and convicted Hissène Habré, the former president of Chad, of crimes of torture under the Convention, and the conviction and sentence were upheld on appeal in 2018.

3. PROSECUTION OF INTERNATIONAL CRIMES BEFORE *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS

A. NUREMBERG AND TOKYO INTERNATIONAL MILITARY TRIBUNALS

As noted above, individuals have long been tried and punished for commission of crimes under customary international law and treaty in national courts, usually on the basis of national legislation criminalizing the conduct and imposing penalties. However, in the mid-20th century, individuals were tried for crimes under customary international law by two international tribunals created especially for the purpose of trying German and Japanese war criminals after World War II. Although the Nuremberg and Tokyo international military tribunals (IMTs) were established by the victorious nations, the trials established important precedents for prosecuting individuals in international fora for crimes against peace, war crimes, and crimes against humanity. Chapter 15, Section 1(E) focused on the issue of crimes against the peace at Nuremberg, whereas this section focuses on prosecution of war crimes and crimes against humanity.

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945
59 Stat. 1544, 82 U.N.T.S. 279

I. Constitution of the International Military Tribunal

Article 1.

In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2.

The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all

sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

* * *

II. Jurisdiction and General Principles

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 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 purposes 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, organizations, 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.

After the receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

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.

Article 11.

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

* * *

IV. Fair Trial for Defendants

Article 16.

In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which

he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

REPORT OF JUSTICE ROBERT JACKSON TO PRESIDENT HARRY TRUMAN ON THE MILITARY TRIAL OF THE MAJOR NAZI LEADERS AT NUREMBERG

Oct. 7, 1946

MY DEAR MR. PRESIDENT:

I have the honor to report as to the duties which you delegated to me on May 2, 1945 in connection with the prosecution of major Nazi war criminals.

The International Military Tribunal sitting at Nurnberg, Germany on 30 September and 1 October, 1946 rendered judgment in the first international criminal assizes in history. It found 19 of the 22 defendants guilty on one or more of the counts of the Indictment, and acquitted 3. It sentenced 12 to death by hanging, 3 to imprisonment for life, and the four others to terms of 10 to 20 years imprisonment.

The Tribunal also declared 4 Nazi organizations to have been criminal in character. These are: The Leadership Corps of the Nazi Party; Die Schutzstaffel, known as the SS; Die Sicherheitsdienst, known as the SD; and Die Geheimstaatspolizei, known as the Gestapo, or Secret State Police. It declined to make that finding as to Die Sturmabteilungen, known as the SA; the Reichscabinet; and the General Staff and High Command. The latter was solely because the structure of the particular group was considered by the Tribunal to be too loose to constitute a coherent "group" or "organization," and was not because of any doubt of its criminality in war plotting. In its judgment the Tribunal condemned the officers who performed General Staff and High Command functions as "a ruthless military caste" and said they were "responsible in large measure for the miseries and suffering that have fallen on millions of men, women and

children. They have been a disgrace to the honorable profession of arms." This finding should dispose of any fear that we were prosecuting soldiers just because they fought for their country and lost, but the failure to hold the General Staff to be a criminal organization is regrettable.

The magnitude of the task which, with this judgment, has been brought to conclusion may be suggested statistically: The trial began on November 20, 1945 and occupied 216 days of trial time. 33 witnesses were called and examined for the prosecution. 61 witnesses and 19 defendants testified for the defense; 143 additional witnesses gave testimony by interrogatories for the defense. The proceedings were conducted and recorded in four languages—English, German, French, and Russian—and daily transcripts in the language of his choice was provided for each prosecuting staff and all counsel for defendants. The English transcript of the proceedings covers over 17,000 pages. All proceedings were sound-reported in the original language used.

In preparation for the trial over 100,000 captured German documents were screened or examined and about 10,000 were selected for intensive examination as having probable evidentiary value. Of these, about 4,000 were translated into four languages and used, in whole or in part, in the trial as exhibits. Millions of feet of captured moving picture film were examined and over 100,000 feet brought to Nurnberg. Relevant sections were prepared and introduced as exhibits. Over 25,000 captured still photographs were brought to Nurnberg, together with Hitler's personal photographer who took most of them. More than 1,800 were selected and prepared for use as exhibits. The Tribunal, in its judgment, states: "The case, therefore, against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases." * * *

