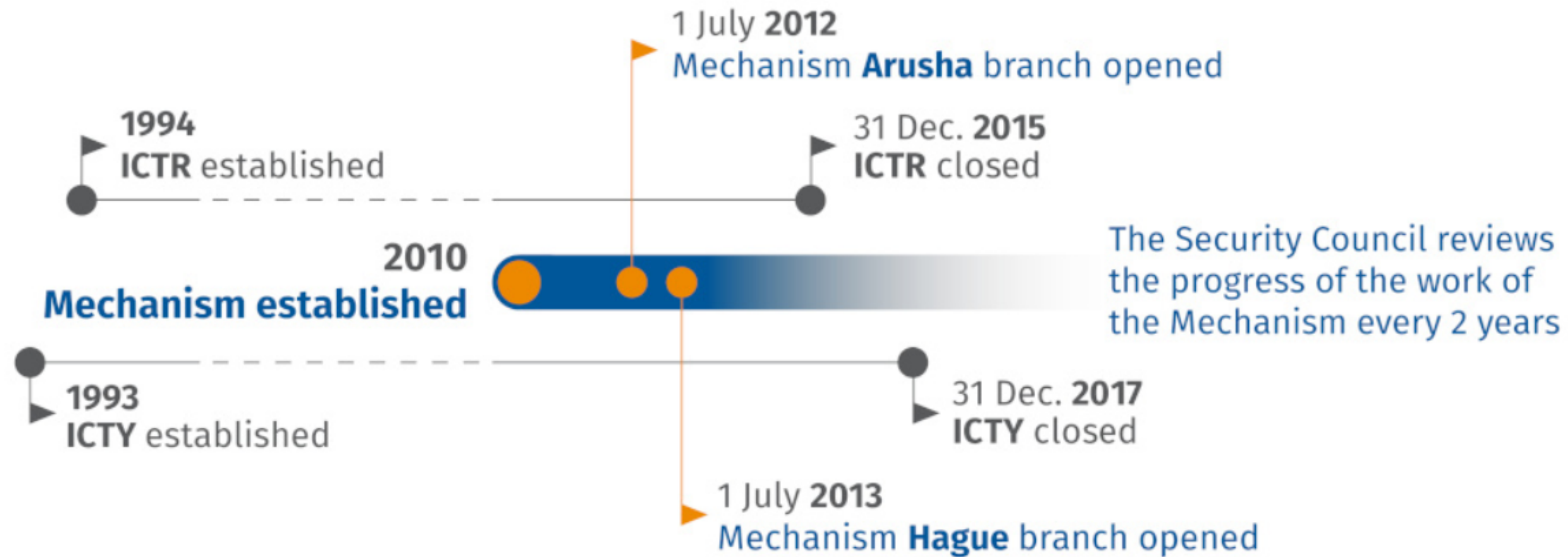


II. Generation evaluation

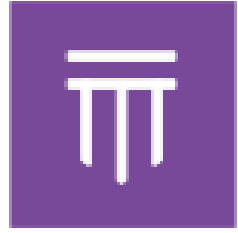
- ESTABLISHMENT: alternative options
 - International treaty
 - X ongoing Conflict / failed state
 - GA Resolution
 - SC Resolution
 - The widest set of competences (Chapter VII)
 - Primacy over domestic courts (and their obligation to delegate cases upon ICTR)
 - Possibility to issue binding ordinances for third countries
 - Prosecution of top political leaders irrespective of their immunity



International Residual Mechanism

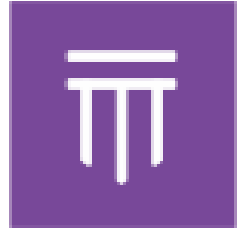


<https://www.irmct.org/en/about>



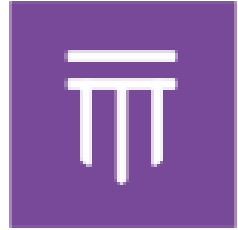
III. Generation: Negatives

- Cooperation between domestic and international elements far from smooth
 - Cambodia: 3 domestic and 2 international judges
 - decision-making by 4 votes majority – unrealistic
 - Independent budgets = little money
 - Established by international treaty
 - Weaker mandate
 - Weaker enforcement



