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Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court

DAFNA GOZANI*

I. INTRODUCTION

Countries recovering from widespread human rights violations face the challenge of restoring civic trust in the domestic rule of law, repairing the social fabric of society, and building a foundation for long-term peace and reconciliation.¹ Although the creation of international criminal courts and tribunals has been a positive step towards “advancing a global system of ending impunity for the most serious crimes,” their creation alone is insufficient to promote a just and lasting resolution of conflict.² The international community must take steps to ensure that the contributions of international tribunals are not undermined or reversed by the manner in which they close their operations and that their legacy is preserved.³

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1. *Stakeholders Convene on Legacy of the SCSL*, EXPLORING THE LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE, <http://scsl-legacy.ictj.org/about-project> (last visited Jan. 25, 2013) [hereinafter *Stakeholders Convene on Legacy of the SCSL*].

2. Caitlin Reiger, *Where to from Here for International Tribunals? Considering Legacy and Residual Issues*, INT’L CENTER FOR TRANSITIONAL JUSTICE 1, 5 (Sept. 2009), <http://ictj.org/sites/default/files/ICTJ-Global-Legacy-Tribunal-2009-English.pdf>.

3. *Id.*

The legacy of an international criminal tribunal is its “lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic capacity.”⁴ Thus, as former U.N. Secretary-General Kofi Annan stated, “it is essential that, from the moment any future international or hybrid tribunal is established, considerations be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned.”⁵

The idea of an international court first came about in the aftermath of World War II.⁶ At the conclusion of the war, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals.⁷ In 1948, the U.N. General Assembly passed a resolution inviting the International Law Commission (ILC) to study the desirability and possibility of establishing an international judicial organ for the trial of individuals and groups charged with genocide or crimes with similar gravity.⁸ Despite the ILC having drafted a statute in the early 1950s, the Cold War derailed these efforts; “the General Assembly effectively abandoned the effort pending agreement on a definition for the crime of aggression and an International Code of Crimes.”⁹

Generally, there are three generations of criminal bodies. The first generation includes the Nuremberg and Tokyo Tribunals; the second generation includes the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and lastly, the third generation includes the International Criminal Court and the hybrid criminal bodies, which includes the Special

4. Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, INT'L CENTER FOR TRANSITIONAL JUSTICE 1, 151 (2007), http://wcjp.unicri.it/proceedings/docs/ICTJ_Admin%20Manual%20Criminal%20Justice_2007_eng.pdf.

5. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 46, U.N. Doc. S/2004/616 (Aug. 23, 2004), available at <http://www.unrol.org/files/2004%20report.pdf>.

6. Claire Calzonetti, *Frequently Asked Questions about the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/courts-and-tribunals/frequently-asked-questions-international-criminal-court/p8981> (last updated July 23, 2012).

7. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM SOC. INT'L L. 551, 554–55 (2006).

8. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 17 (2008).

9. *History of the ICC*, COALITION FOR THE INT'L CRIM. COURT, <http://www.iccnw.org/?mod=icchistory> (last visited on Jan. 25, 2015). The *International Criminal Court*, PROJECT ON INT'L COURTS AND TRIBUNALS, <http://www.pict-pecti.org/courts/ICC.html> (last visited on Sept. 7, 2014).

Court of Sierra Leone (SCSL).¹⁰ In the 1990s, the first ad hoc criminal tribunals were established in response to the atrocities committed in the former Yugoslavia and Rwanda.¹¹ The international community, through the U.N. Security Council, created the ICTY and the ICTR in 1993 and 1994, respectively.¹² In 2002, the U.N., in cooperation with the Sierra Leone government, set up a new type of court in response to the mass killings and other human rights violations in Sierra Leone: the SCSL, a hybrid, ad hoc international criminal tribunal that combined the characteristics of both a national and international court.¹³

While these three institutions were each unique, they all had one major feature in common: they were temporary.¹⁴ Thus, while the SCSL differs from the ICTY and ICTR by being a hybrid institution, for the purposes of this note, these three institutions will be referred to as ad hoc international criminal courts.¹⁵ The SCSL was the first of the three to complete its mandate;¹⁶ the ICTY and the ICTR are expected to complete their mandates in the upcoming year.¹⁷ The closure of these tribunals, their residual mechanisms, and their attempts to establish a positive legacy will not only serve as examples for other existing and future ad hoc tribunals, but will also provide valuable lessons for the International Criminal Court (“ICC” or “the Court”); the first permanent international court and the first court with global application.¹⁸

Since the first of the post-Cold War ad hoc criminal tribunals only recently completed its mandate,¹⁹ developing the best practices for com-

10. *Hybrid Courts*, THE PROJECT ON INT’L COURTS AND TRIBUNALS, <http://www.picti.org/courts/hybrid.html> (last visited July 15, 2014).

11. *Ad hoc Tribunals*, THE INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>.

12. *Id.*

13. *Id.*

14. *Hybrid Courts*, *supra* note 10.

15. *Id.* (Other examples of hybrid institutions are the Crimes Panels of the District Court of Dili, “Regulation 64” Panels in the Courts of Kosovo, and the Extraordinary Chambers in the Courts of Cambodia.)

16. Charles Chemor Jalloh, *The Sierra Leone Special Court and Its Legacy* (Mar. 13, 2014), <http://www.cambridgeblog.org/2014/03/the-sierra-leone-special-court-and-its-legacy>; *see also* Press Release, Special Court for Sierra Leone Outreach and Public Affairs Office, Special Court Hands Over Courthouse and Complex to the Government of Sierra Leone (Dec. 2, 2013), *available at* <http://www.rscsl.org/Documents/Press/2013/pressrelease-120213a.pdf> [hereinafter Special Court Press Release].

17. Kevin Jon Heller, *Completion Strategies*, in THE INT’L PROSECUTORS 11-12 (2012).

18. *ICC at a Glance*, INT’L CRIM. COURT, <http://www.icc-pi.int/iccdocs/PIDS/publications/ICCAatAGlanceEng.pdf> (last visited July 18, 2014).

19. Special Court Press Release, *supra* note 16.

pletion strategies, residual mechanisms, and legacy considerations are still in their beginning stages.²⁰ As one member of the Special Court of Sierra Leone's Management Committee recently said, "we have been successful in establishing tribunals. We must be as successful in ending them."²¹

This note will argue that the ICC should take a broad approach to legacy by fostering affected communities' ownership and understanding of the judicial proceedings, promoting reconciliation, and prioritizing restorative over retributive justice. A broader conception of legacy would place a greater emphasis on facilitating a path toward sustainable peace.²² In addition, this approach would not be limited to the victims or witnesses of human rights violations; rather, it acknowledges the impact that mass crimes have on future generations and the implication about the possibilities for future societal reconciliation.²³ As emphasized by the Honorable Judge Vagn Joensen, President of the ICTR, "[n]ot only must justice be done, it must also be seen to be done."²⁴ In order to maximize the ICC's potential, the international community needs to engage in and prioritize legacy planning from the outset of its activities.²⁵

20. *About The Mechanism*, U.N. MECHANISM FOR INT'L CRIM. TRIBUNALS, <http://www.unmict.org/about.html> (last visited Nov. 11, 2012) [hereinafter *About The Mechanism*]; *Home*, EXPLORING THE LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE, <http://scsl-legacy.ictj.org/about-project> (last visited Feb. 23, 2013) [hereinafter EXPLORING THE LEGACY]; see also Daryl A. Mundis, *Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?*, 28 *FORDHAM INT'L L.J.* 591 (2005) (discussing the challenges facing the closing of the International Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda).

21. *Heller*, *supra* note 17 (internal quotations omitted).

22. The more conservative approach of legacy tends to prioritize activities such as knowledge transfer between international and national staff, as well as training and facilitating legal reform. Alison Cole, *What is the International Criminal Court's Legacy?*, THIS IS SIERRA LEONE (July 17, 2012), <http://www.thisissierrealeone.com/what-is-the-legacy-of-the-international-criminal-court>.

23. For more information about the intergenerational transmission of trauma and its negative impact on the formation of cultural identity and reconciliation, see ALEXANDER A. LUPIS, SCHOLAR RESEARCH BRIEF: INTER-GENERATION TRANSMISSION OF TRAUMA IN CROATIA: VETERANS FAMILIES 20 YEARS AFTER THE SIEGE OF VUKOVAR, IREX 4 (2011); Yael Danieli, *Recovery after Mass Crimes*, in THE OXFORD ENCYCLOPEDIA OF PEACE (Nigel J. Young ed., Oxford Univ. Press 2010), available at <http://www.oxfordreference.com/view/10.1093/acref/9780195334685.001.0001/acref-9780195334685-e-609>.

24. Judge Vagn Joensen, *The Legacy of the Ad Hoc Tribunals and the Future of International Criminal Justice*, YOUTUBE (Nov. 13, 2013), http://www.youtube.com/watch?v=QPBF_13tYsI&list=WLuZ0b-NS3V6llzTKHtI3pyba-WILWGCMX.

25. Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools*

This note will also discuss the legacy lessons that the ICC can learn from the closing of the three ad hoc international criminal courts (the ICTY, the ICTR, and the SCSL). While the ICC is a permanent institution, it will still disengage from the situation countries once the trials are completed; therefore, it has much to gain by looking to the experiences of the ad hoc courts, which were established as temporary institutions from the outset.²⁶ The ICC's greatest challenges will be encouraging local ownership of the trials, increasing the rule of law, and helping to repair the shredded fabric of society after horrific widespread human rights violations. To preserve the legacy of the ICC's work, the Court's focus must go beyond simply trials and convictions; it must instead focus on strengthening the rule of law and helping to establish the foundation for lasting peace.

Part I of this note will provide a general overview of completion strategies, residual issues, and legacy considerations. Part II of this note will provide a very brief background on the ICTY, ICTR, and SCSL, and discuss their utilization of completions strategies in approaching residual issues and legacy considerations. Part III will examine how the ICC can incorporate lessons from the experiences of the ad hoc international criminal courts and will argue that, for the ICC to achieve its full potential, it needs to embrace a broader conception of legacy. Finally, Part IV will conclude that, regardless of an international court's permanent or temporary nature, the prioritization of completion plans, residual mechanisms, and legacy strategies through focusing on the affected community's needs are essential to protecting these institution's legacy and work.

II. COMPLETION STRATEGIES, RESIDUAL FUNCTIONS, AND LEGACY CONSIDERATIONS

International ad hoc criminal courts and tribunals are “transitory investments in providing justice, intended to provide what the domestic justice systems cannot deliver alone due to a lack of capacity, independence, or political will, resulting in part from the legacy of the conflict.”²⁷

for *Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, at 16, U.N. Doc. HR/PUB/08/2 (2008), <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf> [hereinafter *Rule-of-Law Tools*].

26. A situation country is the location where the alleged violations took place. For more information, see *Situations and Cases*, INT'L CRIM. COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/pages/situations%20and%20cases.aspx (last visited Sept. 21, 2014) [hereinafter *Situations and Cases*].

27. Reiger, *supra* note 2, at 1.

Unlike domestic courts, the international community expects international criminal courts and tribunals “to assist in the transformation of post-conflict societies, or at the very least,” to establish a legacy that will stimulate some positive transformation.²⁸ Upon completion of its judicial proceedings, each institution faces three interrelated challenges: completion strategies, residual issues, and legacy considerations.

Some scholars argue that “[l]egacy must be domestically owned and driven. A hybrid or international tribunal should be viewed not as a driver but as a catalyst in terms of motivating a broader set of initiatives.”²⁹ However, in contrast to legacy issues, there are some residual functions that simply cannot be “domestically owned and driven.”³⁰ Thus, while it is important to encourage input from affected communities and inform them of completion strategies, there are also some instances in which the court must handle the residual mechanisms exclusively, at least in the beginning of their implementation.

A. Completion Strategies

Completion strategies refer to the court or tribunal’s work leading up to its closing, which includes the preparation work to handle residual issues that arise from the institution’s closure.³¹ Completion is important for ensuring the credibility and perceived legitimacy of these courts and tribunals. It would be harmful for an institution with a goal to pursue the end of impunity to continue indefinitely.³²

In theory, it is logical for any institution undertaking proceedings with a limited timeframe to begin to plan for its eventual closure at the earliest stage possible.³³ However, because of the complicated and detailed nature of the proceedings, these institutions typically begin to address such issues after trial proceedings are already underway.³⁴ In a framework of limited resources, it is inevitable that these institutions will be pressured to conclude their operations based on financial con-

28. Mohamed Suma, *The Charles Taylor Trial and Legacy of the Special Court for Sierra Leone for Sierra Leone*, INT’L CTR. FOR TRANSITIONAL JUSTICE 1, 1 (Sept. 2009), available at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2009-English.pdf>.

29. Vincent, *supra* note 4, at 151.

30. Gabriel Oosthuizen, Open Society Justice Initiative, *The Residual Functions of the U.N. International Criminal Tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: The Potential Role of the International Criminal Court*, 1, 5 (Sept. 30, 2008) (unpublished draft), available at <http://www.iclsfoundation.org>.

31. *Id.* at 5.

32. *Id.*

33. Vincent, *supra* note 4, at 145.

34. *See id.*

siderations; as a result, a very real danger exists that financial considerations will drive the judicial process.³⁵ Therefore, it is particularly important that the planning happens early and in a transparent manner so investors can understand the institution's methodology and allow the focus to remain on the needs of the affected community, where it belongs.

Because these institutions are generally a response of the preceding conflict that necessitated the involvement of an international criminal court or tribunal, they are unable to rely on domestic judicial systems to continually enforce court orders, supervise lengthy prison terms, and provide on-going witness protection.³⁶ As a result, the closing such institutions raises long-term planning concerns.

By understanding that these ad hoc tribunals would eventually end, the conception of their completion strategies is typically described in terms of three milestones: first, the conclusion of every prosecutorial investigation; second, "the end of all first instance trials;"³⁷ and finally, third, the "conclusion of all appeals from trial judgments."³⁷ Completion strategies are also interconnected with residual mechanisms and legacy planning because they set out the required residual mechanisms necessary to ensure that the court's work and legacy will not be undone after it closes.