As authorized by your Executive Order, it was my policy to borrow professional help from Government Departments and agencies so far as possible. The War Department was the heaviest contributor, but many loans were also made by the State, Justice, and Navy Departments and, early, by the Office of Strategic Services. * * * The United States staff directly engaged on the case at Nurnberg, including lawyers, secretaries, interpreters, translators, and clerical help numbered at its peak 654, 365 being civilians and 289 military personnel. British, Soviet and French delegations aggregated approximately the same number. Nineteen adhering nations also sent representatives, which added thirty to fifty persons to those actively interested in the case. The press and radio had a maximum of 249 accredited representatives who reported the proceedings to all parts of the world. During the trial over 60,000 visitors' permits were issued * * *. Guests included leading statesmen, jurists, and lawyers, military and naval officers, writers, and invited representative Germans.

On the United States fell the obligations of host nation at Nurnberg. The staffs of all nations, the press, and visitors were provided for by the United States Army. It was done in a ruined city and among an enemy population. Utilities, communications, transport, and housing had been destroyed. The Courthouse was untenantable until extensively repaired. The Army provided air and rail transportation, operated a motor pool for local transportation, set up local and long distance communications service for all delegations and the press, and billeted all engaged in the work. It operated messes and furnished food for all, the Courthouse cafeteria often serving as many as 1,500 lunches on Court days. The United States also provided security for prisoners, judges, and prosecution, furnished administrative services, and provided such facilities as photostat, mimeograph, and sound recording. Over 30,000 photostats, about fifty million pages of typed matter, and more than 4,000 record discs were produced. The Army also met indirect requirements such as dispensary and hospital, shipping, postal, post exchange, and other servicing. It was necessary to set up for this personnel every facility not only for working, but for living as well, for the community itself afforded nothing. The Theatre Commander and his staff, Military Government officials, area commanders and their staffs, and troops were cordially and tirelessly cooperative in meeting our heavy requirements under unusual difficulties and had the commendation, not only of the American staff, but of all others.

It is safe to say that no litigation approaching this in magnitude has ever been attempted. * * *

NOTES

1. *Jackson at Nuremberg.* Those who negotiated the IMT Charter, including Justice Robert H. Jackson of the U.S. Supreme Court, who became Chief U.S. Prosecutor, and U.S. Secretary of War Henry Stimson, had three principal objectives: to treat wars of aggression as crimes under international law; to treat atrocities against civilians as "crimes against humanity"; and to achieve these ends through a trial that would uphold the rule of law by protecting the rights of the defendants to due process. Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), paras. 90–91. By its existence and the manner in which it was conducted, the trial had to exemplify the hope that at long last the conscience of mankind might hold those individuals responsible for aggression and atrocities to account under the rule of law. As stated by Justice Jackson in his opening statement to the International Military Tribunal (IMT):

> 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 civilization 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 hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.

2 Trial of the Major War Criminals 99 (1947).

2. *The Tribunal and Its Defendants.* The IMT consisted of four judges, one representing each of France, United Kingdom, United States, and U.S.S.R. The Tribunal indicted twenty-three top Nazis, not including Adolf Hitler, Joseph Goebbels and Heinrich Himmler, who had committed suicide when Soviet troops entered Berlin. One defendant (Robert Ley) committed suicide shortly after the trial commenced. Of the remaining defendants, three were acquitted. Those convicted included, among others, Hermann Goering (Hitler's designated successor); Rudolf Hess (Hitler's Deputy for Nazi Party Affairs); Joachim von Ribbentrop (Foreign Minister); Julius Streicher (editor of the anti-Semitic paper, Der Stuermer); and Admiral Karl Doenitz (chief of the Navy). Martin Bormann (Hess's successor who played a key role in the Holocaust) was convicted in absentia and sentenced to death (but his whereabouts and fate remain shrouded in mystery). International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, 41 A.J.I.L. 172, 331–33 (1947).

3. *Defense of Superior Orders.* Among the important principles relating to individual responsibility for crimes under international law addressed by the Judgment of the IMT were those dealing with the accused's official position and obedience to law or to orders of a superior. On those issues, the IMT's Judgment stated, in part, as follows:

> The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:
>
> > 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.
>
> On the other hand, the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state, in authorizing action, moves outside its competence under international law.
>
> It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by

them in carrying out these orders. The Charter specifically provides in 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.
>
> The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

International Military Tribunal (Nuremberg), Judgment and Sentences, 41 A.J.I.L. 172, 221 (1947).

