

## Chapter 2

# Origins of International Criminal Justice

**Abstract** The idea of a permanent tribunal to try serious crimes including genocide and war crimes is not a new idea; it arose even before the Nuremberg and Tokyo trials prosecuted senior government officials for their roles in the atrocities of World War II. Although the idea for a permanent criminal court was shelved during the Cold War, a small group of committed activists pushed the establishment of the Court onto the international agenda during the 1990s. This chapter will explore the other international criminal tribunals that followed the Nuremberg and Tokyo experiments, including the Yugoslavia and Rwanda tribunals and the hybrid tribunals in Cambodia, Sierra Leone, Timor-Leste, and the Balkans.

**Keywords** Hybrid tribunals • International Criminal Tribunal for the Former Yugoslavia (ICTY) • International Criminal Tribunal for Rwanda (ICTR) • Nuremberg trials • Special Court for Sierra Leone • Tokyo trials

### 2.1 The Legacy of International Criminal Tribunals

A number of international courts and tribunals have prosecuted international crimes since the creation of the United Nations system in 1945. The first were the International Military Tribunal at Nuremberg, Germany, which was established by treaty in August 1945, and the International Military Tribunal for the Far East in Tokyo, Japan, created by special proclamation of the Supreme Commander of Japan, U.S. General Douglas MacArthur, in January 1946. In a later era, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal in Rwanda (ICTR) followed these early experiments, established by the UN Security Council in the mid-1990s after enormous human catastrophes that involved deliberative, large scale, and pre-meditated crimes in the Balkans and Central Africa. Finally, a generation of “hybrid” or “internationalized” tribunals followed those of Yugoslavia and Rwanda, mandated to prosecute both international and domestic crimes. Four of

these were internationalized courts, including the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the Special Panels of Dili, Timor-Leste. In addition, several domestic courts have been empowered to prosecute international law, including the Regulation 64 Panels in Kosovo and the War Crimes Chamber in Bosnia-Herzegovina (Smeulers et al. 2013: 8–9). All of these experiments were temporary and possessed limited temporal, territorial, and subject matter jurisdiction that began after the conclusion of a conflict, except for the ICTY, which was established while the conflict still raged. While these qualities make these tribunals quite different from that of a permanent international court sitting in The Hague, their experience was vital in constructing an institution that resolved some of the more burdensome, lengthy, and expensive aspects of the ICTY and ICTR.

Unlike in domestic common law systems, case law is not binding as a matter of general international law, whether it comes from national or international tribunals. That said, the earliest international criminal tribunals—those in Nuremberg and Tokyo after World War II—have had profound influence on the development of international criminal justice. For instance, the ICTY has made extensive reference to its earlier predecessors. All international tribunals require judges to determine the definitions and scope of crimes and the principles of liability, and judges find prior decisions persuasive even if they are not binding (Cryer 2012: 146–147). The three crimes prosecuted at Nuremberg—war crimes, crimes against humanity, and crimes against peace—have become firmly entrenched in international law, though not until the Rome Conference in 1998 did a majority of states explicitly make clear that crimes against humanity do not need to occur during armed conflict. Another development at Nuremberg that persists to the present era is the use of conspiracy as a basis for international criminal responsibility (Kelly and Timothy 2008: 105–114). Likewise, the doctrine of command responsibility, in which culpability falls most heavily on those at the top of the hierarchy, is an important piece of international criminal law as a result of the Nuremberg precedent. The development of international criminal law over the last fifty years has been a cumulative sharing process, and its principles are not limited to the text of any single treaty or within the walls of a single institution.

### ***2.1.1 The Nuremberg and Tokyo Trials***

The Nuremberg and Tokyo trials after World War II were the first attempts to criminalize aggressive war and abuses against civilian populations. With considerable leadership from the American prosecutor, U.S. Supreme Court Justice Robert Jackson, the Nuremberg trial and its sister tribunal in the Far East seemed to represent a triumph of law over power, but they also represented justice as imposed by the victorious Allied powers and did not prosecute the Allies for their own crimes. The United States was the strongest legal, material, and financial supporter of the Nuremberg tribunal, and the American commitment to try senior Nazi leadership

occurred under relatively high professional standards. Undoubtedly, the trials were not perfect, but they played an important role in reducing tensions between the victors and the vanquished by substituting a legal process for revenge. By focusing the blame on Nazi officials, the trials decreased the risk that the whole German nation and population would be assigned the lasting burden of collective guilt (Beigbeder 1999: 35–40, 48–49; Bosco 2014: 27–28).

