INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW
CHAPTER
1

The Idea of International Criminal Law

This chapter has a simple and straightforward goal: to introduce the subject of the book and to sketch the background you need to make sense of the materials that follow. First, we explain what the study of international criminal law encompasses. Second, we provide a preliminary sketch of what gives criminal law its unique characteristics. In the next chapter, we offer a second preliminary sketch, this one of the basics of international law.

Each of these subjects is a large one, and the materials in these two chapters offer no more than the ABCs of the subject. As the book proceeds, we flesh out each of these sketches with more detail.

A. WHAT IS INTERNATIONAL CRIMINAL LAW?

At bottom, international criminal law is just what the name suggests: It consists of criminal law applied across national borders. But this encompasses several different legal regimes.

1. Transnational Criminal Law

The first category of international criminal law, which we call transnational criminal law, consists of the part of any nation’s domestic criminal law that “regulates actions or events that transcend national frontiers.” The concept is very simple. A state such as the United States has laws against crimes such as bank fraud. If a U.S. national, in the United States, commits bank fraud against a U.S. bank, no transnational issue arises, and ordinary domestic criminal law applies. But what if a Canadian, in Canada, commits fraud against a U.S. bank, perhaps by hacking into its computers? In that case, the perpetrator has presumably violated Canadian law—but what of U.S. law?

2. As explained in more detail in the next chapter, the word state in international law refers to nations or countries.
Can the U.S. legal system reach the Canadian’s conduct in Canada? That is a question of transnational criminal law. We will study many such questions. For example:

1. Where was the crime “committed” — where the hacker did his keyboard work (Canada) or where the compromised computer system was (the United States)?
2. If the crime is deemed to have been committed in Canada, does the U.S. bank fraud statute regulate conduct committed in Canada? Do U.S. courts have jurisdiction over such conduct?
3. What, if anything, can U.S. police do to arrest the Canadian suspect?
4. If Canadian police arrest the suspect, can he be extradited to the United States?
5. Do U.S. constitutional rights (such as the right against compelled self-incrimination) apply to the Canadian in Canada?
6. Does it matter whether his conduct is also a crime under Canadian law, and, if it does, which nation’s legal system gets priority?
7. What are the mechanics of evidence gathering in a foreign country?
8. What should Canada do if the punishment the suspect faces in the United States would be grossly excessive (or, in the case of the death penalty, outlawed) under Canadian law?

These are only some of the questions that arise.

In an era of globalization, transnational crimes — that is, crimes committed across borders — have proliferated. Organized crime operates with the sophistication and cosmopolitanism of vast multinational corporations — and some multinational corporations engage in crime. Vast underworld networks exist for trafficking in narcotics, human beings, weapons, stolen goods, diamonds, nuclear contraband, international terror, and laundered money. Identity theft, within a matter of minutes, can put your credit card information in the hands of a hacker half a world away. Much of transnational criminal law has evolved from the decades of efforts by national governments to secure international cooperation and assistance in law enforcement against crimes committed by foreigners. States are jealous of their own borders, prerogatives, and jurisdictions. But, step by step and agreement by agreement, an infrastructure of international legal assistance has developed, and these institutions have spurred states’ efforts to “globalize” their own criminal law.

2. **International Crimes**

The second great division of international criminal law might be called *international criminal law in the strict sense* — henceforth, we will simply say “international criminal law” for short, as distinguished from transnational criminal law. International criminal law refers to wrongs that are criminalized under international law, whether or not they are also criminalized in states’ domestic laws. This category of crimes is small and to date consists only of the “core crimes”: crimes against humanity, genocide, war crimes, and (as defined in 2010) the crime of aggression. These are the “core crimes” because they generally consist of mass atrocities that show up, glowing in infamy, on the radar of world politics. Often, these crimes cannot effectively be prosecuted or repressed by the territorial state where they are committed, either because the state itself has perpetrated them or because its government has collapsed in civil war, in anarchy, or through foreign conquest. These crimes may be tried either by international tribunals or, under some jurisdictional theories, by hybrid (mixed international and domestic) or purely domestic tribunals.
3. Treaty-Based Domestic Crimes

A third category of international criminal law, overlapping with the first two, consists of activity declared criminal by international treaties but enforced under the domestic law of states that join the treaties. Treaties sometimes criminalize conduct because states recognize that it is international in character and can be attacked only through international cooperation. Such conduct includes air piracy and hijacking, counterfeiting, terrorism, human trafficking, and narcotics trafficking. We have already mentioned that many of these are transnational crimes: They violate some states’ domestic criminal laws, but they must be enforced across borders. But others were criminalized domestically only after the international community agreed on treaties to suppress them.

Typically, these treaties require their parties to enact domestic criminal laws against the activities, to grant themselves jurisdiction to try such crimes even when they are committed abroad, and to participate in international enforcement by agreeing to either extradite or prosecute suspected criminals in their custody. As the name suggests, treaty-based domestic crimes blend properties of transnational and international crimes. Like the “core crimes,” treaty-based crimes are objects of international concern, and law enforcement efforts are coordinated through international law and mechanisms. Like transnational crimes, statutory prohibitions of these acts are part of domestic law, and domestic rather than international tribunals enforce the laws. Although the distinction is somewhat artificial, we classify them separately from the other two categories of international criminal law because the treaties that drive the enforcement efforts are entirely international, but the enforcement efforts themselves are conducted under the auspices of national law.

According to one noted authority, “international crimes”—encompassing both the international and treaty-based domestic categories described here—consist of conduct prohibited by multilateral treaties covering 22 subjects: (1) aggression, (2) war crimes, (3) unlawful use or emplacement of weapons, (4) crimes against humanity, (5) genocide, (6) racial discrimination and apartheid, (7) slavery and related crimes, (8) torture, (9) unlawful human experimentation, (10) piracy, (11) aircraft hijacking, (12) threat and use of force against internationally protected persons (usually, these are government officials), (13) taking of civilian hostages, (14) drug offenses, (15) international traffic in obscene publications, (16) destruction or theft of national treasures, (17) environmental protection, (18) unlawful use of the mails, (19) interference with submarine cables, (20) falsification and counterfeiting, (21) bribery of foreign public officials, and (22) theft of nuclear materials. Today, many would add international terrorism, in its various manifestations, to the list.

B. WHAT IS CRIMINAL LAW?

To understand what is distinctive in international criminal law, we must begin by understanding the nature of criminal law itself. The excerpt following is one of the best-known attempts to define the specific character of criminal law.

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HENRY M. HART, JR., THE AIMS OF THE CRIMINAL LAW
23 Law & Contemp. Probs. 401 (1958)

... What do we mean by “crime” and “criminal”? Or, put more accurately, what should we understand to be “the method of the criminal law,” the use of which is in question? ...

1. The method operates by means of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are “must-nots,” or prohibitions, which can be satisfied by inaction. “Do not murder, rape, or rob.” But some of them are “musts,” or affirmative requirements, which can be satisfied only by taking a specifically, or relatively specifically, described kind of action. “Support your . . . children,” and “File your income tax return.”

2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words. They speak to members of the community, in other words, in the community’s behalf, with all the power and prestige of the community behind them.

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce.

Thus far, it will be noticed, nothing has been said about the criminal law which is not true also of a large part of the noncriminal, or civil, law. The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions prohibiting or requiring described types of conduct, and the community’s tribunals enforce these commands. What, then, is distinctive about the method of the criminal law?

Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation. ... Does the distinction lie in the fact that proceedings to enforce the criminal law are instituted by public officials rather than private complainants? The difficulty is that public officers may also bring many kinds of “civil” enforcement actions — or an injunction, for the recovery of a “civil” penalty, or even for the detention of the defendant by public authority.5 Is the distinction, then, in the peculiar character of what is done to people who are adjudged to be criminals? The difficulty is that, with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings.

If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is called a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy. ... Moreover, it is false to popular understanding, and false also to the understanding embodied in existing constitutions. By implicit assumptions that are more impressive than any explicit assertions, these constitutions proclaim that a conviction for crime is a distinctive and serious matter — something, and not a nothing. What is that something?

5. [Eds.' Note:] Moreover, in many countries, crime victims are permitted to initiate criminal prosecutions.
4. What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:

The essence of punishment for moral delinquency is in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community’s hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.

If this is what a “criminal” penalty is, then we can say readily enough what a “crime” is. It is not simply anything which a legislature chooses to call a “crime.” It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a “criminal” penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

5. The method of the criminal law, of course, involves something more than the threat (and, on due occasion, the expression) of community condemnation of antisocial conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences, commonly called punishment. But if Professor Gardner is right, these added consequences take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction. Indeed, the condemnation plus the added consequences may well be considered, compendiously, as constituting the punishment. Otherwise, it would be necessary to think of a convicted criminal as going unpunished if the imposition or execution of his sentence is suspended. . . .

NOTES AND QUESTIONS

1. Throughout this excerpt, Hart refers to “the community”: the community’s sense of right and wrong, standards that speak to members of the community, the conditions of community life and the interdependencies of the people who are living in the community, duty to the community, community attitudes and needs, and so on. Is there a single, cohesive international “community” for these purposes? On what basis can one nation’s criminal law be justly applied across borders, to foreigners living in a foreign country? That is, if the criminal law reflects a single community’s moral sense and depends on shared knowledge of that moral sense and widespread knowledge of the law, how can “the method of criminal law” apply transnationally in very different communities?

2. Malum in se and malum prohibitum. Elsewhere in his essay, Hart emphasizes that if criminal law is to work, people must know of its existence and content:

If the legislature does a sound job of reflecting community attitudes and needs, actual knowledge of the wrongfulness of the prohibited conduct will usually exist. Thus, almost everyone is aware that murder and forcible rape and the obvious forms of theft are wrong. But in any event, knowledge of wrongfulness can fairly be assumed. For any
where the line should be drawn to realize the optimal level of protection, but the line must be drawn somewhere. Thus, judgments of criminal responsibility necessarily involve a weighing of competing interests that judgments of moral responsibility do not.

2. **The Basic Protections in Criminal Law and Procedure**

Whether the defining feature of criminal law is punishment or moral condemnation, everyone recognizes that criminal condemnation is perhaps the most serious action the law can take. As a result, in most nations, criminal law and procedure must conform to especially stringent requirements. Among those recognized in U.S. domestic law as well as in contemporary international criminal law are the following.

1. **Principle of Legality:** No one can be criminally convicted for conduct that is not unlawful; and no one can be punished except as the law specifies. The Principle of Legality actually contains two sub-principles, which are often stated in two Latin maxims:
   (A) *nulla crimen sine lege* (no crime without law) and
   (B) *nulla poena sine lege* (no punishment without law).

   These two versions of the Principle of Legality, although similar, are not identical. The first principle has to do with what kind of conduct can result in criminal conviction. It insists that only conduct that the law says is criminal can result in criminal conviction. Typically, that means that conduct, no matter how heinous, cannot lead to criminal conviction unless a criminal statute, specifying both the *actus reus* and the *mens rea* of the offense, prohibits it. The second principle focuses on punishment, not on conduct. It says that no punishment can be inflicted unless the law provides for it. To see why the second principle differs from the first, imagine someone convicted of a crime for which the law provides punishment of up to a year in prison. If the judge sentences the offender to two years, the sentence violates *nulla poena sine lege* (because the punishment is greater than what the law provides) but not *nulla crimen sine lege* (because the conviction is lawful). Both principles are essential parts of the Principle of Legality. As we will see, the Principle of Legality plays an important role in international criminal law, because critics as well as defendants often complain that laws and courts created in the aftermath of atrocities violate the Principle of Legality.

2. **Principle of Fair Notice:** No one can be condemned for a crime without fair notice that the conduct is criminal.

3. **Principle of Nonretroactivity:** No criminal law can be applied retroactively.

   Nonretroactivity can be regarded as a corollary to the Principle of Legality and the Principle of Fair Notice. If the criminal statute is retroactive, then at the time the “crime” was committed there was no law against it and no notice that it was criminal. A conviction would therefore violate both the Principle of Legality and the Principle of Fair Notice. The Principle of Nonretroactivity is embodied in the U.S. Constitution in the ban on *ex post facto* laws in Article I, Section 9, Clause 3.

4. **Principle of Lenity:** This principle is also known as *strict construction of the criminal law*. Criminal statutes must always be narrowly construed, and if a statute is ambiguous, it must be construed in the most lenient way, that is, in the way most favorable for the defendant. “Principle of Lenity” is U.S. terminology; in many other legal systems, the principle is referred to as *in dubio pro reo* (“when in doubt, for the accused”), or simply as strict construction of the criminal law.
5. The presumption of innocence.
6. The requirement that guilt must be established beyond a reasonable doubt.
7. The basic procedural rights:
   (A) The right to a (i) speedy (ii) public trial before (iii) an impartial tribunal that
       (iv) bases its decision solely on the evidence offered at trial.
   (B) The right to offer a defense.
   (C) The right to be informed of the charges, in a language that the accused
       person understands, through a written indictment that specifies the charges
       and the conduct charged.
   (D) The right of the accused to confront the witnesses against him.
   (E) The right of the accused to have compulsory process for obtaining witnesses
       in his favor.
   (F) The right to counsel and the privilege against self-incrimination.
   (G) The ban on double jeopardy — that is, repeated prosecution for the same
       offense. In international legal standards, the ban on double jeopardy is called
       ne bis in idem (literally, “not twice for the same”).

   All of these are embodied in American constitutional law, mostly in the Fifth
   and Sixth Amendments. All are embodied explicitly in the Statute of the
   International Criminal Court. Furthermore, all these rights are guaranteed in
   Articles 14 and 15 of the International Covenant on Civil and Political Rights,
   one of the basic treaties concerning international human rights (which has 160
   states parties, including the United States).

   Also important are basic principles governing the prosecutor’s role. However,
   unlike the other rights listed here, these are not firmly settled in international law:
8. (A) The prosecutor must (in the words of U.S. ethical standards), seek justice, not
      simply victory.
   (B) The prosecutor must not initiate or continue proceedings against someone
      without probable cause.

   Finally, as alluded to in our earlier discussion of Kant, criminal guilt must be
   personal:
9. **Principle of Personal Responsibility:** No one should be convicted of a crime unless she
   bears personal responsibility for that crime, either as a principal or as an
   accessory. Guilt by mere association is unjust.
   
   Notice that the Principle of Personal Responsibility does not require the
   offender to have committed the crime himself. He may have hired someone
   else to do it, or tricked someone into doing it, or assisted someone else in
   doing it, or condoned it as a superior officer. What matters is that, directly or
   indirectly, he bears personal responsibility for the crime in some way.
   
   It also deserves mention that personal responsibility may, but need not,
   include legal entities such as corporations. In U.S. law, for example, corporations
   may be convicted of crimes if their employees commit those crimes in the actual
   or apparent scope of their duties with the intention to benefit the corporation.
   Corporations act only through their agents, and so convicting the corporation for
   the crimes of its agents is a form of personal responsibility for the corporate
   “person.” But it would violate the Principle of Personal Responsibility to convict
   one employee of the corporation for a crime with which she had no connection at
   all, merely because the perpetrator was also an employee. (Many legal systems, it
   should be noted, do not have the concept of corporate criminality.)

   All of these principles and requirements have one basic purpose: to safeguard
   against the danger of wrongful criminal conviction.
Convention on Human Rights’ prohibition on inhuman or degrading punishment. This ruling effectively requires European Union member states to abolish life without parole. In addition to reflecting different philosophies of punishment, this striking discrepancy between these approaches foreshadows some of the difficulties that international tribunals face in determining sentencing schemes that seem just to all the participating nations. We take up this subject in Chapter 4.

Do you see relevant differences between domestic criminal justice systems and the international legal community? Do the arguments for condemnation (not necessarily punishment) have more or less traction with regard to international crimes? What about Beccarian concerns about prevention and deterrence, or Kantian notions of retribution? Compare the U.S. sentencing statutes with the following excerpt from an opinion of the International Criminal Tribunal for the former Yugoslavia (ICTY).

PROSECUTOR v. BLAŠKIĆ
Case No. IT-95-14-A, Judgment (July 29, 2004)

678. . . . The Appeals Chamber recalls that Article 24(1) of the Statute [creating the ICTY] limits the penalty imposed by the Trial Chamber to imprisonment. In imposing a sentence, the International Tribunal has recognized the following purposes to be considered: (i) individual and general deterrence concerning the accused and, in particular, commanders in similar situations in the future; (ii) individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced; (iii) retribution; (iv) public reprobation and stigmatisation by the international community; and (v) rehabilitation.

NOTES AND QUESTIONS

1. The phrase “individual and general affirmative prevention” in Blaškić derives from the German theory of positive general prevention.

2. What, if anything, is the difference between retribution (aim (iii)) and “public reprobation and stigmatisation” (aim (iv))? Doesn’t retribution always stigmatize the criminal? Are there forms of stigmatizing people that aren’t retribution?

3. Is rehabilitation a legitimate goal of punishment for perpetrators of mass atrocities? Is it consistent with public reprobation and stigmatization?

D. THE NEED FOR SAFEGUARDS IN THE CRIMINAL LAW

So far, we have introduced basic concepts of criminal law and punishment, linking both to the moral blameworthiness of wrongdoers. As the following excerpt indicates, however, this leaves out an equally important part of the picture: the need for safeguards against wrongful conviction and punishment.

16. Vinter and Others v. The United Kingdom, App nos. 66069/09, 130/10 and 3896/10 (ECHR, 9 July 2013).
In our initial excerpt, Hart — like most criminal lawyers — is evidently thinking exclusively of domestic criminal law, that is, criminal law within a single national community. The questions following the excerpt suggested that standard theories of the aims of criminal law, such as Hart’s, may have a tougher time accounting for transnational criminal law, that is, national law applied across borders in other countries. The same may be true of international criminal law, that is, the law governing the basic international crimes of genocide, crimes against humanity, and war crimes.

Here the difficulty is perhaps more fundamental than the questions of jurisdiction and fair notice across borders. It arises from the fact that the aims of trying perpetrators of the great crimes — notably, national leaders — are anything but routine. Such trials always follow moments of cataclysm: wars and civil wars, bloody ethnic or religious struggles, political upheavals, revolutions, or other changes of basic political systems. Instead of being a normal part of the daily functioning of government, international criminal trials typically occur after governments have fallen or been radically altered.

Such trials, then, are part of transitional justice — the whole range of legal issues that arise when one form of government replaces another. Where ordinary criminal law is a product of continuity, international criminal law in the strict sense is a product of discontinuity, of upheaval and political rupture. Inevitably, then, the trials take on political overtones; and sometimes the requirements of politics and those of criminal law are in tension with each other. Politics is broad and partial; criminal law, as we have seen, is supposed to be narrow and impartial.

