

# Forum for International Criminal Justice Newsletter: August 2017

Welcome to the IAP's Forum for International Criminal Justice (FICJ) August 2017 Newsletter which focuses on the prosecution of war crimes, crimes against humanity and genocide, including a roundup of video highlights, legal analysis, announcements, events, new publications and major news developments from the past month.

Domestic news covered in this Newsletter includes: **US** announces plans to shut domestic war crimes office; **Argentina** sentences former judges for crimes against humanity; **Kosovo** clears ex-Commander Lushtaku of war crimes; and **Serbia's** first Srebrenica trial halted as charges dismissed.



**\*Please have a look at the [FICJ forum](#) page on the IAP website and feel free to contribute:** the Forum provides individual prosecutors with a password protected space to post news, announcements, etc. and to pose questions to fellow prosecutors from around the world. Your contributions will also be posted in this monthly newsletter. Passwords are provided to IAP members – if you do not have a password, check your membership status by contacting the IAP Secretariat: [om@iap-association.org](mailto:om@iap-association.org).

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## Video Highlights



[Click here](#) to watch video of ICTY President Carmel Agius commemorating the Day of International Criminal Justice. Read the [ICTY press release](#) for further information.



[Click here](#) to watch Africa Group for Justice and Accountability member and The Gambia's Chief Justice Hassan Jallow explain how the Africa Group works for justice in Africa.



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# World marks Day of International Criminal Justice

## **Human Rights Watch**

17 July 2017 marked the Day of International Criminal Justice, and the 19th anniversary of the 1998 Rome Statute: the founding treaty of the International Criminal Court (ICC), which is the only permanent criminal court that holds perpetrators of genocide, war crimes, and crimes against humanity accountable. This day



is a moment to enumerate some of the positive steps toward accountability brought about by the ICC and other justice mechanisms on a difficult international landscape.

On 6 December 2016 the ICC began its trial of Lord's Resistance Army commander Dominic Ongwen for war crimes and crimes against humanity committed in northern Uganda. The LRA leadership is notorious for its brutality against Africans, but never before has an LRA commander faced trial.

The trials of two other leaders at the ICC continued: former Ivoirian president Laurent Gbagbo for crimes committed during Côte d'Ivoire's 2010-2011 post-election violence, and Congolese warlord Bosco Ntaganda for atrocities in the Democratic Republic of Congo.

There was progress in a movement to establish a Special Criminal Court for the Central African Republic, a hybrid court that will function as part of CAR's national court system.

Steps necessary for any future trials for grave abuses in North Korea inched closer to reality, with the United Nations Human Rights Council approving plans to strengthen evidence-gathering efforts to support the eventual prosecution of North Korean leaders and officials responsible for crimes against humanity.

In several European countries, prosecutors have initiated criminal proceedings against Syrians believed to be responsible for serious crimes there. This year, a new UN team tasked with investigating serious international crimes committed in Syria since 2011 will begin its work.

Numerous African countries also reaffirmed their support for the ICC after South Africa, Burundi, and Gambia announced their withdrawals, with the new government in Gambia stating it would remain

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an ICC member. Zambia also came out strongly in support of membership with the ICC in public consultations launched by the Zambian government.

The ICC, however, faces major roadblocks. As the court works to strengthen its own practices, backing from member countries is needed to carry out the court's investigations, arrest warrants, and witness protection programs. Private and public diplomacy is necessary to protect the court's independence and legitimacy from outside political pressure. Next year's 20th anniversary of the Rome Statute on 17 July 2018, and the activities leading up to it are an invaluable opportunity for member countries to demonstrate their support.

## Justice in Syria: five ways to prosecute international crimes

### *The Conversation*

The conflict in Syria has seen atrocities committed by [all sides](#) for six long years. Barbarities are an everyday occurrence. There are rules governing the conduct of warring parties. The 1949 Geneva Conventions form the core of international humanitarian law. Violating these rules is a [war crime](#). Some atrocities go even beyond this level of criminality. [Genocide](#), for instance, is [an international crime in itself](#), while the [systematic killing of political opposition](#) would constitute a [crime against humanity](#).



Assad visits troops. EPA

The existence of these offences counts for little, of course, unless the law is enforced. This raises the question: is there any way of prosecuting any side of the Syrian conflict? These are some options that could help inform the way forward.

### **1. International Criminal Court investigation**

The International Criminal Court ([ICC](#)), based in the Hague, is designed to prosecute “the most serious crimes of concern to the international community as a whole”. So perhaps it could act in

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Syria. The court operates on a consensual basis, so that (perhaps counterintuitively) states must sign up to it to allow the exercise of ICC jurisdiction. Syria is not a party to the court.

There is a workaround though. The ICC can investigate international crimes in any country if the UN Security Council requests it to do so. This happened to [Sudan](#) in 2005 and [Libya](#) in 2011. Despite [best efforts](#) by lobbying states, the same has not happened in the case of Syria. Both [Russia and China](#) [blocked](#) a proposed referral in 2014 and there is little sign of them changing their minds.

## **2. A bespoke tribunal**

The creation of the [International Criminal Tribunal for the former Yugoslavia](#) by the UN Security Council in 1993 marked a watershed moment in the administration of international criminal justice. A statute was drafted and experienced judges and lawyers recruited to help build a system of accountability. The subsequent creation of a [similar institution](#) to deal with the 1994 Rwanda genocide continued the trend.

Such one-off approaches have since fallen out of use, however, in favour of ICC prosecution. And, crucially, a UN Security Council resolution is required to create such an international institution (historically, at least). This makes the “bespoke tribunal” option about as likely as an ICC investigation.

## **3. A ‘hybrid’ court**

“Hybrid” courts run on a mix of national and international law and are staffed by both local and international lawyers, allowing for a degree of local ownership. Examples include the [Special Court for Sierra Leone](#) and [the Extraordinary Chambers in the Courts of Cambodia](#). Proposals for a similar Syrian model [already exist](#). Such courts are, however, generally created with the consent of the state concerned. If the Bashar al-Assad regime is to remain in power in Syria this may create [significant difficulties](#) for this approach. Its success would depend on the government’s willingness to cooperate and submit itself to investigation alongside opposition groups.