B. Residual Issues and Mechanisms

Residual issues refer to the enduring tasks of on-going legal and moral obligations to those directly affected by the tribunals after the tribunals close.³⁸ "[A]s a matter of principle, [residual mechanisms] should not only be consistent with the founding [of closing] documents, but also further the objectives of these courts."³⁹ Indeed, this entails some very important responsibilities as matters of life or death and the protection of fundamental human rights are sometimes involved.⁴⁰ The main

35. *Id.*

36. Reiger, *supra* note 2, at 2.

37. Thomas Wayne Pittman, *The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals*, 9 J. INT'L CRIM. JUSTICE 797, 798–99 (2011).

38. Reiger, *supra* note 2, at 2.

39. Briefing paper from Marieke Wierda and Caitlin Reiger of ICTJ's Criminal Justice Program to the ICTJ and the University of Western Ontario Faculty of Law, *Closing the International and Hybrid Criminal Tribunals: Mechanisms to Address Residual Issues*, INT'L CTR. FOR TRANSITIONAL JUSTICE 4 (Feb. 1, 2010), available at <http://www.ictj.org/sites/default/files/ICTJ-Global-Tribunal-Residual-2010-English.pdf> [hereinafter *Closing the International and Hybrid Criminal Tribunals*].

40. Gabriel Oosthuizen and Robert Schaeffer, *Complete justice: Residual functions and po-*

purpose for establishing a residual mechanism “is to ensure that the closing of the Tribunals will not result in impunity for those ‘responsible for serious violations of international humanitarian law.’”⁴¹ Residual mechanisms have the potential “to create a safe space within which those traumatized by their experiences may overcome them.”⁴²

Since the international community has undertaken the responsibility to establish such institutions, it also has the responsibility of closing them. As the Honourable Justice Shireen Avis Fisher, President of the SCSL, stated, “residual responsibilities are not an afterthought or burden. They are an essential part of the ongoing struggle against impunity: to insure that witnesses continue to be protected, archives continue to be preserved, and the supervision of persons convicted by the Special Court continue to meet international standards.”⁴³

The majority of residual functions will involve some combination of judicial, registry, defense, and prosecutorial activities.⁴⁴ Judicial functions include activities performed by judicial officers “with the authority to make legal assessments and issue binding decisions”⁴⁵ The registries’ functions include “administer[ing] and servic[ing] the courts;” this also includes the components of the prosecution and the defense.⁴⁶ The registries are responsible for a broad range of activities such as providing witness protection services, managing issues with personnel, providing security and language services, operating as the court’s channel of communication, and managing records.⁴⁷ The residual function workload is likely to be the heaviest right after the court closes, but it will

tential residual mechanisms of the ICTY, ICTR and SCSL, 3 HAGUE JUST. J. 48, 50 (2008), available at [http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3\(1\)/Residual_functions_EN.pdf](http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3(1)/Residual_functions_EN.pdf).

41. See Catherine Denis, *Critical Overview of Residual Functions’ of the Mechanisms and its Date of Commencement (including Transitional Arrangements)*, 9 J. INT’L CRIM. JUST. 819, 822 (2011) (citing Security Council’s resolutions establishing the ICTY S.C. Res. 808, U.N. Doc. S/RES/808 (February 22, 1993), and the Security Council’s Resolution establishing the ICTR, S.C. Res. 1503, U.N. Doc. S/RES/1503 (August 28, 2003); see also the resolution establishing the IRMCT S.C. Res. 1966, U.N. Doc. S/RES/1966 (December 22, 2010).

42. Leila Nadya Sadat, *The Legacy of the International Criminal Tribunal for Rwanda*, WHITNEY R. HARRIS WORLD LAW INSTITUTE 1, 18 (July 3, 2012), <http://law.wustl.edu/harris/documents/ICTRLecture-LegacyAd%20HocTribunals9.12.12.pdf>.

43. *Tenth Annual Report of the President of the Special Court for Sierra Leone* (June 2012–May 2013), <http://www.sc-sl.org/LinkClick.aspx?fileticket=G5p0a%2fK95Sc%3d&tabid=176> [hereinafter *Tenth Annual Report*].

44. Oosthuizen & Schaeffer, *supra* note 40, at 51-52.

45. *Id.*

46. *Id.*

47. *Id.*

decrease with time.⁴⁸

Due to the temporary nature of ad hoc tribunals, residual mechanisms are necessary to review proceedings and new evidence or try suspects years after cases have been closed.⁴⁹ This function is essential to preserving an international tribunal's legacy. Without it, human rights violators could simply wait out the charges against them, which "risk[s] reinforcing impunity and undermining efforts to re-establish the rule of law."⁵⁰ A recent example occurred on January 2013 when a French Court ruled in favour of a Rwandan extradition request for genocide suspect, Innocent Musabyimana.⁵¹ Such mechanisms are also important for transferring prosecutorial duties and classified documents to the national level, assuring that the witness protection programs continue, preventing future human rights violations, protecting the rights of the accused, and overseeing the establishment of public archives.⁵² Residual mechanisms also serve to handle any appellate proceedings that may arise after the closure of the court.⁵³

Effective residual mechanisms not only have an impact on that specific tribunal or court's work, but also on other institutions' work. For instance, witnessing a court's failure to effectively ensure the protection of its victims and witnesses will likely discourage others from engaging in the work of other international courts such as the ICC.⁵⁴ Correspondingly, such residual mechanisms are also connected to the court's legacy in that they are a way for the court to be remembered.⁵⁵

C. Legacy Considerations

Legacy issues are not easy to define; there have been questions as to what stage these issues should be addressed, how to assess their completion and success, and who would have the responsibility for carrying them out.⁵⁶ There has also been some debate as to whether legacy issues

48. Oosthuizen, *supra* note 30, at 5.

49. *See* Reiger, *supra* note 2, at 2.

50. *Id.* at 2.

51. *Rwanda: French Court Grants Rwandan Extradition Request*, HIRONDELLE NEWS AGENCY (Jan. 30, 2013), <http://allafrica.com/stories/201301310074.html>.

52. Closing the International and Hybrid Criminal Tribunals, *supra* note 39, at 5-6.

53. *The Mechanism for International Criminal Tribunals*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY), <http://www.icty.org/sid/10874> (last visited July 18, 2014).

54. Oosthuizen & Schaeffer, *supra* note 40, at 52.

55. *Situations and Cases*, INT'L CRIM. COURT, http://icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited July 18, 2014).

56. Gabriel Oosthuizen, *The Residual Functions of the UN International Criminal Tribu-*

extend beyond completion and residual issues.⁵⁷ “At the core of legacy should be the concept of sustainability—how to maxim[z]e international interventions in the aftermath of mass atrocities and make a permanent contribution to a country’s capacity to try massive crimes.”⁵⁸ An international court’s or tribunal’s capacity and strength in preventing human rights violations, protecting witnesses, and performing duties involved in transferring cases will partially determine its legacy.⁵⁹

A conservative approach to legacy planning focuses a court’s energy on strengthening the rule of law with an emphasis on enhancing national capacity.⁶⁰ Courts enhance national capacity by employing the “demonstration effect.”⁶¹ This refers to the role an international tribunal or court plays in demonstrating by example and contributes to a cultural shift “through increased rights awareness and increased calls for accountability.”⁶² The conservative approach prioritizes transferring knowledge “between international and national staff [as well as] training and facilitating legal reform.”⁶³ While this approach seeks to create a cultural shift and increase human rights awareness, it does not emphasize the need to directly interact with the affected community.⁶⁴

Alternatively, a broader approach to legacy, mainly supported by civil society, places a greater emphasis on facilitating the path towards reconciliation through direct interaction with the public.⁶⁵ Some activities under this broader conception of legacy include: “preserving public records and materials for posterity;” promoting the long-term positive impact of the courts’ work; outreaching to affected communities and explaining the court’s work; and developing and reaffirming the rule of law through enhancing human and institutional capacities.⁶⁶ Generally,

nals of the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the Potential Role of the International Criminal Court ¶ 19 (Int’l Criminal Law Servs., Open Soc’y Justice Initiative, Briefing Paper, 2008) [hereinafter *The residual functions of the UN International Criminal tribunals*].

57. Oosthuizen, *supra* note 30, at 5.

58. Vincent, *supra* note 4, at 154.

59. Gabrielle McIntyre, *The International Residual Mechanism and the Legacy of International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 3 GOETTINGEN J. INT’L L. 926 (2011).

60. The main proponents of this approach are the entities financing the court, such as the United Nations or the national government. Cole, *supra* note 22.

61. Vincent, *supra* note 4, at 153.

62. *Id.*

63. Cole, *supra* note 22.

64. *Id.*

65. *See generally id.*

66. Oosthuizen, *supra* note 30, at 5.

such an approach does not view legacy in terms of legal accomplishments and successful prosecutions, but in terms of reconciliation and transitional justice.

The Preamble to the Rome Statute, the ICC's founding document, supports this conception of legacy, by stating that "grave crimes threaten the peace, security and well-being of the world," it is evident that the ICC recognizes the interdependent relationship between accountability and stability.⁶⁷ The Preamble also states that the ICC was established "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. . . . for the sake of present and future generations;" this implies that in addition to its prosecutorial function, another one of the ICC's roles is to affect future conduct.⁶⁸ Some argue that the ICC should play an even greater role in restorative and transitional justice "by promoting issues like reconciliation, which also contributes to restoration."⁶⁹ This approach also finds support in some of the founding documents of the ICC's predecessors. For example, the statute establishing the ICTR states that the intention of the court was to contribute to "the process of national reconciliation and to the restoration and maintenance of peace" by ensuring redress for the most serious violations.⁷⁰

Another measure of the court's legacy is "the extent to which they have contributed to public perceptions and debates about events that took place during the conflict."⁷¹ It should be recognized that there is a connection and overlapping purposes for residual mechanisms and legacy strategies. For example, a U.N. Secretary-General's report noted that the "primary use of the archives of a tribunal will be not just for the residual mechanisms that succeed them, but also for national authorities that may seek to conduct further investigations."⁷² That report also "acknowledges that there is an important secondary value of preserving archives 'for memory, education, and research.'"⁷³ Ultimately, the legacy of an international court or tribunal should "lay the groundwork for

67. Cole, *supra* note 22 (citing Rome Statute of the International Criminal Court art. 126, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 1002, 1068 (1998)).

68. Jeremy Sarkin, *Enhancing the Legitimacy, Status, and the Role of the International Criminal Court Globally by Using Transactional Justice and Restorative Justice Strategies*, 6 *INTERDISC. J. HUM. RTS. L.* 83, 86 (2011-2012).

69. *Id.* at 90.

70. Closing the International and Hybrid Criminal Tribunals, *supra* note 39, at 4 (internal quotation marks omitted).

71. Reiger, *supra* note 2, at 5.

72. *Id.*

73. *Id.*

future efforts to prevent a recurrence of crimes by offering precedents for legal reform, building faith in judicial processes, and promoting greater civic engagement on issues of accountability and justice.”⁷⁴

III. AD HOC CRIMINAL TRIBUNALS AND THE SPECIAL COURT OF SIERRA LEONE

The last decade of the twentieth century experienced major advancements in international criminal justice with regards to the creation and establishment of ad hoc criminal tribunals and hybrid criminal tribunals such as the ICTY, the ICTR, and the SCSL.⁷⁵ While the ICTY, ICTR, and the SCSL are all unique, one common feature stands: each is an ad hoc institution created specifically to address a particular situation.⁷⁶ The SCSL was the first of the three to complete its mandate.⁷⁷ The ICTY and the ICTR are expected to complete their mandates in the next two years. The SCSL had the benefit of learning from the critiques of the ICTY and the ICTR, thus this note primarily focus on its legacy preservation activities. However, a short discussion of the ICTY and the ICTR will explain some of issues that the ICC will face in shaping a legacy strategy.⁷⁸

A. *The International Criminal Tribunal for the former Yugoslavia*

1. Historical Background and Completion Strategy of the ICTY

Beginning in 1991, political developments in what used to be the Socialist Federal Republic of Yugoslavia resulted in a number of violent conflicts and widespread violations of international criminal law committed against civilians such as deportations, mass executions, ethnic cleansing, mass sexual assaults, and rapes.⁷⁹

74. *Id.* at 1.

75. See Sarkin, *supra* note 68, at 85.

76. *Hybrid Courts*, PROJECT ON INT'L COURTS AND TRIBUNALS, <http://www.picti.org/courts/hybrid.html> (last visited Oct. 10, 2014).

77. *Special Court for Sierra Leone: Its History and Jurisprudence*, SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org/> (last visited July 18, 2014).

78. For an in depth discussion on the ICTY's legacy, see Guido Acquaviva, 'Best Before Date Shown': *Residual Mechanisms at the ICTY*, in THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 507-36 (Bert Zwart, Alexander Zahar & Göran Sluiter eds., 2011). For an in-depth discussion on the ICTR's legacy, see Cecile Aptel, *Closing the U.N. International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues*, 14 NEW ENG. J. OF INT'L & COMP. L. 169, 169-85 (2008).

79. ROBERT CRYER ET AL., INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND

The U.N. Security Council created the ICTY in 1993 when the conflict in the former Yugoslavia was still underway.⁸⁰ The ICTY was designed to contribute to “the restoration and maintenance of peace” by ensuring redress for the most serious violations.⁸¹ The court tried four types of crimes: genocide; crimes against humanity; violations of the laws and customs of war; and grave breaches of the Geneva Conventions.⁸²

By the end of 2013, the ICTY indicted 161 persons in total and concluded 141 cases.⁸³ There were ongoing proceedings for twenty of the accused – sixteen before the appeals chamber, and four at the trial level.⁸⁴ The ICTY had sentenced seventy-four people—seventeen of whom were transferred, fifty of whom served their sentences, and three who died while serving their sentences.⁸⁵ In addition, the court transferred thirteen individuals to countries in the former Yugoslavia for trial pursuant to Rule 11 *bis*, and enforced sentences in thirteen different states.⁸⁶ Thirty-six of the accused either had their indictments withdrawn or died.⁸⁷

It was not until seven years after the ICTY was established that it seriously began to discuss how it would conclude its work.⁸⁸ Two years later, in 2002, the ICTY President Claude Jorda submitted the first ICTY completion strategy with plans for the ICTY to complete its mandate by 2010.⁸⁹ Subsequently, in 2003, the Security Council adopted a resolution to treat the completion strategies of the ICTY and the ICTR jointly, calling on both courts “to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first

PROCEDURE 122 (2d. ed. 2010).