Furthermore, there is often a fundamental difference between the perpetrators of atrocity crimes and “ordinary” criminals. Ordinary crimes are deviations from the social order, but mass atrocities are often organized by the leaders of a regime, and the perpetrators are not deviants but conformists. The political philosopher Hannah Arendt — excerpted below — coined the phrase “banality of evil” to describe everyday, obedient conformists who commit horrible crimes without malicious motives beyond the desire to do what they are told. Mark Drumbl, in an important study of legal punishment for mass atrocities, emphasizes this difference and argues that it may remove one of the most important reasons for punishment: the incapacitation of wrongdoers.17

Finally, in the aftermath of a cataclysm, the desire to give victims a voice and allow them to seek whatever closure remains to them by condemning their persecutors seems especially urgent, more so than in everyday domestic criminal enforcement (where it is also important, of course). This, too, can create tensions with the requirements of justice for the accused. As two commentators observe, this tension derives from the close connection between international criminal law and international human rights law. After all, the mass atrocities that form the subject matter of international criminal law are invariably major human rights violations. But, the two commentators note:

In several fundamental ways, however, the working presumptions of human rights law and criminal law present mirror images of each other. In a criminal proceeding, the

focus is on the defendant and the burden is on the prosecuting authority to prove that the individual before the court has committed a crime. Ambiguity about that assertion is to be construed in favor of the criminal defendant, and the trier of fact is charged with determining what the defendant did and what his mental state was toward the acts constituting the crime. In human rights proceedings, by contrast, the focus is on the harms that have befallen the victim and on the human rights norm that has been violated. One consequence of this focus is that the substantive norms of international human rights law are generally broadly interpreted to ensure that harms are recognized and remedied, and that, over time, there is progressively greater realization of respect for human dignity and freedom. The analogous rules of domestic criminal law, by contrast, are supposed to be strictly construed in favor of the defendant. And while criminal law tends toward the specific and the absolute, human rights law embraces some contingent, aspirational norms.

The confluence in international criminal law between criminal law principles drawn from domestic criminal law and the philosophical commitments of international human rights law sets up two opposing optics with which to adjudicate a violation. Should it be in the defendant-centered mode of a criminal trial or the victim-oriented style of a human rights proceeding? Should it hew to the rule of lenity that protects defendants from unexpected expansions of the law, or should it reflect the aspirational character of international human rights law? . . . [T]hese conflicting tensions surface in important ways in the jurisprudence of international criminal law.18

The following excerpts explore these tensions through a case study — the trial of Adolf Eichmann. Along with the postwar Nuremberg trials, the trial of Eichmann was the most significant criminal case arising from the Holocaust.

Eichmann (1906-1962) was a Nazi SS lieutenant colonel who was in charge of rounding up Europe’s Jews and transporting them to death camps. At the end of World War II he managed to escape to Argentina, where he lived incognito until 1960. At that time, Israeli agents kidnapped Eichmann on the streets of Buenos Aires and transported him to Israel to be put on trial. Previous war-crimes trials at Nuremberg had focused principally on the “crimes against peace” — Germany’s war of aggression that became World War II — rather than specifically focusing on the Holocaust, and the Eichmann trial was the first major trial of an individual emphasizing solely the mass murder of the European Jews. The trial received an enormous amount of publicity. Eichmann was convicted and executed in 1962.

David Ben-Gurion, who was prime minister of Israel at the time, was quite explicit about the aims of putting Eichmann on trial. He wanted to educate Israelis — many of them recent immigrants from non-European countries — about the Holocaust. He also wanted to remind the rest of the world of its horrors, in order to emphasize the importance and necessity of the state of Israel. Furthermore, although this was not one of Ben-Gurion’s aims, the trial would prove to be a crucial therapeutic moment for Holocaust survivors in Israel. Many of them had kept their stories to themselves for years, and the Eichmann trial provided an opportunity for the survivors to bring their terrible stories out into the open.

The readings that follow use the Eichmann trial to raise crucial threshold questions about international criminal law. How does it differ from “everyday” domestic criminal law? Do trials of the major international crimes have different purposes from ordinary law enforcement? What are those differences, are they legitimate,

and are they consistent with doing justice to the accused? Are these trials political trials, and if so, are they political in an objectionable way?

PROSECUTOR v. EICHMANN
Criminal Case No. 40/61, Judgment
Israel, District Court of Jerusalem (1961)

1. Adolf Eichmann has been brought to trial in this Court on charges of unsurpassed gravity—charges of crimes against the Jewish People, crimes against humanity, and war crimes. The period of the crimes ascribed to him, and their historical background, is that of the Hitler regime in Germany and in Europe, and the counts of the indictment encompass the catastrophe which befell the Jewish People during that period—a story of bloodshed and suffering which will be remembered to the end of time.

This is not the first time that the Holocaust has been discussed in court proceedings. It was dealt with extensively at the International Military Tribunal at Nuremberg during the Trial of the Major War Criminals, and also at several of the trials which followed; but this time it has occupied the central place in the Court proceedings, and it is this fact which has distinguished this trial from those which preceded it. Hence also the trend noticed during and around the trial, to widen its range. The desire was felt—understandable in itself—to give, within the trial, a comprehensive and exhaustive historical description of events which occurred during the Holocaust, and in so doing, to emphasize also the inconceivable feats of heroism performed by ghetto-fighters, by those who mutinied in the camps, and by Jewish partisans.

How could this happen in the light of day, and why was it just the German people from which this great evil sprang? Could the Nazis have carried out their evil designs without the help given them by other peoples in whose midst the Jews dwelt? Would it have been possible to avert the Holocaust, at least in part, if the Allies had displayed a greater will to assist the persecuted Jews? Did the Jewish People in the lands of freedom do all in its power to rally to the rescue of its brethren and to sound the alarm for help? What are the psychological and social causes of the group-hatred [sic] which is known as anti-Semitism? Can this ancient disease be cured, and by what means? What is the lesson which the Jews and other nations must draw from all this, as well as every person in his relationship to others? There are many other questions of various kinds which cannot even all be listed.

2. In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law, and which do not change, whatever the subject of the trial may be. Otherwise, the processes of law and of court procedure are bound to be impaired, whereas they must be adhered to punctiliously, since they are in themselves of considerable social and educational significance, and the trial would otherwise resemble a rudderless ship tossed about by the waves.

It is the purpose of every criminal trial to clarify whether the charges in the prosecution’s indictment against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him. Everything which requires clarification in order that these purposes may be achieved, must be determined at the trial, and everything which is foreign to these purposes must be entirely eliminated from the court procedure. Not only is any pretension to overstep these limits forbidden to the court—it would certainly end in complete failure. The court does not have at its
disposal the tools required for the investigation of general questions of the kind referred to above. For example, in connection with the description of the historical background of the Holocaust, a great amount of material was brought before us in the form of documents and evidence, collected most painstakingly, and certainly in a genuine attempt to delineate as complete a picture as possible. Even so, all this material is but a tiny fraction of all that is extant on this subject. According to our legal system, the court is by its very nature “passive,” for it does not itself initiate the bringing of proof before it, as is the custom with an enquiry commission. Accordingly, its ability to describe general events is inevitably limited. As for questions of principle which are outside the realm of law, no one has made us judges of them, and therefore no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought to these questions. These prefatory remarks do not mean that we are unaware of the great educational value, implicit in the very holding of this trial, for those who live in Israel as well as for those beyond the confines of this state. To the extent that this result has been achieved in the course of the proceedings, it is to be welcomed. Without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the witness box, will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial.

MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW

We ought to evaluate transitions to democracy with greater attention to the kind of public discussion they foster concerning the human rights abuse perpetrated by authoritarian rulers, recently deposed. We should evaluate the prosecution of these perpetrators in light of how it influences such public deliberations.

To that end, the law’s conventional concerns with deterrence and retribution will receive lesser emphasis. The rules designed to keep these concerns at center stage will sometimes need to be compromised. Such compromises are necessary and appropriate, I suggest, in the aftermath of large-scale brutality sponsored by an authoritarian state [as in the Argentine Dirty War]. At such times, the need for public reckoning with the question of how such horrific events could have happened is more important to democratization than the criminal law’s more traditional objectives. This is because such trials, when effective as public spectacle, stimulate public discussion in ways that foster the liberal virtues of toleration, moderation, and civil respect. Criminal trials must be conducted with this pedagogical purpose in mind. . . .

By highlighting official brutality and public complicity, these trials often make people willing to reassess their foundational beliefs and constitutive commitments, as few events in political life can do. In the lives of individuals, these trials thus often become, at very least, an occasion for personal stock-taking. They are “moments of truth,” in several senses. Specifically, the present moments of transformative opportunity in the lives of individuals and societies, a potential not lost upon the litigants themselves. Prosecutors and judges in these cases thus rightly aim to shape collective memory of horrible events in ways that can be both successful as public spectacle and consistent with liberal legality. . . .

There is reason to wonder whether justice to the defendant, however heinous his wrongs, has been compromised when it can be said, as does one Israeli historian, that “the trial was only a medium, and Eichmann’s role was simply to be there, in the glass
booth; the real purpose of the trial was to give voice to the Jewish people, for whom Israel claimed to speak.” Another Israeli scholar adds that “Eichmann rather swiftly became peripheral to his own trial, which was deliberately designed to focus more comprehensively on the Nazi crimes against the Jews.” Those initially willing to testify in his defense were deterred from so doing by threat of prosecution for their own wartime activities. . . .

The primary limit that liberalism imposes on storytelling in criminal trials is the principle of personal culpability: the requirement that no defendant be held responsible for the wrongs of others beyond his contemplation or control. This entails a judicial duty to focus on a very small piece of what most observers will inevitably view as a much larger puzzle, to delimit judicial attention to that restricted place and period within which the defendant willfully acted.

Episodes of administrative massacre, however, generally involve many people acting in coordinated ways over considerable space and time, impeding adherence to this stricture. Moreover, to tell a compelling story, one that will persuade its intended audience that it is not unfairly singling out a serviceable scapegoat, the state (in the person of the prosecutor) must be able to paint the larger tableaux. Hence the recurrent tension, of which trial participants have often been well aware, between the needs of persuasive storytelling and the normative requirements of liberal judgment.

. . . The orchestration of criminal trials for pedagogic purposes — such as the transformation of a society’s collective memory — is not inherently misguided or morally indefensible. The defensibility of the practice depends on the defensibility of the lessons being taught . . .

. . . [A] liberal state may employ a “show trial” for administrative massacre to display the horrific consequences of the illiberal vices and so to foster among its citizens the liberal values (including respect for basic individual rights . . .). . . . The law accomplishes this only when courts and juries themselves respect the law, that is, when they adhere to legal rules reflecting liberal principles of procedural fairness and personal culpability as conditions of criminal liability. The most gripping of legal yarns must hence be classified as a failure if its capacity for public enthrallment is purchased at the price of violating such strictures.

HANNAH ARENDT, EICHMANN IN JERUSALEM:
A REPORT ON THE BANALITY OF EVIL
5, 286 (rev. ed. 1964)

There is no doubt from the very beginning that it is Judge Landau who sets the tone, and that he is doing his best, his very best, to prevent this trial from becoming a show trial under the influence of the prosecutor’s love of showmanship. . . . Clearly, this courtroom is not a bad place for the show trial David Ben-Gurion, Prime Minister of Israel, had in mind when he decided to have Eichmann kidnapped in Argentina and brought to the District Court of Jerusalem to stand trial for his role in the “final solution of the Jewish question.” . . . In the courtroom [Ben-Gurion] speaks with the voice of Gideon Hausner, the Attorney General, who, representing the government, does his best, his very best, to obey his master. And if, fortunately, his best often turns out not to be good enough, the reason is that the trial is presided over by someone who serves Justice as faithfully as Mr. Hausner serves the State of Israel. . . . Justice insists on the importance of Adolf Eichmann, son of Karl Adolf Eichmann, the
man in the glass booth built for his protection: medium-sized, slender, middle-aged, with receding hair, ill-fitting teeth, and nearsighted eyes, who throughout the trial keeps craning his scraggy neck toward the bench (not once does he face the audience), and who desperately and for the most part successfully maintains his self-control despite the nervous tic to which his mouth must have become subject long before this trial started. On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism. . . .

It may be argued that all the general questions we involuntarily raise as soon as we begin to speak of these matters — why did it have to be the Germans? why did it have to be the Jews? what is the nature of totalitarian rule? — are far more important than the question of the kind of crime for which a man is being tried, and the nature of the defendant upon whom justice must be pronounced; more important, too, than the question of how well our present system of justice is capable of dealing with this special type of crime and criminal. . . . It can be held that the issue is no longer a particular human being, a single distinct individual in the dock. . . . All this has often been argued. . . . If the defendant is taken as a symbol and the trial as a pretext to bring up matters which are apparently more interesting than the guilt or innocence of one person, then consistency demands that we bow to the assertion made by Eichmann and his lawyer: that he was brought to book because a scapegoat was needed. . . .

I need hardly say that I would never have gone to Jerusalem if I had shared these views. I held and hold the opinion that this trial had to take place in the interests of justice and nothing else.

NOTES AND QUESTIONS

1. The Jerusalem court and Hannah Arendt both argue that the sole legitimate aim of a criminal trial is to determine the guilt or innocence of the defendant. In contrast, Mark Osiel contends that determining guilt or innocence after mass atrocities, where many people participate, requires examining a context that is far wider than the defendant's own actions. Osiel also defends the legitimacy of framing trials with political goals in mind. Who is right? Or is there some way to reconcile the two positions?

2. Osiel highlights a recurrent dilemma facing prosecutors in cases of state-sponsored or organization-sponsored atrocities. The prosecutor may focus solely and narrowly on the deeds of the accused and not on other atrocities in which the accused played no direct role — but at the cost of misunderstanding the humanitarian catastrophe in which the accused played a part. Alternatively, the prosecutor can try to "paint with a broad brush" to make the entire situation comprehensible — but at the cost of introducing legal irrelevancies. How should prosecutors resolve this dilemma?

In the United States, the Federal Rules of Evidence prohibit the introduction of irrelevant evidence, where Rule 401 defines evidence as relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Furthermore, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of one of the following: unfair prejudice, confusion of the issues, or misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."19

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In the Eichmann trial, the prosecution introduced a great deal of testimony by Holocaust survivors that would have failed these tests, because the events to which they testified either had nothing directly to do with Eichmann, or could amply be proven without any recourse to their testimony. As Prosecutor Gideon Hausner explained, if convicting Eichmann had been his only goal, “it was obviously enough to let the archives speak; a fraction of them would have sufficed to get Eichmann sentenced ten times over. . . . I knew we needed more than a conviction; we needed a living record of a gigantic human and national disaster.”

Hausner explained that the intended audience was both the younger generation of Israelis, with “no real knowledge, and therefore no appreciation, of the way in which their own flesh and blood had perished,” and the world at large, “which had so lightly and happily forgotten the horrors that occurred before its eyes, to such a degree that it even begrudged us the trial of the perpetrator.”

Commentator Lawrence Douglas describes Hausner’s goal as follows:

The act of creating an opportunity for the public sharing of the narratives of the survivors, the proxies of the dead, was itself a way of doing justice. Hausner’s reflections on the strategy of the prosecution thus reveal a remarkable reversal of legal priority: instead of the testimony serving as a means of proving the state’s case, Hausner asks one to imagine the trial itself as a means of offering public testimonials. No doubt Hausner would vigorously resist the force of this observation, arguing that the individual testimonies served to clarify the nature and meaning of the defendant’s actions. Still, the juridical value of the testimony can be understood as largely a by-product of a process prompted by a radical theory of the trial. The trial was a vehicle of the stories of survivors.

Douglas adds:

For Hausner, . . . the magnitude of the crimes, their unprecedented nature, the scars on the survivors created the need to reimagine the legal form; the court, by contrast, reached the opposite conclusion. It was the very magnitude of the horrors that framed the futility of attempting to comprehend them. . . . [T]he attempt to do so was an act of overreaching that, in the court’s mind, would erode the legitimacy of the . . . institution making such pronouncements. To attempt fully to represent and explain the Holocaust is to exit the world of legitimate juridical function and to risk spectacular failure.

Two excerpts from the Eichmann trial illustrate the tension. Both involved the testimony of Holocaust survivors who were also literary figures. The first was the testimony of Abba Kovner, a celebrated resistance fighter and one of Israel’s best-known poets. Although Kovner’s testimony touched on Eichmann at a few points, most of it consisted of stories, some inspiring and some heartbreaking, of the resistance fighters of the Vilna ghetto and their fates. After Kovner concluded his testimony, the court admonished the prosecutor:

*Presiding Judge.* Mr. Hausner, we have heard shocking things here, in the language of a poet, but I maintain that in many parts of this evidence we have strayed far from the subject of this trial. There is no possibility at all of interrupting evidence such as this, while it is being rendered, out of respect for the witness and out of respect for the matter

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21. Id.
23. Id. at 144.
he is relating. It is your task . . . to eliminate everything that is not relevant to the trial, so
as not to place the Court once again — and this is not the first time — in such a situation.
I regret that I have to make these remarks, after the conclusion of evidence such as this.24

The most famous moment in the Eichmann trial occurred during the testimony of
Yehiel Dinur, a death-camp survivor who, after moving to Israel, had published several
books on Auschwitz under the name “Katzetnik [concentration camp inmate]
135633” — the number tattooed on his arm in the camp.25

Q: What was the reason that you hid your identity behind the pseudonym “K. Zetnik,”
Mr. Dinur?
A: It was not a pen name. I do not regard myself as a writer and a composer of literary
material. This is a chronicle of the planet of Auschwitz. I was there for about two years.
Time there was not like it is here on earth. Every fraction of a minute there passed on a
different scale of time. And the inhabitants of this planet had no names, they had no parents
nor did they have children. There they did not dress in the way we dress here; they were not
born there and they did not give birth; they breathed according to different laws of nature;
they did not live — nor did they die — according to the laws of this world. Their name was
the number “Katzetnik.” They were clad there, how would you call it. . . .

Q: Yes. Is this what you wore there? [Shows the witness the prison garb of Auschwitz.]
A: This is the garb of the planet called Auschwitz. And I believe with perfect faith that I have
to continue to bear this name so long as the world has not been aroused after this crucifixion
of a nation, to wipe out this evil, in the same way as humanity was aroused after the cruci-
fixion of one man. I believe with perfect faith that, just as in astrology the stars influence our
destiny, so does this planet of the ashes, Auschwitz, stand in opposition to our planet earth,
and influences it. If I am able to stand before you today and relate the events within that
planet, if I, a fall-out of that planet, am able to be here at this time, then I believe with perfect
faith that this is due to the oath I swore to them there. They gave me this strength. . . .

