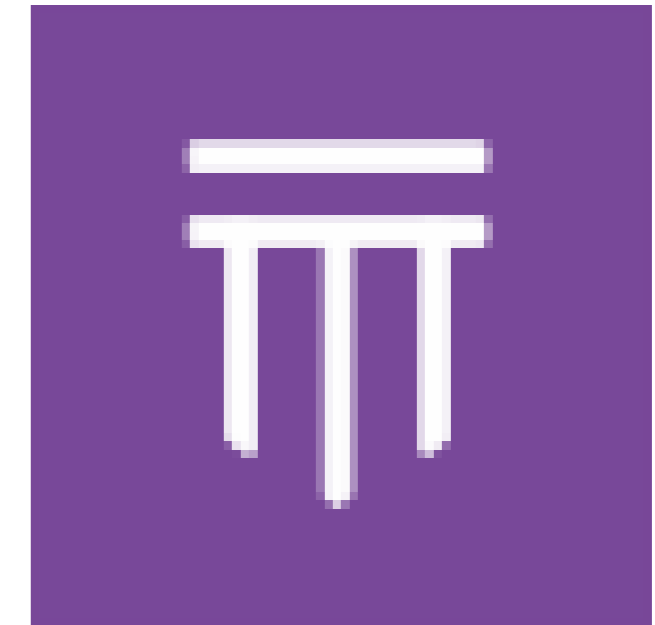


Brno, 03 October 2023

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# International criminal tribunals II.



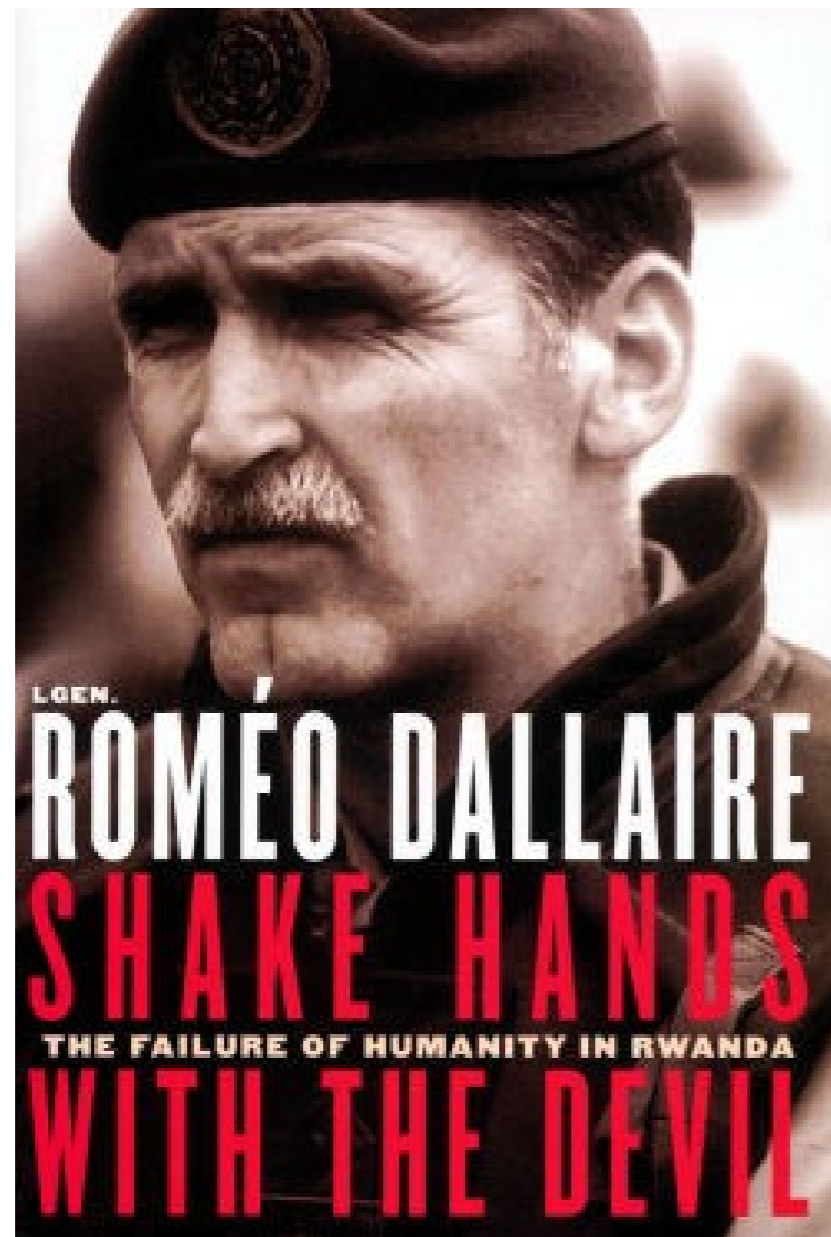
JUSTIN  
Judicial Studies Institute  
Masaryk University