80. *Id.*

81. Closing the International and Hybrid Criminal Tribunals, *supra* note 39, at 4.

82. *Infographic: ICTY Facts & Figures*, UNITED NATIONS INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/11186> (last updated Feb. 2014) [hereinafter *Infographic: ICTY Facts & Figures*].

83. *Key Figures of the Cases*, UNITED NATIONS INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/24> (last updated Aug. 28, 2014) [hereinafter *Key Figures of the Cases*].

84. *Id.*

85. *Id.*

86. *Infographic: ICTY Facts & Figures*, *supra* note 82.

87. *Id.*

88. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 41 (2006).

89. Daryl A. Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142, 142-43 (2005) [hereinafter *The Judicial Effects of the “Completion Strategies”*].

instance by the end of 2008, and to complete all work by 2010.”⁹⁰ A year later, after the two Presidents of the tribunals “hinted that there might be difficulties in fully respecting the dates set out in the completion strategy, the Security Council adopted another resolution,” Resolution 1534, to reaffirm the importance of the completion date.⁹¹

In adopting Resolution 1534, the Security Council established new requirements for the leadership of the ICTY and the ICTR.⁹² First, ICTY and ICTR prosecutors were required to review their caseloads “with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions.”⁹³ Second, the tribunals were to focus new indictments on “the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal.”⁹⁴ Third, the Security Council required status reports on the progress of the tribunals’ implementation of the completion strategies.⁹⁵ While dates were set, some argued that these were merely targets, not deadlines; there were too many variables, such as plea agreements and the arrival of fugitives, to make hard predictions.⁹⁶

Due to the completion strategy, the judges of the ICTY executed two amendments to the ICTY’s Rules of Procedure and Evidence.⁹⁷ First, Rule 11 *bis* was amended so that ICTY cases could be transferred to competent domestic courts.⁹⁸ Second, Rule 28 was amended to give the ICTY judges a role in determining whether a potential indictee is “‘senior’ enough to merit indictment by the ICTY.”⁹⁹ In addition, in order to assist with the completion, the Security Council authorized the appointment of *ad litem* judges.¹⁰⁰ Security Council Resolution 1329, which amended the Statute, reflected the actions the tribunals needed to take in order to “expedite the conclusion of their work at the earliest possible date.”¹⁰¹

90. S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

91. SCHABAS, *supra* note 88, at 43.

92. *See id.*

93. S.C. Res. 1534, ¶ 4, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

94. *Id.*

95. *Id.*

96. Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT’L L. 158, 159-61 (2005).

97. *The Judicial Effects of the “Completion Strategies,” supra* note 89, at 146.

98. *Id.*

99. *Id.*

100. SCHABAS, *supra* note 88, at 41.

101. *Id.*

Some of the ICTY judges were very critical of the completion strategy based on their concerns about the fair trial rights of defendants.¹⁰² The primary concern was whether the costliness and need of expediting a trial would take priority over the defendants' right to a fair trial.¹⁰³ Some argued that this would be a fatal blow to the ICTY's legacy.¹⁰⁴ Nonetheless, it is evident that the ICTY's completion strategy led to "several procedural innovations and an increased use of documentary evidence."¹⁰⁵

2. Residual Mechanisms for the ICTY

In December 2008, the UN Secretary General, per the Security Council's request, issued a report "on the possible options' available to establish ad hoc mechanisms to carry out the residual mechanisms;" in the report, the Secretary General identified the different functions that the mechanisms should fulfil¹⁰⁶ such as: trying fugitives, trying contempt cases, protecting witnesses, reviewing judgments, enforcing sentences, referring cases to national jurisdictions, assisting national jurisdictions, and hosting and maintaining archives.¹⁰⁷ On December 22, 2010, the U.N. Security Council issued Resolution 1966, which established the International Residual Mechanism for Criminal Tribunals (IRMCT).¹⁰⁸ The IRMCT is meant to be a "temporary and efficient" mechanism that will continue the ICTY's and the ICTR's "jurisdiction, rights and obligations and essential functions."¹⁰⁹ The IRMCT will begin before the ICTR and the ICTY complete their outstanding judicial work.¹¹⁰ "This 'overlapping period' is regulated by the Transitional Arrangements that are annexed to the Resolution."¹¹¹ The IRMCT has two branches: one for the ICTY and one for the ICTR.¹¹² The IRMCT branch for the ICTY, located in The Hague, began its work on July 1,

102. CRYER, *supra* note 79, at 131.

103. *Id.*

104. *Id.*

105. *Id.*

106. Reiger, *supra* note 2, at 3.

107. *Id.*

108. *About The Mechanism*, *supra* note 20. The IRMCT is also sometimes referred to as the Mechanism of International Criminal Tribunals (MICT). *See, e.g., id.*

109. *About The Mechanism*, *supra* note 20 (internal quotation omitted).

110. Denis, *supra* note 41, at 821.

111. *Id.* (citing S.C. Res. 1966, U.N. Doc. S/RES/1966 (Dec. 22, 2010)).

112. *Id.*

2013.¹¹³

The IRMCT's functions can be identified from reading the IRMCT statute as a whole. Its functions correspond to those identified by the tribunals as well as the functions presented in the U.N. Secretary General's Report.¹¹⁴ The IRMCT handles appeals proceedings, retrials, trials for contempt of the tribunal and false testimony, proceedings for review of final judgment, sentence supervision and enforcement, assistance to national jurisdictions, and preservation of the management of IRMCT, ICTR, and ICTY archives.¹¹⁵ The IRMCT also serves an important function for accused individuals that are still at large.¹¹⁶ The IRMCT is "competent to prosecute 'the persons indicted by the ICTY or the ICTR who are among the most senior leaders suspected of being most responsible for the crimes.'"¹¹⁷ This is essential because without a mechanism to handle fugitive trials, one of the Security Council's main purposes for establishing the tribunals would be defeated.¹¹⁸

Both the ICTY and the ICTR have sections dedicated to victims and witnesses.¹¹⁹ These sections are in charge of developing long-term plans for witnesses afraid of retaliation, recommending to judges the adoption of protection and security measures, and "providing physical and psychological rehabilitation support services."¹²⁰ The IRMCT will be tasked with continuing the witness protection programs.¹²¹

The ICTY "transferred the records and archives management function to the [Residual] Mechanism" on July 1, 2012.¹²² One year later, the Mechanism was transferred particular judicial and prosecutorial functions such as supervising and enforcing the sentencing process, handling "assistance requests from national authorities, and . . . protect[ing] . . . victims and witnesses in closed cases and . . . cases where a witness is

113. *About The Mechanism*, *supra* note 20.

114. Denis, *supra* note 41, at 820 (citing S.C. Res. 258, U.N. Doc. S/RES/258 (May 21, 2009)).

115. *About The Mechanism*, *supra* note 20.

116. Denis, *supra* note 41, at 823.

117. *Id.*

118. Denis, *supra* note 41, at 822.

119. Oosthuizen, *supra* note 30, at 52.

120. Oosthuizen & Schaeffer, *supra* note 40, at 52.

121. *About The Mechanism* *supra* note 20.

122. President of the International Tribunal for the Former Yugoslavia, Assessment and Report of Judge Theodor Meron in Accordance with Paragraph 6 of the Security Council Resolution 1534 (2004) and covering the period from May 24-Nov. 18, 2013, ¶ 55, U.N. Doc. S/2013/678 (Nov. 18, 2013) [hereinafter *Assessment and Report of UN Security Council Resolution 1534*].

relevant” to the ICTY’s and the Mechanism’s judicial activities.”¹²³ The ICTY continues to provide administrative support services to the Mechanism.¹²⁴

Establishing the IRMCT was essential to not only put the completion strategies of the two tribunals into motion, but also to begin preserving and building a legacy for both the ICTY and the ICTR.¹²⁵ Both Tribunals continue to help draft the Mechanism’s regulatory framework for the provision of judicial services, which has helped eliminate the need for a separate regulatory framework.¹²⁶ The hope is that with the IRMCT generating its successful record, “the meaning of ‘legacy’ of the ad hoc tribunals may come full circle to be understood once again in its initial two-fold sense: both as a message of how each tribunal will be remembered, and as its residual functions connotation.”¹²⁷

3. Legacy Considerations for the ICTY

While the ultimate goal is for the impact of a court’s work to continue after its conclusion, the ad hoc criminal tribunals’ legacy has not always been positive.¹²⁸ Tensions exist within the international community about the ad hoc courts’ “ability to focus on an area that is outside their primary mandate and the pressure on the tribunals to maximize time and efficiency.”¹²⁹ “The ICTY was the “first special tribunal.”¹³⁰ Located in The Hague, the ICTY’s distance from the affected populations was not given sufficient consideration in the tribunal’s early years, “which allowed local actors to distort matters.”¹³¹ Eventually, the ICTY tried to rectify the issue by establishing various outreach programs.¹³²

Some argue that ICTY’s overall connotation remains negative.¹³³ According to “[t]he only comprehensive country-by-country survey re-

123. *Id.* ¶ 56.

124. *Id.* ¶ 65.

125. *About The Mechanism*, *supra* note 20.

126. *Assessment and Report of UN Security Council Resolution 1534*, *supra* note 122, ¶ 57.

127. Pittman, *supra* note 37, at 817.

128. Sarkin, *supra* note 68, at 96; *see* Reiger, *supra* note 2, at 4.

129. Reiger, *supra* note 2, at 4.

130. *International Criminal Tribunal for Yugoslavia*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/international-criminal-tribunal-for-yugoslavia.html> (last visited March 16, 2014) [hereinafter GLOBAL POLICY FORUM].

131. CRYER, *supra* note 79, at 135.

132. *Id.*

133. Kristin Xueqin Wu, *Experiences that Count: A Comparative Study of the ICTY and SCSL in Shaping the Image of Justice*, 9 UTRECHT L. REV. 60, 62 (2013)(Neth.).

garding the attitudes towards the ICTY carried out in 2002 by the International Institute for Democracy and Electoral Assistance (IDEA),” the greater the number of accused that came from an ethnic community, the more negatively the ICTY was viewed in those regions.¹³⁴ The ICTY has also come under scrutiny for being “politicized, biased, unfair, and very costly. . . . critics question[ed] the tribunal’s ability to ease tensions and promote reconciliation” in the regions.¹³⁵

There is also a perception that the ICTY’s impact was ultimately legal and judicial.¹³⁶ One proponent of this view is Professor Ljubo Bavcon, who noted that:

Although in many respects the ICTY undoubtedly represented an important step forward in the development of international law, the idea that it could create peace and security in the region was utopian and unrealistic. So there is no doubt that the creation of the tribunal did more for international justice and international criminal law generally than for the former-Yugoslavia.¹³⁷

Opponents to this view contend that the ICTY’s true legacy runs much deeper. According to Petar Finci, Senior Information Assistant for the ICTY, although the Tribunal is conscious of its negative image:

[T]here is not too much we can do to change minds and hearts. . . . Historical experience from the Nuremberg trials shows that only the second generation, who are untouched by the violence, can start to face these trials objectively. However, that day will come; we have hope for the future generation, and much of our work now focuses on leaving a legacy for the future generation. Obviously there are mistakes: we have no precedence to follow, and most of the time we are inventing “rulebooks” ourselves. However, we believe that the work of this Tribunal is best accessed in the future. We play for the long run.¹³⁸

The major hurdle and damage to the ICTY’s legacy can partially be traced to the lack of planning and lack of focus on early and comprehensive outreach. The ICTY’s outreach program was not established

134. *Id.* at 62 n.6.

135. GLOBAL POLICY FORUM, *supra* note 130.

136. Frédéric Mégret, *The Legacy of the ICTY as Seen Through Some of its Actors and Observers*, 3 GOETTINGEN J. INT’L L. 1011, 1047 (2011).

137. *Id.*

138. Wu, *supra* note 133, at 62.

until six years after the Tribunal was established.¹³⁹ As the former president of the ICTY, Judge Gabrielle Kirk McDonald, explained, “there was a need—a necessity, really—for the Tribunal to do more: to actually communicate with the people of the former Yugoslavia living hundreds of miles away from the Tribunal that had been established for their benefit.”¹⁴⁰

During the beginning of the ICTY’s outreach program, the Tribunal took a passive approach by simply providing information about the trial at its field offices rather than actively distributing the information.¹⁴¹ The outreach program also tended to focus its efforts on “legal scholars and local elites” instead of reaching out to the general population.¹⁴² As a result, some perceive the ICTY’s outreach as insufficient to have an actual impact.¹⁴³ The ICTY’s outreach even acknowledged that its events “confirmed the need for further ICTY engagement on the community level to disseminate the information on the established facts as part of the legacy effort.”¹⁴⁴

Recently, the ICTY has been working with local authorities and international partners to establish information centers in the former Yugoslavia.¹⁴⁵ Since 2010, the outreach program has increased its efforts.¹⁴⁶ “The ICTY has also created a partnership with the United Nations Inter-regional Crime and Justice Research Institute, and the Organization for Security and Cooperation in Europe (OSCE) field operations in Belgrade, Podgorica, Pristina, Sarajevo, Skopje, and Zagre to facilitate activities to support the Tribunal’s legacy, such as training lawyers and judges in the former Yugoslavia.”¹⁴⁷ While the project’s focus is to transfer “knowledge and materials from the ICTY to legal professionals in national jurisdictions,” it has also undertaken the task of “transcribing ICTY proceedings into local languages,” which is very important in educating the public at large.¹⁴⁸

Ultimately, the ICTY’s full accounting of all 161 indicted individ-

139. *Id.* at 63.

140. *Id.*

141. *Id.*

142. *Id.* at 70.

143. *Id.* at 63-64.

144. *ICTY Outreach Activities 2007*, ICTY, <http://icty.org/sid/10128> (last visited Dec. 25, 2013).

145. *Assessment and Report of UN Security Council Resolution 1534*, *supra* note 122, ¶ 69.

146. Wu, *supra* note 133, at 64.

147. *Assessment and Report of UN Security Council Resolution 1534*, *supra* note 122, ¶ 68; Sarkin, *supra* note 68, at 96.