4. *Criminal Organizations.* As Justice Jackson indicated, and as contemplated in the IMT Charter, the prosecution pursued indictments against several alleged criminal organizations. Whether to find such organizations as criminal and what effects, if any, that had on individual responsibility, proved contentious among the prosecutors and among the IMT judges. Ultimately, the judgment found:

> A criminal organization 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 organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the [IMT] Charter. Since the declaration with respect to the organizations and groups will * * * fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of the acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.

1 Trial of the Major War Criminals before the International Military Tribunal 256 (1947). Given this finding, many have concluded that the "whole scheme for streamlined mass trials envisaged by Articles 9 and 10 was nullified. Obviously, having a choice between considerations of expedience, on the one hand, and fundamental principles of criminal law, on the other, the Tribunal decided to sacrifice the former for the sake of the latter." Pomorski, Conspiracy and Criminal Organizations, in The Nuremberg Trial and International Law 243 (Ginsburgs & Kudriavtsev eds. 1990).

5. *The Tokyo Tribunal.* In the Tokyo trials before the International Military Tribunal for the Far East (IMTFE), twenty-five Japanese leaders were tried and twenty-three were convicted. Seven, including Prime Minister Tojo and Admiral Yamashita (chief of the Navy), were executed; sixteen were sentenced to life in prison.

6. *Further Reading.* For further readings on Nuremberg, see Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (1992); Perspectives on the Nuremberg Trial (Mettraux ed. 2008). For accounts more contemporary to the trial, see Jackson, The Nürnberg Case (1947); Wright, The Law of the Nuremberg Trial, 41 A.J.I.L. 38 (1947); Jessup, Crime of Aggression, 62 Pol. Sci. Q. 1 (1947); Taylor, Nuremberg Trials, [1949] Int'l Conciliation No. 450, at 243; Memorandum Submitted by the Secretary-General, The Charter and Judgment of the Nurnberg Tribunal, U.N. Doc. A/ACN. 4/5 (1949); Hankey, Politics, Trials and Errors (1950); Taylor, The Nuremberg Trials, 55 Colum. L. Rev. 488 (1955). For materials on the trials, see Marrus, The Nuremberg War Crimes Trial 1945–46: A Documentary History (1997); see also Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (2011); Priemel, The Betrayal: The Nuremberg Trials and German Divergence (2016).

For documents related to the Tokyo Tribunal, see Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments (Boister & Cryer eds. 2008). For commentary, see Minear, Victor's Justice: The Tokyo War Crimes Trial (1971); Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial (1987); Maga, Judgment at Tokyo: The Japanese War Crimes Trials (2001); Boister & Cryer, The Tokyo International Tribunal: A Reappraisal (2008); Totani, The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II (2009).

See also Historical Origins of International Criminal Law (Bergsmo et al. eds., 5 vols., 2014–2017).

"THE JUSTICE CASE" (CASE 3), UNITED STATES V. JOSEF ALTSTOETTER, ET AL.

Trials of Individuals Before the Nuremberg Military Tribunals
Under Control Council Law No. 10, 1946–1949, Vol. III (1951)
Opinion and Judgment, at 954–84

[After the first trial of the major Nazi leaders, a series of subsequent trials involving less prominent figures also took place at Nuremberg and elsewhere in Germany between 1946 and 1949. Those trials were conducted under Control Council Law No. 10 (C.C. Law 10). The Control Council was the body, comprised of representatives of France, the United Kingdom, the United States, and the U.S.S.R., that governed occupied Germany. In the U.S. occupation zone of Germany, trials were conducted before U.S. judges.

In February 1947, the U.S. Military Government for Germany created Military Tribunal III to try the "Justice Case", which involved sixteen important German judges and legal officials, nine of whom were officials in the Reich Ministry of Justice (the others were members of the People's and Special Courts). The indictment charged all the defendants with "judicial murder and other atrocities, which they committed by destroying law and justice in Germany, and then utilizing the emptied forms of legal process for the persecution, enslavement and extermination on a large scale." Specifically, the defendants were charged with conspiracy to commit war crimes against civilians in territories occupied by Germany and against soldiers of countries at war with Germany; and crimes against humanity against German civilians and nationals of occupied territories. Some of the defendants were also charged with a fourth count of membership in the SS, SD, or the leadership corps of the Nazi Party, all of which had been declared criminal organizations a year before by the International Military Tribunal.