The Nuremberg trials lasted from November 14, 1945, to October 1, 1946. The adjudicators included one judge and one alternate appointed by each of the four major powers, Britain, France, the United States, and the Soviet Union. Each of the four major powers also appointed a prosecutor, and the trials themselves occurred in the American-occupied zone of Germany and benefited from substantial American legal expertise. A total of 24 defendants were indicted, as well as seven criminal organizations. The defendants represented different levels of responsibility in the Nazi regime, and both military and civilian functions. Of the 22 defendants tried (excluding one tried in absentia and one who committed suicide shortly before the trial's commencement), twelve were sentenced to death by hanging, three were sentenced to life imprisonment, and four to prison terms between ten and twenty years. Three defendants were found not guilty and released (Beigbeder 1999: 35–38).

The defendants were charged with four crimes: conspiracy, crimes against peace, war crimes, and crimes against humanity. Framing of the criminal charges at Nuremberg posed an obvious difficulty: what crimes were actually illegal under international law? Certainly, war crimes had been defined by the end of the World War I, but whether the prosecution would be able to show beyond a reasonable doubt that any of the men at Nuremberg had directly ordered or perpetrated any of these crimes was far from certain. Justice Jackson and the American prosecution team opted to pursue conspiracy charges, which caught all of the defendants in the net as they could not claim obedience to higher orders. One problem with this approach was that declaring all those who participate in a conspiracy as equally responsible is unique to Anglo-American law. French, Russian, and German law did not recognize conspiracy as such, and in these jurisdictions defendants could only be tried for their individual crimes. That the Soviet Union had also waged aggressive war by invading Poland in September and Finland in December 1939 complicated Jackson's legal theory further (Overy 2003: 14–19).

American and British prosecutors also wanted to include Nazi anti-Semitism as a charge, but how to frame the indictable offense posed a definitional problem. The term "genocide," coined in 1944, was one possibility, but French and Soviet prosecutors were anxious to include the persecution of their populations as well as the Jews. A new category of offense, "crimes against humanity," was agreed and included the persecution and murder of Jews, Poles, and Roma (gypsies). However, despite the severity of these crimes, the Nuremberg trials left the category of "crimes against humanity" relatively undeveloped, and the judgment of the tribunal did not strictly separate crimes against humanity from war crimes, which included such atrocities as cruel treatment of civilian populations, murder of prisoners of war, enforced population exchanges, and pillage during armed conflict (ibid: 20–21; Beigbeder 1999: 44–48).

The most powerful legal challenge to the prosecutions at Nuremberg was never addressed by the prosecutors at all: that most of the crimes of which the defendants stood accused were not regarded as crimes at the time they were committed. Under the prohibition of *ex post facto* criminal laws (sometimes rendered by the Latin phrase, *nullum crimen sine lege*, or “no crime without law” in European civil law systems), retroactive justice of this sort was unknown in most legal systems. Jackson explained that the Nazi crimes were severe enough to have been “regarded as criminal since the time of Cain,” and indicated that they would have been criminalized if the law had not been so grossly perverted under Nazi rule. The central purpose of the tribunal, however, was not to conform to existing international law, but to establish new rules of international conduct and lay boundaries for future human rights violations (Overly 2003: 22–23).