148. Sarkin, *supra* note 68, at 96.

uals significantly symbolizes the success of international justice efforts.¹⁴⁹ It sets an example for other tribunals by indicting individuals from all sides of the conflict.¹⁵⁰ Moreover, as stated by ICTY Judge G.K. McDonald:

The judgments of the Tribunals do more than determine the guilt or innocence of the accused. They do more than establish a historical record of what transpired. They do more than interpret international humanitarian law. Rather, the judgments of the Tribunals are evidence of actual enforcement of international norms. This is the best proof that the numerous conventions, protocols, and resolutions affirming human dignity are more than promises. Rather, the rule of law is an important component of the peace process.¹⁵¹

Before the ICTY was established, international criminal law was rarely used.¹⁵² “Despite its shortfalls, the tribunal . . . [was] instrumental in the creation of the first permanent international criminal court.”¹⁵³ Importantly, for the purposes of legacy planning, the fact that both the ICTY and the ICTR are physically located at a large distance from the affected communities foreshadows some of the issues the ICC may need to address.

B. The International Criminal Tribunal for Rwanda

1. ICTR’s Historical Background and Completion Strategy

The factors that gave rise to the Rwandan Genocide have roots going back to the colonization of Rwanda.¹⁵⁴ Ethnic tensions erupted between Hutus, who were the majority of the population, and Tutsis, who had previously been favored by the colonizers.¹⁵⁵ In April 1994, the day after extremists allegedly shot down the plane carrying the presidents of Rwanda and Burundi, violence in Rwanda erupted.¹⁵⁶ The Rwandan Armed Forces (FAR) and armed government-trained civilian militias set

149. *Id.* ¶ 72.

150. Sadat, *supra* note 42, at 14.

151. Agnieszka Szpak, *Legacy of the ad hoc International Criminal Tribunals in Implementing International Humanitarian Law*, 4 MEDITERRANEAN J. SOC. SCI. 529 (2013).

152. Sarkin, *supra* note 68, at 86.

153. GLOBAL POLICY FORUM, *supra* note 130.

154. *Rwanda: A Historical Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html> (last visited July 21, 2014).

155. *Id.*

156. *Id.*

up roadblocks and makeshift security checkpoints where they massacred Tutsis and moderate Hutus.¹⁵⁷ Encouraged by mass media, ordinary civilians “hunted down and killed their neighbors and friends.”¹⁵⁸ Despite the ongoing violence, U.N. forces stood by as the slaughter continued and were forbidden to intervene because it would breach their “monitoring” mandate.¹⁵⁹ On April 8, 1994, the Rwandese Patriotic Front (RPF), a Tutsi-dominated organization, launched a major offensive to end the genocide and “rescue 600 of its troops surrounded in Kigali.”¹⁶⁰ However, several months later, conflicting accounts from U.N. agencies reported that RPF troops carried out “a series of reprisal killings,” executing several hundred civilians.¹⁶¹ “Over the course of one hundred days, more than eight hundred thousand ethnic Tutsis, Twas, or moderate Hutus were the victims of genocide in Rwanda.”¹⁶²

In 1994, the U.N. Security Council created the ICTR in 1994¹⁶³ and decided to locate the seat of the ICTR in Arusha, United Republic of Tanzania, a neighboring country, because of security concerns.¹⁶⁴ The ICTR was designed to contribute to “the process of national reconciliation and to the restoration and maintenance of peace” by ensuring redress for the most serious violations.¹⁶⁵ It had jurisdiction over war crimes, crimes against humanity, and genocide.¹⁶⁶ While the ICTR was given an initial four-year mandate, the U.N. did not set a deadline for the court to finish its work.¹⁶⁷ It was, however, understood that as an ad hoc international tribunal with a mandate limited to grave crimes committed in Rwanda in 1994, the ICTR’s lifespan would be relatively

157. Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. OF INT’L & COMP. L. 239, 240-41 (2008); *Rwanda: A Historical Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html> (last visited July 21, 2014).

158. *Id.* at 241.

159. *Rwanda: A Historical Chronology*, *supra* note 154.

160. *Id.*

161. Rwanda Assessment: Country Information and Policy Unit, REFWORLD (Apr. 2002), <http://www.refworld.org/pdfid/486a53400.pdf>.

162. *Symposium on the Legacy of International Criminal Courts and Tribunals in Africa with a Focus on the Jurisprudence of the International Criminal Tribunals for Rwanda*, INT’L CTR. FOR ETHICS, JUSTICE, AND PUB. LIFE 1, 1 (Feb. 2010), http://www.brandeis.edu/ethics/pdfs/internationaljustice/Legacy_of_ICTR_in_Africa_ICEJPL.pdf.

163. *Id.*

164. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 955, U.N. Doc. S/RES/808 (Nov. 8, 1994).

165. *Closing the International and Hybrid Criminal Tribunals*, *supra* note 39, at 4 n.14.

166. CRYER, *supra* note 79, at 136.

167. Aptel, *supra* note 78, at 169–70.

short.¹⁶⁸

As time passed, the ICTR's budget increased while the attitudes and priorities of U.N. member-states shifted; the international community voiced frustration with the tribunal's efficiency and ability to successfully achieve its mandate.¹⁶⁹ This frustration led to increased pressure on ICTR officials to complete the tribunal's work.¹⁷⁰ Similar to the ICTY, the ICTR was also slow to begin its outreach work; in 2000, an "info point" was opened in Kigali where information about the trials as well as court proceedings broadcasts were made publicly available, the ICTR also developed a Kinyarwanda section in its website which translated key decisions into Kinyarwanda.¹⁷¹

The ICTR is currently wrapping up its work and does not have any cases in progress.¹⁷² It has completed a total of seventy-five cases, which include eleven pending appeals and twelve acquittals; it also transferred ten cases to two national jurisdictions, France and Rwanda.¹⁷³ So far, seven individuals have been released after completing their sentences, two detainees died before judgment, and nine accused individuals are still at large.¹⁷⁴ Recently, the ICTR announced that all but one of its appeals would be concluded in 2013 and 2014.¹⁷⁵

Regarding its completion strategy, the ICTR moved slower than the ICTY.¹⁷⁶ After the ICTY announced its completion strategy, the U.N. urged the ICTR to formulate a completion strategy and a plan to transfer cases to competent national courts.¹⁷⁷ The ICTR presented the first draft of its completion strategy to the U.N. in July 2003.¹⁷⁸ Similar

168. *Id.* at 170.

169. *Aptel*, *supra* note 78, at 170.

170. *Id.*

171. COURTING CONFLICT? JUSTICE PEACE AND THE ICC IN AFRICA 65 (Nicholas Waddell & Phil Clark eds., 2008).

172. *Status of Cases*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Sept. 14, 2013).

173. *Id.*

174. *Status of Cases*, *supra* note 172, at 1.

175. President of the International Criminal Tribunal of Rwanda, Letter dated Nov. 13, 2013 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, U.N. Doc. S/2013/663 (Nov. 13, 2013).

176. SCHABAS, *supra* note 88, at 42.

177. *The Judicial Effects of the "Completion Strategies," supra* note 89, at 144.

178. Eighth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Annex ¶ 2, 2003, U.N. Doc. A/58/140-S/2003/707 (July 11, 2003) [hereinafter Eighth Annual ICTR Report].

to ICTY, Security Council Resolution 1503 provided the same timetable for the ICTR's completion.¹⁷⁹ The completion strategy was later expanded by Security Council Resolution 1534 for the ICTY and the ICTR in order to review its' caseloads and decide which cases could be tried by domestic courts.¹⁸⁰ Rwanda, France, the Netherlands, and Norway had all agreed to accept cases.¹⁸¹ In particular, there was initial reticence in the idea of transferring cases to Rwanda due to doubts on the condition of the Rwandan prisons and whether the court could provide fair trials.¹⁸² Despite operating at a slow pace due to delays, in part due to the large number of people awaiting trial, cases were transferred nonetheless.¹⁸³

According to the completion strategy report for the ICTR, presently, the "Tribunal has completed all work at the trial level . . . disposed of all referral applications, and has successfully concluded all evidence preservation hearings."¹⁸⁴ To date, all that remain are appeals cases.¹⁸⁵ Most of the ICTR's judicial functions have already been transferred to the Residual Mechanism, with the first Residual Mechanism appeal under way.¹⁸⁶ In addition, "the transition of administrative services is ongoing and . . . expected to be complete by the end of 2014."¹⁸⁷ The ICTR has also begun the transfer of the Tribunal's records and archives to the Residual Mechanism.¹⁸⁸

2. Residual Mechanisms for the ICTR

As previously mentioned, on December 22, 2010, the U.N. Security Council issued Resolution 1966, which established the International Residual Mechanism for Criminal Tribunals (IRMCT).¹⁸⁹ According to the IRMCT's First Annual Report, "[i]n establishing the Mechanism,

179. CRYER, *supra* note 79, at 139.

180. *Id.*

181. Aptel, *supra* note 78, at 177-78.

182. *See id.* at 139-40.

183. JUSTICE AND RESPONSIBILITY, HUMAN RIGHTS WATCH, <http://www.hrw.org/reports/1999/rwanda/Geno15-8-05.htm> (last visited Oct. 18, 2014).

184. Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as of Nov. 5, 2013), ¶ 76, U.N. Doc., S/2013/663 (Nov. 13, 2013) [hereinafter Report on the Completion Strategy of the ICTR].

185. *Id.*

186. *Id.* ¶¶ 6, 76.

187. *The Registrar Meets the Senegalese President*, ICTR NEWSLETTER (Oct.-Dec. 2013), <http://www.unictr.org/Portals/0/English%5CNews%5CNewsletter%5COct-Dec2013.pdf>.

188. Report on the Completion Strategy of the ICTR, *supra* note 184, at ¶ 76.

189. The IRMCT is also sometime referred to as the Mechanism of International Criminal Tribunals (MICT). *About The Mechanism*, *supra* note 21.

the Security Council emphasized that it should be “a small, temporary and efficient structure whose functions and size would diminish over time.”¹⁹⁰ The residual mechanism for the ICTR is located in Arusha, Tanzania and began functioning on July 1, 2012.¹⁹¹ Pursuant to Resolution 1966, the IRMCT will have jurisdiction over three of the nine individuals indicted by the ICTR for their participation in the genocide who are still at large.¹⁹² The other six “have been referred to Rwanda,” but the IRMCT will continue to “assist with tracking efforts” for those cases.¹⁹³

The Mechanism has been mandated for a period of four years with subsequent periods of two years following progress reviews.¹⁹⁴ The Arusha branch is currently operating out of the same locations as the ICTR, but is expected to move to its new premises in 2016. The Government of Tanzania has provided the land and connection to facilities at no cost.¹⁹⁵ Beyond the Mechanism’s technical tasks devoted to the archives, relocating acquitted persons, monitoring proceedings in Rwanda, and trying of fugitives, it will be critical for the Mechanism to facilitate “development assistance and promote capacity building and educational programs to ensure that the legacy of accountability and peace takes hold.”¹⁹⁶

According to its first annual report, the Mechanism has continued to provide the same level of witness support and protection services while streamlining the process.¹⁹⁷ The unit “handled protection issues not only in Rwanda but also in the Great Lakes region, from urban centers to refugee camps.”¹⁹⁸ This has included taking surveys among the witnesses to try to improve its efficiency and to ensure that witnesses are receiving the services.¹⁹⁹ “In addition, it has “developed strategies that are currently being implemented to further strengthen the management and safekeeping of confidential witness information.”²⁰⁰

190. First Annual Report of the International Residual Mechanism for Criminal Tribunals, ¶ 7, U.N. Doc. A/68/219-S/2013/464 (Aug. 2, 2013) [hereinafter First Annual Report of the International Mechanism].

191. *About The Mechanism*, *supra* note 21.

192. Report on the Completion Strategy of the ICTR, *supra* note 184, ¶ 5.

193. *Id.*

194. First Annual Report of the International Mechanism, *supra* note 190, ¶ 7.

195. *Id.* ¶ 27.

196. Sadat, *supra* note 42, at 14.

197. First Annual Report of the International Mechanism, *supra* note 190, ¶ 61.

198. *Id.* ¶ 62.

199. *Id.* ¶ 61.

200. *Id.*

In October 2012, the IRMCT issued its first appeal decision that upheld a decision of the ICTR to transfer the case of Phénéas Munyargama to Rwanda.²⁰¹ In reaching its decision, the Appeals Chamber stated that the IRMCT's Statute and Rules of Procedure and Evidence reflect normative continuity with those of the ICTY and ICTR. According to the Appeals Chamber, "these parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice."²⁰²

3. Legacy Considerations for the ICTR

The ICTR's mandate was to render justice and contribute to reconciliation.²⁰³ From the beginning, there was concern that this mandate was broad, and some had argued that it was based on a false premise that criminal trials could contribute to the reconciliation of society.²⁰⁴ There were also concerns that the ICTR was both "geographically and metaphorically too distant from the people of Rwanda, who remain for the most part uninformed about unaffected by the Tribunal."²⁰⁵

Since the ICTR was limited by a temporal jurisdiction restricted to crimes committed in 1994, the acts of planning the crimes were excluded from prosecution.²⁰⁶ Additionally, the prosecution's policy to focus on the highest-level perpetrators was difficult for victims to accept.²⁰⁷ The prosecution was also criticized for being biased due to the lack of public indictments of the RPF for alleged crimes, which "may fuel a sense of impunity among members of the current government and lead to continued instability in the region, as well as contribute to a feeling of persecution among Hutus."²⁰⁸

All these facts have potentially undermined the legacy of the ICTR. There have been arguments that the ICTR's primary contribution has been in the area of international jurisprudence at the expense of de-

201. *Mechanism for International Criminal Tribunals (MICT) Issues First Appeal Decision Upholding a Decision of the ICTR to transfer the Case Phénéas Munyargama to Rwanda*, UNITED NATIONS MECHANISM FOR INT'L CRIM. TRIBUNALS (Oct. 5, 2012), <http://www.unmict.org/en/news/mechanism-international-criminal-tribunals-mict-issues-first-appeal-decision-upholding-decision> [hereinafter *MICT Issues First Appeal Decision*].

202. *Id.*

203. S.C. Res. 955, U.N. Doc. S/RES/808 (Nov. 8, 1994).

204. Aptel, *supra* note 78, at 185.

205. CRYER, *supra* note 79, at 122.

206. Aptel, *supra* note 78, at 186-87.

207. *Id.* at 187.