[A more viable alternative](#) may be to establish a “hybrid” court in a neighbouring country such as Jordan or Turkey, though this option would similarly require cooperation from the Syrian authorities (whoever that may be) to succeed.

## **4. Universal jurisdiction**

Trials of atrocities committed in Syria are, in fact, already underway. In [Sweden](#), [Finland](#), [Germany](#) and [Switzerland](#) refugees suspected of international crimes are being prosecuted under the doctrine of “universal jurisdiction”. This principle allows any state to prosecute any perpetrator of a serious international crime. Precedent for such action includes the recently concluded [trial of the former Chadian president Hissène Habré](#) under Senegalese jurisdiction.



Trials brought under this principle do present their own difficulties (such as evidence acquisition) and are limited in their reach. Nevertheless this form of legal scrutiny, even at a limited level, serves as a warning to warring parties that criminal actions do have consequences.

## 5. Trials in Syrian courts

Prosecution of atrocities in the Syrian courts would present considerable logistical and financial difficulties for a ruined state. Even if national trials were feasible (if funded externally, for instance) they would risk being politically vulnerable to manipulation by the ruling elite, whoever that may be.

Alternatively there is the choice of avoiding justice altogether, perhaps via an act of amnesty. The present scale of inhumanity in Syria makes this a deeply troubling option.

### No easy solution

As the Syria conflict shows little sign of abating, the priority at present should be on the cessation of hostilities. But, as part of the reconciliation process that follows, transitional justice should play a key role. The favourite option may be the creation a “hybrid” court (politics permitting), paired with ongoing “universal jurisdiction” trials in states able to carry these out.

For the time being agencies such as the UN-created “[investigatory mechanism](#)” and the non-profit [Commission for International Justice and Accountability](#) must continue to collect and catalogue the evidence required for the time when it is so critically needed.

# Challenges of Urban Warfare

*By Priya Pillai, IntLawGrrls*

[Aleppo](#) in Syria. [Mosul](#) in Iraq. [Marawi](#) in the Philippines. All cities now unfortunately synonymous with the destruction of war, and its attendant miseries visited on the populations inhabiting them. A [new ICRC report](#), based on analysis of conflicts in Syria, Iraq and Yemen, has found a casualty rate five times higher in cities compared to other conflicts. It is [estimated](#) that by 2050, more than 60% of the global population will reside in cities.

The urban landscape makes conflict more complex, and particular concerns relating to the application of international humanitarian law (IHL) in cities are examined here. Protecting civilians, and distinguishing them from combatants is fraught. The use of explosive weapons destroys infrastructure necessary for survival. Restrictions on food and basic provisions create conditions that make existence difficult, forcing populations to leave, if able. Unexploded ordinances and snipers hamper safe exit. The ensuing mass displacement adversely impacts areas receiving besieged populations, often with [scarce means](#) to accommodate them.

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## IHL in urban contexts

The fundamental rules of IHL regulating the conduct of hostilities are embodied in the [Geneva Conventions and the Additional Protocols](#), as well as [customary law](#). The central tenets – the principles of distinction, proportionality and precaution in attacks – regulate the conduct of hostilities for the protection of civilians in all contexts. A distinction is to be made between combatants and civilians, and between military objectives and civilian objects. Any military action must be proportionate to the intended aim.

The existence of an international armed conflict (IAC) or non-international armed conflict (NIAC) requires a complex [case-by-case analysis](#). Increasingly there are concerns regarding the classification of situations, due to the [invocation of terrorism](#) and questions concerning the applicability of IHL. Here, the classification of conflict is not addressed, but only those facets of IHL pertaining to the protection of a city and its inhabitants are highlighted.

These basic principles apply in NIAC and IAC, with some differences in the elaboration of the legal provisions. These principles are also reflected in customary law, distinct from treaty law, and applicable to both types of conflict. However, it is the [application of these principles](#) to densely populated areas that is operationally complex.

## Protection of civilians

Civilians are protected from attack under IHL. As long as an individual is not a member of the armed forces or armed group, she is considered a civilian. However, the distinction between civilian and combatant is eroded in case of “direct participation in hostilities” by the former (Art. 51(3), AP I, Art. 13(3) AP II and customary law Rule 6). The [ICRC Interpretive Guidance](#) on the notion of Direct Participation in Hostilities under International Humanitarian Law delineates three cumulative criteria for acts to amount to “direct participation”: first, there must be an adverse impact on military operations or activities; second, a direct causal link between the act and the harm caused; and third, the act must be designed to cause the threshold of harm. Preparatory acts and subsequent actions are considered “direct participation”. Protection ceases during such participation, and is reinstated upon cessation. However, it may still be difficult to distinguish between direct and indirect participation. In doubt, the individual must retain protection.

There are estimates of over 100,000 civilians trapped in [western Mosul](#), and between 500-1000 in [Marawi](#). Reports indicate civilians unable to flee and forced to remain as “human shields”. Hostage taking includes the use of human shields and is prohibited under IHL (the 4<sup>th</sup> Geneva Convention, Art. 4(2)(c) APII, and customary law Rule 97). Also applicable are provisions relating to impeding the conduct of operations by virtue of civilian movement, which is prohibited (Art. 51 (7), AP I). A distinct category however may be when sympathetic individuals volunteer to stay in neighborhoods to impede military operations, and the impact of a lack of coercion on classification of the situation.

There have been reports of [starvation](#) among civilians unable to leave Marawi. Tactics that impact “objects indispensable to the survival of the civilian population” (reflected in Art. 54 AP I, Art. 14 AP II and customary law Rules 53 & 54), resulting in starvation are prohibited. In addition, the prevention of humanitarian aid and restricting the movement of humanitarian personnel are prohibited under customary law (Rules 55 & 56).

Another core concern is the distinction of military objectives from civilian objects. This principle may be blurred with “[dual use](#)” objects, i.e. used for both civil and military purposes, such as bridges, electricity networks, communication systems and other infrastructure. In case of doubt, it should be presumed to be a civilian object, per Art. 52(3), AP I. Customary law Rules 10 & 16 reiterate the principle of distinction. This however becomes more problematic in the warfare in cities such as Mosul.