III. Generation: Sierra Leone, East Timor, Cambodia

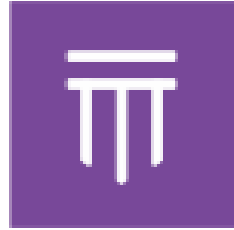
- HYBRID COURTS, mix courts, specialized courts, internalized courts
- Draw on negative experience of ICTY and ICTR
 - costs, mistakes in management, negative feedback of domestic governments and population
- Attempt to connect international institutions with domestic context
- *In situ* courts
- They integrate domestic judges and domestic law
 - not always possible: existing and functioning domestic judicial structure
 - Pragmatic step of UN unwilling to spend too much money?
- Easier access of witnesses, etc.
- Faster reconciliation



Extraordinary Chambers for Cambodia

- Parallel negotiations for ECCC and Special Court for Sierra Leone
- Material jurisdiction
 - prosecution of the leaders of Khmer Rouge regime
 - Violations of international law
 - Serious crimes perpetrated during the Cambodian genocide
 - Communist party GP Pol Pot
 - Agrarian socialist society
 - Emptied cities
 - Relocation to labor camps in countryside
 - Mass executions, forced labour, abuse, malnutrition, etc.
 - Killing fields (pickaxes)
- Deaths of 1.5 to 2 mil people from 1975 to 1979 (approx. ¼ of the population)
- Strong economic support of Chinese Communist Party
- End: invasion of Vietnamese military





Extraordinary Chambers for Cambodia

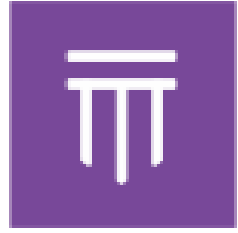


- Government asked the UN for assistance with prosecution in 1997
- Domestic volatile situation
- Negotiations abandoned in 2002
- Finances, composition, amnesties

- 2001, domestic Act on ECCC
 - GA UN issues resolution 57/228 asking to renew the negotiation while preserving the ECCC,
 - another resolution issued the very same day, addressing worries of politicised justice

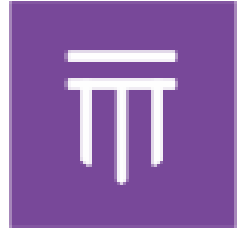
- Treaty between UN and Cambodia of 13 May 2003
 - Formally independent on both national government and UN

- Biggest point of controversy: crimes of genocide v autogenocide (x 1948 convention)
 - ICTR *Akayesu* case: genocide must target stable groups, membership in which is given by birth



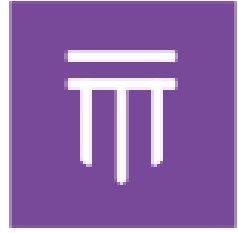
Special Court for Sierra Leone

- Posterchild of hybrid courts
 - Seated in Free Town
 - Mixed composition
 - Based on international treaty
- Biggest controversy: Lomé agreements of 1999 (signed under UN auspices)
- Material jurisdiction
 - Accountability of members of RUF
 - HR violations of SL people, detention of peacekeepers
 - AND crimes against implementation of peace process, crimes committed by peacekeepers UNAMSIL
 - Crimes against humanity, grave violations of A3 of Geneva conventions, other grave violations of humanitarian law
- Resolution 1315 of 14 August 2000
- Crimes on Sierra Leone territory committed from 30 November 1996



Special Court for Sierra Leone – sui generis court

- Both international and domestic law (two domestic criminal acts: particularly targeting cruelty against children – reflected in A5 of the Statute)
 - Rape of children
- Temporal jurisdiction: 3 years – extended (no final date)
- In situ, Process with Charles Taylor – Hague