208. Sadat, *supra* note 42, at 16.

livering justice to the genocide survivors in Rwanda.²⁰⁹ Unfortunately, there has yet to be a comprehensive survey of the Rwandan general population to gauge the impact and contributions of the ICTR.²¹⁰ Nevertheless, the ICTR was able to contribute to reconciliation in several ways. First, a factual account of the genocide was created; second, judicial notice confirming the genocide against the Tutsi ethnic group in Rwanda was issued; third, individual criminal responsibility rather than group criminalization or stigmatization was established; fourth, almost the entire interim government of the Rwanda genocide era was placed on trial at the Tribunal; fifth, victims were given a voice to validate their experience and suffering; and finally, re-education and communication promoting respect for human rights and the rule of law in Rwanda was provided.²¹¹

Additionally, on October 2, 1998, the ICTR established the first ever conviction of the crime of genocide in an international criminal court when it handed down its judgment of Jean-Paul Akayesu, the former Mayor of Taba commune.²¹² This determination, resulting from a fair and independent judicial process, was essential to establishing a clear historical record, assisting with reconciliation, and continuing the fight against impunity.

C. *The Special Court for Sierra Leone*

1. SCSL's Historical Background and Completion Strategy

Since 1991, Sierra Leone suffered a decade long conflict marked by systemic and widespread violations of human rights and humanitarian law. The rebel group, the Revolutionary United Front (RUF), entered Sierra Leone from neighboring Liberia with the goal of overthrowing the government and in its process, committed a multitude of atrocities that included recruiting child soldiers, amputating its victims' limbs, torture, the mass raping of women and girls, and also the killing of several thousand civilians.²¹³ In 2002, a treaty between the U.N. and the

209. Gallimore, *supra* note 156, at 243.

210. *Id.*

211. *Id.* at 251.

212. Gallimore, *supra* note 156, at 241.

213. See generally *Summary, in Sierra Leone: Sowing Terror, Atrocities against Civilians in Sierra Leone*, HUMAN RIGHTS WATCH, Vol. 10, No. 3 (A) (July 1998), <http://www.hrw.org/legacy/reports98/sierra/> [hereinafter *Sowing Terror*]; see also, OPEN JUSTICE SOCIETY INITIATIVE, *Legacy: Completing the Work of the Special Court of Sierra Leone 2* (2011) [hereinafter *Legacy: Completing the Work of the Special Court of Sierra Leone*].

Government of Sierra Leone established the SCSL.²¹⁴ The treaty granted the SCSL:

[t]he power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.²¹⁵

In addition to the SCSL's purpose to bring those who had previously committed atrocities to justice, it also had "forward looking aims" such as "ending impunity, deterring would-be perpetrators, providing a measure of justice for the victims, helping to strengthen the rule of law in Sierra Leone, and contributing to capacity-building within the country, particularly for the legal profession."²¹⁶

The SCSL was the first of its kind in several ways. It was the first of the "hybrid" ad hoc criminal tribunals, meaning it involved both international and national law components.²¹⁷ The U.N. Secretary General appointed international judges, which formed a majority, and the Government of Sierra Leone appointed the rest of the judges.²¹⁸ The SCSL applied its own Statute and Rules of Procedure and Evidence, but those made reference to international instruments and some national laws.²¹⁹

The SCSL was also the first court to operate in the country where

214. Vincent O. Nmehielle & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, in FLETCHER FOREIGN WORLD AFF. 107, 107 (Summer 2006).

215. Statute of the Special Court for Sierra Leone art. 1 (Jan. 16, 2002), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJEW%3D&%E2%80%BA> [hereinafter Statute of the Court for Sierra Leone]; Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 1(1) (Jan. 16, 2002), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLK1rMQtCHg%3d&tabid=176> [hereinafter Agreement between the U.N. and the Government of Sierra Leone].

216. Alison Smith, *The Intersection of Law, Policy, and Practice*, in INTERNATIONALIZED CRIMINAL COURTS, SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, 125, 125 (Cesare Romano, André Nollkaemper, & Jann K. Kleffner eds., Oxford Univ. Press 2004). [hereinafter *The Intersection of Law, Policy, and Practice*].

217. *Id.* at 134; see also No Peace Without Justice, *Making Justice Count Assessing the impact and legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia*, 1, 1 (Sept. 2012) <http://www.npwj.org/content/Making-Justice-Count-Assessing-impact-and-legacy-Special-Court-Sierra-Leone-Sierra-Leone-and> [hereinafter *Impact and Legacy Survey*].

218. CRYER, *supra* note 79, at 182.

219. Aldo Zammit Borda, *Precedent in International Courts and Tribunals*, 2 CAMBRIDGE J. OF INT. & COMP. L. 287, 297 (2013).

the crimes were committed and the first international court to view legacy and outreach as priorities since the early stages of its work.²²⁰ All of the SCSL trials were held in Sierra Leone with the exception of the Charles Taylor trial, which had to be transferred to The Hague due to security concerns.²²¹ The SCSL's outreach program focused on "improving domestic understanding of the court's activities."²²² The hope was that the SCSL could "advance[] the state of international criminal justice while strengthening the country's domestic legal system" so that the citizens of Sierra Leona could believe in the process.²²³

The establishment of SCSL was a landmark achievement in international criminal justice. The SCSL "has helped to establish an authoritative record of the nature of the crimes that took place during the Civil War - who was responsible for them, what groups were targeted, and why."²²⁴ In addition to its own success, it provides valuable lessons for future courts and the advancement of international criminal justice. The SCSL is the first ad hoc, post-Cold War, international tribunal to close²²⁵ and is unique in that it contemplated issues of completion and legacy much earlier than the other tribunals. Despite its efforts, those issues did not receive the attention they deserved from the SCSL's political backers, which left the SCSL to devise its own solutions.²²⁶

In order to manage the responsibility of witness protection, the SCSL undertook steps to create the first national protection program, one of only a few witness protection programs in Africa.²²⁷ The Witness Protection Unit provides "protection and assistance to witnesses in national cases, such as organized crime, gender based violence and corrup-

220. See generally THE SPECIAL COURT FOR SIERRA LEONE, THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org> (last visited on Jan. 25, 2015).

221. *Id.*

222. Suma, *supra* note 28, at 1.

223. *Id.*

224. ICTJ, *SCSL Holds Valuable Lessons for International Justice*, EXPLORING THE LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE, (Nov. 04, 2012), <http://scl-legacy.ictj.org/ictj-scsl-holds-valuable-lessons-international-justice>; see also Ninth Annual Report of the President of the Special Court for Sierra Leone, Special Court of Sierra Leone, 1, 37 (June 2011 - May 2012), available at <http://www.scl.org/LinkClick.aspx?fileticket=ZEDnSBp6ahc%3d&tabid=176>; [hereinafter Ninth Annual Report of the President].

225. *Impact and Legacy Survey*, *supra* note 217, at 36.

226. Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test*, International Center for Transitional Justice and Sierra Leone Court Monitoring Programme, 1, 3 (2009), <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Taylor-Trial-2009-English.pdf>.

227. Ninth Annual Report of the President, *supra* note 224, at 38.

tion cases.”²²⁸

By the end of 2012, the SCSL had indicted thirteen people and convicted nine, “including the first sitting African head of state, [former Liberian President] Charles Taylor.”²²⁹ In September 2013, the Appeals Chambers judges of the Special Court upheld Taylor’s conviction by the Trial Chamber in April 2012, concluding the SCSL’s final case.²³⁰ Later, in December 2013, as part its successful completion of its mandate, the SCSL formally handed over the SCSL’s landmark courthouse to the Government of Sierra Leone.²³¹

2. Residual Mechanisms for the SCSL

There were serious risks involved in closing the SCSL, just as there are risks with closing the other tribunals; however, the residual mechanisms that are supported and moulded by the local population and civil society can help ensure that the SCSL’s closure leaves a lasting legacy in Sierra Leone.²³² In contrast to other international criminal tribunals’ residual mechanisms, the Residual Special Court of Sierra Leone (RSCSL) began its work after the SCSL shut down instead of during its last phases.²³³ RSCSL was set up by an agreement between the U.N. and the government of Sierra Leone in August 2010 to address the residual issues resulting from the closing of the Special Court. The Sierra Leone Parliament ratified the agreement in December 2011.²³⁴ According to the RSCSL Statute:

The purpose of the Residual Special Court is to carry out the functions of the Special Court for Sierra Leone that must continue after the closure of the Special Court. To that end, the Residual Special Court shall: maintain, preserve and manage its archives, including the archives of the Special Court; provide for witness and victim protection and support; respond to

228. *Id.* at 36.

229. *About this Project*, EXPLORING THE LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE, <http://scsl-legacy.ictj.org/about-project> (last visited Sept. 16, 2014).

230. Alpha Sesay, *Charles Taylor’s Conviction and Sentence Upheld: What next for him?*, INTERNATIONAL JUSTICE MONITOR, A PROJECT OF THE OPEN SOCIETY JUSTICE INITIATIVE (Sept. 26, 2013), <http://www.ijmonitor.org/2013/09/charles-taylors-conviction-and-sentence-upheld-what-next-for-him/>.

231. Special Court Press Release, *supra* note 16.

232. *See generally* Cruvellier, *supra* note 226.

233. Geraldine Coughlan, *Much remains to be done in Sierra Leone*, INT’L JUSTICE TRIBUNE (May 9, 2012), <http://www.rnw.nl/international-justice/article/much-remains-be-done-sierra-leone>.

234. Ninth Annual Report of the President, *supra* note 224, at 38.

requests for access to evidence by national prosecution authorities; supervise enforcement of sentences; review convictions and acquittals; conduct contempt of court proceedings; provide defense counsel and legal aid for the conduct of proceedings before the Residual Special Court; respond to requests from national authorities with respect to claims for compensation; and prevent double jeopardy.²³⁵

The RSCSL seat will be seated in Sierra Leone.²³⁶ The fact that the SCSL is located in the country where its subject crimes were committed is advantageous in facilitating its residual mechanisms in several ways.²³⁷ First, it provides increased accessibility to witnesses and victims;²³⁸ and second, it allows increased visibility of the court's work.²³⁹ Such a presence creates the possibility that the SCSL's work "may assist in rebuilding the Sierra Leonean justice system and serve as a symbol against impunity for egregious crimes in the region as a whole,"²⁴⁰ third, it increases affected communities' access to the court and its archives.²⁴¹

The RSCSL has the authority to preside over ad hoc judicial proceedings, such as review proceedings or contempt of court cases arising out of witness tampering.²⁴² "It is anticipated that of the 557 witnesses who testified [in SCSL proceedings], approximately 100 may require ongoing post-trial witness protection or support."²⁴³ According to the Ninth Annual Report of the President of the Special Court for Sierra Leone, "[t]he RSCSL staff will work closely with the Sierra Leone Police, in particular the Witness Protection Unit, to ensure that the concerns and needs of witnesses are adequately addressed."²⁴⁴

The RSCSL also has jurisdiction to try the case against the SCSL's last remaining fugitive, Johnny Paul Koroma but has the option of refer-

235. *Id.*

236. *Id.* at 35 (citing Article 6 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone).

237. Oosthuizen & Schaeffer, *supra* note 40, at 65.

238. *Id.*

239. *Id.*

240. *Id.*

241. Valerie Oosterveld, *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, 8 LOY. U. CHI. INT'L L. REV. 13, 27 (2010) [hereinafter *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*].

242. Ninth Annual Report of the President, *supra* note 224, at 38.

243. *Id.*

244. *Id.*

ring the case to a competent national authority.²⁴⁵ Upon the closure of the SCSL, the SCSL's archives became the property of the RSCSL and are co-located in both Sierra Leone and in the Netherlands, where the RSCSL interim seat is located.²⁴⁶ Pursuant to the RSCSL Agreement, "in order to preserve and promote the legacy of the Special Court, electronic access to, and printed copies of, the public archives shall be available to the public in Sierra Leone."²⁴⁷ These archives, which will be made available to the public through the Sierra Leone Peace Museum, are "one of the richest resources on the nation's conflict."²⁴⁸ The Peace Museum will be an independent national institution dedicated to the memory of Sierra Leone's decade-long conflict²⁴⁹ and will include a memorial, exhibition, and an archive that will "provide information to future generations about the conflict's history and respect the memory of those who suffered during the conflict."²⁵⁰

3. Legacy of the SCSL

The international community had high expectations for the SCSL, expecting this new model of ad hoc tribunal to conduct its business more efficiently and economically.²⁵¹ The new model was designed with an "in-country presence, the incorporation of national and international staff, a reasonably secure environment, and good state cooperation."²⁵² According to Geoffrey Robertson, the first president of the Appeals Chamber of the SCSL, "the Court alone ha[d] the power to deliver the justice that is a prerequisite for reconciliation."²⁵³

The SCSL was, however, not without criticism. Some argued that the length and the delaying of trials, the 150 million dollar price tag, and the court's limited jurisdiction to only focus on crime starting on November 30, 1996, all posed as a threat to peace in Sierra Leone. First, the delayed initiation of trials was problematic because some of the most important indictees and actors involved in the conflict either died

245. *Id.* at 39.

246. *Id.* at 38.

247. *Id.* at 36 (citing Article 7.2 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone).

248. *Id.* at 36.

249. *Id.* at 37.

250. *Id.* at 5.

251. Cruvellier, *supra* note 226, at 19.

252. *Id.* at 44.