The use of explosive weapons with wide impact area effects within urban confines is not prohibited *per se*. However, the principles of distinction and proportionality become more difficult to adhere to. The “reverberating effects” of such weapons on the infrastructure of cities may cause greater damage and loss of life than their direct impact. It is therefore [argued](#) that the use of explosive weapons in urban contexts take into account the “reasonably foreseeable” effects. Weapons and munitions should be assessed for their ‘reverberating effects’. The determination of “foreseeability” in this regard is an evolving area of law and state practice. The ICRC has highlighted the lack of training in the use of weapons in urban areas.

### **Protection of cultural heritage**

Urban spaces are a living embodiment of history and culture, containing libraries, historic monuments, cultural artefacts, museums etc. Much of this legacy is at risk of being lost in urban conflict. The destruction of Mosul and its iconic [mosque](#) is the latest such instance. The destruction of the [Bamiyan Buddhas](#) are a testament to the importance of protecting cultural heritage, wherever located.

The Hague [Convention for the Protection of Cultural Property in the Event of Armed Conflict](#), 1954, provides for the protection of cultural heritage, such as religious and secular monuments, works of art, archives, manuscripts, among others. This protection is also reflected in Art. 53 AP I and Art. 16 AP II. The first conviction at the [International Criminal Court](#) for the destruction of cultural property in Timbuktu was successfully concluded in 2016. However, there are growing concerns regarding the use and destruction of schools in conflict, including in [Palestine](#), and [Ukraine](#), which are not protected by the Hague Convention. Hence, the Draft “[Lucens Guidelines](#)” have been formulated to address this issue. While an important start, the guidelines are not binding.



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## Conclusion

The growing trend of conflict in urban areas necessitates revisiting the rules in place, and if needed, adapting them. What is unchangeable is the primacy of protection of the civilian population, and avoiding all encompassing destruction of the cities that they call home.

# Kosovo War Court President Promises Impartial Justice

***In her first interview as president of the Kosovo Specialist Chambers, Judge Ekaterina Trendafilova told BIRN that the newly-established Hague-based institution that will try former Kosovo Liberation Army members for wartime and post-war human rights abuses will not be ethnically biased as it will only prosecute suspected criminals, not the guerrilla organisation itself.***



The president of the Kosovo Specialist Chambers, Ekaterina Trendafilova. Photo: KSC.

*By Marija Ristic BIRN Belgrade*

Trendafilova also promised that the court would protect its witnesses properly - a failing in previous attempts to prosecute Kosovo Liberation Army fighters - and expressed hope that its work will help to enhance the rule of law in Kosovo.

This is not the first time that Trendafilova has ruled in cases of international criminal justice; prior to joining the Kosovo Specialist Chambers, she was a judge at the International Criminal Court, an experience that she believes will benefit her in her new role.

**Other hybrid courts, administered by the UN and the EU, have operated in Kosovo before. How is this court different and how will you, as a judge, make sure that it fulfils its mandate?**

The Specialist Chambers are different in many respects. I will mention some of them and I will not use these labels, such as 'hybrid', 'international' or 'internationalised'. The Specialist Chambers are

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created by a constitutional amendment that was enacted by the Kosovo parliament with a two-thirds majority. This is a strength for us. It means that the people of Kosovo expressed through their representatives in parliament that such an institution is necessary and desirable.

Next, the Specialist Chambers can rely on Kosovo authorities, including the police, to execute orders, searches, and seizures and to arrest suspects. Kosovo authorities, by virtue of the [Kosovo] Law [on the Specialist Chambers and Specialist Prosecutor's Office], are required to cooperate with the Specialist Chambers to achieve the ultimate goal to bring to account those responsible for the alleged grave crimes committed.

At the same time, however, we are an institution relocated to the Netherlands, our host country, which means that we can ensure the highest degree of safety and security for all those interacting with the Specialist Chambers, in particular victims and witnesses.

Further, only international judges may adjudicate at the Specialist Chambers. This choice shows that the Kosovo parliament had the utmost regard for the independence and integrity of this institution, future prosecutions before it and the safety of witnesses and victims.

As a judge and president of the Specialist Chambers, I will ensure that the Specialist Chambers fulfil their mandate through the application of the law, as enacted by the Kosovo parliament, and the rules adopted by the judges. Most importantly, I trust that the highly experienced judges, appointed to the roster of international judges, will conduct exemplary court proceedings and deliver best quality judgments...

**How do the Specialist Chambers cooperate with Kosovo authorities? When it comes to detention and arrests, will you use special court police or Dutch or Kosovo police?**

As provided in the Law [on the Specialist Chambers and Specialist Prosecutor's Office], we can avail ourselves of the Kosovo police as any other court in the country. Likewise, the Specialist Prosecutor can enforce his orders through a police force within his Office. Any orders and decisions of the Specialist Chambers, including search and seizure and the arrest of suspects on the territory of Kosovo, have to be executed. This is what the law dictates. In addition, we can request international cooperation where necessary.

**How sensitive do you need to be in respect of the current political conditions in Kosovo?**

It is not really a question of being sensitive. The Specialist Chambers are a judicial institution, independent in the exercise of their functions and the fulfilment of their mandate, in compliance with the Law [on the Specialist Chambers and Specialist Prosecutor's Office] as agreed upon and enacted by an absolute majority of the parliament of Kosovo.

We carry on with our mission, as enshrined in the law, regardless of the political processes in Kosovo. We only abide by the constitution and the law.

Nevertheless, we are following closely the developments in Kosovo and are aware of any sensitive issues, without being influenced by them.

**How do you respond to the criticism that the Specialist Chambers are biased because they only deal with one ethnic group, Kosovo Albanians?**

The Specialist Chambers will not prosecute any ethnic group. They will not prosecute any organisation. The Specialist Chambers will only prosecute and hold accountable individual persons. The Law [on the Specialist Chambers and Specialist Prosecutor's Office] clearly provides for individual criminal responsibility, which means that persons may only be held accountable for crimes they committed as individuals, not as representatives of an ethnic group, of communities, or any other groups.