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Katarína Šipulová



## 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 of 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)

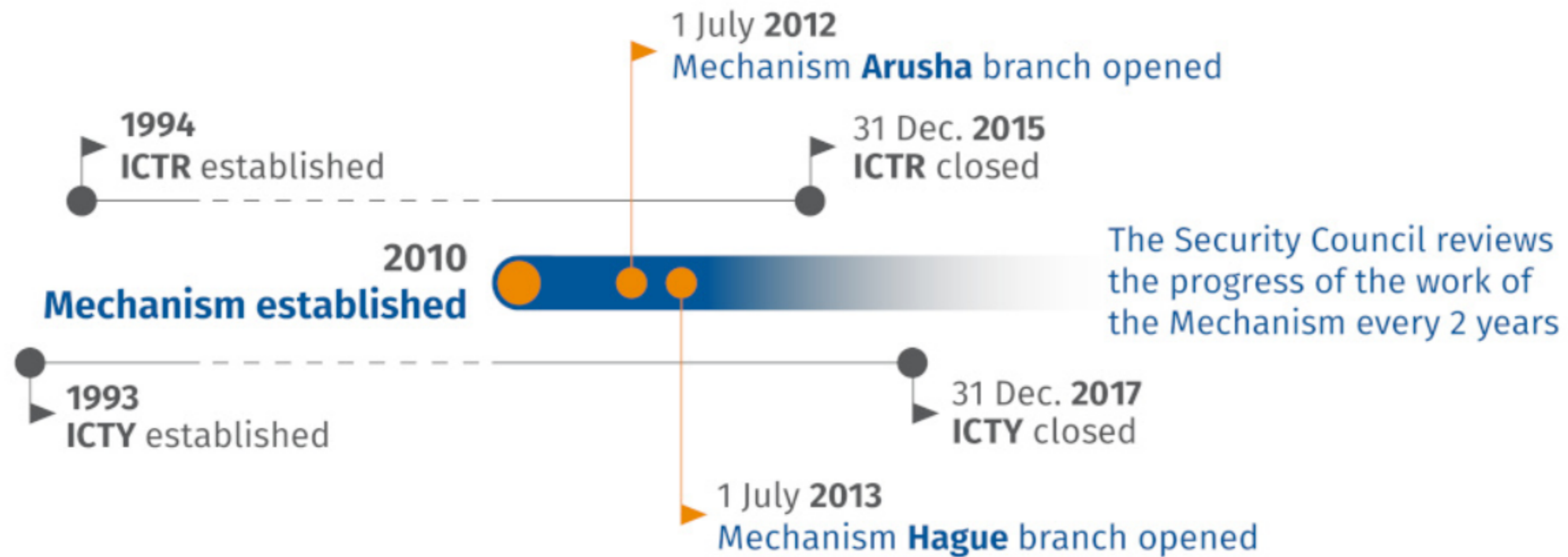


## II. Generation evaluation

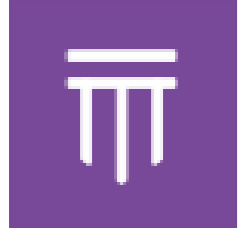
- ESTABLISHMENT: alternative options
  - International treaty
    - X ongoing Conflict / failed state
  - GA Resolution
  - SC Resolution
    - The widest set of competences (Chapter VII)
    - Primacy over domestic courts (and their obligation to delegate cases upon ICTR)
    - Possibility to issue 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 L
- 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. 1/4 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
- 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





# 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



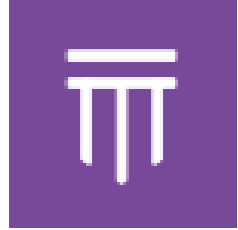
# Special Court for Sierra Leone – sui generis court

- 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 <sup>rd</sup> country	In situ
C. Perceived Independence	No	Yes
D. Cooperation	No	Yes



# Legitimacy

	Second generation		Third generation		
	ICTY	ICTR	SCSL	ECCTC	SPSC
A. Mandate	Resolution	Resolution	Treaty	Treaty	Resolution
B. Seat	3 <sup>rd</sup> country	3 <sup>rd</sup> country	In situ	In situ	In situ
C. Perceived Independence	No	No	Yes	Partly	Partly
D. Cooperation	No	No	Yes	Yes	No

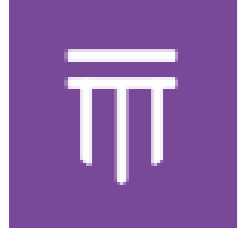


# Effectivity of international criminal tribunals

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

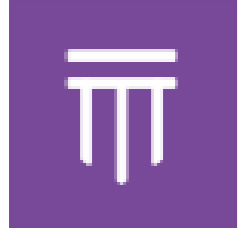
## Posner – Yoo

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

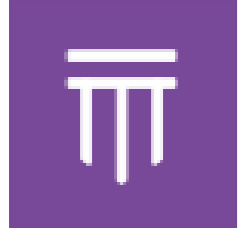
- Focus of majority of legal scholarship
- How to evaluate this?



# 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

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

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

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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