After Japan’s surrender on August 14, 1945, Japan accepted the terms of the Potsdam Declaration, which placed the Japanese government under the control of General Douglas MacArthur, the Supreme Commander for the Allied Powers. On January 19, 1956, MacArthur issued a proclamation establishing an International Military Tribunal for the Far East, with the intention to assign criminality to individuals and reject the charge of collective responsibility for the Japanese people. Unlike Nuremberg, however, the proclamation was not a collaborative process; it was largely an American project. MacArthur appointed eleven judges from among the Allied powers, and the tribunal had one prosecutor, an American. The crimes and procedures were the same as at Nuremberg. However, the Tokyo trials lasted more than twice as long, with 400 witnesses and more than 4000 pieces of documentary evidence, producing a trial transcript of over 45,000 pages. All 25 defendants at the Tokyo trials were convicted, of whom seven were sentenced to death by hanging and the rest given jail sentences from 7 years to life. Dissenting opinions from some of the judges indicated a difference of opinion about guilt and due process, and the Indian judge condemned the entire proceeding as an exercise in victor’s justice, weakening the impact of the verdicts. The decision to grant immunity to the Japanese Emperor, seen as a semi-divine figure, was also controversial (Beigbeder 1999: 54–60; Futamura 2008: 60–66). Although the focus of the prosecutor was on crimes against peace, that is, waging aggressive and belligerent war, successful prosecutions also took place for war crimes and crimes against humanity, including the large-scale atrocities in Nanjing, China, and the Philippines. The successful prosecutions were a product of a multinational team of investigators and prosecution staff, and the Tokyo Tribunal created important precedent about the responsibility of senior government officials for these crimes (Totani 2010: 147, 152–155, 161).

The Nuremberg and Tokyo trials sought to prosecute only those with the greatest responsibility. With the exception of an editor of an influential and racist newspaper in Germany, all perpetrators convicted at the tribunals held high positions within the state hierarchy or were high-ranking military leaders (Smeulders et al. 2013: 26). Many lower-ranked perpetrators were convicted not by the Nuremberg or Tokyo tribunals, but rather in subsequent national prosecutions such as the Nazi doctors trial in Germany and the famous cases of Adolf Eichmann in

Israel and Klaus Barbie in France (ibid: 34–35). Subsequent international tribunals have succeeded to varying degrees in cooperating with local or national prosecutions for international crimes.

One benefit of the Nuremberg tribunals—and the later ones in Rwanda and the former Yugoslavia—is that the trial record itself became a historical document. Hannah Arendt, describing the trial of Eichmann in Jerusalem in 1961, referenced the immense archival material of the Nazi regime that Nuremberg prosecutors compiled and distilled. This impartial record has encouraged postwar Germany to confront its past honestly and helped build a powerful German culture of remembering. It has also de-legitimized Holocaust denialism. Indeed, the absence of such a historical record for the Armenian genocide in 1917 has allowed the Turkish government to avoid accountability and deny that the genocide took place. Germany cannot do this today, and the Nuremberg tribunal is part of the reason (Goldstone and Bass 2000: 54–55).

### ***2.1.2 The International Criminal Tribunal for the Former Yugoslavia***

Forty-seven years after the Nuremberg tribunal completed its mandate, the UN Security Council unanimously voted to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY). At the time the tribunal was established, the major powers were resisting pressure to intervene militarily in the most destructive European conflict since World War II. The wars in the former Yugoslavia displaced about 3.5 million people in a campaign of ethnic cleansing, carried out through systematic forced expulsions, terror, and massacres, perhaps none as infamous as the destruction of the Bosnian Muslim community by Serbian forces at Srebrenica on July 11, 1995. The ICTY had primacy over national courts and could try genocide, war crimes, and crimes against humanity. The tribunal had eleven judges, elected from around the world, and included three principal organs: the office of the prosecutor, the registry, and the judiciary, consisting of two trial chambers and one appeals chamber (Beigbeder 1999: 146–156).

The ICTY struggled with funding, hostility from Security Council members, staffing, and the arrest of perpetrators, but it enjoyed the support of the Islamic world and profited greatly from the support of the United States and the United Kingdom. The ethnic cleansing campaign in Bosnia-Herzegovina had started in April 1992, but not until February 1993 did the Security Council finally approve the creation of the ad hoc tribunal for Yugoslavia. Only in August 1994 did South African jurist Richard Goldstone take office as the first chief prosecutor, and he still had to assemble a competent international staff. As Goldstone reflected later, “[s]uch delays are not just undignified; they are damaging. It is more difficult for a tribunal to have a deterrent effect if that tribunal is being created in the middle of a conflict. And the formidable operational challenge of finding witnesses and

gathering forensic evidence only gets harder as time goes by,” not to mention the impact of this failure on victims who sought accountability and redress (Goldstone and Bass 2000: 52–53).