For they left me, they always left me, they were parted from me, and this oath always
appeared in the look of their eyes. For close on two years they kept on taking leave of me and
they always left me behind. I see them, they are staring at me, I see them, I saw them standing
in the queue. . . .

Q: Perhaps you will allow me, Mr. Dinur, to put a number of questions to you, if you will
agree?
A: [Tries to continue] I remember . . .

Presiding Judge: Mr. Dinur, kindly listen to what the Attorney General has to say.

[Witness Dinur rises from his place, descends from the witness stand, and collapses on the
platform. The witness fainted.]

Presiding Judge: I think we shall have to adjourn the session. I do not think that we can
continue.

Attorney General: I did not anticipate this.

Presiding Judge: [After some time] I do not think that it is possible to go on. We shall adjourn
the Session now, and please, Mr. Hausner, inform us of the condition of the witness and
whether he will at all be able to give his testimony today. And I would ask you to do so soon.26

Dinur did not return. In the Judgment, the court alluded to his abortive testimony
only once:

25. “KZ” — pronounced “kah-tzet” in German, hence the pen-name “Katzetnik” — stands for Konzentrationslager, that is, “concentration camp.”
Documents were submitted describing the Holocaust in the East, but the bulk of the evidence consisted of statements by witnesses, “brands plucked from the fire,” who followed each other in the witness box for days and weeks on end. They spoke simply, and the seal of truth was on their words. But there is no doubt that even they themselves could not find the words to describe their suffering in all its depth. . . . This is a task for the great writers and poets. Perhaps it is symbolic that even the author, who himself went through the hell named Auschwitz, could not stand the ordeal in the witness box and collapsed.

Moreover, this part of the indictment is not in dispute in this case. The witnesses who gave evidence about this part were hardly questioned at all by Counsel for the Defence, and at a certain stage in the proceedings he even requested that the Court therefore
waive the hearing of these witnesses. To this we could not agree because, since the Accused denied all the counts in the indictment, we had to hear also the evidence on the factual background of the Accused’s responsibility, and could not break up the indictment according to a partial admission of facts by the Accused.27

Do you find persuasive the court’s reason for permitting witnesses with no specific knowledge about Eichmann to testify about the horrors of the Holocaust “for days and weeks on end”? Is it true, as Judge Landau says of the testimony of Abba Kovner, that “[t]here is no possibility at all of interrupting evidence such as this, while it is being rendered, out of respect for the witness and out of respect for the matter he is relating”? The defense had offered to stipulate to the facts of the Holocaust. Did the court owe a duty to permit the survivors their days and weeks in court? Was their testimony essential to provide context for understanding Eichmann’s actions? Is this what a criminal trial is supposed to be?

27. Eichmann Judgment, ¶119.
CHAPTER 3

International Criminal Tribunals: From Nuremberg to The Hague — and Beyond

In the materials that follow, we examine the background of modern international criminal law in the strict sense (as we labeled it in Chapter 1): law establishing international crimes and international institutions for trying them.

We begin by examining in detail the prototype of all subsequent international tribunals. This was the military tribunal set up by the victorious World War II Allies at Nuremberg, Germany, to try Germans and their allies accused of war crimes, aggression, and crimes against humanity. We then briefly examine the parallel Tokyo Tribunal, which tried Japanese leaders facing similar charges. There were no further international criminal tribunals for nearly half a century, until the United Nations established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. In the remainder of the chapter, we briefly survey the range of post-ICTR tribunals—in East Timor, in Sierra Leone, in Cambodia, and elsewhere. The International Criminal Court (ICC) is treated in a separate chapter.

A. THE NUREMBERG TRIBUNAL

By the time the World War II ended on August 16, 1945, an estimated 50 to 60 million people had perished as a result of the fighting. The Soviet Union alone lost almost 25 million, more than half of them civilians. Germany suffered 7.5 million war dead, amounting to more than 10 percent of its population; these included more than 300,000 civilians killed in Allied bombing of German cities. The war dead included 6 million Jewish victims of genocide and 3 million Soviet prisoners of war who died of mistreatment in POW camps. Other groups targeted for total eradication during the Holocaust included Jehovah’s Witnesses, Roma and Sinti people (gypsies), and homosexuals; in addition, the Nazis murdered an estimated 200,000 mentally and physically handicapped persons in a eugenics-inspired, pseudoscientific program of “mercy killings.” In addition to groups targeted for total destruction, the Nazis killed approximately 2 million non-Jewish Poles, especially targeting intelligentsia, political leaders, and clergy. Other atrocities included slave labor; horrifying medical experiments performed on conscious human beings in the camps; widespread torture, looting, rape; and “disappearances” of political prisoners.
In September 1944, U.S. Secretary of State Henry Stimson wrote to President Franklin D. Roosevelt: “It is primarily by the thorough apprehension, investigation and trial of all the Nazi leaders and instruments of the Nazi system of terrorism such as the Gestapo, with punishment delivered as promptly, swiftly and severely as possible, that we can demonstrate the abhorrence which the world has for such a system and bring home to the German people our determination to extirpate it and its fruits forever.” Stimson’s memorandum contains the root idea of the Nuremberg trial of the German leadership, which was created at U.S. insistence, over the objections of Great Britain. The British did not want to put the top Nazis on trial — they wanted to round them up and shoot them. The British feared that Adolf Hitler and other German leaders “would use the courtroom as a forum for accusing the British and French of having grievously injured Germany after World War I by the terms of the Versailles Treaty, the French occupation of the Ruhr in 1923, the failure of the victorious powers to disarm, and other political and economic sins.” In the British view, war-crimes trials should be reserved for low-ranking accused; the higher-ups should face summary execution on the basis of purely political decisions. The Soviet government had a third view: The guilt of the German leadership should be determined by political decision with no trials — the same as the British idea — but international trials should nevertheless be held to determine degree of guilt and sentences.

The U.S. view prevailed. The Allies met in London to discuss and draft the charter of the future tribunal, which set up shop in the southwest German city of Nuremberg. Heading the U.S. delegation was Supreme Court Justice Robert Jackson, who took a leave of absence from the Court and afterward served as lead U.S. prosecutor at Nuremberg.

The Allies hoped to try the top Nazis in the first round of trials; but most of the Nazi leadership had committed suicide or fled. Eventually, the Allies tried 22 members of the remaining political, economic, and military leadership of the Third Reich. Three were acquitted of all charges, and others of some of the charges; two committed suicide during the trial; and the remainder received terms of years or death sentences.

The following excerpt sets out the substantive criminal law of the Charter.

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL
(THE “LONDON AGREEMENT” OR “NUREMBERG CHARTER”)

Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 284

. . . Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or

3. Id. at 59.
assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

**ARTICLE 7**

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

**ARTICLE 8**

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

**ARTICLE 9**

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

**ARTICLE 10**

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

**NOTES AND QUESTIONS**

1. Notice from Article 6 that the jurisdiction of the Tribunal reaches only “persons . . . acting in the interests of the European Axis countries. . . .” No provision
permitted the trial of Allied perpetrators of similar crimes. Yet Jackson wrote to Tru-
man that the Allies “have done or are doing some of the very things we are prose-
cuting Germans for. The French are so violating the Geneva Convention in the
treatment of prisoners of war that our command is taking back prisoners sent to
them. . . . We are prosecuting plunder and our Allies are practicing it. We say aggres-
"ively war is a crime and one of our allies asserts sovereignty over the Baltic States based
on no title except conquest.” Churchill ordered the bombing of civilian neighbor-
hoods in German cities, and Truman himself ordered the atomic bombing of Hiro-
shima and Nagasaki; U.S. Admiral Chester Nimitz admitted that he conducted
unrestricted submarine warfare (a war crime charged against German Admiral Dönnitz);
and the Soviet Union massacred between 15,000 and 20,000 Polish officers
in Katyn Forest in anticipation of a postwar conquest of Poland. Does the Charter’s
limited jurisdiction reduce the Tribunal to mere hypocrisy or “victor’s justice”? Should
the Tribunal have extended its jurisdiction to the Allies? What would the
likely response have been to such a proposal?

One consequence of restricting Article 6 to Axis defendants was that aggressive war,
war crimes, and crimes against humanity were not turned into genuine international
crimes at Nuremberg: They were crimes only when committed by the Axis countries.
Not until 1950 did the UN General Assembly declare that the substantive law of the
Nuremberg Charter constitutes universal principles of international law.5

2. Notice also that “[l]eaders, organizers, instigators and accomplices participating
in the formulation or execution of a common plan or conspiracy to commit any of the
foregoing crimes are responsible for all acts performed by any persons in execution of
such plan.” The purpose of this clause was to enable the Tribunal to “reach back” to
the years between Hitler’s 1933 ascendency to power and September 1, 1939.

One difficulty with this idea was that the crime of conspiracy is unknown in civil law
countries, including France and Russia. As one historian reported the London
debates:

During much of the discussion, the Russians and French seemed unable to grasp all the
implications of the concept; when they finally did grasp it, they were genuinely shocked.
The French viewed it entirely as a barbarous legal mechanism unworthy of modern law,
while the Soviets seemed to have shaken their head in wonderment. . . .6

One reason for this shocked response was the proposition that each and every
conspirator is “responsible for all acts performed by any persons in execution of
such plan” — in this case, for literally tens of millions of murders. Is this extended
theory of liability a good way to treat participation in a conspiracy? A few months after
the adoption of the Nuremberg Charter, the U.S. Supreme Court incorporated this
extended notion of liability into federal criminal law in Pinkerton v. United States,7
which holds that each conspirator is responsible for all reasonably foreseeable
offenses committed by other conspirators in furtherance of the conspiracy. This
concept is now known in U.S. law as “Pinkerton liability.” As we shall see in Chapter 17,
subsequent international tribunals have dropped the crime of conspiracy from those
enumerated in international criminal law. The conspiracy crime does not appear in
the UN’s 1950 Nuremberg Principles.

5. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and Judg-
3. Another of the Allies’ ideas for putting the Nazi movement as well as individuals on trial is embodied in Articles 9 and 10 of the Charter. Article 9 enables the Tribunal to declare entire organizations to be criminal organizations. The indictment asked for such declarations of criminality against the Leadership Corps of the Nazi Party, the Gestapo (secret police) and Security Service, the SS, the Storm Troopers, the Reich Cabinet, the General Staff, and the High Command. According to Article 10, after such a finding, any member of the organization could be found guilty of its crimes simply by proving that he was a member of the organization. It is a concept of collective guilt. As we shall see below, the Tribunal found Articles 9 and 10 hard to stomach and drastically limited their applicability. These articles also do not appear in the UN’s Nuremberg Principles.

4. One persistent challenge facing international tribunals lies in the fact that their procedural rules must meld the widely varying procedures of different legal systems. As Telford Taylor explains, this was true at Nuremberg:

Under the Continental system (known to lawyers as the “inquisitorial” system), most of the documentary and testimonial evidence is presented to an examining magistrate, who assembles all of it in a dossier. If this process establishes a sufficient basis for prosecution, copies of the dossier and the indictment based on it are given to the defendant and to the court which is to try the case, and the trial then proceeds with both the court and the concerned parties fully informed in advance of the evidence for and against the defendant. If the court, on its own motion or at the request of one of the parties, decides to take further testimony, the witnesses are usually questioned by the judges, rather than the lawyers, so that cross-examinations by opposing counsel, which play so large a part in Anglo-American trials, do not often occur. The defendant is not allowed to testify under oath, but may make an unsworn statement to the court. . . .

Naturally, the limited role of lawyers in Continental criminal trials had little appeal for British barristers or American advocates. The French and Russians went a long way to meet their allies’ psychological needs for the adversarial process, even though they understood it very imperfectly; at the very last meeting Nikitchenko had to ask: “What is meant in the English by ‘cross-examine’?” Falco found “a little shocking” the idea that the defense would not, prior to trial, be informed of “the whole case against them” and complained: “It seems there is a possibility under this draft that the defense could be faced during the trial with the opening of a Pandora’s box of unhappy surprises, inasmuch as during the trial there is liberty to the prosecution to produce something new.” Jackson was driven close to distraction:

. . . I would not know how to proceed with a trial in which all the evidence had been included in the indictment. I would not see anything left for a trial and, for myself, I would not know what to do in open court.

The differences were resolved by compromises which were crude but proved workable. For example, the Charter would require, contrary to Anglo-American practice, that the indictment “shall include full particulars specifying in detail the charges against the defendants” and that there would be “documents” submitted with the indictment, but, contrary to Continental practice, it did not require that the prosecution present all of its evidence with the indictment. Contrary to Continental practice the defendants could testify as witnesses in their own behalf, but contrary to Anglo-American practice, defendants could also make an unsworn statement at the end of the trial.8

The four victorious powers (France, Great Britain, the Soviet Union, and the United States) divided the judicial and prosecutorial responsibilities among them. All four

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had judges on the tribunal, and all four shared in prosecuting the case: There were four chief prosecutors, each focusing on one aspect of the cases. United States Supreme Court Justice Robert Jackson opened for the prosecution, in a lengthy and famous speech. We quote two excerpts from the speech — Jackson’s initial presentation of the case and part of his argument that the trial was not illegitimately \textit{ex post facto}.

\textbf{OPENING STATEMENT OF ROBERT JACKSON}

\textit{2 The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg, Germany, Nov. 21, 1945 (1946)}

May it please Your Honour,

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power ever has paid to Reason.

This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of seventeen more, to utilise International Law to meet the greatest menace of our times — aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a cause of that magnitude that the United Nations will lay before Your Honour . . . .

In justice to the nations and the men associated in this prosecution, I must remind you of certain difficulties which may leave their mark on this case. Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events. Despite the magnitude of the task, the world has demanded immediate action. This demand has had to be met, though perhaps at the cost of finished craftsmanship. In my country, established courts, following familiar procedures, applying well-thumbed precedents, and dealing with the legal consequences of local and limited events, seldom commence a trial within a year of the event in litigation. Yet less than eight months ago today the courtroom in which you sit was an enemy fortress in the hands of German S.S. troops. Less than eight months ago nearly all our witnesses and documents were in enemy hands. The law had not been codified, no procedures had been established, no tribunal was in existence, no usable courthouse stood here, none of the hundreds of tons of official German documents had been examined, no prosecuting staff had been assembled, nearly all of the present defendants were at large, and the four prosecuting powers had not yet joined in common cause to try them. I should be the last to deny that the case may well suffer from incomplete researches, and quite likely will not be the example of professional work which any of the prosecuting nations would normally wish to sponsor. It is, however, a completely adequate case to the judgment we shall ask you to render, and its full development we shall be obliged to leave to historians.
Before I discuss particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate.

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The world-wide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the First World War we learned the futility of the latter course. The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation, make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as is humanly possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice. At the very outset, let us dispose of the contention that to put these men to trial is to do them an injustice entitling them to some special consideration. These defendants may be hard pressed but they are not ill used. . . .

If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law. Realistically, the Charter of this Tribunal, which gives them a hearing, is also the source of their only hope. It may be that these men of troubled conscience, whose only wish is that the world forget them, do not regard a trial as a favour. But they do have a fair opportunity to defend themselves—a favour which, when in power, they rarely extended even to their fellow countrymen. Despite the fact that public opinion already condemns their acts, we agree that here they must be given a presumption of innocence, and we accept the burden of proving criminal acts and the responsibility of these defendants for their commission. . . .

We would also make clear that we have no purpose to incriminate the whole German people. We know that the Nazi Party was not put in power by a majority of the German vote. We know it came to power by an evil alliance between the most extreme of the Nazi revolutionists, the most unrestrained of the German reactionaries, and the most aggressive of the German militarists. If the German populace had willingly accepted the Nazi programme, no Storm-troopers would have been needed in the early days of the Party, and there would have been no need for concentration camps or the Gestapo, both of which institutions were inaugurated as soon as the Nazis gained control of the German state. Only after these lawless innovations proved successful at home were they taken abroad . . . .

While this declaration of the law by the Charter is final, it may be contended that the prisoners on trial are entitled to have it applied to their conduct only most charitably if at all. It may be said that this is new law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of the law has taken them by surprise.

I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their programme ignored and defied all law. . . . International Law, Natural Law, German Law, any law at all, was to these men simply a propaganda device to be
invoked when it helped and to be ignored when it would condemn what they wanted to do. That men may be protected in relying upon the law at the time they act, is the reason we find laws of retrospective operation unjust. But these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws. They cannot show that they ever relied upon International Law in any state or paid it the slightest regard. . . .

The re-establishment of the principle that there are unjust wars and that unjust wars are illegal is traceable in many steps. One of the most significant is the Briand-Kellogg Pact of 1928, by which Germany, Italy and Japan, in common with practically all nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means, and condemned recourse to war for the solution of international controversies. This pact altered the legal status of a war of aggression. . . .

Any resort to war — to any kind of a war — is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes.

But if it be thought that the Charter, whose declarations concededly bind us all, does contain new law, I still do not shrink from demanding its strict application by this Tribunal. The rule of law in the world, flouted by the lawlessness incited by these defendants, had to be restored at the cost to my country of over a million casualties, not to mention those of other nations. I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives, but that progress in the law may never be made at the price of morally guilty lives.

It is true, of course, that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations, and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some State. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by the normal processes of legislation, for there is no continuing international legislative authority. Innovations and revisions in International Law are brought about by the action of governments such as those I have cited, designed to meet a change in circumstances. It grows, as did the Common Law, through decisions reached from time to time in adapting settled principles to new situations. The fact is that when the law evolves by the case method, as did the Common Law and as International Law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law, as far as International Law can be decreed, had been clearly pronounced when these acts took place. Hence we are not disturbed by the lack of judicial precedent for the inquiry it is proposed to conduct.
THE LAW OF THE CHARTER

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law — international and domestic — is that there can be no punishment of crime without a pre-existing law. “Nullum crimen sine lege, nulla poena sine lege.” It was submitted that ex post facto punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the
Renunciation of War of 27th August, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939. . . .

The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. . . .

But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing. . . .

THE LAW RELATING TO WAR CRIMES AND CRIMES AGAINST HUMANITY . . .

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal.
The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.

THE ACCUSED ORGANISATIONS

[Under Article 9 of the Charter, entire organisations could be declared criminal. Under Article 10,] . . . the declaration of criminality against an accused organisation is final, and cannot be challenged in any subsequent criminal proceeding against a member of that organisation. Article 10 is as follows:

“In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.”