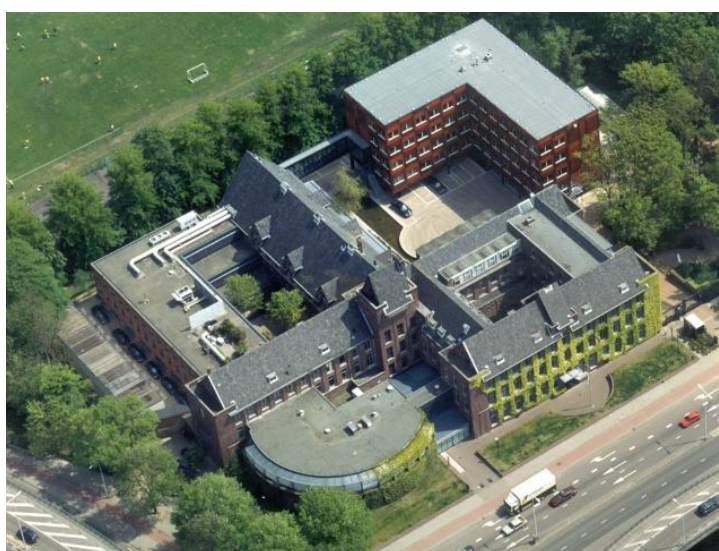
**The court also has a victims' support unit, and the law envisages reparation programmes. How will these work in practice?**

First of all, let me say that I am quite pleased that the Specialist Chambers, unlike the ICTY, gives victims the opportunity to participate in the proceedings. Victims of crimes alleged in an indictment may apply to the Victims Participation Office within the Registry if they wish to participate.

The Law [on the Specialist Chambers and Specialist Prosecutor's Office] provides that victims have a right to notification, acknowledgement and reparations. In practical terms, this means that victims will be able to participate meaningfully in the proceedings before the Specialist Chambers and seek reparations.

Once an accused has been found guilty of a crime, the judges may order an accused to pay appropriate reparations to victims collectively or individually. The Victims' Participation Office will also administer a list of victims counsel in order to ensure efficient legal representation of and assistance to victims...

**Witness protection has so far been one of the key issues in war crime trials in Kosovo, and the Specialist Chambers claims to have prepared a robust witness protection system. How do you think international and national courts have protected witnesses testifying about international crimes so**



The Specialist Chambers building in The Hague. Photo: Europol.

**far? Is this one of the reasons why courts are often a long way away from the places where the crimes were committed?**

By virtue of my past experience but also being conscious of some previous examples, I am very much aware of the importance of witness protection. This is a key factor for the mandate of the Specialist Chambers, reflected by the relocation of the proceedings to the Netherlands. For that reason, a robust system of witness protection has been devised in our Rules of Procedure and Evidence. In addition, any interference with the security and well-being of witnesses will not be tolerated and will be prosecuted by the Specialist Chambers.

Being relocated is certainly a potent instrument to provide better protection to witnesses, victims and other persons interacting with the Specialist Chambers. My firm understanding and that of all judges is, as expressed in the rules, that justice will not be done at the expense of the safety and well-being of anyone cooperating with the Specialist Chambers. Hence, protection is pivotal for us.

**What do you see as the potential obstacles to the Specialist Chambers' success?**

I will tackle this question from a different point of view, namely what are the factors to measure the success of the Specialist Chambers in fulfilling their mandate. First, the persons who will be charged with serious crimes by the Specialist Prosecutor will have to be apprehended or will voluntarily surrender in order to face the allegations against them. It is my hope that the Specialist Prosecutor will expeditiously discharge his investigation duties and will file indictments as soon as he is ready.

Second, accused persons are to be afforded a fair and expeditious trial, in conformity with the Kosovo constitution and the highest standards of human rights. Third, victims' rights are to be effectively protected. Fourth, the Specialist Chambers and the trials that will be conducted will be an opportunity for the people of Kosovo to face the past. Lastly, through their mandate, the Kosovo Specialist Chambers will enhance and foster the rule of law in Kosovo...

**In which ways do you believe this court can help the criminal justice field advance? Is there something that this court has that some other courts could use as a new innovation?**

The design of the Kosovo Specialist Chambers and the legal framework for its operation provide for a number of innovations, which could advance the criminal justice field and could equally serve as good models for future institutional improvements. In this regard, I will refer to the Specialist Chamber of the Constitutional Court. This chamber falls within the structure of our institution, being tasked to review whether the Rules of Procedure and Evidence comply with the Kosovo constitution and also embrace the highest standards of human rights.

Another responsibility of the chamber is to ensure that the rights of individuals, as enshrined in the constitution, are protected before the Specialist Chambers and by any action of the Specialist

Prosecutor's Office. Other criminal justice institutions dealing with the same or similar crimes, do not have this core human rights safeguard mechanism.

Next, an Ombudsperson is another novelty of our institution when compared to international criminal tribunals. His or her task is to monitor and protect the fundamental rights and freedoms, enshrined in Chapter II of the constitution, of persons interacting with the Specialist Chambers and Specialist Prosecutor's Office in accordance with the law and the rules.

Third, the Kosovo Specialist Chambers venture for efficiency and effectiveness in its functioning. For example, the Law [on the Specialist Chambers and Specialist Prosecutor's Office] does not provide for permanently present judges at the seat of the Specialist Chambers but only when the specific nature of the work so requires. The law has also established a roster of international judges and such a system of operation whereby the president holds the authority to assign judges to different panels whenever necessary.

We have also catered for meticulous management of the cases and have established strict deadlines for judicial performance. These and many other approaches agreed upon and adopted by the judges will render the overall institution very efficient.

Some of these features derive from the Kosovo judicial system, while others were introduced by the Plenary of Judges. These innovations may be looked at and seriously considered for future models of international criminal justice.

**Bearing in mind the current crisis with the International Criminal Court and the emergence of the hybrid courts like this one for Kosovo or the one for the Central African Republic, do you think this is the future of international justice? Or just a temporary compromise?**

To start with, I do not agree that the International Criminal Court is in crisis. On the contrary, the first permanent international criminal court is operational for already 15 good years and is establishing itself firmly on the international arena. The problems which the International Criminal Court faces with some member states could be perceived as another proof that it is on the right track combatting heinous crimes affecting the consciousness of humanity. The harshest opposition against the International Criminal Court comes from those who fear the time they will be brought to account before it.

The existence of the International Criminal Court, however, does not prevent emergence of other type of institutions like the Specialist Chambers and the hybrid court for the Central African Republic where the specificity of the crimes, of the issues to be resolved weighs in favour of taking a different avenue.