Because Goldstone had little support to conduct prosecutions during an ongoing conflict, he started with low-ranking perpetrators who could be easily apprehended in order to build up evidence and global opinion against higher-ranking perpetrators. As a result, in a sharp departure from the Nuremberg and Tokyo trials, the Yugoslavia tribunal convicted a higher number of low-ranking perpetrators or those with no official role at all. On the other hand, it became the first international criminal tribunal to indict a sitting head of state, President Slobodan Milošević, who was arrested after he lost elections in 2001 (Smeulers et al. 2013: 26–27). The Court’s first case against Dusan Tadić was uncomfortable given Tadić’s comparatively minor role as a guard at a concentration camp, for which he received 20 years imprisonment. The first judgment was against Drazen Erdemović, a Croat who had been forced under threat of death to take part in the summary execution of hundreds of Muslims in Srebrenica, the first application of a duress defense by the tribunal. Erdemović pleaded guilty and received early release; he later testified against President Milošević (Beigbeder 1999: 156–158). The *Erdemović* decision resulted in a close three-to-two split in the appeals chamber and a powerful dissenting opinion that argued that duress could be a defense to international crimes. During the negotiations over the International Criminal Court, the decision was widely debated and reconsidered, another example of how international criminal law is continually evolving (Weigend 2012: 1220–1224).



The International Criminal Tribunal for the Former Yugoslavia, The Hague, Netherlands. Photo from Thinkstock.com



The Milošević trial was emblematic of the delay and expense that plagued the ICTY from the beginning. The prosecutor, then former Swiss Attorney General Carla del Ponte, adopted a strategy that made the trial unmanageably long and only slowly developed Milošević's aggressive military agenda for a Greater Serbia. After upholding on several occasions his right to defend himself, the trial chamber eventually imposed court-assigned defense counsel on Milošević. The compounding of the delays in the Milošević case took its toll: he died during the trial on March 11, 2006, some months away from a verdict (Boas 2007: 1–9). The ICTY ultimately arrested 161 perpetrators, of whom 74 were convicted and sentenced, 18 were acquitted, and 13 were transferred to domestic courts in Bosnia, Serbia, or Croatia. In addition, 36 indictments were later withdrawn or dropped, and 20 cases are still ongoing, most in the appeals chamber. The ICTY aims to complete its work by the end of 2015, though it only recently began trials of high profile cases involving the politician Radovan Karadžić and the military leader Ratko Mladić.

### ***2.1.3 The International Criminal Tribunal for Rwanda***

The difficulties that plagued the ICTY were exacerbated at the ICTR because of its relative isolation and opposition from the Government of Rwanda. Between April and July 1994, between 500,000 and one million people were brutally murdered, with the Tutsi people (and moderate Hutu allies) targeted for extermination by Hutu Power militias and leadership in a carefully-planned genocide. The international community was acutely aware of the situation on the ground as it occurred. Not only did Western nations fail to act but they took affirmative steps to encourage Hutu Power by removing UN peacekeeping forces before the worst of the killing began. Only the overthrow of the murderous regime by Tutsi rebel forces in the summer of 1994 stopped the slaughter, but the fleeing Hutu militias fled to neighboring Zaire (today, the Democratic Republic of the Congo) where they destabilized the Rwandan state for years (Melvern 2000: 4–5, 227–228; Chrétien 2003: 330–336). On November 8, 1994, the Security Council voted to create the ICTR, though Rwanda objected because the tribunal would not be permitted to sentence perpetrators to death. The ICTR was based in Arusha, Tanzania, with an appeals chamber shared with the ICTY in The Hague. The Rwanda tribunal had primacy over national courts. The tribunal's statute was based to a large extent on the Yugoslavia tribunal's statute, though specific references to armed conflict and war crimes are omitted in view of the internal nature of the conflict. This was the first time that the category of crimes against humanity was separated from war crimes, and the first time that the laws of war were prosecuted in a purely internal conflict (Beigbeder 1999: 174–175; van den Herik 2005: 281). International criminal law was evolving.