253. Ozonnia Ojielo, *Beyond TRC: Governance in Sierra Leone*, in *RESCUING A FRAGILE STATE: SIERRA LEONE 2002-2008* 43, 50 (Lansana Gberie ed., 2009).

or were still unaccounted for by the time the trials began in 2002.²⁵⁴ Second, the SCSL's limited jurisdiction has led some to perceive the court as Freetown-centric because Freetown and the Western area of Sierra Leone only began feeling the war's impact after 1996.²⁵⁵ Finally, some believed that the SCSL criminal prosecutions were a threat to peace "and a Western intrusion in African accountability Mechanisms."²⁵⁶

Nevertheless, positives of the SCSL generally outweigh the criticisms. The SCSL was able to create a working relationship with the State, which was essential to its operation since the SCSL did not have a police force of its own to apprehend suspects.²⁵⁷ The SCSL also employed local judges, lawyers, and investigators who are able to use their training to serve Sierra Leone even after the SCSL's closure.²⁵⁸ The SCSL also made great contributions to the jurisprudence of international law on the recruitment and use of child soldiers in armed hostilities, the criminalisation of forced marriage as a crime against humanity, and attacks on peacekeepers.²⁵⁹ The SCSL established legal precedent that the reasons for fighting are immaterial in determining where crimes against humanity have been committed; by trying senior officials from all three war parties, the SCSL sent the public a message that such crimes would not be tolerated regardless of one's goals or intentions.²⁶⁰

According to Alison Smith, who previously served as the Chief Legal Advisor to the SCSL's Vice President and is currently the Director of No Peace Without Justice's International Criminal Justice Pro-

254. Danielle Koehn, *An Imperfect Body*, 1 UNDERGRADUATE TRANSITIONAL JUST. REV. 173, 179 (2013).

255. *Id.* at 184.

256. *Id.* at 186. (quoting William Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court of Sierra Leone*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH, 3, 26 (William Schabas & Shane Darcy eds., 2004).

257. Mariana O. Rosenblut, *The International Criminal Court on Trial*, MAXIMUM AFR. J. (Nov. 17, 2013), <http://maximumafrica.org/east-africa/international-criminal-court-trial/>; see also Patricia M. Wald, *Apprehending War Criminals: Does International Cooperation Work?*, 27 AM. U. INT'L REV. 229, 230 (2012).

258. David Tolbert, *ICTJ: SCSL Holds Valuable Lessons for International Justice*, EXPLORING THE LEGACY OF THE SPECIAL COURT OF SIERRA LEONE (Nov. 4, 2012), <http://scsl-legacy.ictj.org/ictj-scsl-holds-valuable-lessons-international-justice/>.

259. Rosemary Grey, *The Hague 2012*, in *On Mandates*, INT'L PEACE AND SECURITY INSTITUTE (June 13, 2014), <http://ipsinstitute.org/on-mandates/>.

260. CRYER, *supra* note 79, at 184. The SCSL tried members from the Civil Defense Force (a defense force set up by the Sierra Leone Government), the RUF, and the Armed Forces Revolutionary Council (AFRC); Suma, *supra* note 28, at 1.

gram, the main thing that the SCSL should be remembered for is its vision to be an institution established to serve the people of Sierra Leone and of Liberia.²⁶¹ This vision began, according to Smith, when the U.N. Security Council agreed with the government of Sierra Leone to place the SCSL in Sierra Leone.²⁶² Smith asserts that this vision continued on through the entire existence of the SCSL and that other tribunals should refer to it when carrying out their own mandates.²⁶³

As stated previously, the SCSL was the first international court to view legacy and outreach as priorities from the early stages of its work despite “legacy” never being an explicit part of the SCSL’s mandate.²⁶⁴ Its outreach program educates communities in both Sierra Leone and Liberia on the “trials, impunity, and the rule of law” with the goal of stimulating informed discussion.²⁶⁵ Since the Special Court’s establishment, the SCSL’s Outreach and Public Affairs Section has sought to “provide the greatest possible accessibility” to the SCSL’s activities.²⁶⁶ The staff, based in Freetown, work with eight Field Officers located in the Provinces of Sierra Leone, two staff members in Liberia, and a network of civil society organizations to help inform the local community about the SCSL’s trial progress.²⁶⁷

By prioritizing outreach in the early stages of its work, the SCSL established a solid basis for its legacy. The SCSL designated an outreach coordinator for each region and school children would learn about the history of the conflict and the work that the SCSL was doing every Tuesday and Wednesday.²⁶⁸ The Court also used a variety of outreach techniques such as utilizing local media, cooperating with NGOs, working with local organization, and setting up booths at local markets.²⁶⁹

The SCSL’s outreach program raised awareness about the trials and the investigations.²⁷⁰ It also engaged local communities and civil so-

261. *ICTJ’s SCSL Legacy Podcast Series: Alison Smith Discusses the Legacy and Impact of the Special Court in Sierra Leone*, EXPLORING THE LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE (Jan. 23, 2013), <http://scsl-legacy.ictj.org/ictjs-scsl-legacy-podcast-series-alison-smith> [hereinafter *ICTJ’s SCSL Legacy Podcast Series: Alison Smith*].

262. *Id.*

263. *Id.*

264. *Impact and Legacy Survey*, *supra* note 217, at 1.

265. Ninth Annual Report of the President, *supra* note 224, at 32.

266. *Id.*

267. *Id.*

268. Ojielo, *supra* note 253.

269. Koehn, *supra* note 254, at 188.

270. WAR DON DON (New Day Films 2010) (see 13:30 for an example of the Special Court’s outreach efforts).

ciety.²⁷¹ From the beginning stages of the SCSL operations, there was a clear priority for “court officials to raise awareness, explain, and get support for their work.”²⁷² Due to the relatively low literacy rates in Sierra Leone and Liberia, the SCSL made use of video and audio reports as a means of disseminating information.²⁷³ Indeed, many individuals have said that the SCSL’s innovative outreach program will serve as a model for future tribunals.²⁷⁴

The outreach staff also collaborated with civil society groups to create a nationwide campaign on the problem of community violence and held discussions with youth groups and organizations.²⁷⁵ Other mechanisms the outreach staff utilized include: radio discussions and call-in programs; “Accountability Now Clubs” for university students in Sierra Leone and Liberia; schools visits; year-round trial screening summaries; and Special Court interactive forums where approximately forty non-governmental organizations meet once a month to discuss the court’s latest activities and ask for feedback.²⁷⁶ The SCSL has also made “use of traditional methods of information dissemination such as town hall meetings in villages and towns.”²⁷⁷ In addition, the buildings and grounds were used for the trials and will be used in a way to honor the victims and help the process of national healing.²⁷⁸ A survey conducted by the nongovernmental organization (NGO) No Peace Without Justice and the SCSL indicated that there was a high degree of awareness of the SCSL’s activities in both Sierra Leone and Liberia.²⁷⁹ More than 90% of overall respondents had heard of the SCSL and nearly 50% of people have participated in outreach activities.²⁸⁰

One unique challenge the SCSL faced was the Charles Taylor trial. Pursuant to the Security Council Resolution 1688 (2006), the trial of Charles Taylor, the former president of Liberia, was held in the Special Court’s Hague sub-office.²⁸¹ The SCSL moved the Charles Taylor trial

271. Ninth Annual Report of the President, *supra* note 224, at 32.

272. Cruvellier, *supra* note 226, at 28.

273. *Id.* at 18.

274. *Id.* at 29.

275. Ninth Annual Report of the President, *supra* note 224, at 34.

276. *Id.*

277. *Id.*

278. Tolbert, *supra* note 258.

279. *Impact and Legacy Survey*, *supra* note 217, at 1.

280. *Id.*

281. S.C. Res. 1688, at 1, 3, U.N. Doc. S/RES/1688 (June 16, 2006).

due to security concerns in the area.²⁸² The transfer of the Taylor trial had a symbolic impact; before the transfer, the court “previously garnered praise for sitting in the country where the crimes” occurred and giving the “nationals a significant, if not equal, role in the process.”²⁸³

The Special Court took several measures to try and recreate the success that it had with holding the cases in Sierra Leone. For judgment in the Charles Taylor trial, the “feed was broadcast[ed] in Krio, with a Krio interpreter supplied by the Court Management Section,” this made the Charles Taylor judgment accessible to people who were not fluent in English.²⁸⁴ In the capital of Liberia, Monrovia, “several radio stations and one television station broadcast[ed] the Judgment live.”²⁸⁵ The Judgment was also available online via the “Special Court’s website and the Open Society Justice Initiative funded ‘Charles Taylor Trial’ website.”²⁸⁶

However, the outreach efforts were not without their flaws or obstacles. Initially, the SCSL set up two additional centers to broadcast the live stream of the proceeding, but due to continuous technical problems, they were eventually shut down.²⁸⁷ The Charles Taylor trial was thus streamed in only one of the two courtrooms inside the SCSL compound; the inaccessibility resulted in few individuals actually watching the trial.²⁸⁸ The SCSL’s website provided a live stream, but it was largely useless outside to the court’s premises due to the poor quality of internet facilities in Sierra Leone and the regular electricity cuts.²⁸⁹ “Satellite communications, upon which the court’s video-link depend[ed] [on], [were] subject to climate interference, technical incidents, or lack of facilities.”²⁹⁰ These limitations were even more pronounced in Liberia.²⁹¹ These deficiencies were, to some extent, countered by the SCSL’s Outreach Program.²⁹² While these efforts should be commended, the obstacles and failures in the execution of outreach strategies should also serve as lessons for future international criminal tribunals.

The SCSL legacy activities continue to be an essential part of the

282. Cruvellier, *supra* note 226, at 13.

283. *Id.* at 14.

284. Ninth Annual Report of the President, *supra* note 224, at 33.

285. *Id.*

286. *Id.*

287. Cruvellier, *supra* note 226, at 15.

288. *Id.*

289. *Id.* at 16.

290. *Id.* at 18.

291. *Id.* at 16.

292. *Id.* at 15.

court's operations and should receive continued support from the international community in order to reach its full potential and preserve its legacy.²⁹³ Through its various projects, the SCSL has strengthened the domestic justice system, served as a model for the rule of law in Sierra Leone, and transferred valuable skills and knowledge to Sierra Leonean court staff.²⁹⁴ There are, however, still very real risks to the legacy of the SCSL, and only time will tell if the SCSL will have the necessary "political and financial support" from the international community to become truly meaningful.²⁹⁵

IV. LESSONS FOR THE INTERNATIONAL CRIMINAL COURT

A. *Historical Overview of the International Criminal Court*

The International Criminal Court (ICC) was established by treaty, the Rome Statute, instead of a U.N. resolution or agreement; as of May 1, 2013, it has 122 state parties to its statute.²⁹⁶ It is the first permanent international court and the first court with global application.²⁹⁷ "The Court is seated in The Hague in the Netherlands²⁹⁸ and is considered a "court of last resort . . . based on the principle of complementarity."²⁹⁹ The principle of complementarity dictates "that the primary responsibility for exercising jurisdiction over international crimes rests with domestic jurisdictions and that the ICC cannot act unless the country with jurisdiction over the case is not investigating, prosecuting, or is 'unwilling or unable genuinely' to do so."³⁰⁰

Establishing the ICC "is one of the most important developments

293. *Id.* at 45.

294. Ninth Annual Report of the President, *supra* note 224, at 7.

295. Tolbert, *supra* note 258.

296. Rome Statute came into force on July 1, 2002, after 66 states ratified it. *ICC at a Glance*, INT'L CRIM. COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx; Oosterveld, *supra* note 241, at 23. *See* Rome Statute of the International Criminal Court art. 126, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 1002, 1068 (1998) [*hereinafter* Rome Statute].

297. Cole, *supra* note 22.

298. *About the ICC*, INT'L CRIM. COURT, <http://www2.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB>.

299. INTERNATIONAL CRIMINAL LAW SERVICES, INTERNATIONAL, HYBRID AND NATIONAL COURTS TRYING INTERNATIONAL CRIMES 1, 12, *available* at http://wcjp.unicri.it/deliverables/docs/Module_4_International_war_crimes_courts.pdf.

300. *Id.*

in international criminal law.”³⁰¹ From its inception, the ICC “was envisioned as a body that would preside over only those cases of most serious concern to the international community as a whole,” namely genocide, crimes against humanity, war crimes, and crime of aggression.³⁰² The Court is still controversial since powerful states such as the United States, Russia, China, and India are unwilling to join.³⁰³ While some have argued that the ICC has failed to live up to the high expectations of the international community, one area that the ICC has shown a great deal of leadership in is the field of victim’s rights; the ICC has a number of victim-centered laws designed to empower and include the victims of the crimes.³⁰⁴ The ICC’s “innovative, victim-centered approach include: informing victims of decisions that concern them; allowing victims’ participation in proceedings; providing legal aid for the victim’s representation; taking measures for victims’ protection, offering support, assistance, and being able to claim reparation.”³⁰⁵

The ICC’s subject matter, personal, and territorial jurisdictions are limited. The Court is limited to hearing cases involving four crimes: crimes against humanity, war crimes, genocide, and the crime of aggression.³⁰⁶ It can hear a case if the crime is committed on the territory of a State Party to the Rome Statute, if the accused is a national of a State Party, or if a non-State Party has accepted the jurisdiction of the ICC with respect to the crime at issue.³⁰⁷ However, if the U.N. Security Council refers the case to the ICC, these limitations do not apply, and the ICC can hear cases about crimes originating in or committed by nationals of states that are not parties to the Rome Statute.³⁰⁸ The U.N. Security Council, under its Chapter VII powers—which apply only when there are threats to the peace, breaches of the peace, or an act of aggres-

301. CRYER, *supra* note 79, at 144.

302. Susana SaCouto & Katherine Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. U. INT’L L. REV. 807, 808 (2007).

303. Sarkin, *supra* note 68, at 83.

304. T. MARKUS FUNK, VICTIM’S RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT, 43 (2010).

305. WADDELL & CLARK, *supra* note 171, at 66.

306. Rome Statute, *supra* note 296, art. 1.

307. Rome Statute, art. 12(2); *see also id.* art. 124 (stating “notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this Article may be withdrawn at any time. The provisions of this Article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1.”).

308. *Id.* art. 13(b).

sion—can also ask the ICC to defer an investigation or prosecution for renewable periods of up to twelve months.³⁰⁹

The ICC is currently investigating eight situations: Uganda, the Democratic Republic of the Congo, Darfur, Sudan, Central African Republic, Kenya, Libya, and Côte d'Voire.³¹⁰ Four out of the eight ongoing ICC cases against African individuals were referred to The Hague by their own governments.³¹¹ The cases of Kenya and Côte d'Voire were a result of the ICC prosecutor's decision to launch his own investigation.³¹² Libya and Sudan, both not parties to the Rome Statute, were referred to the ICC by the U.N. Security Council.³¹³ While all the current situations are in Africa, the Office of the Prosecutor is also conducting preliminary examinations in a number of situations including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, and Nigeria; the ICC currently holds "all of its trials in The Hague."³¹⁴

While there has been some discussion about "moving small parts of the trials to the countries where the alleged crimes took place," very little effort seems focused on making local or regional trials a main component of the ICC's framework.³¹⁵ Furthermore, despite the international community's recognition of the benefits in on-location trials, due to security concerns and the lack of effective safeguards in some cases, the general advantages of holding a proceeding in the country where the crimes took place—or even a neighboring country—may pose more risks than benefits. One recent example is the ICC's involvement in Kenya. Initially, President Uhuru Kenyatta, Deputy President William Ruto, and broadcaster Joshua Arap Sang's trials were scheduled to start in early April, 2013.³¹⁶ They were all charged with "crimes against humanity arising out of the post-election violence" that took place in Kenya between 2007 and 2008.³¹⁷ In February 2013, Kenyan witnesses "re-

309. *Id.* art. 16; *Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, United Nations <http://www.un.org/en/documents/charter/chapter7.shtml>.