- Read the full interview on the [BIRN website](#)



## UCLA ICC Forum: Current Question on Performance



**The ICC has established four key goals regarding, broadly, its proceedings, leadership, witness security, and victim access. What are the appropriate ways to measure the ICC's progress towards those stated goals? How can the performance of the ICC as a whole be properly assessed?**



Dancy



Krcmaric



McIntyre



Shany



Stahn

[Click here to read the invited experts' responses to the performance question](#)

The ICC has now released two reports detailing its progress towards the implementation of performance indicators to measure its success in various areas, which can be accessed [here](#) and [here](#). The focus of these reports is the development of Court-wide indicators: the development of additional performance indicators, reflecting the specific functions of the main organs, flow from this source. The reports identify the following four key goals as critical for assessing the performance of the ICC as a whole:

- The Court's proceedings are expeditious, fair, and transparent at every stage;
- The ICC's leadership and management are effective;
- The ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and
- Victims have adequate access to the Court.

Developing appropriate ways of measuring progress towards these goals is extremely important, but complex for a number of reasons—not least because the ICC is but one actor in the system of international justice created by Rome Statute. Although many national judicial bodies devise performance measures or indicators, they are not necessarily suitable models for the ICC because of, inter alia, its limited number of cases; the diversity of underlying country situations, each with their own unique political, diplomatic and legal cultures; and its dependence on other actors for cooperation.

So, for example, with respect to expeditiousness, the Court's long-term aim will be to establish an expected duration for the stages of each new case against which actual performance can be measured and, crucially, variations accounted for. In order to get these measures right, however, the Court first needs to complete an adequate number of cases that can serve as benchmarks. But is the uniform application of benchmarks appropriate, or even possible, given the peculiarities of each situation and case?

The complexity of assessing the "performance" of the Court may be further compounded by consideration of factors extrinsic to the Court. Is it possible to assess the Court's "performance" with reference only to the Court's activities?

There are on-going investigations in eight different country/situations. The operational, logistic, and security-related considerations on the ground; and the extent of cooperation of local and international partners, including States and the United Nations Security Council, can impact on results-based performance, and vary significantly from one situation to another.

Other measures may prove difficult to quantify due to contested lack of a common understanding of definitions and understandings. For instance, fairness lies at the heart of criminal proceedings, whether at the national or international level, but its subjectivity makes it an inherently difficult value to measure. The question of, to whom does the concept of fairness apply, also primarily arises: the accused? the victims? the international community? Before fairness can be measured, there must be a shared understanding of what it means.

How does one measure such things as whether the Court's "leadership and management are effective," or whether it ensures "protection of those at risk from involvement with the Court"?

Against this backdrop, which aspects of the Court's performance can meaningfully and usefully be measured? How best can this be done, given the unique nature of the institution and its context? How should quantitative and qualitative measures be applied? Are there institutions, judicial or otherwise, in a sufficiently analogous position to the ICC whose experience it could draw on? Are there learnings from national experiences that could prove transferable to the international and global context? Should the ICC limit the choice of indicators to those primarily under the control of the Court itself? What impact does the budget of the Court have on its performance? Most broadly, what in the end is to be gained from such an exercise—what are the benefits; are there any hidden pitfalls?

- Read the experts' views on the [UCLA website](#)



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## New open access publication: The Crisis in Ukraine 2014

***International Law and the Use of Force: A Case-Based Approach*, Olivier Corten and Tom Ruys, eds, Oxford University Press, Forthcoming, by Mary Ellen O'Connell, Notre Dame Law School**

In the early morning hours of February 28, 2014, Russian armed forces moved out of their naval base on the Black Sea and into Crimea, triggering a crisis with Ukraine that continues as this chapter goes to print. The chapter begins with a detailed factual account of the Russian move into Crimea and subsequent intervention on behalf of separatist militias in Eastern Ukraine. Russia has put forward sophisticated arguments under international law to attempt to justify its military interventions in Crimea and Eastern Ukraine. On close analysis, no claim is adequate to avoid the charge of aggression. The United Nations Charter, Article 2(4), generally prohibits the use of force. Any serious violation of the prohibition is aggression. Russia can point to similar conduct by Western states from aiding the separatist Kosovo Liberation Army during in 1999 to assisting insurgents seeking to overthrow the government of Syria to Turkey's invasion of Cyprus, allegedly under the terms of a treaty. While these and other violations of the Charter have plainly weakened the perception that the prohibition on the use of force is a peremptory norm, requiring strict compliance, peremptory norms are not modified as a matter of law by violations. Russia cannot defend its use of force against Ukraine by pointing to the violations of other states...

- Read the full chapter on the [SSRN website](#)

## News July 2017

 Click on the hyperlinked headlines to see the full articles of international criminal justice news from the previous month.

### 28 July

#### [Argentina sentences former judges for crimes against humanity](#)

(Jurist)

A Mendoza court sentenced four former federal judges to life in prison for crimes against humanity carried out during Argentina's 1976-1983 dictatorship. The judges were originally tried as accomplices for failure to investigate the kidnapping, torture and murder of dissenters. The prosecutors eventually charged the judges as principals arguing that the judges' "inaction on the petitions preceded the disappearance of more

than 20 dissidents." The sentence has been applauded by several human rights groups, including the Grandmothers of the Plaza de Mayo, which has advocated for civilian perpetrators being brought to justice for their role during the last dictatorship...

#### [Senior Prosecutor Says Kenya Unwilling to Prosecute Two Kenyans Wanted by ICC](#) (OSJI)

A senior prosecutor told Kenya's High Court that the country is unwilling to prosecute two Kenyans wanted by the International Criminal Court (ICC) in relation to bribery allegations against them. Senior Assistant Director of Public Prosecutions Victor Mule told the court on Thursday that in such a situation the ICC can exercise its jurisdiction as a court of last resort. He argued this was possible

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because the ICC's founding law, the Rome Statute, has force of law in Kenya...

## 27 July

### [DRC: Ntabo Ntaberi Sheka: Rebel leader surrenders to UN](#)

(Aljazeera)

The founder and leader of a Democratic Republic of Congo rebel group who is wanted for crimes against humanity has surrendered, the UN mission in Congo has said. Ntabo Ntaberi Sheka, the founder of Nduma Defense of Congo, has been wanted since 2011 on a national warrant for crimes against humanity, including for mass rapes. He surrendered to UN forces in the country's North Kivu region on Wednesday...