The effect of the declaration of criminality by the Tribunal is well illustrated by Law Number 10 of the Control Council of Germany passed on 20th day of December, 1945, which provides:

“. . . (3) Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.
(b) Imprisonment for life or a term of years, with or without hard labour.
(c) Fine, and imprisonment with or without hard labour, in lieu thereof.”

In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

Article 9, it should be noted, uses the words “The Tribunal may declare” so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organisation or group, this Tribunal should not hesitate to declare it to be criminal because the theory of
“group criminality” is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.

NOTES AND QUESTIONS

1. What are Jackson’s and the tribunal’s arguments that the trial was not illegitimately based on retroactive law? Are these arguments convincing?
2. What was the purpose of the Nuremberg trials? Deterrence? Retribution? Rehabilitation?
3. Article 6(c) defines crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war . . .” (emphasis added). How faithful is the tribunal’s judgment to the language indicating that atrocious conduct occurring before the war can constitute crimes against humanity?
4. Under the tribunal’s analysis of Articles 9 and 10, what must prosecutors prove to convict a member of a criminal organization such as the SS of crimes committed by the SS? Is this a concept of collective guilt or individual guilt? Could an SS member who never killed anyone be convicted of the war crime of murder?
5. The Allies greatly feared the revival of Nazism in Germany. Those Nuremberg defendants sentenced to death were hanged, and their corpses were photographed with their names pinned to their shirt-fronts, out of fear that neo-Nazis might whisper that they were still alive. Then their bodies were cremated in the ovens of the Dachau concentration camp, and the ashes scattered on a river — as a symbolic gesture, but also to ensure that the graves would not become neo-Nazi shrines.
6. Do you agree with the tribunal that “[t]o initiate a war of aggression . . . is not only an international crime; it is the supreme international crime”? Is it worse than genocide? Why might the tribunal have thought the answer is yes?

B. THE SUBSEQUENT NAZI TRIALS

The four Allied powers that occupied Germany at the end of the Second World War together enacted a statute, Allied Control Council Law No. 10 (“CCL 10”), which
formed the basis for additional trials at Nuremberg and elsewhere. CCL 10, like the Nuremberg Charter, criminalized crimes against peace, war crimes, crimes against humanity, and membership in a criminal organization. It defined some of the offenses slightly differently than the Nuremberg Charter, however. For example, under CCL 10 crimes against peace included “initiation of invasions” of other countries even when the invasions were not resisted — specifically, the German annexation of Austria and part of Czechoslovakia before World War II. Its definition of crimes against humanity included actions performed before the war; and it added imprisonment, torture, and rape to the list of enumerated offenses that would count as crimes against humanity. Although these were implicit in the Nuremberg Charter’s catch-all category of “other inhumane acts,” CCL 10 was the first modern statute to declare that torture and rape during organized attacks on civilian populations are international crimes.

Thousands of Germans were tried under CCL 10, by courts convened by one or another of the Allies. Among the most interesting were the trials held by the Americans in the second round at Nuremberg. Where the first Nuremberg trials aimed at the leadership of the Third Reich, the second round singled out representative categories of German society who had colluded with Nazi atrocities: industrialists, doctors, lawyers, judges, and others. Thus, for example, the defendants in the “Doctors Trial” were physicians and medical administrators involved in one of the Third Reich’s most chilling criminal enterprises: performing atrocious medical experiments on living, conscious concentration camp inmates.

**Doctors.** Although some of these trials are now of merely historical interest, others had a more lasting impact. Particularly influential was the Doctors’ Trial because in its judgment the court articulated a set of principles — the Nuremberg Code — that became the foundation for modern medical and experimental ethics. The Nuremberg Code marks the first authoritative statement of the principle that medical experiments require the informed, voluntary consent of the subject.

**Industrialists.** Equally interesting (though less influential) were the trials of industrialists who used slave labor. The idea that businessmen who are complicit in atrocious crimes may themselves be criminally liable is an important one. These cases raise the difficult question of how active the complicity must be to rise from the level of moral responsibility to that of criminal guilt. We study this question in greater detail in Chapter 17.

Along the same lines, the British tried three men involved in the manufacture of Zyklon B, the gas used in the death camps, which was originally devised and manufactured as a pesticide. The defendants were the company’s CEO, his second in command, and the gassing technician. They were charged with the war crime of supplying poison gas knowing that it would be used in the murder of Allied nationals. The technician was acquitted after persuading the court that he did not know Zyklon B would be used on human beings; the other defendants were convicted and hanged.9 The issue was revived in 2005 when a Dutch businessman, Franz van Anraat, was convicted by a Dutch court of complicity in war crimes for selling Saddam

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Hussein’s government chemicals used to make poison gas that Saddam used against Kurds in Iraq.\textsuperscript{10}

\textit{Lawyers and judges}. Particularly poignant for lawyers was the Justice Case, which tried leading judges and jurists from the Third Reich who had enforced discriminatory or politicized Nazi law, or otherwise perverted the legal process to commit war crimes or crimes against humanity. This included, for example, judges in the infamous People’s Court, which handed out death sentences to political opponents of the Hitler regime. Others were lawyers who wrote memos justifying the mistreatment of Soviet prisoners and the executions of captured Soviet commissars and captured Allied commandos. On the basis of Articles 6(c) and 7 (or, rather, their counterparts in CCL 10), the tribunal found it irrelevant that all these actions accorded with German law; it likewise brushed aside the defense of judicial immunity, arguing that the defense would be available only to a genuinely impartial judge. The Justice Case became the model for the Academy Award–winning film \textit{Judgment at Nuremberg}.

\section*{C. THE TOKYO TRIBUNAL}

In addition to the Nuremberg trials, the end of World War II also saw an international military tribunal for the Japanese leadership, held at Tokyo. Japan, like Germany, had committed large- and small-scale atrocities, including mistreatment and murder of captives, sexual enslavement of Korean “comfort women,” and massacres of civilians, including the 1938 Rape of Nanking, in which up to 300,000 Chinese civilians were killed.

Although it was nominally conducted by all the Allies, the International Military Tribunal for the Far East (IMTFE) was dominated by the United States. The U.S. general Douglas MacArthur established its Charter (based on the Nuremberg Charter with a few small modifications and written by U.S. officials), chose the judges, and made the important decision not to try the Japanese emperor or crown prince. The 11 judges came from the 9 nations that were party to the Japanese surrender agreement, plus India and the Philippines, who were added to provide an Asian presence on the court. Although all 11 nations were represented on the prosecution team, there was only a single chief prosecutor, Joseph Keenan, an American. At Nuremberg, recall, each of the four principal Allies provided its own chief prosecutor, and the four teams divided responsibilities among themselves.

Due in large part to lack of understanding of Japanese governmental decision-making processes, the selection of defendants at Tokyo was somewhat haphazard. Twenty-eight military and governmental officials were eventually tried, including Prime Minister Tojo. Two defendants died of natural causes, and one was removed during the trial because of a mental breakdown. Far more than at Nuremberg, the IMTFE involved a clash of cultures, including tensions between colonial powers like Great Britain and colonies such as India. Indeed, the Indian judge, Radhabinod Pal,

\textsuperscript{10} Van Anraat narrowly escaped a genocide conviction because the court concluded that his intention was merely to make money, not to destroy the Kurds. See Harmen G. Van der Wilt, Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the \textit{van Anraat} Case, 4 J. Intl. Crim. Just. 239 (2006).
D. The International Criminal Tribunal for Former Yugoslavia

Issued a 700-page dissent from the IMTFE’s judgment, and in one frequently quoted passage Justice Pal argued passionately that the ban on aggressive war represented an effort by colonial powers to freeze the international status quo to their own advantage. In addition to Justice Pal, one other judge dissented, and three wrote separate opinions.

Seven of the defendants were sentenced to death, 16 to life imprisonment, and 2 to terms of years. There were no acquittals. The rules of the tribunal permitted a death penalty by simple majority vote of the judges, and one defendant was hanged on a 6-5 vote. When the defendants appealed their convictions to the U.S. Supreme Court, MacArthur announced that if the Court granted habeas corpus, he would ignore it. Instead, the Court concluded that it had no jurisdiction in *Hirota v. MacArthur*. In 1955, the 13 convicts who remained alive were paroled.

The Tokyo trials developed an influential jurisprudence on crimes of sexual violence, centered around mass rapes committed in Nanking, China, and also important decisions on the nature of command responsibility. However, to many observers it seemed less fair than Nuremberg and more like victors’ justice — indeed, one major book about the IMFTE is titled *Victors’ Justice*. So it appeared to Justice Pal, who wrote in his dissenting opinion, “If Japan is judged, the Allies should also be judged equally.”

As a side note, the Tokyo Tribunal included the first female prosecutor at a major war crimes trial, Grace Llewellyn Kanode.

D. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA

It would be more than 40 years until the next international tribunal, which was established by the United Nations in the wake of the brutal civil war (the “Balkan Wars”) following the breakup of Yugoslavia in the early 1990s.

In 1993, after a UN investigation of crimes committed in the Balkan Wars, the UN Security Council adopted Resolutions 808 and 827, creating the International Criminal Tribunal for the Former Yugoslavia (ICTY). The tribunal, sitting at The Hague in the Netherlands, is divided into three Trial Chambers of three judges each and one Appellate Chamber of five judges. Its statute grants it jurisdiction over the crimes of genocide, crimes against humanity, “violations of the laws and customs of war,” and grave breaches of the Geneva Conventions, committed in the territory of former Yugoslavia after January 1, 1991.

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next two years and assembled 65,000 pages of documents and 300 hours of videotapes. The subsequent work of the ICTY rested substantially on these documents, videotapes, and the Commission’s 3,500-page final report.

The Bosnian War came to an end in 1995, after NATO bombed Serb forces in Bosnia to protect the UN safe zones, and Croatian forces inflicted a decisive defeat on the JNA, recapturing central Croatia. At that point, Milošević became receptive to peace talks, which occurred in Dayton, Ohio, and resulted in a treaty signed on December 14.

Conflict erupted again in 1999, when the province of Kosovo attempted to secede from Yugoslavia. Kosovo is inhabited by a Serb minority and an Albanian Muslim majority. Escalating combat between Serb forces and the Muslim “Kosovo Liberation Army” raised international fears of a second Bosnia. When peace talks, aimed at installing NATO peacekeepers, failed, NATO, spearheaded by the United States but without sanction from the UN Security Council, began bombing Serb units. NATO eventually expanded its air war from Kosovo to Belgrade, Serbia’s capital city, and Milošević surrendered in June 1999, three months after the bombing began. The Kosovo events became part of ICTY’s docket: While the Kosovo war was going on, ICTY issued an indictment against Milošević for war crimes and crimes against humanity.

Two years later, a popular uprising overthrew Milošević, and the successor Yugoslav government eventually turned him over to the ICTY, where he was tried for numerous crimes, including genocide. The Milošević trial was notorious and controversial. Milošević never acknowledged the legitimacy of the tribunal, charging that it represented nothing more than a Western plot against Serbia. At first he refused legal counsel and insisted on representing himself. The result was delay and disruption, as Milošević delivered lengthy speeches and diatribes. He proved to be a fierce cross-examiner and lost no opportunity to abuse and humiliate prosecution witnesses. The trial was also repeatedly delayed because of Milošević’s ill health (he had a heart condition). Milošević died mere weeks before the four-year-long trial was due to end. The death of Milošević before the trial’s completion meant that the tribunal could issue no judgment in the case of its most prominent defendant.

In 2008 the Serbian government arrested Radovan Karadžić, the former president of the short-lived Bosnian Serb republic, and one of the two most wanted fugitives of the Balkan Wars. The other is General Ratko Mladić, who was captured in 2011. As of mid-2014, both of them are on trial — two of the final four trials.

2. The Tribunal

a. The ICTY Statute

Article 1 of ICTY’s statute grants it “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” The substantive criminal law differs in some respects from the law at Nuremberg. It does not include crimes against peace. War crimes are specified in greater detail and are divided into two categories: grave breaches of the Geneva Conventions (that is, crimes of violence against prisoners and detainees) and war crimes involving excessive destruction or banned weapons. The list of crimes against humanity derives from Allied Control Council Law No. 10, the statute used in Germany in the second round of Nuremberg trials. Along with murder,
deportation, extermination, enslavement, persecution, and “other inhumane acts”—the crimes against humanity enumerated in the Nuremberg Charter—it adds imprisonment, rape, and torture, “when committed in armed conflict, whether international or internal in character, and directed against any civilian population.” In addition, the ICTY statute adds genocide to the list of crimes, alongside war crimes and crimes against humanity. Only natural persons (not corporations, organizations, or governments) can be defendants; and, following the Nuremberg model, the head-of-state and superior-orders defenses are abolished.

The ICTY established an organizational structure followed subsequently by the ICTR and ICC. Sitting in The Hague, it consists of three Trial Chambers, an Appellate Chamber, an independent Prosecutors’ Office, and a Registry that administers the tribunal. Judges come from many nations and sit in three-judge panels (in the Trial Chambers) and five-judge panels (in the Appellate Chamber). No two judges can be nationals of the same state. Rules of procedure and evidence draw on both the common law and civil law traditions.

ICTY can impose sentences of imprisonment, but not the death penalty.

Concerned about the costs of the ICTY and ICTR, in 2010 the UN Security Council adopted Resolution 1966, which establishes a “Mechanism for International Tribunals,” or “MICT.” The MICT will replace the ICTY and ICTR with a “residual mechanism” that is supposed to be smaller, more efficient, and temporary. The transition from the ICTY to the MICT began in summer 2013. As of mid-2014, however, the ICTY and MICT continue to overlap, including overlapping personnel.

b. Jurisdiction

The tribunal has concurrent jurisdiction with national tribunals of the various Yugoslav states: Cases can be tried either before the tribunal or a national court. But ICTY has primacy over national courts; it was feared that if the national tribunals had primacy they might insist on trying their own perpetrators in order to shield them. In this respect, the ICTY differs radically from the International Criminal Court, which gives national tribunals primacy and can admit only cases that states are unwilling or unable to investigate and try. The ICTY has transferred a few cases to national courts involving lower-level figures, whom the tribunal generally does not indict.

The jurisdiction of ICTY is broad, perhaps broader than the drafters of the statute had contemplated. As indicated above, it possesses “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.” (The final clause, “in accordance with the provisions of the present Statute,” means simply that the tribunal can try only the crimes enumerated in the statute.) The jurisdiction was framed broadly in order to encompass all the varying ethnic groups involved in the violence, but it had at least one unexpected consequence: When NATO forces began bombing in the 1998 Kosovo war, then-ICTY prosecutor Louise Arbour personally visited all the NATO capitals to warn member states that any serious war crimes their forces committed fell under ICTY’s jurisdiction and could be prosecuted. Reportedly, her visits caused considerable astonishment. (There were, however, no prosecutions of NATO forces, despite Serbian allegations of NATO war crimes.)
c. The Work of the Tribunal

As of mid-2014, ICTY has tried more than 100 cases. Its docket (including both completed and uncompleted cases) involves 161 defendants. Defendants include all the ethnic groups in former Yugoslavia and all levels of the command structure: grunt-level perpetrators of atrocities, local and larger-scale military commanders, and major political leaders.

The best way to obtain a quick overview of ICTY’s work is by examining its Web site, http://www.icty.org (click on “The Cases”). Cases are indexed by defendants’ names and also include the names of geographic regions where the crimes took place—thus, for example, the case known as Mucić et al. is subtitled “Čelebici.” It concerns several defendants occupying positions of authority at the Čelebici prison camp in Bosnia, where inmates were tortured, raped, beaten, killed, or otherwise abused. Half an hour spent skimming these summaries will provide a measure of the tribunal’s work and also of the range of atrocities and depth of tragedy in the Balkan Wars. The full opinions are also available, but they are very lengthy, running to hundreds of pages, because—in the civil law tradition—they include detailed descriptions of the evidence and fully reasoned factual findings as well as legal findings. The tribunal also aims to establish a historical record and therefore includes very full factual findings.

At first ICTY’s work was hampered by the difficulty of capturing defendants, who were often protected by political sympathizers. UN and NATO troops, who might have helped capture suspects, reportedly were reluctant to do so because they believed it would undermine their basic peacemaking mission by making them appear to be taking sides in the ethnic conflict. The tribunal’s first case arose because the defendant, Dražen Erdemović—a soldier who participated in the Srebrenica massacre—turned himself in and pled guilty. ICTY’s first contested trial came about only because the defendant, Duško Tadić, made the mistake of visiting Germany, where he was arrested and turned over to ICTY. Tadić, a Bosnian Serb café owner and karate instructor, had repeatedly visited a prison camp, where he participated in brutal beatings and tortures of prisoners. He was convicted and sentenced to 25 years. He was granted early release in 2008.

Other practical issues confronting ICTY—as well as ICTR, the Rwanda tribunal—include the difficulty of gathering evidence in communities that are often quite hostile to the enterprise, and the difficulty and expense of protecting witnesses, who may be subject to vengeance and retribution if they testify before the tribunal and then return to their own communities. This is particularly difficult for victims of sexual violence. Relocating a Yugoslav family in a witness protection program cost hundreds of thousands of dollars a year, and although the tribunals have large budgets (ICTY’s peak budget was almost $350 million, while ICTR’s was $250 million), extensive witness relocation was impracticable.

The ICTY jurisprudence is extensive (the judgments of the tribunal amount to thousands of pages) and remarkably interesting; the tribunal has innovated in many areas of both substantive international criminal law and procedure. Arguably, its jurisprudence has “moved the ball” in international criminal law more than any other development since Nuremberg, and possibly more than the Nuremberg Tribunal itself. Rather than discussing the ICTY’s jurisprudence here, we will refer to it repeatedly in other chapters as topics arise.
an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia. . . .

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

NOTES AND QUESTIONS

1. Is it reasonable to suppose that the work of the tribunal would help lead to a reestablishment of peace and security in former Yugoslavia? How would the tribunal do so?

2. A major issue confronting ICTY, as well as other international tribunals, is whether it should direct its attention entirely at the “big fish” defendants—organizers and planners—or should it include prosecutions of low-level perpetrators. ICTY has prosecuted both. Erdemović and Tadić were both low-level perpetrators, and perhaps they were prosecuted only because at that time they were the only defendants ICTY had in its custody. The general rule has been to target only the most senior officials. It is also arguable that the colossal expense of trial before an international tribunal can be justified only if the defendants are important figures. For one thing, important figures are arguably the only ones likely to be deterred by the prospect of prosecution in an international tribunal, which will seem quite remote to foot soldiers and other “little” defendants. On the other hand, if one purpose of the tribunals is to give victims justice, it may be important to try at least some of the actual rapists and triggermen. That may, of course, give rise to the sense of selective prosecution—the sense that one triggerman is singled out almost at random while his comrades go on their way. What is your view?