310. *Situations and Cases*, *supra* note 26.

311. *Id.*

312. Sarkin, *supra* note 68, at 84.

313. *Id.*

314. Stuart Ford, *International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers*, 43 J. MARSHALL L. REV. 715, 716 (2009-2010).

315. *Id.*

316. *Kenya: Witnesses Reject ICC Move to Arusha*, STAR (Feb. 5, 2013), <http://allafrica.com/stories/201302051231.html?viewall=1>.

317. *Id.*

jected a proposal to move the Kenyan ICC trials” to the neighboring country of Tanzania because they still feared for their safety there.³¹⁸ The year before, Kenyan witnesses “rejected a plan to relocate them to African countries after the trials are over” because “they need[ed] to stay in Europe to ensure their safety.”³¹⁹ These cases highlight the need to take additional efforts to address the underlying causes of such fears and to ensure that appropriate and effective safeguards are in place to protect those who participate in ICC proceedings and investigations.

The ICC completed its first case on March 14, 2012 when it found Congolese warlord Thomas Lubanga Dyilo “guilty of having committed the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the [Democratic Republic of Congo] between September 2002 and August 2003.”³²⁰ This trial was the “first test of formal victim participation in an international criminal trial,” with a total of 129 victims participating through their legal representatives.³²¹

B. Completion Strategies for the International Criminal Court

The Rome Statute provides very little guidance on how the Court should close its investigations.³²² The ICC will, in time, complete its work in each of the current situation countries.³²³ While the permanency of the ICC does address some of the completion and residual issues that ad hoc tribunals necessarily face due to their temporary nature, Valerie Oosterveld, Director of Western University’s Centre for Transitional Justice and Post-Conflict Reconstruction, notes that the ICC will need to consider how to handle situations when it decides to “scale down its in-

318. *Id.*

319. *Id.*

320. *Lubanga Case*, COALITION FOR THE INT’L CRIM. COURT, <http://www.coalitionfortheicc.org/?mod=drctimelinelubanga>.

321. *Id.*

322. *Rome Conference*, COALITION FOR THE INT’L CRIM. COURT, <http://www.iccnw.org/?mod=rome> (last visited March 22, 2014); see Rebecca J. Hamilton, *Closing ICC Investigations: A Second Bite at the Cherry for Complementarity?*, HUMAN RIGHTS PROGRAM 1, 9–10 (May 2012), <http://www.law.harvard.edu/programs/hrp/documents/Hamilton.pdf>. (Some have maintained that Article 53(3) b of the Rome Statute, which allows the pre-trial chamber to review a prosecutors’ decision to open an investigation also allows for a review of the prosecutor’s decision to close an investigation. Others argue that Article 53(3) b, as it pertains to the closure of investigations, is ambiguous).

323. *The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals*, *supra* note 241, at 14.

vestigatory and outreach presence in a situation country in response to a lack of international action on arrest warrants.”³²⁴ Oosterveld suggests that “[i]f the ICC does scale down its [operation] in a situation country, it must also plan for future rapid scaling up of investigatory, defense and outreach presence if fugitives are captured and transferred to the ICC.”³²⁵

Completion strategies need to be part of the ICC’s initial considerations when the ICC begins its involvement in a situation country. Realistically, however, there are limitations to the amount of detail that can be included in such strategies; for instance, it is often difficult to predict the number of trial and appeals there will be during the early stages of involvement.³²⁶ That said, planning the process by which the Court will close its investigations and end its proceedings as well as planning how the information is gathered and interpreted into an eventual strategy document is important to develop at the earliest stage possible.³²⁷ Such a strategy should address the ICC’s responsibilities after the proceedings are completed, or in other words, its residual activities.³²⁸ This information should also be disseminated to the affected communities as well as the international community early on to establish appropriate expectations and understanding of the entire process. Some have suggested that the first draft of the completion strategy document should “be circulated to all interested parties for information and comment” and updated biannually.³²⁹

Additionally, to keep “external interested parties” updated on “progress and long term thinking,” the ICC should consider suggestions made about conducting presentations and explanations when meeting with international and national NGOs as well as with other stakeholders, such as local civil society organizations.³³⁰ Using outreach programs to explain early on that the Court is undertaking responsibility for activities after the end of judicial proceedings will help preserve a positive legacy for the ICC and increase awareness among the communities about what resources would be available to them, such as witness protection programs and access to archived information. By ensuring affected communities are able to understand and stay apprised of the

324. Oosterveld, *supra* note 241, at 29.

325. *Id.*

326. Vincent, *supra* note 4, at 146.

327. *Id.*

328. *Id.* at 147.

329. *Id.* at 148.

330. *Id.* at 149.

ICC's advancement, the ICC can empower local communities, bring perpetrators of human rights to justice, and strengthen a nation's justice system, thereby serving its goal to end impunity and prevent future atrocities.

C. Residual Mechanisms for the International Criminal Court

Although the ad hoc tribunals residual mechanisms are still in their infancy, the awareness and planning that went into their formation creates valuable knowledge and experience which the ICC can build on and tailor to match its own specific residual issues. As previously stated, the ICC's permanency does address some of the residual issues that ad hoc institutions faced; for example, the ICC would not need to formulate a mechanism to prosecute fugitives post-closure.³³¹ Additionally, it would not need to concern itself with the issue of transferring cases to an impartial forum that can guarantee a fair trial.³³² Despite that, other residual issues still remain. After the ICC proceedings end, the ICC would still have ongoing responsibilities to protect victims and witnesses, ensure that sentences remain enforced, and that affected populations have access to archives.

In response to these issues, the ICC's Assembly of State Parties Committee on Budget and Finance has stated that "appropriate consideration should be given to the role that the field offices are expected to play and how, at the conclusion of Court proceedings in a given area, any residual issues should be handled."³³³

The choice to keep the principal seats of the residual ICTY, ICTR, and the SCSL in The Hague, Arusha, and Freetown, respectively, helped ensure continuity with the support of existing host city relations.³³⁴ For future residual mechanisms, however, the residual activities should always, whenever possible, take place in the situation country as it allows the mechanism to become embedded in the communities' social fabrics.³³⁵ Furthermore, this helps the communities learn to accept

331. Oosterveld, *supra* note 241, at 29; see Oosthuizen & Schaeffer, *supra* note 41, at 53 (highlighting the issue ad hoc institutions face when deciding how to try fugitives post-closure).

332. *Id.*

333. International Criminal Court Assembly of States Parties, *Report of the Committee on Budget and Finance on the Work of Its Twelfth Session*, ¶ 73, ICC-ASP/8/5 (May 13, 2009), available at http://www2.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-5-ENG.pdf [hereinafter *2009 Report of the Committee on Budget and Finance*].

334. See Oosthuizen & Schaeffer, *supra* note 40, at 63 (discussing the advantages of not relocating the ICTY, ICTR, and the SCSL).

335. *ICTJ's SCSL Legacy Podcast Series: Alison Smith*, *supra* note 216.

the judgments and arrests made by the Court.³³⁶ Therefore, the Court should follow civil society's suggestions and seek to increase its field presence and utilize field offices to carry out residual work after the judicial proceedings are completed.

By developing its own archival system, the ICC can also learn from the experiences of ad hoc tribunals.³³⁷ For example, the ICTY and ICTR failed to "adopt common public [versus] confidential security classification systems from the beginning of their existence," thus an additional, and even avoidable, burden was created on the process of preparing the archives for closure.³³⁸ The delayed availability of information to the public could foreseeably cause distrust, frustration, and disengagement impacting the Court's legacy.

The ICC can learn from these experiences and employ mechanisms and procedures from the beginning of a case to keep track of document sources and to "ensure consistency in the way information is classified and processed within the different organs."³³⁹ Thus, the ICC would prevent having additional work for itself, but also use this archive as an opportunity to establish best practices. Additionally, "[c]lear policies should be developed from the outset" of the court's activities in order to "facilitat[e] the legacy of court archives" and establish "which documents will be retained and where they . . . [will] be kept."³⁴⁰ Access to archives is important to prevent "historical revisionism and to facilitate historical research."³⁴¹ Therefore, should the ICC choose to keep its case archives in The Hague, it is essential that affected populations also have access to these documents. The ICC should make sure to consider this issue during the beginning of its involvement.

In regards to the issue of victim and witness protection, the distance of the ICC from the current situation in the countries pose an obvious obstacle since the location of victim and witness protection mechanisms are important. These mechanisms have proven to work best when it is physically situated where the crimes took place.³⁴² Currently, all eight of the ICC's cases involve states in Africa.³⁴³ If the ICC choos-

336. *Id.*

337. Oosterveld, *supra* note 241, at 30.

338. *Id.*

339. *Id.*

340. Vincent, *supra* note 4, at 153.

341. Oosterveld, *supra* note 241, at 27.

342. *See generally* Boas & Oosthuizen, *supra* note 30, at 10-13.

343. Michael Birnbaum, *African Leaders Complain of Bias at the ICC as Kenya Trials get Underway*, WASH. POST (Dec. 5, 2013), <http://www.washingtonpost.com/world/europe/african->

es to not establish field offices in each of these situation countries to help facilitate victim and witness protection, it should at the very least ensure that some form of regional coordination with field offices is in the nearby countries.

In order to preserve the Court's legacy, outreach regarding residual mechanisms is essential. Outreach efforts to explain witness programs in order to overcome witnesses' fears, is crucial to its efficacy. Without knowledge of the availability of the witness protection programs and their capabilities, it is unlikely that even the most capable witness protection programs can be successful.³⁴⁴ Effective outreach efforts will not only increase witness involvement in trials, but can also foster the possibility of allowing local trials if witnesses understand that their identities will be protected and that they have relocation as a possibility. As highlighted in the instance of the SCSL, holding trials where the crimes occurred, or at least, closer to where the crimes occurred, has numerous benefits. For example, according to a recent legacy survey, the impact of the SCSL's work was much greater in Sierra Leone, where the court was located, than in neighboring Liberia, which was also greatly impacted by the conflict.³⁴⁵

D. The International Criminal Court's Legacy

The ICC is still struggling to establish relevance in affected communities.³⁴⁶ While the ICC has acknowledged the need to tackle legacy issues and to engage in "discussions about completion strategies, residual functions and legacy in the other tribunals and courts . . . to build[] on their experience and knowledge,"³⁴⁷ it seems that the ICC is nevertheless repeating its predecessors' mistakes by not planning for its legacy early on in its activities.³⁴⁸

Because "[h]olding trials within the concerned state allows the

leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html [hereinafter *African Leaders complain of bias*].

344. *Supra* Section IV (discussing cases in Kenya where witnesses were afraid to return to their countries after testifying).

345. *Impact and Legacy Survey*, *supra* note 217, at 2.

346. *The Field Presence of the ICC*, NO PEACE WITHOUT JUSTICE, <http://www.npwj.org/ICC/Field-Presence-ICC.html> (last visited Sept. 20, 2014) [hereinafter *The Field Presence of the ICC*].

347. International Criminal Court Assembly of States Parties, *Report on Review of Field Operations*, ¶ 23 (July 30, 2010), ICC-ASP/9/12, <http://www.icc-cpi.int/NR/rdonlyres/3358BCD6-6DC3-42D6-91F8-ABC5FFED3CA6/0/ICCASP912ENG.pdf> [hereinafter 2010 *Report on Review of Field Operations*].

348. Cole, *supra* note 22, at 3.

public to participate far more closely in the proceedings, and the proceedings themselves can have important effects on issues such as truth and reconciliation,³⁴⁹ the ICC must begin to prioritize the implementation of locally based activities to ensure its efficacy, efficiency, and legacy so that the disconnect caused by distance can be resolved.³⁵⁰ If the ICC fails to consider such issues, it will not only undermine the Court's work and legacy, but can also have greater repercussions on the legitimacy and integrity in the ever-evolving system of international criminal justice.³⁵¹ If the Court does not play an educative and preventive function by establishing a process "to promote reconciliation and ensure nonrepetition of human rights violations in the future, then the same events that led to the violations are likely to reoccur."³⁵² The Court needs to "begin elaborating its vision for what it intends to accomplish in any given country, what legacy it will leave, how it will assure that legacy and what resources it will need to do so."³⁵³

The prosecutions made by international courts are often at risk of not properly resonating with the affect communities and victims.³⁵⁴ Since the ICC is a headquarter-based institution located in the Hague, civil society groups, such as the NGO No Peace Without Justice, have "consistently advocated for the ICC to become closer to the victims, communities and other stakeholders affected by its work in situation countries."³⁵⁵ The ICC currently has a minimal presence in these situation countries, which make it difficult for the Court to carry out its day-to-day operations, create and maintain meaningful interactions with the affected communities, and contribute anything of significance to the impact of the Court in these countries.³⁵⁶ In order to increase ownership in its proceedings, the ICC should engage with a variety of different actors, such as civil society groups, local bar associations, victim groups, the diplomatic community, and the international aid organizations, throughout the court's involvement in the concerned country.³⁵⁷

In addition to increasing ownership, the ICC, through the "demon-

349. Sarkin, *supra* note 68, at 91.

350. See *ICTJ's SCSL Legacy Podcast Series: Alison Smith*, *supra* note 216.

351. See generally *The Field Presence of the ICC*, *supra* note 346.

352. Sarkin, *supra* note 68, at 97.

353. *The Field Presence of the ICC*, *supra* note 346.