All the defendants pled not guilty. Military Tribunal III returned its judgment on December 3 and 4, 1947. The case raised interesting questions about the nature of the law such tribunals apply, whether defendants are aware of that law, the role of lawyers and judges in assisting policy-makers in the commission of criminal acts, and whether lower-level officials could excuse their behavior because it had been ordered by superiors.]

* * * We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the Four occupying Powers. * * *

* * * As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the state into whose hands the perpetrators fall. These rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the state or in occupied territory, has been unquestioned. (Ex parte Quirin, [317 U.S. 1 (1942)]; In re Yamashita, 327 U.S. 1, [(1946)].) However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a state having a recognized, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that state. The law is universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus, notwithstanding the paramount authority of the substantive rules of common international law, the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law

could, no doubt, be tried and punished by the state of which they were nationals, by the offended state if it can secure jurisdiction of the person, or by an international tribunal if of competent authorized jurisdiction.

Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. Nor is the apparent immunity from prosecution of criminals in other states based on the absence there of the rules of international law which we enforce here. Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers.

* * *

C.C. Law 10 is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law. * * *

As the prime illustration of a crime against humanity under C.C. Law 10, which by reason of its magnitude and its international repercussions has been recognized as a violation of common international law, we cite "genocide" * * *. A resolution recently adopted by the General Assembly of the United Nations is in part as follows:

"The General Assembly therefore

> Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials, or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable * * *."

The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive

evidence of the fact. We approve and adopt its conclusions. Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.

The defendants contend that they should not be found guilty because they acted within the authority and by the command of German laws and decrees. Concerning crimes against humanity, C.C. Law 10 provides for punishment whether or not the acts were in violation of the domestic laws of the country where perpetrated (C.C. Law 10, art. II, par. 1(c)) * * *.

* * * The Nuremberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violation by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the IMT Charter and C.C. Law 10, and within the limitations on the power conferred, it enforces international law as superior in authority to any German statute or decree. It is true, as defendants contend, that German courts under the Third Reich were required to follow German law (i.e., the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. Here we have the paramount substantive law, plus a Tribunal authorized and required to apply it notwithstanding the inconsistent provisions of German local law. The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.

* * *

The defendants claim protection under the principle *nullum crimen sine lege*, though they withheld from others the benefit of that rule during the Hitler regime. Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed. By way of illustration, we observe the C.C. Law 10, article II, paragraph 1(b), "War Crimes," has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for

the Tribunal, after the manner of the common law, to determine the content of those rules under the impact of changing conditions.

Whatever view may be held as to the nature and source of our authority under C.C. Law 10 and under common international law, the *ex post facto* rule, properly understood, constitutes no legal nor moral barrier to prosecution in this case.

Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth. As applied in the field of international law, the principle *nullum crimen sine lege* received its true interpretation in the opinion of the IMT in the case versus Goering, et al. The question arose with reference to crimes against the peace, but the opinion expressed is equally applicable to war crimes and crimes against humanity. The Tribunal said:

> 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. * * *

NOTES

1. *Justice Accused.* The Tribunal found ten of the defendants guilty and acquitted four. Two defendants were not included in the judgment: one died before the trial began, while the other's case was declared a mistrial because he was too sick to attend much of the trial. The court sentenced four of the guilty to life imprisonment and the remainder to prison terms ranging from five to ten years. The proceedings spawned both riveting literature, see Müller, Hitler's Justice: The Courts of the Third Reich (Schneider trans. 1991), and an

award-winning 1961 movie, *Judgment at Nuremberg*. What standards do you think should apply to lawyers and judges who facilitate or allow others to perpetrate war crimes, crimes against humanity, genocide, or torture? See Bilder & Vagts, Speaking Law to Power: Lawyers and Torture, 98 A.J.I.L. 689 (2004).

2. *Victors' Justice?* Although the Nuremberg and Tokyo trials formed the foundation for development of much of the contemporary rules on individual responsibility for crimes under international law, they have not escaped criticism. A bias was built into the IMT Charter itself, given that it authorized only prosecution of war criminals of the "European Axis countries." The murder of thousands of Polish officers by Soviet forces in the Katyn Forest near Smolensk, the allied firebombing of Dresden, and the dropping of the atomic bombs on Hiroshima and Nagasaki, Japan, are among the events that suggest that the victors may not have been free of culpability. The IMT convicted Germans for invading Poland, but refused to admit evidence of the Soviet Union's secret agreement with Hitler to divide Poland. Admiral Doenitz was convicted on different and lesser charges after evidence was adduced that one of the charges against him, sinking nonmilitary ships without warning, was essentially similar to the practice of the U.S. Navy in the Pacific. Does the partiality inherent in a tribunal established by the victors impugn the legal validity of the IMT's judgment and sentences? Does it undercut the moral legitimacy of the IMT? Is it desirable, therefore, to have a more permanent tribunal set up by all states?