3. Early in its existence, the ICTY confronted an ethical problem among defense lawyers: It was discovered that some defense counsel were paying their clients kickbacks to ensure that they could keep their lucrative assignments. The practice, which was also prevalent in the ICTR, was quickly stamped out.

4. The ICTY, like subsequent international tribunals, has no death penalty.

5. For rather obvious reasons, the ICTY made efforts to ensure that it tried defendants from all major ethnic groups and places within former Yugoslavia. Some believe that this policy has led to disparities in the strength or seriousness of some cases.

e. Plea Bargaining

One of the most controversial issues facing the ICTY, as well as the other international tribunals, is the practice of plea bargaining. The purposes of plea bargaining are essentially two: first, to clear the docket by obtaining convictions without the difficulty and uncertainty of a trial; and second, to get defendants to cooperate by offering information needed to investigate other cases. (In U.S. jargon, this is nicknamed “flipping” defendants or “getting them to flip.”)

Plea bargaining takes two forms: sentence bargaining, in which defendants are offered a reduced sentence in return for a guilty plea, and charge bargaining, in which defendants are offered the chance to plead guilty to lesser charges (which often guarantees a reduced sentence). In international tribunals, where all the available charges are very serious, charge bargaining is rare (although we will see that it has
small peacekeeping force, UNAMIR, in Rwanda. But despite urgent warnings of the coming genocide from UNAMIR’s commander, Canadian general Roméo Dallaire, the UN’s central peacekeeping office repeatedly denied him permission to take steps such as seizing arms caches. After the genocide began, Dallaire requested reinforcements and rules of engagement that would have allowed him to stop the genocide; but again the UN in New York denied him permission. Throughout the period of the genocide, the U.S. mission at the UN actively lobbied to shrink rather than expand UNAMIR, and (as we shall see in Chapter 20 on genocide) the U.S. government fought hard to prevent the Rwandan events from being labeled a genocide, for fear that would generate pressure to intervene. Years later, in March 1998, President Bill Clinton went to Rwanda and publicly apologized for U.S. inaction.

But the United States by no means bears sole responsibility for world inaction. UN Secretary-General Boutros Boutros-Ghali was absent from New York for much of the period of the genocide. And France, with deep connections to the Rwandan government and mistrust of the RPF (which came out of Anglophone Uganda) was hostile to intervention on behalf of the Tutsis. Western media were largely absent from Rwanda, and the world press repeatedly distorted what was going on by describing it as a civil war rather than a genocide, with equal atrocities on “both sides,” the whole thing resulting from age-old tribal hatreds incomprehensible to outsiders.

After the genocide, General Dallaire, haunted by the atrocities he witnessed but was powerless to stop, suffered a breakdown. He has subsequently recovered and has become a renowned speaker on the issue of genocide.

It is in this context that we turn to the ICTR.

2. The Tribunal

a. Founding

Like the ICTY, the Rwanda Tribunal was created by the UN Security Council under its Chapter VII powers, after a finding that the Rwandan genocide had created a threat to international peace and security, and that the tribunal “would contribute to the process of national reconciliation and to the restoration and maintenance of peace.” Although the tribunal’s legality was not questioned by defendants, as Tadić had questioned the legitimacy of the ICTY, the creation of the ICTR represented a further evolution of the power of the Security Council to establish tribunals. The Balkan Wars occurred between several states (Serbia, Croatia, Bosnia, Slovenia) and therefore represented a genuinely international situation. But the Rwanda genocide was internal to Rwanda. Consider whether “the process of national reconciliation” in Rwanda is a legitimate basis for Security Council action under Article 39, which requires a threat to international peace and security. Was the tribunal a genuine effort to respond to an ongoing threat, or was it rather a belated response to international outrage at what transpired in Rwanda during the “hundred days of genocide” in which the UN took no constructive action? Or, finally, was it an essential means by which the international community showed that it treats mass killings in Africa and Europe in similar ways?

At the time of the resolution creating the tribunal, Rwanda itself happened to have a seat on the Security Council. When it came time to vote on the resolution, Rwanda cast the only “no” vote. Why? Rwanda had several objections to the tribunal. First, it would be located outside Rwanda. The Security Council placed the tribunal in
E. The International Criminal Tribunal for Rwanda

Arusha, Tanzania. Symbolically, Arusha was significant because it was the site of the peace accord shortly before the genocide. It also seemed essential that the ICTR not be located in Rwanda itself, where there would be great security problems and where, it was feared, the tribunal would itself become a provocation. Nevertheless, Rwanda believed that it was essential for trials to occur where the Rwandan people could see them. Second, Rwanda objected because ICTR would not be able to impose the death penalty, and the Rwandan government believed that genocide should be punishable by death. One Rwandan official complained that the major perpetrators would live out their lives in comfort in a “full-service Swedish prison.” (Most of those convicted, it turns out, are imprisoned in Mali, Benin, or Swaziland under conditions that are hardly luxurious. However, some have indeed been imprisoned in France, Italy, or Sweden, where confinement conditions are better.) Rwandan preferred that the international community assist it by capturing and extraditing alleged perpetrators, to face trial in Rwandan courts.

On the other hand, Rwanda itself was lamentably unable to take on the burden of trying its own. By the end of the genocide, Rwanda’s legal system was in ruins; and the number of suspects in Rwandan prisons exceeded 100,000. This itself created a major humanitarian crisis because genocide suspects were literally rotting away in overcrowded, disease-ridden prisons. In the words of one visitor to the Gitarama prison,

“there were three layers of prisoners: at the bottom, lying on the ground, there were the dead, rotting on the muddy floor of the prison. Just above them, crouched down, there were the sick, the wounded, those whose strength had drained away. They were waiting to die. Their bodies had begun to rot and their hope of survival was reduced to a matter of days or even hours. Finally at the top, standing up, there were those who were still healthy. They were standing straight and moving from one foot to the other, half asleep. Why? Simply because that’s where they happened to be living. Whenever a man fell over, it was a gift to the survivors: a few extra centimetres of space. I remember a man who was standing on his shins: his feet had rotted away.”

In Chapter 4, we discuss the Rwandan response to this crisis, especially its innovative creation of informal traditional courts, called gacaca, to deal with the innumerable cases.

Interestingly, in 2007 Rwanda’s parliament abolished the death penalty, specifically to enable the transfer of genocide suspects from the ICTR back to Rwanda. As the ICTR reaches the end of its mandate and seeks to wrap up business, it has sometimes attempted to transfer cases to other countries (a procedure that its rules permit under some circumstances); abolishing the death penalty allows Rwanda itself to take these cases.

b. The Statute

Article 1 of the ICTR statute grants the tribunal “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the

37. For a detailed description of the legal response within Rwanda to the genocide, see Mark A. Drumbl, Atrocity, Punishment, and International Law 71-99 (2007).]
territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.” Notice both the limited time duration and the extended territorial jurisdiction of ICTR.

In most other respects, the statute follows the ICTY model. ICTR is structured similarly to the ICTY, with Trial Chambers, an Appellate Chamber, a Registry, and an independent prosecutors’ office. And, like the ICTY, the UN Security Council has replaced it with the MICT — in this case, located in Arusha rather than The Hague.

Among the crimes, the ICTR statute lists genocide first (it was listed last in the ICTY statute). Given the character of the Rwandan events, this seems appropriate. The statute also alters the definition of crimes against humanity. Where the ICTY statute requires that the crimes be committed during an armed conflict, the ICTR statute requires that they be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”

Here, for the first time, a tribunal statute severs the link between crimes against humanity and war (what scholars call “the war nexus”) and acknowledges that crimes against humanity can be committed independently of an armed conflict. The ICTR definition also incorporates a discrimination requirement (“committed . . . on national, political, ethnic, racial or religious grounds”) that has not appeared in any other definition of crimes against humanity.

c. Jurisdiction

As we have seen, the Yugoslav Tribunal has very broad jurisdiction, encompassing persons who commit any statute crimes in the territory of former Yugoslavia since 1991. By contrast, the UN Security Council granted the ICTR a far narrower temporal jurisdiction but somewhat wider spatial jurisdiction. It has jurisdiction over “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.” The final date was uncontroversial: By December 31, 1994, the genocide in Rwanda was over, and the RPF government was in place. But the initial date, January 1, 1994, aroused more controversy. The time period was extended backward from April 6, 1994 — the date of President Habyarimana’s assassination — to include the planning stage of the crimes.

But the question is whether going back three months was long enough.

The Rwandan government did not think so, and the tribunal’s limited temporal jurisdiction was the first of seven reasons given by Rwanda for voting against ICTR’s establishment. Rwanda regarded the temporal jurisdiction as “inadequate” because it would prevent the tribunal from addressing acts committed in 1992 and 1993 in preparation for the genocide that followed, as well as four specific massacres of Tutsis carried out from 1990 through 1993. Rwanda concluded that “[a]n international tribunal which refuses to consider the causes of the genocide in Rwanda and its planning, and that refuses to consider the pilot projects that preceded the

38. ICTR Statute, art. 3.
39. Id.
41. Id. at 301.
major genocide of April 1994, cannot be of any use to Rwanda, because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation.”

Some scholars speculated that certain criminal acts (planning, conspiring, etc.) that occurred before January 1, 1994, could still be punishable if there were a nexus between those acts and the genocide committed in 1994. This theory was tested dramatically in a case involving three journalists charged with direct and public incitement to genocide and conspiracy to commit genocide.

In 2003, the Trial Chamber convicted two journalists for anti-Tutsi broadcasting by Radio Television Libre des Mille Collines, and a third for his role as editor-in-chief of the anti-Tutsi newspaper Kangura. The conviction was partly based on articles or broadcasts from before 1994. The Trial Chamber reasoned that both conspiracy and incitement were continuing crimes, so that the pre-1994 journalism fell within the ICTY’s temporal jurisdiction. However, in 2007 the Appeals Chamber held that the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present in 1994. . . . The existence of continuing conduct is no exception to this rule. . . . [E]ven where such conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994.

For this reason, it reversed the convictions for incitement to genocide based on pre-1994 journalism. (The Appeals Chamber did permit pre-1994 conduct to be admitted as evidence that might indicate the motive and meaning of conduct in 1994.) Two judges dissented. Judge Pocar stated: “Insofar as offences are repeated over time and are linked by a common intent or purpose, they must be considered as a continuing offence, that is a single crime,” while Judge Shahabudeen argued that an incitement operates gradually on its listeners as they process and assimilate its meaning, so that even if the inciting speech occurred before 1994, its inciting effect continued into the year of the genocide.

All three defendants were also convicted of conspiracy to commit genocide. Here the analysis was slightly different than in the incitement charge. The Trial Chamber stated:

[C]onspiracy is an inchoate offence, and as such has a continuing nature that culminates in the commission of the acts contemplated by the conspiracy. For this reason, acts of conspiracy prior to 1994 that resulted in the commission of genocide in 1994 fall within the temporal jurisdiction of the Tribunal.

The theory that conspiracy is a continuing crime rests on a traditional view that the conspiracy is renewed each day the conspirators maintain it. On appeal, the

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47. Id. at ¶1044.
journalists’ conspiracy convictions were reversed on the facts, without reaching this issue. While Judge Shahabudeen concludes from this that the Appeals Chamber left the Trial Chamber’s conspiracy analysis intact, the earlier-quoted dictum that all the elements of the crime must have taken place in 1994 casts doubt on whether the temporal jurisdiction issue for conspiracy has truly been resolved.

d. The Work of the Tribunal

As in the case of ICTY, the best way to understand the work of the Rwandan Tribunal is by navigating its Web site, http://unictr.org. Perhaps the most obvious difference between the ICTR and ICTY is that the Rwandan Tribunal has completed far fewer cases. As of April 2014, it has completed 44 cases, with 17 on appeal, and 4 still in progress.

Why has the Rwanda Tribunal proceeded so slowly? There are several reasons. First, Rwanda’s own disaffection with the ICTR hampered cooperation in evidence gathering. Defense lawyers have complained that Rwanda will provide only prosecution evidence. Second, the tribunal suffered from repeated administrative failures. Third, proceedings involve translations back and forth between three languages, English, French, and Kinyarwanda (Rwanda’s native tongue).

A final reason arises from a deliberate strategic choice by the tribunal prosecutors. Believing that the trials would function best by creating a detailed historical record, they elected to call very large numbers of witnesses. In addition, following the model of the two rounds of Nuremberg trials, many of the cases involve multiple defendants, representing major sectors of Rwandan society (military, government, media). Mounting such complex cases has slowed down the trial process; many cases involve hundreds of trial days.

Jurisprudentially, the Rwanda Tribunal has made notable contributions. The crime of genocide figured only rarely in the ICTY cases, in large part because it is far more difficult to prove than war crimes or crimes against humanity. In Rwanda, unsurprisingly, genocide has frequently been the key issue, and we owe much of contemporary genocide jurisprudence to the ICTR. To take one notable example, the ICTR’s Akayesu decision found that rape can be a form of genocide when it aims to impregnate a woman with a baby whose father comes from another ethnic group or when rape traumatizes the victim so that she loses the wish to procreate. The ICTR has also broken new ground by finding that media figures can be complicit in genocide through their publications and broadcasts.

Moreover, the Rwanda Tribunal secured an early guilty plea from Rwanda’s prime minister, Jean Kambanda; he was the first head of government convicted for international crimes. Théoneste Bagosora, who many believe to be the principal architect of the genocide, was convicted in December 2008 and sentenced to life.

e. Plea Bargaining

Unlike the ICTY, the practice of plea bargaining has been largely nonexistent at the ICTR. This is for several reasons. As noted above, one of ICTR’s first cases involved Prime Minister Jean Kambanda. Kambanda pleaded guilty, under the belief (encouraged by prosecutors) that he would receive a short sentence. Instead, prosecutors recommended a life sentence. Needless to say, this outcome did not encourage other defendants to plead guilty. A second reason that there have been few guilty pleas is that defendants believe that their conditions of confinement are better in Arusha than in the Malian prisons where most have been sent; as a result, they prefer to prolong their stay in Arusha by going to trial. Furthermore, some of the defendants are infected with HIV and believe that their lives will be so short that sentencing discounts do not matter; they prefer to “roll the dice” at trial and hope for acquittal.51

Most interesting, however, is a fourth reason. It is conventional wisdom that most criminal defendants have only one interest, reducing their sentences. How the law characterizes their actions does not interest them unless a lesser offense means a lesser sentence. According to Nancy Amoury Combs, matters are very different at ICTR. Most defendants were prominent Hutus, and it mattered greatly to them how the trial characterizes them:

The great majority of ICTR defendants . . . steadfastly deny that genocide occurred in Rwanda, maintaining instead that the 1994 violence took place in the context of the long-running war between the Rwandan government and the RPF. ICTR defendants do not dispute that events spiraled out of control and that unfortunate and unnecessary violence was targeted against Tutsi civilians. But they maintain that this violence constituted the excesses of a legitimate and spontaneous national defense effort, not a genocidal plan to eliminate the Tutsi.52

As a result, as long as the charge against them is genocide, they reject sentencing discounts. Apparently, these defendants are willing to sacrifice years in prison to avoid being labeled génocidaires.

NOTES AND QUESTIONS

1. The ICTR has experienced other problems. One is the same problem of “victor’s justice” that dogged the Nuremberg trials. Hutus charge that many Tutsis in the RPF committed war crimes and crimes against humanity, and believe that unless Tutsis are tried, the ICTR is unfair and partial. However, efforts by the ICTR to investigate alleged crimes by Tutsis were rebuffed by the Rwandan government, and prosecutor Carla del Ponte claimed that political pressure from Rwanda led to her removal as prosecutor for ICTR.53 Some observers believe that the lack of Tutsi defendants delegitimizes the ICTR in the eyes of Hutus and reinforces their ideological view that no genocide took place and that genocide charges are simply a conspiracy against them.

Do you believe it was essential for the ICTR to bring cases against Tutsis? How could it do so without Rwandan cooperation? Or was it sufficient to try only génocidaires, given that the alleged crimes of the RPF are far smaller than the genocide?


51. Combs, supra note 16, at 118.
52. Id.
53. Cobban, supra note 49.
2. A second problem has been the difficulty of making the tribunal’s work available to Rwandans in Rwanda. For several years after the ICTR’s creation, its Web site was only in French and English; although it now includes Kinyarwanda, document translation has proceeded slowly. Some observers, both in and out of Rwanda, have charged that the real audience of ICTR is the international community, not Rwanda. If so, is that a major objection? If the aims of an international tribunal include general deterrence, making a historical record, and reinforcing the importance of international norms, why isn’t the international audience as important as the Rwandan audience? Or is this line of thought simply another manifestation of the same “who cares about Rwanda?” mentality that led the international community to ignore the genocide while it was happening?

3. Critics have also charged that the ICTR has done an inadequate job of witness protection, so that vulnerable witnesses such as rape victims, who had been promised confidentiality, returned to Rwanda to discover that their identities had been revealed. Even more problematic, rape victim witnesses who had been infected with HIV by defendants found that the tribunal was providing free medication to their rapists but would not pay for medication for them.\footnote{Samantha Power, Rwanda: The Two Faces of Justice, N.Y. Rev. of Books, Jan. 16, 2003.} The ICTR does, however, run a medical clinic for witnesses, which has provided anti-retroviral treatment for those who need it.

\section*{F. OTHER INTERNATIONAL TRIBUNALS}

Several other international tribunals have also come into existence in recent years. These include those in Sierra Leone, East Timor, Cambodia, and Lebanon.

\subsection*{1. Sierra Leone}

The Special Court for Sierra Leone (SCSL) was established “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.”\footnote{Statute of the SCSL, Article 1.} For almost ten years, the small West African country was ravaged by an exceptionally brutal civil war involving pro-government forces (the Civilian Defense Force, or CDF) and two rebel groups (the RUF and AFRC), all of which were implicated in atrocities. The conflict was not so much about politics as about control of Sierra Leone’s diamond mines, and the war was partly funded through the sale of “conflict diamonds” or “blood diamonds.” All the factions recruited child soldiers—many through kidnapping or the threat of death—who were often kept in a state of perpetual intoxication on palm wine or drugs. Girls were sexually enslaved or forced into “bush marriages” (discussed in detail in Chapter 23). The forces of one faction, the RUF, were notorious for amputating limbs of civilians as a terror tactic. Liberian president Charles Taylor sponsored and funded the RUF; he was the best-known defendant before the Special Court. The war ended as UN peacekeepers gradually succeeded in disarming the factions.
Nearly 60 years after the Nuremberg Tribunal pioneered the idea of individual accountability for international crimes, the International Criminal Court (ICC) came into being. It is the first permanent, rather than ad hoc, institution with jurisdiction over natural persons—not states or other entities—who commit the core international crimes of genocide, crimes against humanity, war crimes, and, once certain amendments are finally approved, the crime of aggression.

Unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the ICC is not a creature of the UN, although the UN Security Council is given certain privileges discussed within. Crucially, it also differs from the ad hoc tribunals in that it is built upon the premise that national and local efforts to achieve justice after atrocity must be the primary mechanism of accountability. This international court will serve to “complement,” rather than preempt, municipal justice. Thus, states can, by exercising their “complementarity option,” divest the ICC of its ability to pursue cases originating on the states’ territory or concerning their nationals if they pursue the cases domestically. But if a state is not “genuinely” willing and able to so, the ICC will work to ensure that those most responsible for the gravest international crimes cannot operate with impunity.

The treaty that establishes the ICC, the Rome Statute of the International Criminal Court (the “Rome Statute” or the “ICC Statute”), came into force on July 1, 2002, and only crimes committed after that date fall within the jurisdiction of the ICC. As of January 2014, the ICC claimed 122 states parties, including all of South America, nearly all of Europe and North America (with the exception of the United States), and roughly half the countries of Africa. A further 51 countries, including Russia, have signed but not ratified the Rome Statute; under customary international law, these states have an obligation, at the least, to refrain from acts that would defeat the object and purpose of the treaty.

In a relatively brief period, the ICC, which is based in The Hague, the Netherlands, has moved from a concept to a multicultural institution reportedly employing more than 700 persons and with a yearly budget exceeding $140 million. One should not underestimate the extent of that achievement. One consideration, as explained by an ICC judge,

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2. See Jon Silverman, Ten Years, $900m, One Verdict: Does the ICC Cost Too Much? BBC News Mag., (Mar. 14, 2012). By contrast, the ICTY’s budget for the two-year period of 2010-2011 was $286 million and it employed more than 800 staff. See The Cost of Justice, available at http://www.icty.org/sid/325.
is the enormous difficulty in carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Court, of difficult access, unstable, and unsafe. Carrying out investigations in [areas of ongoing armed conflict] entail[s] logistical and technical difficulties, unprecedented problems which no other prosecutor or court is faced with. Another grim reality is the notorious scarcity of financial and other resources available for investigations and other work of the Court.3

Indeed, as Judge Kaul reflected, “I did not know how unbelievably difficult it would be to build up a new international organization, especially such a complex one as the ICC, from scratch to a one hundred percent, functioning institution.”4

One of the central conflicts in the process leading to the Rome Statute concerned how cases could come to the court. Powerful nations, led by the United States and others, were worried that an independent ICC could pursue politically motivated prosecutions of their nationals. Thus, the United States and others insisted that the ICC’s jurisdiction be restricted to that which the UN Security Council referred to it. Other states and non-governmental organizations (NGOs) objected to this approach, noting that such a system would permit the permanent five (P-5) members of the Security Council and their friends to avoid ICC jurisdiction by vetoing any proposed referral of their actions to the ICC for investigation. These parties were concerned that powerful states would thus insulate themselves from accountability while imposing western justice on poor and less influential states. The objecting states and NGOs pushed for a system whereby states parties and the ICC prosecutor himself, on his own motion (proprio motu), could initiate examination of situations.

The Rome Statute splits the baby, thereby potentially frustrating all interested parties: It authorizes cases to come to the ICC through referrals by the Security Council and states parties and through the prosecutor’s own initiative. In response to the concern that the independent and assertedly politically unaccountable prosecutor could abuse her powers in initiating cases, however, the Rome Statute provides that where the prosecutor proceeds proprio motu, she must secure judicial approval under Article 15 before moving from a preliminary examination of the facts to a full investigation.

Another conflict surrounded the extent of the ICC’s jurisdiction, and here another compromise was crafted. The ICC was not given universal jurisdiction: Where a matter arrives at the ICC through states parties’ referrals or the prosecutor’s proprio motu powers, it must satisfy territorial and personal jurisdiction limits. That is, the situation referred must either (1) have occurred on the territory of a state party, or concern the actions of a national of a state party, or (2) have occurred on the territory of, or concern the national of, a non-state party to the Rome Statute that gives its so-called ad hoc consent under ICC Rule 12 to the ICC exercise of jurisdiction over a given situation. The above limitations mean, in short, that if a despotic government does not join the ICC or consent to its jurisdiction and confines its crimes to its own nationals and territory, the ICC cannot prosecute — with one very significant exception. The Security Council is not bound by the nationality and territorial limitations that control state- or prosecution-initiated cases, and it can therefore refer the posited non-state party despot for ICC prosecution.

4. Id. at 576.
The Security Council is given another important power in the Rome Statute: It has the power to defer investigations and prosecutions in one-year increments. Thus, the Security Council is vested under Article 16 of the Rome Statute with the authority to put investigations on hold pursuant to its powers, under Article VII of the UN Charter, to ensure international peace and security. The Security Council is the only body outside the ICC that has the official power to block an ICC investigation or prosecution for a period of time.

One of the most controversial consequences of the above-described jurisdictional scheme is the reality that nationals of non-states parties may—and have been—targeted by the ICC. As noted, the Security Council can—and has in the cases of non-states parties Sudan and Libya—refer situations that concern high-ranking officials of non-states parties as investigative targets. And a non-party’s national may find himself in the dock at the ICC where that national commits a qualifying crime on the territory of a state party or a consenting state. This is a cause for grave concern among those nations that have not chosen to join the ICC.

These jurisdictional compromises, as well as other provisions of the Rome Statute, were designed to give the court independence—although, as we shall see, the ICC’s lack of enforcement powers may make it vulnerable to politics in fact if not in theory. Under the Rome Statute, the ICC is not beholden to the UN or to any particular political constituency, and its states parties are numerous and diverse enough to, in all likelihood, prevent the ICC from being co-opted by any particular political, regional, or ideological faction. This independence, in turn, means that a new, non-sovereign sheriff has emerged on the international stage and that states, NGOs, and other international institutions and organizations will need to figure out how to alter their policies and strategies to take account of this new force. The actors who previously decided whether justice would follow armed conflict or atrocity—the UN, states, and to some extent civil society—have been augmented by an unaligned and supposedly apolitical new friend of accountability. It is difficult to forecast the long-term consequences of this disruption of the traditional political equilibrium, but given that the ICC’s primary mission is to end impunity for international crimes, it is likely to be more difficult for political actors to trade “justice for peace” by, for example, offering international criminals amnesty or safe haven in exchange for an agreement to relinquish power or to cease hostilities.

In terms of the ICC’s structure, its Assembly of States Parties (ASP) is responsible for a wide range of administrative matters, including providing the officers of the court with general guidelines, adopting the budget, increasing the numbers of judges, and similar matters. The ASP is also the forum for adoption of amendments to the ICC Statute. The ASP drafted and adopted the ICC’s Elements of Crimes and the Rules of Procedure and Evidence. Each state party has one representative to the ASP, and signatories of the Rome Treaty that have not yet ratified it can send observers. The ASP also elects, and can remove, the ICC judges and prosecutor.

The ICC itself is composed of four “organs”: The Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry. The Presidency is responsible for the overall administration of the ICC, with the exception of the Office of the Prosecutor. The Presidency is composed of three judges of the court, elected to the Presidency by their fellow judges. As of this writing, the President of the Court is Judge Sang-Hyun Song (Republic of Korea).

The Judicial Divisions consist of 18 judges split into three “divisions”: the Pre-Trial Division, the Trial Division, and the Appeals Division. The judges who serve in these divisions are elected by a two-thirds majority on secret ballot of the ASP, and the
judges must be nationals of a state party.\textsuperscript{5} It has been argued that the requirement that judges be elected by two-thirds of the states parties in the ASP “should ensure that they will be, and be perceived as being, impartial and reflective of the judicial community as it exists in most nations.”\textsuperscript{6}

The Office of the Prosecutor (OTP) is headed by the prosecutor, who is assisted by one or more deputy prosecutors, all of whom must be of different nationalities. The prosecutor and deputy prosecutors are elected by secret ballot of an absolute majority of the Assembly of States Parties. The maximum term of the prosecutor and the deputy prosecutors is nine years, and they may not be reelected. The current prosecutor, Fatou Bensouda (The Gambia), was elected by the ASP and took office in June 2012, replacing the court’s first prosecutor, Luis Moreno-Ocampo (Argentina), at the conclusion of his term. It is worth underscoring the OTP’s mission, as defined by the ICC Statute: The OTP “shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.”\textsuperscript{7} As important, the prosecutor is required to “establish the truth” and to investigate “incriminating and exonerating circumstances equally.”\textsuperscript{8}

The Registry is responsible for the non-judicial aspects of the administration and servicing of the ICC. The Registrar, who exercises his functions under the authority of the President of the Court, is elected by the judges for a term of five years; Herman von Hebel (the Netherlands) currently holds the post. The ICC also includes a number of semi-autonomous offices such as the Office of Public Counsel for Victims. These offices fall under the Registry for administrative purposes but otherwise function as wholly independent offices. The ASP has also established a trust fund for the benefit of victims of crimes within the jurisdiction of the ICC and the families of these victims.

Some have cited the ICC Statute’s failure to create an independent defense “organ” analogous to the prosecutor’s office as a deficiency in the statute.\textsuperscript{9} A formal, truly independent institutional advocate for the defense is assertedly needed “for structural balance.” While the prosecutor “may propose changes in the Rules of Procedure and Evidence, and has a voice when others suggest changes,” and has a seat at the table in the budgetary process, there is no formal role in these areas for the defense built into the ICC Statute.\textsuperscript{10} In response to concerns such as these, the regulations of the court provided for the establishment of a permanent Office of Public Counsel for the Defence (OPCD), touted as “a significant innovation in the architecture of international criminal justice.”\textsuperscript{11} The credo of the OPCD is “to represent and protect the rights of the Defence in order to reinforce equality of arms and to enable a fair trial.”\textsuperscript{12} The OPCD is situated in the Registry, which will administer it; however, it “otherwise shall function as a wholly independent office.”\textsuperscript{13}

\textsuperscript{5} See ICC art. 36(4)(b), (6).
\textsuperscript{7} ICC art. 42(1).
\textsuperscript{8} Id. art. 54(1).
\textsuperscript{10} Id. at 328.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
OPCD became operational with the appointment in January 2007 of its principal counsel, Xavier-Jean Keïta (Senegal).

The ICC has received many thousands of complaints about alleged international crimes in at least 139 countries. Eight situations that were referred to the ICC, all of which are in Africa, have progressed to full investigations: the Democratic Republic of Congo (DRC); Uganda; the Central African Republic (CAR); Darfur, Sudan; the Republic of Kenya; the Libyan Arab Jamahiriya (Libya); the Republic of Côte d’Ivoire, and Mali. Of the eight

- Two resulted from referrals by the UN Security Council (Darfur, Sudan and Libya).14
- Four were situations referred to the ICC by states parties alleging international crimes committed on their own territories—so-called self-referrals. These situations include Uganda, the DRC, CAR, and Mali.15 Note, however, that the OTP has a policy of inviting states to self-refer where it has conducted a \textit{proprio motu} examination and has determined that there is a reasonable basis to proceed; the volitional quality of these self-referrals ought to be considered in that context.
- Two were nominally initiated by the prosecutor (Kenya and Côte d’Ivoire). The prosecutor used his \textit{proprio motu} powers to initiate a preliminary examination into the post-election violence in Kenya, and the court approved a full investigation under Article 15. Côte d’Ivoire was, at the time, a non-state party and so could not self-refer. Nevertheless it let the ICC know that it wished the ICC to assume jurisdiction of crimes committed there since 2002, and the prosecutor’s commencement of a case \textit{proprio motu} was approved by the ICC. Côte d’Ivoire later ratified the Rome Statute. This matter, then, in reality has the quality of a self-referral rather than a \textit{proprio motu} prosecution.

A number of referred situations have been either declined (Chad, Iraq, the Palestinian Authority, and Venezuela) or are subject to ongoing analysis in the OTP (including Afghanistan, Colombia, Georgia, Guinea, Honduras, Korea, and Nigeria). A number of the cases that have been subject to lengthy ongoing analysis—such as Colombia and Georgia—are situations in which domestic authorities are trying to exercise their complementarity option and the OTP is monitoring the local cases to ensure that they constitute “genuine” attempts to bring those most responsible to justice.

Because the investigations and cases are proceeding apace, any summary we attempt will be quickly outdated. Accordingly, we encourage readers to access the ICC’s Web site for the status of outstanding matters to date,16 but we provide the following snapshot to give readers a sense of the ICC’s docket. As of this writing, the ICC, at the OTP’s request, has publicly issued arrest warrants or summons to appear to 36 individuals:

- One, Thomas Lubanga Dyilo (Lubanga), from the DRC, was convicted after the ICC’s first trial (January 2009-August 2011) of conscripting, enlisting, and using child soldiers. He was sentenced to 14 years in prison and his appeal is under

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consideration. Another defendant, Germain Katanga (DRC) was convicted in March 2014 as an accessory to the crime against humanity of murder and of four war crimes; he awaits sentencing.

- Another individual, Mathieu Ngudjolo Chui (Ngudjolo) from the DRC, was, after a two and one-half year trial, acquitted and released; the prosecution has appealed this judgment. Upon his release, Mr. Ngudjolo applied for asylum in the Netherlands, where he remains pending disposition of this application.
- Three more defendants, Jean-Pierre Bemba Gombo (Bemba) from the CAR, Joshua Arap Sang (Sang) (Kenya), and Kenya’s sitting Deputy President William Samoei Ruto (Ruto) are currently on trial or awaiting judgment.
- Five persons, including Bemba, are charged with obstructing justice in the course of Bemba’s trial. These warrants were issued pursuant to the CAR situation and included Bemba’s lead defense counsel, Aimé Kilolo Musamba (Kilolo), Bemba’s defense team case manager, Jean-Jacques Mangenda Kabongo (Mangenda), Fidèle Babala Wandu (Babala), and Narcisse Arido. They are charged with knowingly presenting false or forged evidence to the ICC and corruptly influencing a witness to provide false testimony. Another arrest warrant was issued for obstruction — that is, attempting to corruptly influence the testimony of three ICC witnesses — in the Kenya situation for Walter Osapiri Barasa (Barasa).
- Two persons are presently scheduled to be tried in 2014: Abdallah Banda Abakaer Nourain (Banda) (Darfur), and Kenya’s current president, Uhuru Muigai Kenyatta (Kenyatta).
- Four defendants — Callixte Mbarushimana (DRC), Bahir Idriss Abu Garda (Abu Garda) (Sudan), Henry Kosgey, and Mohammed Hussein Ali (Kenya) — were arrested but the ICC Pre-Trial Chamber refused to confirm the charges brought by the prosecution, meaning that these cases cannot proceed to trial. In one case, that of Laurent Gbagbo (Côte d’Ivoire), the Pre-Trial Chamber held a confirmation hearing but adjourned the hearing and requested the prosecutor to consider providing further evidence or conducting further investigation into the charges.
- Bosco Ntaganda (DRC) surrendered himself to the custody of the court is awaiting a confirmation of charges hearing. Also awaiting confirmation on the obstruction charges are Bemba, Kilolo, and Babala (CAR).
- Ten persons named in ICC warrants or summons are still at large: Sylvestre Mudacumura (DRC); Joseph Kony, Okot Odhiambo, Dominic Ongwen (Uganda); Ahmed Harun, Ali Kushayb, Omar Al Bashir, and Abdel Raheem Muhammad Hussein (Sudan); Charles Blé Goudé (Côte d’Ivoire); and Barasa (Kenya). (Otti (Uganda) is also a fugitive but is believed dead.)
- Two persons who are subjects of ICC arrest warrants have been arrested and are being held by domestic authorities, and have not been turned over to the ICC: Saif al-Islam Gaddafi (Libya) and Simone Gbagbo (Côte d’Ivoire). Two more persons have been arrested by states parties and will shortly be turned over to the Court: Mangenda and Narcisse (CAR).
- Chambers ruled inadmissible one case in which an arrest warrant had been issued, involving Abdullah Al-Senussi (Libya), meaning that the case is left to prosecution by Libyan domestic authorities.
- Two cases in which arrest warrants had been issued, involving Raska Lukwiuya (Uganda) and Muammar Gaddafi (Libya), were terminated after the suspects died. After confirmation, the case against Saleh Mohammed Jerbo Janus (Sudan) was terminated due to his death. Vincent Otti (Uganda) has been reported killed, but his case has yet to be dismissed.
• The OTP withdrew charges against Francis Kirimi Muthaura (Kenya), after his arrest and a confirmation of charges, because the available evidence no longer supported the charges beyond a reasonable doubt.\footnote{17}

This survey illustrates that the ICC is fully engaged in its mission. The question now is whether it will fulfill the hopes of its champions: bringing to justice those persons most responsible for the worst crimes known to humankind when individual states with jurisdiction over these offenses are unable or unwilling to bring such persons to the dock. Will the ICC, in such circumstances, prove to be an efficient and effective way to guarantee criminal accountability and thus prevent future crimes of aggression, war crimes, crimes against humanity, and genocide?

Few nations voted against the ICC’s formation: China, Iraq, Israel, Libya, Qatar, the United States, and Yemen. And the ICC Statute has attracted an impressive number of states parties—122 at present—in a short period of time. Many commentators expected that only the “angelic States—the Scandinavians, Canada, the Netherlands, and so on—would join the Court”\footnote{18} because in doing so they subject themselves to ICC jurisdiction.\footnote{18} However, over time, an “astonishing thing happened. The very States expected to steer clear of the Court because of their obvious vulnerability to prosecution started to produce instruments of ratification at the United Nations headquarters.”\footnote{19} Why would the heads of states in countries experiencing internal armed conflict wish to open themselves up to potential criminal sanction by an international organization they cannot control? Some view this as a pre-commitment strategy, whereby states intentionally use the ICC “to tie their own hands as they make tentative steps toward conflict resolution.”\footnote{20} These states may ratify the Rome Statute because “they view the Court as a promising and realistic mechanism capable of addressing civil conflict, human rights abuses and war.”\footnote{21} Others tell a more cynical story: that some states are joining so they can make self-interested “self-referrals”—that is, ask the ICC to take jurisdiction over rebel groups that threaten their government—and that they would prefer the ICC expend the resources and political capital to deal with. Those states that do so, however, may wish to take a cautionary note from Côte d’Ivoire, which declared itself amenable to ICC jurisdiction under the presidency of Laurent Gbagbo. Eight years later, Mr. Gbagbo finds himself under arrest by the ICC for international crimes, fruitlessly arguing that Côte d’Ivoire’s ad hoc consent to ICC jurisdiction did not extend to his alleged crimes.