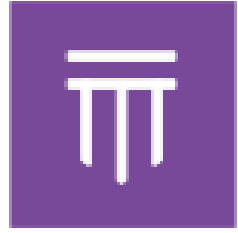


East Timor: Special chambers

- 1999 conflict (mass murders, persecutions)
- Civil war – legacy of decolonization process started in the first half of 1970s
- Indonesia – mass violations of HR (since 1976)
- 1990s: East Timor starts negotiations on independence and democratization
- Indonesia promises referendum – after 80% votes for independence – armed forces initiate HR repressions

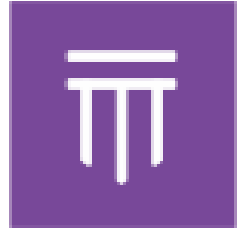
- Very wide jurisdiction
- Unlimited temporal jurisdiction
- Personal jurisdiction not limited to persons carrying grave accountability

- *Too much ,too messy*



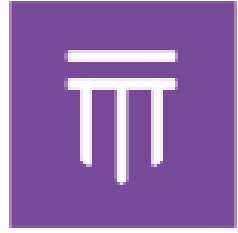
Limitations of 3rd Generation

- No mandate to address immunities of heads of states, or to require cooperation of third countries
- *x problematic extraditions*
 - *SCSL and Charles Taylor – years long negotiation with Nigeria and Ghana*
 - *Only thanks to the agreement of SC with conclusion of the international treaty (= Charter UN, as the treaty was concluded by SC, not GA)*
- *East Timor:*
 - *Only semi-hybrid*
 - *No legitimate government with sovereign authority*
 - *Indonesia does not cooperate*
 - *Weak legal culture*
 - *Budgetary issues*



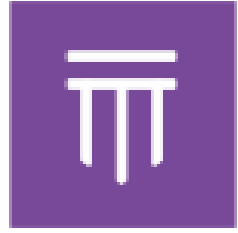
How effective were individual tribunals?

- *ICTR and ICTY*
- Jurisprudence
 - Development of important doctrines: genocide, crimes against humanity, individual criminal accountability, fair trial conditions
- Inspired SCSL and all 3rd generation
- Residual mechanism in Hague: concluded (2011)
- Reiteration of history (lot of evidence, recollection, partial reconciliation)
- ICTR
 - USA and UK against investigation of crimes committed by RPF militia (nowadays Rwanda's government and army)
 - Prosecuted over 60 actors of genocide, including Bagosora or Bikindi
 - New crime of rape as a war crime
 - Torture as CAH



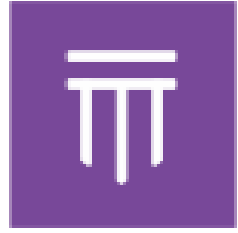
How effective were individual tribunals?

- *ICTR and ICTY*
- Deterrence
 - Peace?
 - Balkan: failure of ICTY
 - 1999 – expansion of jurisdiction to cover conflict in Kosovo (low deterrence potential?)
 - Very lengthy processes
 - Difficult to get the accused
- Legitimacy
 - Budget – dependent on UN member states
 - Low compliance and cooperation of domestic judiciary
 - Low reconciliation
 - Only symbolic role?



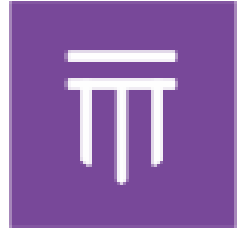
Legitimacy

	Second generation	Third generation
A. Mandate	Resolution	Treaty
B. Seat	3 rd country	In situ
C. Independence	No	Yes
D. Cooperation	No	Yes



Legitimacy

	Second generation		Third generation		
	ICTY	ICTR	SCSL	ECCC	SPSC
A. Mandate	Resolution	Resolution	Treaty	Treaty	Resolution
B. Seat	3 rd country	3 rd country	In situ	In situ	In situ
C. Independence	No	No	Yes	Partly	Partly
D. Cooperation	No	No	Yes	Yes	No