3. *Ex Post Facto Prosecutions.* To what extent did the goals of the framers of the IMT Charter conflict with the basic principle of criminal justice prohibiting *ex post facto* prosecutions (*nullum crimen sine lege; nulla poena sine lege*)? In the case of acts labeled "crimes against humanity," such as mass murder, the acts concerned were crimes under every legal system. They were "internationalized" by the IMT Charter, but it hardly seems unfair to the defendants to be prosecuted and punished for such acts. Could the same be said for crimes against peace or aggression? Soldiers had not been prosecuted for the act of planning, initiating or participating in an act of aggression from the Peace of Westphalia in 1648 to the Nuremberg trials. Aggression had not been characterized as a crime under international law until the IMT Charter did so. Does the IMT Judgment, quoted in *The Justice Case*, deal persuasively with this issue?

GENERAL ASSEMBLY RESOLUTION ON AFFIRMATION OF THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED BY THE CHARTER OF THE NUREMBERG TRIBUNAL

Adopted by the U.N. General Assembly, Dec. 11, 1946
G.A. Res. 95(I), U.N. Doc. A/236 (1946), at 1144

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, subparagraph a, of the [U.N.] Charter, to initiate studies and make

recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the [IMT] Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the Codification of International Law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

NOTES

1. *Stalled Progress.* In 1948, the General Assembly asked the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction would be conferred upon that organ by international conventions. Report of the International Law Commission on the Work of its First Session, U.N. Doc. A/925 (1949). The Cold War, however, effectively precluded any real progress toward creation of an international criminal tribunal. It took an end to the Cold War and inhuman atrocities in the former Yugoslavia which began in 1991, to bring about the creation of the first truly international tribunal to try individuals accused of crimes under international law (see next subsection).

2. *National Court Prosecutions.* A number of prosecutions concerning atrocities committed by prominent Nazis and collaborators during the World War II period were carried out by national courts subsequent to the Nuremberg trials. Most celebrated was the trial in Israel in 1961 of Adolf Eichmann, who played an important role in implementing the Holocaust. Eichmann was kidnapped by Israeli agents in Argentina, brought to Israel and convicted for the crimes under Israeli law, including crimes against the Jewish people, crimes against humanity and war crimes. 36 I.L.R. 5 (1968); see Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963); see also Chapter 11, Section 5. Similarly, Klaus Barbie in 1987, Paul Touvier in 1994,

and Maurice Papon in 1998, were convicted by French courts of crimes against humanity committed during World War II.

3. *Vietnam and War Crimes.* Questions of individual responsibility for violations of the laws of war received widespread public attention during the Vietnam War. The U.S. killing of prisoners in custody and the massacre of Vietnamese civilians (most notoriously in the Son My-My Lai cases) resulted in the court martial of some U.S. soldiers. See *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), aff'd, 22 C.M.A. 534, 48 C.M.R. 19 (1973), petition for writ of habeas corpus granted sub nom., *Calley v. Callaway*, 382 F.Supp. 650 (M.D. Ga.1974), rev'd, 519 F.2d 184 (5th Cir.1975). Such incidents stimulated demands for punishment of higher officials in both military and civilian positions. Although no punitive action was taken against the senior military commanders, the issue of their individual responsibility was widely discussed and the precedent of Nuremberg invoked. See Taylor, Nuremberg and Vietnam, ch. 5–7 (1970).

B. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

1. Creation and Completion

Widespread atrocities in the early 1990s, including mass killings and what came to be called "ethnic cleansing," committed within the territory of the former Yugoslavia, and especially in Bosnia and Herzegovina, prompted the creation of an *ad hoc* international criminal tribunal by the U.N. Security Council for the prosecution of responsible individuals. In May 1993, the Security Council unanimously adopted Resolution 827, to establish "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace * * *." S.C. Res 827 (1993). The Security Council took this action under Chapter VII of the Charter, having found that the situation in the former Yugoslavia constituted a threat to the peace. Annexed to Resolution 827 was a Statute for the International Criminal Tribunal for the former Yugoslavia (I.C.T.Y.).