The tribunal faced almost insurmountable obstacles from the start, particularly as it was created over the opposition of Rwanda, where it was viewed by

the Tutsi rebel government that overthrew the genocidal regime as poor compensation for the international community's failure to stop the genocide. The first indictments were made in December 1995, and subsequently a Hutu militia leader and a local mayor were transferred to Arusha for trial. Like the ICTY, however, construction of the tribunal was significantly delayed, and the first courtroom was only completed in November 1996. Although the United States provided substantial support, few other countries did. The tribunal also suffered from serious operational deficiencies: poor relations between the prosecutor and the registrar and inexperienced or unqualified staff. Even more serious were errors of strategy and due process by the Office of the Prosecutor, despite the transfer to Arusha of very senior Rwandan leadership, including a former prime minister, former cabinet ministers, a military general, and the propagandist in charge of the "hate radio." Investigations were difficult, defense counsel was isolated, and verdicts zigzagged between rigorous enforcement of due process rights and cavalier treatment of defendants' objections. In short, the tribunal lacked a grand strategy (Beigbeder 1999: 178–182; Cruvellier 2010: *passim*). The ICTR indicted a total of 95 individuals and convicted 59 perpetrators. Though several trials are ongoing, the ICTR expects to complete its work by the end of 2014. The oddly-named United Nations Mechanism for International Criminal Tribunals (also called the Residual Mechanism) will take over jurisdiction of any outstanding arrest warrants from both the ICTY and ICTR when both tribunals finally close. The Residual Mechanism includes a list of judges to be called upon in the future and provided with a small staff should any suspects still at large be apprehended. The Mechanism will be called upon as needed, and will not be continuing. The Residual Mechanism for the ICTR began operating on July 1, 2012, and the one for ICTY commenced on July 1, 2013. The Residual Mechanism will hear any appeals resulting from the last four cases still ongoing at the ICTY, and the Mechanism retains jurisdiction over three fugitives of the ICTR who are still at large (United Nations Mechanism for International Criminal Tribunals 2014).

Despite doubts about the tribunal's respect for the due process rights of the defendants, one of the major accomplishments of the Rwanda tribunal was that it helped politically silence all supporters of the regime that had overseen the genocide. While one may doubt that the ICTR subsequently deterred atrocities in eastern Congo and elsewhere in Africa, the prosecutions marginalized the Hutu Power militias and the former genocidal regime, which proved vital to political stability in Rwanda and the region. Like the Nuremberg tribunal before it, the ICTR de-legitimized genocide denialism and the belief that the Tutsis and Hutus were simply engaged in a civil war. The ICTR emphatically contributed to constructing the memory of the Rwandan genocide, which today is recognized in popular culture on par with the African slave trade and South African apartheid as among the most serious mass crimes to disfigure the African continent (Cruvellier 2010: 172). Relatedly, the ICTR's decisions extensively helped to develop international jurisprudence on the crimes of genocide and crimes against humanity, producing considerable writings on the elements of the offenses, the intent requirements, and the status of the victims, especially with regard to women and gender-based



violence. The ICTR was the first international tribunal to recognize that mass rape may constitute an act of genocide. Although the proceedings of the tribunal had their troubles, the ICTR produced a large and impressive body of jurisprudence (van den Herik 2005: 278–284). Prior to the establishment of the Rwandan and Yugoslav tribunals, the testimonies of victims of sexual violence were very rare in international prosecutions. The recognition of mass sexual violence as an international crime helped challenge the gendered foundations of international criminal law, helping to end impunity for these crimes and providing clear precedent for later tribunals (Koomen 2013: 254–255).

### ***2.1.4 The Hybrid Tribunals***

The establishment of the so-called “hybrid” or “mixed” tribunals in Sierra Leone, Cambodia, Lebanon, East Timor, Bosnia, and Kosovo reflected the dissatisfaction of the international community with the Yugoslavia and Rwanda tribunals. The hybrid model was intended to shorten the duration of judicial proceedings while respecting due process, ensure the greater involvement of and impact on local societies, and provide greater financial efficiency (Tortora 2013: 93–94). “Citizens of the affected country should feel some participatory connection to the trials if those trials are to further the oft-declared goals of international criminal justice—promoting reconciliation, developing a culture of accountability, and creating respect for judicial institutions in a post-conflict society” (Raub 2009: 1021). There was precedent for this: a hybrid tribunal was established in the Netherlands in 1999 for the perpetrators of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. As part of an agreement with Libya to retrieve the two suspects involved in the bombing, a criminal trial was held in The Hague before Scottish judges and under Scottish law (Stewart 2014: 158–159). If the experiments in Yugoslavia and Rwanda proved anything, they proved that international criminal tribunals are expensive. Those two tribunals alone staffed more than 2000 employees and had a combined annual budget exceeding \$250 million. For this reason, the mixed tribunals for Sierra Leone and Cambodia, for instance, were financed on the basis of voluntary contributions—a method that hardly seems desirable or reliable for a permanent court, but one that avoided the dramatic budget battles of the Rwandan and Yugoslav tribunals (Arsanjani and Reisman 2005: 402).