## 25 July

### [Will Syria's war criminals be let off the hook?](#)

(BBC News)

For six years, the United Nations Commission of Inquiry on Syria has been painstakingly gathering information about possible war crimes and crimes against humanity committed during the conflict... In each report there is a demand for "accountability" - that no-one should be allowed to commit such horrific acts and get away with it. "This would be incredible, a scandal," says commission member ... Carla Del Ponte, who describes the violations in Syria as by far the worst she has ever come across. "But nothing happens, only words, words, and more words." ...

## 24 July

### ['If you are old enough to carry a gun, you are old enough to be a soldier'](#)

(The Guardian)

... Rebel commanders say they are forced to recruit children. "In your country, the children have schools, a home, food. Here it is not like that. So all have risen in arms, young and old, to achieve something better," says Nyeland, David's commanding officer. James Jowang, a political officer with the faction, offers another explanation. "Here, in our country, there is no age for fighting," he says. "If you are old enough to carry a weapon, you are old enough to be a soldier."

### [Ugandan Court Fails to Hold Confirmation of Charges Hearing in Kwoyelo Case](#)

(International Justice Monitor)

A pre-trial hearing at the High Court of Uganda in the case of Colonel Thomas Kwoyelo did not occur as scheduled on July 18, 2017, reportedly because of a lack of funds. The hearing had been scheduled to confirm the charges against Kwoyelo, but it failed to take place when neither the judges, the prosecution, nor the defense lawyers showed up for the proceedings. This was meant to be the sixth pre-trial hearing of the case this year. The start date for the main trial remains uncertain given that the charges against Kwoyelo have not been confirmed...

## 23 July

### [Bosnia's wartime 'mistresses of life and death'](#)

(The National)

She may once have been known as "the mistress of life and death", but in the court trying her for war crimes Azra Basic hardly stands out. Ms Basic is among around a dozen women charged or convicted of crimes committed during Bosnia's inter-ethnic war in the 1990s which claimed nearly 100,000 lives. Compared to the several hundred men convicted by local and international courts for crimes committed during the 1992-1995 war, the number of women is not many... Bosnia's war crimes prosecutors say more cases against women suspects are in the pipeline. According to local media, some 40 women are being investigated for war crimes...

## 21 July

### [Ntaganda's Testimony Enters Fourth Week as Court Goes on Recess](#)

(International Justice Monitor)

On Friday, the testimony of former Congolese rebel commander Bosco Ntaganda at the International Criminal Court (ICC) entered its fourth week. It was also the last day of hearings before the court goes into summer recess. On June 14, Ntaganda took the stand to testify in his defense at the ICC. He has since recounted his involvement in various rebel groups, which he said was motivated by the 1994 genocide in Rwanda and inspired by Uganda's President Yoweri Museveni...





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## [Court Ratifies Historic Sepur Zarco Sexual Violence Judgment](#)

(International Justice Monitor)

The High Risk Appellate Court upheld the historic Sepur Zarco judgment this week after unanimously rejecting the three appeals presented by the defense counsel of the two military officials convicted last February in the case. The judges read the summary of the ruling in an open session on Wednesday afternoon...

## [A Step Backward: The Closure of the Office of Global Criminal Justice](#)

(Jurist)

... From the environment to trade, the US has chosen to step away from not only legal but also moral obligations. This past week another indication of further retrenchment was manifest when US Secretary of State Rex Tillerson announced that he was closing the Office of Global Criminal Justice (OGCJ), the office where the US asserts leadership and support for international justice and holding accountable those who feed upon their own citizens. Like much else this new US administration has done, this is wrong!...

## **20 July**

### [Bosnian War Convicts 'Free for Months Before Jail'](#)

(International Justice Monitor)

People convicted of committing crimes during the Bosnian war spend months at liberty because of procedural delays before going to prison - a situation which has angered victims' groups...

## [Non-Compliance But No Referral – The ICC Muddies the Waters](#)

(Justice in Conflict)

Last week, the judges at the International Criminal Court (ICC) handed down their long-awaited judgment regarding South Africa's failure to arrest Sudanese President Omar al-Bashir... The ICC found that South Africa had indeed failed to comply with its obligations, yet curiously, the judges failed to make a referral to the ASP or the UNSC. Not only is this a significant departure from previous rulings on non-compliance with respect to Bashir's presence in signatory states, but it may do the ICC more harm than good as far as being taken seriously as a legal institution...

## [ICC Judges amend the Regulations of the Court](#)

(ICC Press Release)

On 12 July 2017, the judges of the International Criminal Court (ICC), by unanimity of the 17 judges present at a special plenary convened by the President under Rule 4(2) of the Rules of Procedure and Evidence, adopted some amendments to the Regulations of the Court during their thirty-sixth plenary session...

## [UN warned not to whitewash 'grave violations against children' in Yemen](#)

(The Guardian)

Charities have urged the UN to name and shame the Saudi-led coalition over child rights violations in Yemen after research showed more than 120 children were killed or maimed in airstrikes by the alliance last year. A briefing by Save the Children and Watchlist on Children and Armed Conflict said the coalition committed "grave violations against children" in a series of 23 attacks in 2016. In each case, the alliance bombed hospitals or schools, or killed or injured children...

## **19 July**

### [ICC Appeals Chamber directs Trial Chamber I to carry out a new review of Mr Gbagbo's detention](#)

(ICC Press Release)

Today, 19 July 2017, the Appeals Chamber of the International Criminal Court delivered its judgment reversing a decision of Trial Chamber I and directing that Chamber to carry out a new review as to whether Mr Laurent Gbagbo should continue to be detained or should be released, with or without conditions. Until this matter has been so decided, Mr Gbagbo shall remain in detention...

## **17 July**

### [On World Day for International Justice GJC Calls on the International Community to take Immediate Action on Yazidi Genocide](#)

(Global Justice Centre)

On the World Day for International Justice and almost three years after ISIS began a campaign of genocide against the Yazidis, the Global Justice Center renews its calls to world leaders to uphold international law and ensure justice for Yazidi women and girls. "As successes attacks are waged against ISIS on the battlefield, it is equally



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important that there is justice and accountability for ISIS fighters in international courts,” says Janet Benshoof, founder and president of the Global Justice Center (GJC). “The women and girls persecuted by ISIS deserve to see their abusers held accountable for the crimes committed against them.” ...