354. Elizabeth Evenson, *Gaddafi Prosecution Can Help ICC Complete Unfinished Business*, THE GUARDIAN (Sept. 15, 2011), <http://www.guardian.co.uk/law/2011/sep/15/gaddafi-prosecuitor-icc-unfinished-business>.

355. *The Field Presence of the ICC*, *supra* note 346.

356. *Id.*

357. Vincent, *supra* note 4, at 151–52.

stration effect” of the norms and values of due process and international human rights, “may be able to have an impact on domestic systems and contribute to a culture of human rights.”³⁵⁸ Education and dissemination of information is critical because a lack of regional knowledge about trials diminishes the importance of precedent in the region.³⁵⁹ According to ICTY’s former Chief Prosecutor, Justice Richard Goldstone, “the judicial process is insufficient alone to satisfy the human need for knowing the truth of a tragic series of events. In addition to criminal prosecution, it is necessary for a damaged society to arrive at a wider understanding of the causes of its suffering.”³⁶⁰ Therefore, public education during and after the ICC proceedings should be essential components in legacy planning. To assist with educating affected communities, the ICC should try and replicate the ICTY’s project of making its case documents accessible by also publishing and distributing its judgments in local languages.³⁶¹

Outreach programs are not only necessary for the ICC to be effective and efficient, but also play an important role in preserving the Court’s legacy. “Sustained dialogue with victims and affected populations can help reduce frustration and disappointment,” in addition to helping those communities take ownership of trials.³⁶² Despite the importance of these activities, the ICC’s in-country activities have been “poorly equipped to respond to unfolding political developments,” which has led to common remark by those in the situation countries that “the Court is not present.”³⁶³ In addition, the Court’s ability to monitor and analyze outreach is limited by the fact that the function is coordinated and based from the Hague; it has been argued that the ICC should try to involve “core partners at the country level” to increase the effectiveness of its outreach efforts.³⁶⁴

The ICC should look to the experience of the SCSL, particularly the Charles Taylor trial (which took place in the Hague), and seek to utilize some of the SCSL court’s outreach strategies. The SCSL engaged the Prosecution team in its outreach efforts by having Chief Prosecutor David Crane travel across the country to the affected communi-

358. *Id.* at 153–54.

359. *See generally* *The Field Presence of the ICC*, *supra* note 346.

360. Sarkin, *supra* note 68, at 93.

361. *Id.* at 96.

362. WADDELL & CLARK *supra* note 171, at 68.

363. *Id.* at 67.

364. *Id.* at 68.

ties.³⁶⁵ It was important for David Crane to personally speak with those in the affected communities about the events that had occurred and have them meet the prosecutor working on their behalf.³⁶⁶ The SCSL also used more community volunteers than outreach officers, which had several advantages. First, most of the volunteers were unpaid, which increased outreach without increasing the SCSL's limited budget. Second, these individuals were far more familiar with the customs and culture of the communities with whom they were engaging. Third, particularly in areas with different tribal dialects, these volunteers were able to communicate directly with the populations rather than speak through a translator. If the ICC trains local volunteers from the affected communities, it can create an effective local presence for the court as well as a participatory mechanism for the local community.³⁶⁷ The ICC should also consider using the media to educate the public, such as broadcasting its trials and sharing knowledge of how they work while taking into account what limited infrastructure may be available to disseminate such information.

The ICC faces risks of its work being undermined each time it fails to reach out and explain why the Court made certain choices. An example of such failure derives from the ICC's first trial; despite the many allegations of murder and sexual violence, Thomas Lubanga was ultimately charged with only three war crimes: conscripting children under the age of fifteen years old into armed groups; enlisting children into armed groups, and using children to participate actively in armed conflict.³⁶⁸ During the beginning stages of investigation, Congolese authorities unexpectedly detained Lubanga; it was also unclear as to how long they would be able to hold him in custody.³⁶⁹ At that time, the ICC prosecutor had only gathered sufficient evidence in regards to the child recruitment charges, but not the sexual offenses or murder charges.³⁷⁰ The ICC had chose to employ a prosecutorial strategy by choosing to charge the accused based on the strength of the evidence against the accused

365. Wu, *supra* note 133, at 70-71.

366. *Id.* at 71.

367. *Id.*

368. *Thomas Lubanga at the International Criminal Court*, INT'L JUSTICE MONITOR: A PROJECT OF THE OPEN SOC'Y JUSTICE INITIATIVE, <http://www.ijmonitor.org/thomas-lubanga-background> (last visited Sept. 21, 2014).

369. *Deconstructing Lubanga: The ICC's First Case: the Trial and Conviction of Thomas Lubanga Dyilo*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INT'L CRIM. COURT (AMICC) at 3, http://www.amicc.org/docs/Deconstructing_Lubanga.pdf. [hereinafter *Deconstructing Lubanga*].

370. *Id.*

and how much could be proved.³⁷¹ It should be noted here that such prosecutorial discretion is not without checks and balances by the pre-trial chambers.³⁷² Despite the Court's system of checks and balances, the general population unaware of the strategy was left frustrated without explanation for why certain charges were not pursued by the prosecution.³⁷³ This left a sense of injustice to the affected communities; by not disclosing the underlying goodwill, an obstacle to reconciliation was created, one that may lead to the cycle of violence being left unbroken.³⁷⁴

Accordingly, the ICC's judicial functions, non-judicial functions, and its long-term legacy would be improved by maintaining a stronger and permanent representation in situation countries.³⁷⁵ As of 2010, 85.6% of ICC personnel are allocated to headquarters and 14.4% to situation countries.³⁷⁶ While the ICC is operating under tight budgetary restrictions, the Court is at risk of paralysis if it is unable to execute its essential functions, some of which necessarily require a field presence. For example, the predicament created by the ICC's distance from the current situation countries has led to some hostility and a loss of community support in Africa.³⁷⁷

While the ICC can learn from the lessons of the ad hoc criminal tribunals, it will have to create its own approach to legacy. Because of the global reach of the ICC, it cannot just create a singular legacy strategy for the entire court. It will have to work with the individual situation countries early on to create a legacy strategy by consulting key stakeholders and victims and representatives from affected communities.³⁷⁸

V. CONCLUSION

The creation of international criminal tribunals has greatly advanced the international community's mission to end impunity and establish foundations for lasting peace. While that may be true, if the in-

371. *Deconstructing Lubanga*, *supra* note 369, at 3.

372. Wu, *supra* note 133, at 73.

373. *Thomas Lubanga at the International Criminal Court*, *supra* note 368.

374. Wu, *supra* note 133, at 72-73.

375. *See generally Impact and Legacy Survey*, *supra* note 217, at 14 ("This indicates the importance of international courts and tribunals having a strong presence in the countries in which they are investigating and bringing cases and stands as an important lesson for the future.")

376. *2010 Report on Review of Field Operations*, *supra* note 347, at 8.

377. For further discussion, see Section VI. (POSTSCRIPT) of this article.

378. *See generally The Field Presence of the ICC*, *supra* note 346.

ternational community does not begin prioritizing completion strategies, residual mechanisms, and legacy planning, these advancements are at risk of being undone. While the need to leave a legacy is now firmly accepted as part of the United Nations policy, how these activities are to be incorporated remains uncertain and inconsistent.³⁷⁹

The ICC must consider not only how it enters a community torn apart by atrocities, but also be mindful of how it intends to leave it. The ICC will have to address many of the same residual issues and legacy questions that the ad hoc criminal tribunals have previously faced and are still handling. Similar to the obstacles that ICTR and ICTY faced as a result of their distance from the affected populations, the ICC will have to make additional efforts so that the affected communities have the opportunity to take ownership over the trials with the goal of establishing a basis for peace and reconciliation. Just as the completion of the ad hoc criminal tribunals, the ICC's completion of judicial proceeding will not only impact the "sustainability of peace and the rule of law within the countries concerned, but also the extent of public support and legitimacy for international justice in general."³⁸⁰

Accordingly, policy priorities need to be formulated early on, emphasizing the creation of a strong legacy programs so that the focus is not solely on its trials or convictions. The ICC should begin drafting a legacy strategy plan before its proceedings commence, outlining community needs and goals as well as identifying potential problems in advance to tackle. Legacy programs need to focus on increasing its engagement with domestic institutions, the training of the country's domestic justice sector personnel, particularly prosecutors, attorneys, judges, and magistrates, as well as working on establishing a relationship with the situation country (and its surrounding states).³⁸¹ While scarceness of resources may lead the ICC to try to minimize these efforts and initiate the implementation of its residual functions only after the completion of proceedings, short-changing legacy efforts puts whatever success the Court may have had at grave risk of being undermined or undone. Therefore, in order for the ICC to reach its full potential, it must create a completion strategy that plans the necessary residual mechanisms, which will ultimately impact the Court's legacy. To establish a positive legacy, it is not enough to bring certain perpetrators to justice; it is also necessary that the affected communities impacted by

379. Sarkin, *supra* note 68, at 96.

380. Reiger, *supra* note 2, at 5.

381. Suma, *supra* note 28, at 3 (discussing the SCSL).

the ICC's work, and the international community as a whole, see and *understand* that justice is being done.

VI. POSTSCRIPT

At the time of writing, the ICC faced arguably the most important public perception battle in its history. In 2013, the ICC's announced that it lacked sufficient evidence to proceed in its high profile case against Kenya's current President, Uhuru Kenyatta.³⁸² ICC Prosecutor Fatou Bensouda explained that she could no longer rely on the two key witnesses she needed to try the Kenyan President because one witness was no longer willing to testify and the other witness confessed to having provided false evidence.³⁸³ After the announcement, a poll showed that the percentage of Kenyans who supported the ICC process fell from 55% in April 2012 to 39%.³⁸⁴ At Assembly of State Parties in November 2013, Kenyan leaders had also won concessions that essentially made it easier for them to forgo some court sessions and attend others remotely by video link rather than being required to come in person at The Hague.³⁸⁵ Some Human Rights Advocates have argued that the weight these cases have placed on the ICC has resulted in changes that will undermine the entire court.³⁸⁶

The ICC's involvement in Kenya began in March 2010, when the ICC Pre-Trial Chamber II granted the "prosecution authorisation to open an investigation *proprio motu* in the situation of Kenya."³⁸⁷ In 2011, Kenyan President Uhuru Kenyatta and Deputy President William Ruto were indicted on charges of encouraging violence after the disputed elections in December 2007, which resulted in the deaths of approximately 1,100 people.³⁸⁸ The President and Deputy President unsuccessfully sought permission from both the ICC and U.N. Security Council to "skip ICC proceedings in the name of national security and pushed for immunity from prosecution for sitting heads of state."³⁸⁹ In fact, on the

382. Rick Gladstone, *Kenya President's Trial Near Collapse*, BOSTON GLOBE (Dec. 20, 2013), <http://www.bostonglobe.com/news/world/2013/12/20/trial-kenyan-president-may-collapse/LG30B2TkSM9UTT9w2CBCZO/story.html>.

383. *Id.*

384. Tomas Zak, *Kenyatta in Court: The ICC Needs to Start Winning Some Public Perception Battles*, THINK AFRICA PRESS (Nov. 12, 2013), <http://thinkafricapress.com/kenya/manipulation-and-misinformation-kenyatta-and-icc-question>.

385. See *African Leaders complain of bias*, *supra* note 343.

386. *The Intersection of Law, Policy, and Practice*, *supra* note 216.

387. *Situations and Cases*, *supra* note 26.

388. Birnbaum, *supra* note 343.

389. *Id.*

day of the Nairobi Westgate mall attack, Deputy President Ruto was permitted to leave The Hague and return to Kenya to coordinate a response; Kenyan officials have argued that the ICC prosecutions were distracting their leaders from counter-terrorism efforts.³⁹⁰ Eventually, as stated above, the Kenyan leaders succeeded; Deputy President Ruto will be permitted to forgo attendance for part of his trial.

After the Westgate attack, Kenya helped convene an October summit of the African Union, where the ICC's focus on Africa was condemned.³⁹¹ At that summit, Hailemariam Dessalegn, the Prime Minister of Ethiopia and current African Union chairman, "read out the union's collective complaint against the ICC's *"unfair treatment"* of Africans, criticizing the ICC "as a condescending political instrument targeting Africa and Africans;" Kenya's President, Uhuru Kenyatta, called the ICC a racist "toy of declining imperial powers."³⁹² Observers noted that, "African leaders have viewed the [Kenyan] case with increasing bitterness and criticism, contending that the court is preoccupied with pursuing cases in Africa exclusively."³⁹³ The summit ended with a joint recommendation that President Kenyatta be able to skip his trial at the ICC, scheduled to begin in November 2014.³⁹⁴ Despite the public uproar, the AU states—which comprise of thirty-four out of 122 State Parties to the Rome Statute—did not reach an agreement regarding whether to withdraw from the ICC.³⁹⁵

This development is just the latest of many struggles with Kenya that are now bringing into question not only the future of those cases, but also of the AU's general support of the ICC. The controversy has added momentum to other ICC battles, such as the ICC's case against Omer Hassan al-Bashir, the President of Sudan, Abdel-Rahim Mohamed Hussein, Defense Minister of Sudan, Ahmed Haroun, the governor of North Kordofan, and militia leader Ali Kushayb.³⁹⁶ Al-Bashir, who became the first head of state targeted by the ICC in 2008, was charged with committing genocide in the Darfur region. He has accused

390. *Id.*

391. *Id.*

392. Sreeram Chaulia, *The International Controversy Court: Why its Selective Justice is Failing Africa and the World*, RT (Oct. 13, 2013), <http://rt.com/op-edge/africa-international-controversy-court-183>.

393. Gladstone, *supra* note 382.

394. Chaulia, *supra* note 392.

395. *Id.*

396. *Sudan Accuses ICC of Playing "proxy political foe"*, SUDAN TRIBUNE (Dec. 12, 2013), http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=49167.

the court of having a bias against Africans and rejected the jurisdiction of the ICC by asserting that it is not a party to the Rome Statute.³⁹⁷

Only time will tell the outcome of these cases and the impact that these events will have on the ICC's legacy. If nothing is done to ensure that affected communities have ownership over these cases, the ICC's legacy will inevitably be in peril.

397. *Id.*; see also *Omar al-Bashir Charged with Dafur Genocide*, GUARDIAN, (July 12, 2010), <http://www.theguardian.com/world/2010/jul/12/bashir-charged-with-darfur-genocide>.