One must also acknowledge that many of the world’s most populous and powerful countries either have not signed the ICC Statute (for example, China, India, Indonesia, Pakistan, and Turkey), have “unsigned” it after initially signing (Israel and the United States), or have signed but not ratified it (for example, Russia). Indeed, only 8 of the 20 most populous nations in the world are states parties to the ICC, and none of the top 4 countries in terms of population—together accounting for almost half of

\footnote{17} Prosecutor Bensouda noted other reasons for the withdrawal of charges: “the fact that several people who may have provided important evidence regarding Mr. Muthaura’s actions have died, while others are too afraid to testify for the Prosecution”; “the disappointing fact that the Government of Kenya failed to provide my Office with important evidence, and failed to facilitate our access to critical witnesses”; and the decision to drop a key witness after he recanted a crucial part of his evidence and admitted to taking bribes. Statement by ICC Prosecutor on the Notice to Withdraw Charges Against Mr. Muthaura (Mar. 3, 2013).


\footnote{19} Id.

\footnote{20} Beth Simmons & Allison Danner, Credible Commitments and the International Criminal Court 5 (July 30, 2009).

\footnote{21} Editorial, supra note 18, at 418.
the world’s population—have joined. This situation reflects, to some extent, the fact that in international practice, states can be cautious about making important, potentially costly, and permanent commitments of this type. It is often the case that new institutions gather support over years, not months. Some non-states parties have claimed a need for time to consider the treaty or to reconcile their domestic law and institutions to the ICC Statute. Certainly, the fact that a given state has not signed or ratified the ICC Statute does not necessarily imply hostility toward the ICC, nor does it signal a lack of enthusiasm about the goals of the institution.

Yet this circumstance creates both symbolic and practical problems. First, the fundamental rationale of the court is that there is a global consensus that the crimes within the ICC’s jurisdiction claim the condemnation of all of “humanity” and as such it is appropriate that they be the subject of international prosecutions in the event that states with jurisdiction over them fail to enforce international standards. Yet, as the Indian Delegation noted when the ICC Statute was adopted, “[w]e are reminded again and again that the ICC is being set up to try individuals who, on the grossest scale, violate the rights of individuals. It will act, in the name of humanity, to protect the interests of humanity. . . . And we are now about to adopt a Statute to which the Governments who represent [half] of humanity would not be a party.”

Second, the ICC’s ultimate effectiveness will hinge in part on the degree to which it will be able to entice non-states parties to join the court or—perhaps more crucially at this point—at least to cooperate with it. As Judge Kaul has explained:

As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely cooperation from states parties. As foreseen and planned by its founders, the Court is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions.

As we shall see, many states parties have declined to fulfill their responsibility to cooperate in the apprehension of President Al Bashir of Sudan; non-states parties are not even obliged to do so. In cases where a Security Council resolution has not referred the case to the court, the ICC cannot claim a right to the cooperation of non-states parties in securing evidence, apprehending offenders, and funding the ICC’s operations. Even where the Security Council has made a referral, it does not have to require all states parties to the UN Charter to cooperate in apprehending those eventually charged; such was the case in the Sudan and Libya referral resolutions. The Security Council’s exhortation to all states to arrest Al Bashir has not eventuated in his apprehension, and that body has declined thus far to take more decisive action. Where non-states parties are truly concerned about possible abusive prosecutions and thus are reluctant to aid the fledgling institution, the court may be further stymied in its efforts to secure justice for the victims of horrific crimes.

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24. Kaul, supra note 3, at 578. Prosecutor Luis Moreno-Ocampo expressed it thus: “The issues that I face as an international prosecutor are different than those of a national prosecutor. A prosecutor in the United States does not have to convince the chief of police to follow his instructions. He has a police force at his disposal. I have none of this. In effect, I am a stateless prosecutor.” Luis Moreno-Ocampo, Integrating the Work of the ICC into Local Justice Initiatives, 21 Am. U. Intl L. Rev. 497, 502 (2006).
Although critical to its ongoing success, inducing additional states to join, or cooperate with, the ICC regime may be challenging. A number of the holdouts object to important provisions of the Rome Statute that they claim render the ICC’s functioning contrary to international law and subject to unchecked abuses of its broad powers for political purposes. Two institutional features that come in for the lion’s share of criticism are (1) the prosecutor’s power to initiate *proprio motu* examinations of alleged crimes within the jurisdiction of the ICC without state party or UN Security Council referrals, and (2) the jurisdiction that the ICC Statute gives the court over the nationals of non-states parties in certain circumstances.

The United States has been one such holdout. It is worth examining its position because it has been one of the most vigorous advocates for international criminal accountability, having spearheaded the Nuremberg and Tokyo Tribunals and strongly supported the creation and functioning of the ICTY and ICTR. The United States’ position has shifted from a deep antagonism to the very idea of the court, to a willingness as a Security Council member to allow the Darfur referral to go forward and to actively support the referral of the Libyan situation to the ICC. That said, many believe that the United States, at present, is unlikely to join the ICC for a variety of reasons. The first is the traditional—and bipartisan—reluctance of the United States to embrace permanent supranational courts and institutions. Further, many U.S. objections to the treaty are fundamental. The principal objections continue to center on concerns about limitations the ICC Statute imposes on national sovereignty (because the threat of prosecution may preclude action that national security imperatives might otherwise demand); a fear of politically motivated prosecutions (by a prosecutor with an anti-U.S. or anti-Western bias); doubt that a criminal proceeding in the ICC would provide the same degree of due process and personal protection afforded in U.S. courts;


26. For example, on August 2, 2002, President George W. Bush signed into law the “American Servicemember’s Protection Act” (ASPA), which includes (1) a prohibition on U.S. cooperation with (including extradition to) the ICC and a bar on provision of support to the ICC; (2) a restriction on U.S. participation in UN peacekeeping operations absent an exemption of U.S. personnel from ICC jurisdiction; (3) the prohibition of direct or indirect transfer of classified military national security information (including law enforcement intelligence) to the ICC; and (4) preauthorized executive authority to free members of the armed forces of the United States and certain other persons detained or imprisoned by or on behalf of the ICC (the so-called Hague Invasion Clause). See 22 U.S.C. §§7423-7427. Originally, the ASPA contained a qualified prohibition of U.S. military assistance to states parties to the ICC who did not conclude agreements shielding U.S. actors on their territories from ICC jurisdiction (so-called Article 98 Agreements); subsequent legislation threatened nonmilitary aid cutoffs as well. The military aid cutoff was deemed counterproductive and was repealed. The ASPA does give the president the power to waive its operative provisions. See, e.g., id. §7422. And it states that nothing in its provisions would prohibit the United States from “rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.” Id. §7433.

27. On December 31, 2000, President Clinton signed the Rome Statute on behalf of the United States. He stated, however, that given U.S. concerns about “significant flaws” in the treaty: “I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.” Statement by the President, The White House, Office of the Press Secretary, Signature of the International Criminal Court Treaty (Dec. 31, 2000). The Clinton administration reasoned that, as a signatory of the treaty, the United States could attend the meetings of the Assembly of States Parties and attempt to continue to influence the structure and conduct of the ICC. However, Clinton’s successor, President George W. Bush, “unsigned” the treaty, informing the UN Secretary-General on May 6, 2002, that “the United States does not intend to become a party to the treaty” and, accordingly, that “the United States has no legal obligations arising from its signature.” Press Statement, U.S. Dept. of State, International Criminal Court: Letter to UN Secretary-General Kofi Annan (May 6, 2002). In evaluating objections to the treaty, readers are encouraged to revisit this strategic choice, evaluating for themselves the (asserted) dangers the ICC poses to U.S. national interests and the likely efficacy of continuing engagement versus outright opposition in protecting those interests.
and the possibility that members of the U.S. military engaged in international operations, notably peacekeeping and humanitarian missions authorized under Chapter VII of the UN Charter, might be prosecuted before the ICC even though the United States is not a party to the Rome Statute. Finally, to the consternation of many U.S. senators, the ICC Statute does not permit states parties to make reservations to it (with one notable exception \(^28\)); thus, the treaty is largely a take-it-or-leave-it proposition.

Some might argue that the United States’ non-party status is an unfortunate circumstance for the ICC because it must do without the United States’ power, its financial and law enforcement resources, and the leadership role the United States has often assumed in helping to craft and enforce international criminal law norms. Others might argue that were the United States to join the court, and become its major donor, it could impair the court’s credibility as a truly independent organ, unaccountable to any other international body or any one superpower.

It remains to be seen whether the court can, through able, politic, and important prosecutions and judicious declinations, win the trust, confidence, and ultimately the signatures or accessions of non-states parties — particularly those wealthy and populous countries that could do much to support and promote the ICC’s mission. Much would seem to depend upon whether the fears of those nations who believe that the ICC Statute is subject to grievous abuse are realized. Accordingly, in the following materials, we will explore how the ICC is designed and has functioned over its brief existence. While the entire ICC Statute is a worthy read (and is posted on our Web site), be sure to read carefully Articles 1 through 24 and 53 before attempting to tackle materials that follow.

A. A PRIMER ON JURISDICTION, ADMISSIBILITY, AND UN SECURITY COUNCIL ROLE

For the ICC to investigate or exercise jurisdiction over a case, a number of requisites must be met. As a preliminary matter, one must understand the terminology used to describe these requisites. The ICC Statute distinguishes between two concepts: jurisdiction and admissibility. In this section we will provide the basics regarding these critical concepts and discuss as well the potentially important role that the UN Security Council may play in ICC proceedings.

1. Jurisdiction

“Jurisdiction” refers to the legal limits of the ICC’s reach and is expressed in terms of jurisdiction over time (jurisdiction \(ratione\) temporis), subject matter (jurisdiction \(ratione\) materiae), and geographic criteria (jurisdiction \(ratione\) territorii). The ICC Statute distinguishes between two types of jurisdiction: (1) primary or inherent jurisdiction; and (2) complementary jurisdiction. The ICC’s primary or inherent jurisdiction covers all serious international crimes committed on or after July 1, 2002, and on the territory of states parties to the Statute. The ICC’s complementary jurisdiction covers war crimes, crimes against humanity, and crimes of genocide committed in the territory of non-party states that have accepted the ICC Statute, or states that have been referred to the Court by the Security Council or that have ratified the Rome Statute.

\(^28\) The Rome Statute provides for one possible reservation in ICC Article 124, which states that “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 war crimes described in ICC Article 8 “when a crime is alleged to have been committed by its nationals or on its territory.” Note that this war crime jurisdictional “opt-out” extends for seven years after the ICC Statute enters into force for that joining state party. Only Colombia and France entered Article 124 reservations to their ratifications. France subsequently withdrew its opt-out and Colombia’s expired on November 1, 2009. ICC Article 123(1) required that the UN convene an ICC Review Conference seven years after the entry into force of the statute. The only item required to be on the agenda was Article 124’s war crimes opt-out. The UN convened its Review Conference in Kampala, Uganda, on May 31-June 11, 2010. There, the participants declined to delete ICC Article 124’s opt out.
This chapter sets out some basics of international law—the minimum background necessary to understand the materials that follow. We begin by exploring the standard "classical" ideas underlying international law and how they have evolved since World War II (Section A). Then we introduce the basic sources of international law: treaties, custom, general principles, judicial decisions and writings of jurists, and so-called peremptory norms (Section B). After a brief discussion of the perennial question of whether international law is "real" law (Section C), we conclude by exploring the relationship between international law and the law of individual countries and, in particular, the United States (Section D).

Obviously, this chapter cannot substitute for a course in international law, and some of the most crucial topics in international law do not appear here. For one thing, we focus only on public international law—international law involving relations among states and international organizations (such as tribunals). We thus omit the elaborate body of doctrines and procedures that govern private law litigation concerning transnational legal issues. For another, we omit discussion of international economic law, including issues of trade law and international sanctions, which can sometimes have criminal aspects. Likewise, we omit crucial subjects like the law of the sea, international environmental law, and the law of international institutions such as the United Nations or the World Trade Organization. This chapter covers only some topics necessary to study international criminal law, which itself forms a relatively small part of international law as a whole.

A point about terminology: In international law—we sometimes call it IL for short—the word state always means an independent, sovereign country or nation such as Canada, China, or Côte d'Ivoire. When we talk about the 50 U.S. states and the context might be unclear, we say U.S. states. International lawyers call state law that applies within a state national or municipal or domestic law. We generally use the phrase domestic law. International agreements and judicial opinions usually capitalize State; we generally do not do so except in quotations.

A. THE CLASSICAL PICTURE OF INTERNATIONAL LAW

In its classical formulation, international law governs the relations among sovereign states. As a kind of "public" law, it addresses relationships between states and
individuals only incidentally or secondarily. Some international law scholars empha-
size this difference by distinguishing between “horizontal” relations of one state to
another and “vertical” relations between a state and its citizens or subjects. In the
most restrictive view of IL, only horizontal relations count. This classical picture
assumes the following:

1. International law governs the relations among states, not between states and their
citizens or subjects. IL is to the “society of states” what domestic law is to the
persons within a state. In other words, states, not people, business corporations,
or international organizations, are the “citizens” of international legal society.
2. Each state has exclusive sovereign authority over its own territory and the persons
within that territory.
3. No state has authority over another sovereign state. All states are equal, and no
state has authority within the territory of another sovereign state.
4. There is no world government.
5. Therefore, rules of international law exist only when sovereign states consent to
them. They can consent explicitly, by making treaties (also known as conventions
or international agreements—for our purposes, the terms are interchangeable). Or
states can consent implicitly, by coordinating their behavior through custom. As
we will see, treaty law and customary international law are the two most important
forms of IL.

Because rules of IL require state consent, the classical picture of IL is
sometimes called the consensual model of IL.
6. Individuals have no rights or obligations under IL unless states grant the rights or
create the obligations, either through treaty or custom. International law in its
most restrictive form does not “recognize” individuals, only states; and individ-
uals often lack standing to raise claims before international bodies.

Reviewing these six principles, it becomes evident that the idea of international
criminal law, which deals entirely with individuals and often crosses state boundaries,
fits badly with the classical picture of IL. And indeed, prior to World War II, there was
little international law, either conventional or customary, on the subject. As we will
see, the rise of international human rights and international criminal law after World
War II, as well as the creation of the United Nations (UN), added new principles to
the corpus of international law to such an extent that the classical picture no longer
accurately portrays IL today. This is especially true of human rights law and
international economic law: In both these subjects, many argue that the six classical
assumptions no longer accurately describe the law.

1. Historical Overview

The term international law is more or less interchangeable with the older term law of
nations. The newer term was coined in 1780 by the English jurist and philosopher
Jeremy Bentham, who thought that it is less likely than law of nations to be confused
with domestic law. Law of nations translates the Latin phrase jus gentium, a Roman law
concept that referred to the body of law common to all the peoples in the Roman
Empire.

The classical picture of international law is the product of a specific time and place:
Europe in the age of the nation-state, which began roughly in the seventeenth cen-
tury. The European origin of international law turns out to be crucial if we wish to
understand political debates about IL today. Among other things, it helps explain the resentment that former European colonies occasionally express toward international criminal enforcement. We offer the following view to stimulate discussion and analysis.¹

a. Westphalian Sovereignty

The classical picture of a world with sovereign states as the primary legal actors began to emerge at the end of the Thirty Years’ War (1618-1648), the bloodiest and most catastrophic war in European history before the twentieth century. European society before the Thirty Years’ War was not organized into national states as we know them now. Rather, Europe was a political hodgepodge of overlapping dukedoms and principalities, organized loosely into larger political units with crisscrossing loyalties and uncertain jurisdictional boundaries. The war began as a civil war between Protestants and Catholics in Germany, but eventually it embroiled most European powers in a complex struggle for power, territory, and influence. It ended with the Peace of Westphalia, an elaborate treaty that settled the remaining territorial claims. Crucially, the parties to the treaty realized that their only hope for peace lay in an agreement that rulers would not interfere with each other’s government of their own territory.

According to Article 64, all the 300 small principalities that made up the Holy Roman Empire “are so establish’d and confirm’d in their antient Rights . . . that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.”² Article 65 permitted the principalities to “make Alliances with Strangers for their Preservation and Safety,” notwithstanding their allegiance to the emperor. Thus was born the modern legal doctrine of sovereignty.

These clauses are, symbolically at least, the origin of the doctrine of sovereignty spelled out in the second and third principles of the classical doctrine of IL. Each state is sovereign over its own territory, no state can exercise sovereignty within another state’s territory, and states have the right to form their own foreign policies, including decisions about which treaties to enter into with other states. For this reason, the classical picture is often called Westphalian sovereignty. From the point of view of classical international law, how sovereignty gets parceled up within a state is irrelevant from the point of view of other states: The basic legal fiction is that every state confronts every other state as a single, undivided sovereign entity. The inner workings of each state remain a “black box” to every other state.

The following is often described as the leading case on the nature of territorial sovereignty under the Westphalian conception.

² The Treaty of Münster (a city in Westphalia) may be found at the Web site of the Avalon Project of Yale Law School, http://avalon.law.yale.edu/17th_century/westphal.asp.
whom prefer to settle most of their grievances through negotiation rather than litigation. In its 80-year history, the ICJ and its predecessor have rendered fewer than 200 decisions, most of them concerning boundary disputes.

However, in recent years the ICJ’s docket has been filled with high-profile cases, including some important international criminal law cases concerning jurisdiction, allegations of genocide filed by Bosnia against Serbia and by the Democratic Republic of Congo against Rwanda, and some actions by Serbia against other countries growing out of the Balkan wars of the 1990s.11

It is difficult to judge the full effect of the United Nations on the classical Westphalian picture of IL. The UN was founded by states that jealously guarded their own sovereignty, as states continue to do today. Among the most important provisions of the Charter are Article 2(1), which enshrines “the principle of the sovereign equality of all its Members”; Article 2(4), which forbids states from using force or the threat of force against the territorial integrity or political independence of any state; and Article 51, which preserves each state’s inherent right of self-defense.

At the same time, however, the veto power of the Security Council’s permanent members ensures that in a world of “sovereign equality,” some states are more equal than others. More important, it seems clear that the UN has profoundly altered the structure of international decision making and made unilateralism less legitimate. In this way, it indirectly limits states’ sovereign powers. Finally, as we shall see, the UN has become an important source of customary international law.

2. The Modified Classical Picture of International Law

In a widely publicized 1999 speech, then-Secretary-General of the UN Kofi Annan suggested that

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty — and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter — has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny.12

Annan added, however, that these changes “do not lend themselves to easy interpretations or simple conclusions.”