### [Court to Rule on Appeal of Historic Sepur Zarco Sexual Violence Verdict](#)

(International Justice Monitor)

On July 19, the High Risk Appellate Court in Guatemala will announce its resolution on three appeals presented by two former military officials convicted last year in the historic Sepur Zarco sexual violence case. The appeals seek to overturn the February 26, 2016 verdict by High Risk Tribunal A, presided over by Judge Yassmín Barrios... The trial court sentenced both military officials to 30 years in prison for crimes against humanity against 15 women who were the victims of sexual violence and sexual and domestic slavery...

### [Tillerson to Shutter State Department War Crimes Office](#)

(Foreign Policy)

Secretary of State Rex Tillerson is downgrading the U.S. campaign against mass atrocities, shuttering the Foggy Bottom office that worked for two decades to hold war criminals accountable, according to several former U.S. officials...

### [Nepal: Search for justice](#)

(The Kathmandu Post)

The ongoing transitional justice process in Nepal has consistently fallen short of demonstrating a willingness or the capacity to investigate and prosecute the perpetrators of gross human rights violations and abuses committed during the conflict, consistent with international human rights law and standards. During the decade-long internal armed conflict (1996-2006), both parties, the government security forces and the Maoist rebels, allegedly committed gross human rights violations and abuses, which reach the threshold of international crimes— crimes that include, among others, extra-judicial executions, enforced disappearances, torture and sexual violence. These are crimes that tear at the very fabric of Nepali society and culture...

### [State Dept. Office of Global Criminal Justice on the Chopping Block—Time to save it](#)

(Just Security)

Word out of Washington is that the Trump Administration has started to restructure the State Department and particularly the Under-Secretariat for Civilian Security, Democracy & Human Rights... First on the chopping block appears to be the Office of Global Justice (GCJ). GCJ serves as the principal adviser to the Secretary of State and other governmental agencies on U.S. policy related to the prevention of, and responses to, war crimes, crimes against humanity, and genocide. GCJ also serves as the liaison to international, hybrid, and mixed tribunals exercising jurisdiction over these international crimes, including the International Criminal Court...

### **16 July**

#### [Military Justice for War Crimes in Afghanistan?](#)

(HRW)

It's a familiar story: Soldiers blame the “fog of war” for civilian deaths. Sometimes it only takes one soldier with a conscience to reveal the truth, but it requires a government's commitment to see justice done. That commitment seems sorely lacking in the United Kingdom, whose military has been dogged by allegations of killing of citizens in Afghanistan. Australia – whose military has also been tarnished by horrific allegations in Afghanistan – should take note of the UK's missteps as it tries to get to the truth...

### [A Second Look At The International Criminal Court](#)

(Forbes)

July 17 is the Day of International Criminal Justice marking the anniversary of the adoption of the Rome Statute in 1998. The Rome Statute is the founding treaty of the International Criminal Court (ICC). The ICC was specifically established to investigate and prosecute the most heinous international crimes. The Rome Statute equips the ICC with jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression...

### **14 July**

#### [U.N. raps Sri Lanka's slow progress on tackling war crimes](#)

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Follow us on twitter: [@iaprosecutors](https://twitter.com/iaprosecutors)



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The United Nations criticized Sri Lanka on Friday for slow progress in addressing war crimes and past human rights abuses and said the international community was running out of patience. The U.N. and rights activists have accused the Sri Lankan military of killing thousands of civilians, mostly Tamils, in the last weeks of the civil war with Tamil separatists that ended in 2009 and have demanded reforms and redress...

## 13 July

### [Serbia's First Srebrenica Trial Halted as Charges Dismissed](#)

(Balkan Transitional Justice)

The trial of eight former Bosnian Serb police officers charged with involvement in the massacre of Bosniaks in the village of Kravica near Srebrenica in July 1995 was stopped on Thursday after the Belgrade appeals court threw out the charges. The court said that charges were dismissed because they were not filed by the authorised prosecutor, since the Serbian war crimes prosecutor's position was vacant at the time, Beta news agency reported. The charges were filed on January 21, 2016, when the previous war crimes prosecutor, Vladimir Vukcevic, had already retired, and his replacement had not yet been selected...

### [UN: Another 38 probable mass graves found in DR Congo](#)

(Aljazeera)

Another 38 probable mass graves have been found in the Democratic Republic of Congo, where violence between troops and armed fighters has killed thousands of people since August, the United Nations announced on Wednesday. This means at least 80 mass graves have been identified so far, the UN peacekeeping mission in the vast Central African nation said. The latest mass graves were found this month in the Diboko and Sumbula areas of Kamonia territory by an investigative team from the local UN human rights office and the Congo's military justice authorities, the UN said...

## 12 July

### [Sri Lanka will be submitted to jurisdiction of ICC](#)

(Daily Mirror)

Former External Affairs Minister Prof. G.L. Peiris, in an interview with the Daily Mirror, aired his views

on the International Convention for the Protection of All Persons from Enforced Disappearances...

## 10 July

### [Co-Investigating Judges' Reasons for Dismissing Case Against Im Chaem Released](#)

(Cambodia Tribunal Monitor)

Today, the Co-Investigating Judges (CIJs) issued the reasons for the closing order of 22 February 2017 in which they dismissed the case against IM Chaem for lack of personal jurisdiction. In this press release, the CIJs summarise the main reasons for the dismissal...

### [The real problem behind South Africa's refusal to arrest al-Bashir](#)

(ISS)

Last week the judges of the International Criminal Court (ICC) ruled that South Africa erred in its decision not to arrest Sudanese President Omar al-Bashir during his controversial visit to the country in 2015. Two South African courts had come to the same conclusion, and so the decision of the ICC's Pre-Trial Chamber II on 6 July was not surprising. But the judgment is important – not only because it raises questions about South Africa's role in international justice – but because of what it says about the weak tools in the ICC's arsenal to ensure cooperation by states. Having found that it obstructed justice, the judges should have reported South Africa to the United Nations Security Council (UNSC), which referred the situation in Darfur, Sudan to the ICC for investigation. The judges didn't choose this course of action, which means South Africa faces no sanction for hobbling the court it signed up to, and denying Darfur's victims of justice...