The Special Court for Sierra Leone was the first of these experiments, envisioning the substantial involvement of judges, prosecutors, and staff from the country where the crimes took place. In addition, the Special Court’s personal jurisdiction was limited only to those who bore the greatest responsibility for the crimes. The Special Court was born out of a June 2000 request by the president of Sierra Leone to the United Nations for assistance in prosecuting the leaders of the Revolutionary United Front, a rebel group notorious for using drug-addicted child soldiers to terrorize civilians in order to control the country’s diamond

resources. Despite an attempted amnesty, the rebels continued fighting and took 500 UN peacekeepers as hostages. In March 2002, the parliament of Sierra Leone ratified the proposal establishing the court, and a year later, the prosecutor issued indictments for 13 individuals, including former President Charles Taylor of Liberia and the leaders of the three main armed factions (Rodman 2013: 64–65; Tortora 2013: 96–97). However, the transfer of Charles Taylor to The Hague to stand trial for security reasons substantially increased the Special Court's operational costs (Ralston and Finnin 2008: 59). The Special Court completed proceedings against 21 individuals, of whom 16 were convicted (including Taylor), two were acquitted, and three died before the conclusion of the trials. One persistent question before the Special Court that profoundly influenced later international criminal law was whether international crimes could be pardoned or amnestied. Although the Lomé Accord included a complete and unconditional amnesty to all combatants for crimes occurring after 1991, international crimes were excluded. The Lomé Accord also initiated the creation of a truth and reconciliation commission before which former combatants could testify in the presence of victims as an alternative to a criminal proceeding, though this commission's jurisdiction overlapped and occasionally conflicted with the Special Court (Tejan-Cole 2003: 158). Here too there were lessons for a future International Criminal Court.

Other “hybrid” tribunals followed. In 2003, the ICTY endorsed the creation of a domestic court to provide assistance in trying perpetrators from the Bosnian war. The State Court of Bosnia and Herzegovina was created as part of the ICTY's “completion strategy” as the ICTY sought to wind down its work; the State Court, a special organ of the Bosnian judiciary, had jurisdiction over war crimes and other violations of international criminal law. Although the State Court faced its own funding difficulties and a shortage of skilled staff, the State Court's proceedings were more expeditious than those of the ICTY (Burke-White 2008: 345–350). In 1997, Cambodia sought the assistance of the UN in establishing a framework for the prosecution of those responsible for the atrocities committed by the former Khmer Rouge regime between 1975 and 1979. In 2004, the Extraordinary Chambers in the Courts of Cambodia were established to prosecute only the most senior leaders, rather than low- or middle-ranking perpetrators, in an effort to control costs (Ralston and Finnin 2008: 66–67). Finally, in May 2007, the Security Council approved creation of the Special Tribunal for Lebanon, established in The Hague, to prosecute the perpetrators responsible for the assassination of former Lebanese Prime Minister Rafik Hariri and 22 others on February 14, 2005. With a limited mandate, the Special Tribunal courted controversy as it was authorized to try suspected perpetrators in absentia with a right to retrial if an accused was later arrested. Despite a lengthy investigation, the perpetrators are still unclear and have not been apprehended, though a handful of trials in absentia began in 2014 (Jenks 2009: 59–62).