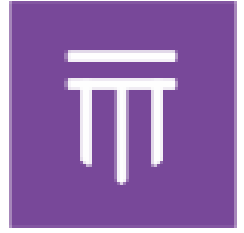


Effectivity of international criminal tribunals

- Helfer – Slaughter
 - Independence
 - High standards on who is the judge
 - Presenting the evidence
 - Binding effect of decisions

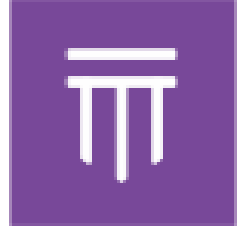
Posner – Yoo

Characteristic	Dependent	Independent
Time	During the conflict	Unlimited
Jurisdiction	Statute	International law
Initiation	Victim only	Independent party
Membership	Bilateral	Multilateral
Commitment	After conflict	A priori
Judges	Selection by a state	Independent selection



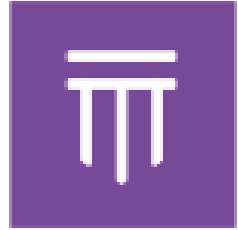
Effectivity and promises of mandates:

1. Prosecution of crimes
2. Deterrence
3. National reconciliation



Effectivity and promises of mandates:

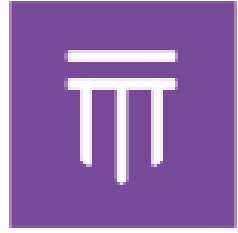
1. Prosecution of crimes
 - Focus of majority of legal scholarship
 - How to evaluate this?



Effectivity and promises of mandates:

1. Prosecution of crimes

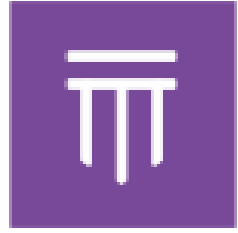
- Focus of majority of legal scholarship
- How to evaluate this?
 - *Number of convicted*
 - *Number of accused*
 - *Number of cases issued per year*
 - *Execution/compliance with the rulings (cooperation of domestic courts and governments)*
 - *Development of the international criminal law doctrine (II v III Gen)*
 - *Individual accountability*
 - *X politicization (personal jurisdiction and its limits)*
 - *X length of proceedings (II. GEN; SCSL concluded in 2014 – but, only 21 accused)*



Effectivity and promises of mandates:

3. National reconciliation

- Domestic reception, legitimacy of courts
- Seat
- Language
- Transparency
 - How understandable is the work
 - How visible is the work



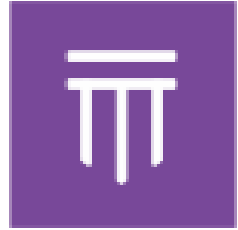
Effectivity and promises of mandates:

3. National reconciliation

- ICTY

Positive perception of the role and potential of ICTY in respective countries (2001)

Serbia	8 %
Kosovo	83 %
Bosnia	51 % (but, the most trust-worthy among international institutions)
Montenegro	24 %
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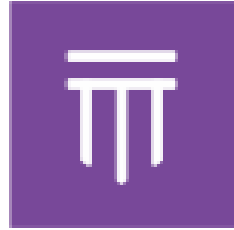


Effectivity and promises of mandates:

3. National reconciliation

- SCSL

	% of respondents (82% were war refugees)
I do follow the cases	73 %
SCSL is beneficial for Sierra Leone	61 %
Willing to stand as a witness if needed	57%



Effectivity and promises of mandates:

- 3. National reconciliation
 - ECCC

Perceptions of ECCC by public

ECCC should partake on prosecution of Khmer Rouge regime	86.9%
Judges of ECCC are fair	66.7 %
ECCC will be neutral	67.1%
If the answers above were negative, these are the reasons	
Weak results of prosecution	29.7 %
ECCC is corrupted	22.9%
ECCC is politicized (ties to government)	28.2%
Too lengthy proceedings	15.1%



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Thank you for your
attention