Where have these changes in the international legal order left us? The easiest way to see the changes is by reviewing the elements of the classical picture, noting the exceptions along the way.

1. Public international law still governs the relations among states but increasingly addresses questions about how states deal with individuals — in particular their own citizens, in such diverse fields as including environmental law, laws of war and humanitarian law, human rights law, and international criminal law, all of which do protect rights and impose obligations on persons.


2. Each state has exclusive sovereign authority over its own territory and citizens — except that states have no authority to launch aggressive wars, nor to violate basic human rights, nor to sponsor actions that constitute international crimes (among other exceptions).

3. No state has authority over another sovereign state — except that the UN Security Council can authorize action on the territory of states against threats to international peace and security.

4. There is no world government — but there are a growing number of regional and worldwide organizations that sometimes assume limited governmental functions.

5. Therefore, rules of international law exist only when sovereign states consent to them — except, as we shall see, that agreements to violate basics of the international order (such as the prohibition on genocide or on aggressive war) have no legal force even if states consent to them.

6. Individuals do have rights and obligations under IL insofar as states have recognized such rights and obligations through treaties or customary international law. It is still true, however, that normally individuals lack standing to raise claims of IL before international bodies — except bodies such as the European Court of Human Rights.

We should emphasize that this modified classical picture of international law holds to a greater extent in some areas of law than in others. In international trade law, for example, states have accepted a greater role for individuals and individual participation than in international criminal law; and European Union (EU) members have likewise ceded more sovereignty to centralized EU institutions than the classical picture (even the modified classical picture) may suggest.  

B. THE SOURCES OF INTERNATIONAL LAW

We turn next to the sources of international law, in order to understand what IL consists of. The following documents are two of the most influential statements of the sources of international law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;

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I. General principles as secondary source of law. Much of international law, whether customary or constituted by agreement, reflects principles analogous to those found in the major legal systems of the world, and historically may derive from them or from a more remote common origin. General principles common to systems of national law may be resorted to as an independent source of law. That source of law may be important when there has not been practice by states sufficient to give the particular principle status as customary law and the principle has not been legislated by general international agreement. General principles are a secondary source of international law, resorted to for developing international law interstitially in special circumstances. For example, the passage of time as a defense to an international claim by a state on behalf of a national may not have had sufficient application in practice to be accepted as a rule of customary law. Nonetheless, it may be invoked as a rule of international law, at least in claims based on injury to persons, because it is a general principle common to the major legal systems of the world and is not inappropriate for international claims. Other rules that have been drawn from general principles include rules relating to the administration of justice, such as the rule that no one may be judge in his own cause; res judicata; and rules of fair procedure generally. General principles may also provide “rules of reason” of a general character, such as acquiescence and estoppel, the principle that rights must not be abused, and the obligation to repair a wrong. International practice may sometimes convert such a principle into a rule of customary law.

NOTES AND QUESTIONS

1. Article 38 of the ICJ Statute sets out the sources of law that the ICJ will use in resolving disputes brought before it. Strictly speaking, it binds only the ICJ and does not purport to set out a universal system of international law. Nevertheless, because the ICJ settles disputes about international law among consenting UN members, its statute has had great persuasive power in the delineation of the sources of IL. The Restatement (Third) of the Foreign Relations Law of the United States, composed by the influential American Law Institute, represents a dominant, mainstream view of IL in the postwar world. Do the ICJ Statute and the Restatement identify the same sources of IL? Do they accord different weights to different sources?

2. Both documents single out two fundamental sources of IL: treaties (agreements) and custom. Both acknowledge the role of so-called general principles—the ICJ Statute regarding them as a primary source of IL and the Restatement regarding them as a supplementary, interpretive source. The ICJ Statute also recognizes the opinions of highly qualified commentators as a supplemental source. A few comments are in order about each of these.

1. International Agreements (Treaties)

An international agreement, also known as a treaty or convention (the words treaty and convention are synonyms in IL; covenant, protocol, and pact are also synonyms for treaty), is an explicit agreement among its states’ parties. The IL rules about treaties are themselves codified in a treaty, the Vienna Convention on the Law of Treaties (VCLT), which was adopted in 1969 and entered into force in 1980. The United
States has not ratified the VCLT but generally accepts that many of its provisions represent a codification of binding, customary international law.

The two most basic principles in the VCLT are simple: First, under Article 6, “[e]very State possesses capacity to conclude treaties”; and second, under Article 26, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” This latter principle is often referred to by the Roman law maxim, 
\textit{pacta sunt servanda} (agreements must be kept).

Treaties are negotiated and signed by governmental representatives. To become binding, the states must then formally accept or ratify a treaty. (Exceptionally, treaties themselves can stipulate alternative means of acceptance.) What constitutes ratification in a given state depends on the state’s domestic law. Thus, for example, in the United States, a treaty signed by the executive does not take effect until after two-thirds of the Senate gives its advice and consent to the treaty and the president then formally ratifies it.

A treaty normally does not come into force — that is, bind the parties as a matter of IL to all the treaty’s particulars — until a certain number of states have ratified it, thus becoming parties to it. The number of states that must join prior to the treaty “entering into force” is generally spelled out in the treaty itself. Students may encounter another word — 
\textit{accession} — in connection with treaty membership. Accession, which has the same effect as ratification, simply means that a state has agreed to be bound by the treaty after the treaty has come into force. According to Article 18 of the VCLT, signing a treaty obligates states not to take actions that would “defeat the object and purpose” of the treaty, even if the treaty has not yet been accepted or entered into force for that state.

States need not accept treaties in an all-or-nothing manner (unless the treaty provides otherwise). Thus, states are permitted to enter “reservations” to portions of a treaty, provided that the reservation is not “incompatible with the object and purpose” of the treaty and that reservations are not precluded by the terms of the treaty. They may also accompany their acceptance of a treaty with “understandings” about how they interpret the meaning of phrases and concepts in the treaty, or “declarations” of actions the state will or will not take in complying with the treaty. In the United States, these three types of qualifications to a treaty are often referred to collectively as 
\textit{RUDs} (“reservations,” “understandings,” and “declarations”).

\section{Customary International Law}

As the ICJ Statute and the Restatement indicate, customary international law (CIL) consists of widespread state practice (sometimes designated by the Latin word \textit{usus}) undertaken out of a sense of legal obligation (usually referred to as \textit{opinio juris}). Both elements are required. A sense of legal obligation with no state practice could hardly count as customary law because the custom is missing. Conversely, states might engage in a customary practice for reasons of political expediency rather than a belief that the practice is legally required. In that case, the practice is not CIL. It is important to bear in mind this difference between nonbinding custom and customary international law.

One particular category of political expediency can be especially difficult to distinguish from CIL. This consists of rules of \textit{comity}. Comity generally means something akin to courtesy or mutual respect — a willingness to accommodate other states out of goodwill (and, usually, the hope that the other state will reciprocate), rather than legal obligation. To illustrate with a trivial example, states customarily treat visiting
presidents and prime ministers with courtesy and decorum. The host state does not put them up in cheesy strip-mall motels or serve them instant coffee in Styrofoam cups. But the pomp and circumstance of state visits is a matter of comity, not a rule of international law. There is no legal obligation to roll out the red carpet and use the fancy china. By contrast, that visiting heads of state or heads of government will typically enjoy immunity from suit in the courts of the host country is a matter of CIL, a binding rule widely recognized and accepted by the international community. (On rare occasions, U.S. courts have treated rules of comity as legally binding, but in contexts far removed from international criminal law.\textsuperscript{14})

As comment b to Restatement §102 indicates, “state practice” need not consist solely of state behavior “on the ground.” Instead, it can be evidenced by official governmental acts such as the passage of laws. Because of the difficulty of determining state practice, today many look to supplemental indicators. For example, when a duly authorized foreign minister says “we accept \textit{X} or don’t accept \textit{Y},” that can be authoritative. When the UN General Assembly unanimously adopts a resolution specifically endorsing a statement of CIL, that too can provide some authoritative evidence.

The fact that state practice can be evidenced by such acts of national governments as passing laws or ratifying treaties is very important. For example, it is universally agreed that CIL prohibits states from engaging in torture. But a glance through the annual reports of Amnesty International or U.S. State Department country reports on human rights shows that a great many states persist in the practice of torture. How, then, could the rule of CIL exist, if state practice consists of torture rather than its absence? The answer is that states can violate legal obligations that they themselves have helped create, engaging in torture even though they officially condemn it. Virtually all states have enacted laws criminalizing torture or have ratified the UN Convention Against Torture, or both. In international law, their domestic laws and treaty ratifications are state practice that contributes to the formation of CIL. Hence, it is no contradiction to announce that a CIL rule against torture exists in a world where torture continues to be practiced or condoned by many states. It means only that those states (and their officials) violate the law.

The fact that state practice can include state acts that are symbolic rather than tangible — the enactment of laws or the ratification of a treaty — does have one curious implication. It means that sometimes the identical state behavior — for example, the enactment of a criminal law against torture in order to comply with treaty obligations — gets “double counted” as both state practice and \textit{opinio juris}. There is nothing untoward about this: If a state criminalizes torture out of respect for what it takes to be international legal obligation, then enacting the anti-torture statute is at once state practice and evidence of \textit{opinio juris}.

Official state pronouncements and declarations, General Assembly resolutions, and the like are sometimes referred to as “soft law.” Unlike treaty ratifications, they do not themselves impose legal obligations, and so they are not “hard law.” However, they can contribute to the formation of CIL by providing evidence of states’ \textit{opinio juris}, and jurists have sometimes claimed that over time and repetition, soft law pronouncements have hardened into CIL.

Other commentators object to the proposition that nonbinding soft law can transmute into binding hard law through widespread repetition — or that there is such a
thing as soft or nonbinding law. As one author warns, “the accumulation of nonlaw or prelaw is no more sufficient to create law than is thrice nothing to make something.”¹⁵ This is particularly important in the area of human rights, where, according to critics, states frequently issue pious declarations in favor of human rights while continuing to ignore those rights both in their own domestic law and in their behavior on the ground. The declarations may lead human rights-oriented jurists to announce new customary rules of human rights law that seem to be purchased through talk alone (and talk is cheap). Thus, two respected jurists criticize such rules as “a cultured pearl version of customary international law” that operates “through proclamation, exhortation, repetition, incantation, lament.”¹⁶ Two other scholars, labeling such rules “the new customary international law,” denounce them as “incoherent and illegitimate.”¹⁷ As we will see in this book, similar criticisms have been raised against expansive new rules of international criminal law.

Do you agree with the criticism? How could a defender of the “new customary international law” respond? If all states denounce human slavery and label it “criminal,” even in nonbinding “soft” government statements, isn’t that a basis for stating that human slavery violates CIL, even if the practice persists in some countries?

According to comment b to Restatement §102, “a practice can be general even if it is not universally followed.” In other words, a rule of CIL can exist even if some states do not participate in the custom — and the rule may bind those states as well. How is this consistent with the consensual model of IL, according to which states can be bound by rules only if they consent to them?

Perhaps it is not. One way that IL accommodates the tension between consensualism and the binding force of customary rules is by creating an important exception. A state that persistently objects to a rule of CIL throughout the period in which the rule is being formed will not be bound by the rule. However, if the state has not persistently objected, it may be bound by the rule whether it likes it or not. To take an important example: Over the past 60 years, the majority of states have abolished capital punishment in their domestic law or practice, and several multilateral treaties (including the Second Protocol to the ICCPR) have also abolished it among their states parties in whole or in part. However, even if an anti-death-penalty rule of CIL is emerging, it would not bind any state that has persistently objected.

How are rules of CIL determined? Unfortunately, there are few shortcuts to the painstaking process of examining treaties together with the laws, judicial decisions, official acts, and actual practice of many states, state by state, to determine that a state practice backed by opinio juris exists. International judicial decisions and scholarly treatises on CIL sometimes make for mind-numbingly tedious reading as, for paragraph after paragraph and page after page, they review the minutiae of documents from many states. Tedious or not, however, this is the most responsible way to determine CIL. Even then, controversies can emerge. For example, in 2005 the International Committee on the Red Cross (ICRC) published a handbook on the CIL governing armed conflicts, the product of a ten-year research effort by a large team. A first volume that enumerates and explains the CIL rules is 676 pages long. Two additional volumes canvas worldwide state practice and opinio juris for each of

these rules — and these volumes weigh in at 4,449 pages. Nevertheless, the U.S. State and Defense Departments issued a detailed criticism of the ICRC’s handbook, arguing that its authors and editors relied on some sources that are not legitimate state practice or opinio juris and overstate the significance of other sources. (In its turn, the ICRC defended its work against the U.S. criticisms.)

3. General Principles

As both the ICJ Statute and the Restatement indicate, general principles common to most domestic legal systems are also a source of international law. Comment l to Restatement §102 cites as examples “the rule that no one may be judge in his own cause; res judicata; and rules of fair procedure generally.” Within international criminal law, important general principles include the principle of legality and the rule against double jeopardy (referred to in international practice by the Latin phrase ne bis in idem). These rules are not the same as CIL because they originate as domestic-law rules governing states’ own legal systems, rather than as obligations of states toward each other or toward the international community as a whole.

Notice that in Article 38 of the ICJ statute, general principles are a source of law on the same footing as treaty and custom; but in Restatement §102, they are only a secondary source of law. What might account for that difference? How well do general principles fit with the consensual model of IL? Have states that adopted the ban on double jeopardy in their domestic criminal justice systems really consented to having it become a rule of international law?

As a practical matter, the determination of “general principles” may invest judges with a great deal of discretion. An ICJ judge has opined that “the true view of the duty of international tribunals [in applying ‘general principles’] is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and practices rather than as directly importing these rules and institutions.” Similarly, two judges of the International Tribunal for the Former Yugoslavia (ICTY) explained in Prosecutor v. Erdemovic:

[O]ur approach will necessarily not involve a direct comparison of the specific rules of each of the world’s legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.


4. “Judicial Decisions and Teachings of the Most Highly Qualified Publicists”

Notice that Article 38 of the ICJ Statute makes “judicial decisions and teachings of the most highly qualified publicists” subsidiary sources of law, while Restatement §102 does not include them as sources of law at all. What might account for this difference? One factor may be a difference between the United States and most European and Latin American legal systems. In the latter, academic experts play a much more prominent role in the legal system than in the United States. Their opinions and commentaries are often relied on by judges and legislators, in much the same way that U.S. judges may rely on decisions by important judges in other jurisdictions as persuasive authority. For better or for worse, academics have no such authority in the legal system of the United States. Should “the most highly qualified publicists” count as a source of law?

Among “the most highly qualified publicists,” one that deserves special mention is the International Law Commission (ILC). The ILC was established in 1947 by the UN General Assembly to prepare drafts on various subjects in international law. It consists of 34 IL experts, elected by the General Assembly to five-year terms, and it meets annually. Its drafts carry considerable authority.

5. “Peremptory Norms” (Jus Cogens)

Comment k of the Restatement excerpt discusses special norms of international law that “prevail over and invalidate international agreements and other rules of international law in conflict with them.” The terminology comes from Article 53 of the VCLT:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

A more common name for such peremptory norms is jus cogens (pronounced “yoos kogenz,” with a hard g). In theory, at least, the jus cogens norms are the most fundamental norms of international law—its (almost) immovable bedrock. Most scholars would include the following among the jus cogens norms: pacta sunt servanda (treaties are to be kept), the rule against launching aggressive war, and fundamental human rights norms such as the prohibitions on genocide and slavery.

A jus cogens norm is, in other words, a norm of international law that is so basic and important that (1) it invalidates treaties that violate it; (2) it cannot be changed the way that lesser norms of CIL are, namely through state practice and opinio juris changes; and (3) there is no “opting out” by claiming to be a persistent objector.
In theory, a norm of *jus cogens* can change if another norm of *jus cogens* displaces it, but there are no undisputed cases where that has happened. (Some commentators argue that the widespread acceptance of NATO’s attack on Serbia in the Kosovo war indicates that the *jus cogens* norm against military interventions has been displaced by permission to engage in humanitarian intervention, but this view is quite controversial.)

Not all states agree. Notably, France has never accepted the doctrine of “peremptory norms” and for that reason has never signed or joined the VCLT (although France declares that it applies the VCLT’s principles). One important French jurist — former President of the ICJ Gilbert Guillaume — has opined that France is a persistent objector to the doctrine of peremptory norms and, therefore, that French courts are not bound by the *jus cogens*. However, Guillaume’s is not the dominant opinion in France.²⁴

Strictly speaking, the only legal force of *jus cogens* norms the VCLT recognizes is that states cannot adopt treaties that violate those norms. But in practice, jurists have sometimes given *jus cogens* norms — especially fundamental human rights norms — an almost natural-law status. In the words of the International Law Commission, “[i]t is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may . . . give it the character of *jus cogens*.”²⁵ When we study the *Pinochet* case in Chapter 6, we will see that the British judges in the case frequently refer to torture as a “*jus cogens* crime.”

Lawyers and judges have sometimes drawn wide-ranging conclusions about *jus cogens* norms. They have argued, for example, that every state has a legal interest in ensuring that *jus cogens* norms are not violated. Lawyers refer to obligations that fall on all states as *erga omnes* (“toward all”) obligations, and in one often-quoted dictum, the ICJ stated that “the principles and rules concerning the basic rights of the human person” give rise to obligations *erga omnes*.²⁶ And sometimes it is said that any state can assert “universal jurisdiction” over crimes that violate *jus cogens* norms — an issue we shall study in detail in Chapter 5. Other jurists disagree that *jus cogens* norms create universal obligations or universal jurisdiction.

Finally, we should note that there is a certain air of mystery about where *jus cogens* norms come from. There is no settled list of *jus cogens* norms, and states seldom issue public proclamations about *jus cogens*. Although the Latin name might suggest that thousands of years of legal tradition underwrite *jus cogens*, this is simply not true. Current doctrines asserting that aggressive war and atrocious human rights abuses violate *jus cogens* date back only as far as the end of World War II. Indeed, the entire jurisprudence (if one can use that term) of *jus cogens* is a postwar creation.²⁷ Labeling a deed such as torture a “*jus cogens* crime” has great rhetorical force, but it is not easy to show how or when the prohibition against torture became a *jus cogens* norm. “*Jus cogens* crime” is a claim that the international community regards torture as a bedrock violation of international law — and that is something that needs to be demonstrated by citing widespread state *opinio juris* to that effect. In practice, lawyers and courts seldom undertake this demonstration. Instead, “*jus cogens* crime” simply becomes a label equivalent in meaning to “particularly grave international crime.”

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