Does the hybrid tribunal still have a future in a world with the International Criminal Court? The Court is not likely to address every current or future conflict due to resource constraints and restrictions on its jurisdiction. The hybrid

tribunal may also possess some unique advantages compared to purely domestic or purely international courts, such as flexibility, cost efficiency, and the combination of international legitimacy with local sensitivity (Raub 2009: 1053). This may be why, even now, hybrid tribunals are in the works for perpetrators in the civil war between government forces and Séléka rebels in the Central African Republic and for the trial of former President of Chad Hissène Habré in Dakar, Senegal, for crimes committed during his dictatorship in Chad between 1982 and 1990. The Extraordinary African Chambers in the Courts of Senegal opened in February 2013 to prosecute crimes against humanity, war crimes, genocide, and torture by the Habré regime. Habré's trial is expected to begin in early 2015 (Human Rights Watch 2014). In June 2014, the African Union endorsed a United Nations-backed report that recommended a special tribunal for crimes committed by both sides in the conflict in the Central African Republic (Al Jazeera 2014).

### ***2.1.5 Other International Prosecutions***

The costs of international criminal justice influenced the debate over possible justice mechanisms in East Timor (now Timor-Leste) and Kosovo. Here, the model was not a “hybrid” tribunal that would prosecute both domestic and international law, but instead a domestic “internationalized” court established as part of the larger UN peace mission in those countries, with funding drawn from the general UN peacekeeping budget. Unlike the “mixed” tribunals, the “internationalized” courts fell within the local legal system rather than apart from it. Compared to their predecessors, the Special Panels for Serious Crimes at the Dili District Court and the Regulation 64 Panels in the Courts of Kosovo proved to be very cheap (Ralston and Finnin 2008: 60; Chiam 2008: 217). The Special Panels in Timor-Leste almost exclusively tried low-ranking perpetrators, primarily Timorese militia members acting on the orders of the Indonesian military, as the Indonesian government refused to extradite more prominent military leaders (Smeulers et al. 2013: 28). The panels were composed of a combination of two international judges and one Timorese judge, with a largely international staff. International law standards applied in relation to genocide, war crimes, torture, and crimes against humanity, while Timorese law applied with respect to murder and rape (Chiam 2008: 213–214). While the crimes that occurred in Kosovo in 1999 still fell under the jurisdiction of the ICTY, a bloated budget and a slow-moving apparatus encouraged efforts to instead provide international judges and prosecutors to domestic courts in Kosovo. Like the Special Panels in Timor-Leste, the Regulation 64 Panels in Kosovo included two international judges and one local judge, with most prosecutions for genocide, war crimes, murder, and rape (Stahn 2001: 174–176).

Not all prosecutions for genocide or crimes against humanity have been accepted by the international community as legitimate. In Ethiopia, the “Red Terror” trials against former officials of the Marxist military junta (the *Derg*)

that brutally ruled the country from 1974 to 1991 stretched out over fifteen years and involved marked violations of due process. Twenty-two top regime officials, including former head of state Colonel Mengistu Haile Mariam, were tried in absentia for crimes such as genocide, and 18, including Mengistu, were sentenced to death. While the trials did lead to the creation of a permanent record of the abuses of the *Derg* regime and victims were allowed to testify in court in large numbers, the due process shortcomings of the proceedings and the lack of international support turned the verdict made the verdict appear retributive, not restorative (Tronvoll et al. 2009a: 9–10, b: 136–138, 149–152). The Iraqi High Tribunal, established in October 2005 by Iraq's transitional government, was intended to replace the American-backed Special Tribunal with one supported by the country's own government. Jurisdiction was limited to genocide, crimes against humanity, war crimes, and some political offenses under Iraqi law. The failure of the international community (besides the United States) to provide support or expertise for the tribunal reduced confidence in the Iraqi judges to conduct complicated war crimes trials and failed to shake the perception that the trial was an American project. Death sentences for perpetrators, including former President Saddam Hussein, sparked international opposition (Chiam 2008: 225–226). In 2010, the Government of Bangladesh established an International Crimes Tribunal to prosecute those leaders responsible for serious atrocities during the 1971 civil war between East and West Pakistan that led to Bangladesh's independence. Although the Tribunal has only indicted a small number of people, it has already carried out several of the death sentences, including against leaders who were still active in Bengali politics and were political opponents of the current regime. The tribunal has been condemned by international human rights organizations for its strongly political overtones and for violations of due process (Silva 2013: 63–65). More recently, Uganda's attempts to try a senior leader of the Lord's Resistance Army in a newly-created International Crimes Division of the High Court elicited opposition from human rights activists for the potential use of the death penalty, poor access to defense counsel, and a problematic legal framework (Human Rights Watch 2012: 13–17).