## 6 July

### [Al-Bashir case: ICC Pre-Trial Chamber II decides not to refer South Africa's non-cooperation to the ASP or the UNSC](#)

(ICC Press Release)

Today, 6 July 2017, Pre-Trial Chamber II of the International Criminal Court composed of Judges Cuno Tarfusser, Presiding, Chang-ho Chung, and Marc Perrin de Brichambaut who appended an individual opinion, delivered in open session its decision finding that South Africa failed to comply with its obligations by not arresting and



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surrendering Omar Al-Bashir to the Court while he was on South African territory between 13 and 15 June 2015. However, the Chamber considered that it is not warranted to refer South Africa's non-compliance to the Assembly of States Parties or the Security Council of the United Nations...

## 5 July

### [CAR armed groups committing war crimes: HRW](#)

(Jurist)

Armed groups have been committing war crimes in the Central African Republic (CAR), according to a report released Wednesday by Human Rights Watch (HRW) detailing violence in three central provinces between November 2014 and April 2017. During that time period, HRW documented at least 566 civilian deaths at the hands of the Seleka and anti-balaka groups. Armed groups also destroyed no fewer than 4,207 homes, forcing people to flee the area and causing the deaths of 144 children and elderly people. Those responsible for the deaths have not been "detained, arrested or otherwise held accountable" and are still free to roam the areas where their crimes occurred...

### [Mexico: Murders, Disappearances, and Torture in Coahuila de Zaragoza are Crimes against Humanity](#)

(FIDH)

FIDH and several Mexican organizations will submit a joint communication (report) today to the Prosecutor of the International Criminal Court (ICC), requesting that her Office open a preliminary examination into the serious crimes committed in the Mexican state of Coahuila from 2009-2016. The contents of the report are based on the investigation and legal analysis carried out by the FIDH with the support of more than 100 Mexican organizations...

### [ICC 'following' evidence on Afghanistan war crimes claims](#)

(BBC News)

There is a "reasonable basis" to believe that allegations of war crimes and crimes against humanity were committed in Afghanistan by US troops, the Taliban and Afghan forces, Fatou Bensouda, Prosecutor of the International Criminal Court (ICC) has told Hardtalk. She said she was

"following the evidence" and "following the law" in the investigation...

## 3 July

### [Symposium: Doing Justice to Truth in International Criminal Courts and Tribunals](#)

(Humanity Journal)

As the field of international criminal justice has institutionalized over the course of the past 70 years, communities—both local and international—have increasingly turned to international criminal courts and tribunals (ICTs) to serve as arbiters of truth in the aftermath of mass atrocities... That ICTs somewhat inevitably perform a truth-telling function is now well-established. Yet, if this is so, less apparent is how the truths that emerge from ICTs should be judged, how they relate to other kinds of truth, and which perspectives and criteria should be relied upon to evaluate judicialised truths in practice. It is with these questions in mind that we convened the present symposium...

### [Victims of Sexual and Gender Based Violence Crimes Need Special Reparations](#)

(International Justice Monitor)

As the trial of Dominic Ongwen continues before the International Criminal Court (ICC), significant questions remain about how reparations for victims of sexual and gender based (SGBV) crimes will be approached...

### [Kosovo Ex-Commander Lushtaku Cleared of War Crimes](#)

(Balkan Transitional Justice)

The Supreme Court in Pristina on Monday acquitted former Kosovo Liberation Army commander Sami Lushtaku of war crimes, his lawyer Arianit Koci told BIRN. Lushtaku had appealed to the Supreme Court, alongside two other former senior members of the KLA's so-called 'Drenica Group' who had also been convicted of war crimes, Sylejman Selimi and Jahir Demaku. It is not yet clear what the court decided in Selimi and Demaku's cases...

### [Ignoring international warrants, Sudan's leader says he'll visit Moscow](#)

(New York Times)





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Genocide and war-crimes charges have long shadowed Sudan's president, sometimes forcing him to scrap or alter travel abroad to avoid the risk of arrest and extradition to the International Criminal Court. Still, Sudan said Monday, he had accepted an invitation to visit Russia next month. The invitation to the president, Omar Hassan al-Bashir, from President Vladimir V. Putin of Russia, presents a new test of Mr. Bashir's defiance of the international court at The Hague, which issued arrest warrants for him years ago over the genocide in Sudan's Darfur region. Mr. Bashir's refusal to heed the warrants has come to symbolize a broader impunity shown toward the court, the international judicial authority that was created to deal with egregious crimes in which victims have no other recourse...

### [A Small Step Toward Justice in Syria](#)

(HRW)

Today, the UN Secretary-General appointed Catherine Marchi-Uhel to head a new UN team tasked with investigating serious crimes committed in Syria since 2011. For victims who have known

nothing but suffering, despair and abandonment, the creation of this team represents a small step in the difficult struggle for justice, redress and an end to impunity that has marked the bloody conflict...

### 27 June

#### [Investigating Post-2003 War crimes: Afghan Government wants "one more year" from the ICC](#)

(Afghanistan Analysts Network)

The ICC Office of the Prosecutor (OTP) announced on 14 November 2016 that it would "imminently" make its final decision whether to ask the ICC Pre-Trial Chamber for authorisation to open an investigation into war crimes and crimes against humanity committed since Afghanistan signed the ICC statute in 2003. The Afghan government, however, has asked the ICC to hold off on plans for an investigation for one more year. AAN researcher Ehsan Qaane analyses the developments over the past seven months, the back-and-forth between the Afghan government and the ICC, and the likely key issue: whether war criminals enjoy amnesty in Afghanistan, or not...

## Quick links

The following are some useful research links:

- FICJ [Resource Library](#): research tools, best practice reports, commentaries and more
- FICJ [Global Legal Developments](#): specialised units, legislation, international & national cases
- International Criminal Court Legal Tools Database: an electronic library on international criminal law and justice with over 41,000 documents: [browse](#) | [search](#) | [annotated Rome Statute](#) | [annotated Rules of Procedure and Evidence](#) | [National Implementing Legislation Database](#)
- International Criminal Tribunal for the Former Yugoslavia [Legal Library](#)
- International Criminal Tribunal for Rwanda [Documents](#)

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