## 2.2 An Opening

Although Cold War rivalries rendered the debate over a permanent international tribunal dormant in the decades after Nuremberg, international politics eventually returned the issue to the UN agenda. In 1989, Trinidad and Tobago assembled a coalition of Latin American and Caribbean states favoring an international court with jurisdiction over drug trafficking offenses following the drafting of the UN Convention Against Illicit Traffic in Narcotic Drugs in 1988. As a result of the proposal, the General Assembly requested the ILC to draft a preliminary template for a permanent criminal court (Johnson 2003: 93). The ILC provisionally adopted

a draft code of crimes in 1991 and created a working group on an International Criminal Court in 1992 (Sadat 2000: 38). The most important immediate precursor to the negotiations over the International Criminal Court was the ILC's draft statute for an international criminal tribunal in 1994. The ILC's draft statute "got the diplomatic ball rolling again," although it created a model quite different from that later established by the Rome Statute. Unlike the Rome Statute, the ILC draft statute required the consent of the state concerned, subject to compulsion by the Security Council. Except for genocide, over which jurisdiction would be automatic, the draft statute created a broader range of subject matter jurisdiction. Because the proposal was founded on state consent, the draft statute proposed encompassing many different crimes with an international criminal dimension, including terrorism and drug trafficking. In the end, the Rome Statute went beyond the ILC draft statute, giving an independent Prosecutor the power to investigate and prosecute even without a state's consent, though with stricter subject matter limitations. Although the World Trade Center attacks on September 11, 2001, for instance, would have fallen within the purview of the ILC's draft statute, the attacks were not to fall within the jurisdiction of the final Rome Statute (Crawford 2003: 110, 140–56).

The ILC's draft statute was modest and did not please everyone. However, except for the jurisdiction of the Court, which was expanded beyond the scope of the ILC draft statute during the negotiations in Rome, most of the other ILC proposals made their way into the final plan for the International Criminal Court. The ILC, for instance, worked from the basic premise that an international criminal tribunal would "complement" rather than replace national prosecutions and that it would only prosecute the most serious violations of international criminal law. The ILC's draft statute established a judicial branch with separate pretrial, trial, and appellate divisions, a registry, a prosecutorial arm, and a court presidency, the basic structure of which was adopted at Rome. With the completion of the ILC's draft statute, the General Assembly established a Preparatory Committee, which met in six sessions throughout 1996 and 1997, charged with preparing a widely acceptable and comprehensive text. This consolidated text served as the starting point for negotiations held at the Diplomatic Conference in Rome, Italy, from June 15 to July 17, 1998 (Sadat 2000: 38–40). This Conference became known as the Rome Conference, and the resulting treaty establishing an International Criminal Court became known as the Rome Statute.

## 2.3 Discussion Questions

1. What have been some of the persistent problems faced by international criminal tribunals? How could a permanent International Court address some of these concerns?

2. What are some of the relative advantages and disadvantages to establishing an international criminal tribunal in the country where the atrocities occurred? To placing it in The Hague?

## 2.4 Further Reading

The literature on transitional justice and international criminal law is enormous. For an updated and brief overview of international criminal law, a criminal justice student may be interested in David Stewart's *International Criminal Law in a Nutshell* (West Academic 2014), which is sophisticated enough for law students but simple enough for non-lawyers. Besides the many excellent sources cited in this chapter, those interested in transitional justice may be interested in *Unspeakable Truths: Facing the Challenge of Truth Commissions* by Priscilla B. Hayner (Routledge 2002) and *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* by Martha Minow (Beacon 1999), both of which address the theoretical and practical challenges of accountability after civil conflict. The Nuremberg Tribunal is the subject of many numerous and highly readable books, but students may be particularly interested in *Nuremberg* by Joseph E. Persico (Beacon 1999) for a dramatic account of the trials. One of the most critically-acclaimed books in this field is Roméo Dallaire's *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Carroll and Graf 2005). Dallaire was the head of the UN mission to Rwanda during the genocide, and he bears witness to many devastating and hopeful events.

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