The I.C.T.Y. functioned through the completion of its final trial, *Prosecutor v. Ratko Mladić* (Judgment), Case No. IT-09-92-T (Nov. 2, 2017), and formally closed in December 2017. (See further below on completion and the residual mechanism for continuing functions.)

2. Jurisdiction

The I.C.T.Y., which was located in The Hague, the Netherlands, had jurisdiction over grave breaches of the Geneva Conventions of 1949

(I.C.T.Y. Statute, Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

Although the I.C.T.Y. Statute did not explicitly provide for the liability of an individual as part of a "joint criminal enterprise," a legal doctrine to that effect emerged in the jurisprudence of the Tribunal, under which a member of an organized group could be found responsible for crimes committed by other members of group when undertaken within the group's common plan or purpose. The doctrine proved important for successfully prosecuting political and military leaders for mass war crimes, genocide, and crimes against humanity. Because such "collective responsibility" is not universally accepted in national legal systems, the doctrine attracted controversy. See Danner & Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75 (2005).

3. Structure

The I.C.T.Y. Statute provided for three organs: the judges, the prosecutor's office, and the registry. The Tribunal's permanent judges were elected by the U.N. General Assembly from a list submitted by the Security Council; the permanent judges selected one member to serve as President. *Ad litem* judges were appointed by the U.N. Secretary-General at the request of the President to sit on one or more specific trials. Three judges (at least one of them a permanent judge) were assigned to try each case. The Appeals Chamber consisted of seven permanent judges, five of whom were permanent judges of the I.C.T.Y. and two of whom were permanent judges of the International Criminal Tribunal for Rwanda (I.C.T.R.) (see next subsection). These seven judges also constituted the I.C.T.R.'s Appeals Chamber. Each appeal was heard and decided by five judges of the Appeals Chamber.

The Office of the Prosecutor was charged with investigating, indicting, and prosecuting persons who fell within the jurisdiction of the I.C.T.Y. It was headed by a chief prosecutor, appointed by the Security Council for a renewable four-year term. The prosecutor acted independently, neither seeking nor receiving instructions from governments or international organizations (nor from either of the Tribunal's other two organs). Pursuant to the Statute, U.N. members were under an obligation to cooperate with the prosecutor's investigations and prosecutions.

The Registry provided administrative support for the Tribunal, including the staffing of the courtroom reporters and interpreters, the bringing of witnesses to the Tribunal, the provision of defense counsel for indigent defendants, and oversight of the U.N. detention unit where the accused were housed during trials.

4. Obtaining Custody of Indictees

Security Council Resolution 827 required that all states cooperate fully with the Tribunal and take "any measures necessary under their domestic law to implement" the resolution and the I.C.T.Y.'s Statute. All member states of the United Nations were obligated under Article 25 of the Charter to accept and carry out decisions of the Security Council. Consequently, a number of countries, including France, Germany, Italy, the Netherlands, Spain, and the United States, enacted legislation to permit surrender of individuals indicted for serious crimes to the I.C.T.Y. or other similar tribunals.

Several I.C.T.Y. indictees voluntarily surrendered to the I.C.T.Y.; others were turned over by governments of the former Yugoslavia's successor states or third countries Rarely, indictees were captured by military or civilian forces present in the former Yugoslavia, such as NATO forces. Some defendants raised unsuccessful challenges to the legality of their apprehension. See, e.g., *Prosecutor v. Dokmanović*, I.C.T.Y. Case No. IT-95-13a-PT, Decision on Motion for Release by the Accused (1997); Scharf, The Prosecutor v. Dokmanović: Irregular Rendition and the ICTY, 11 Leiden J. Int'l L. 369 (1998).

The first indictee taken into custody by the I.C.T.Y. (based on a transfer by Germany) was Dusko Tadić, a Bosnian Serb accused of war crimes and crimes against humanity. After resolution of certain important jurisdictional issues by the Appeals Chamber (see Chapter 6, Section 1(B)), the Trial Chamber proceeded to find Tadić guilty on eleven counts of war crimes and crimes against humanity, including taking part in Serb attacks on his home town of Kozarac and other villages, and herding the inhabitants into camps, where they were beaten and kept in inhuman conditions. *Prosecutor v. Tadić*, I.C.T.Y. Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997).

Tadić was sentenced to twenty years in prison. He appealed his conviction to the Appeals Chamber, as did the prosecutor for separate reasons. The Appeals Chamber found Tadić guilty of additional crimes and increased his sentence to twenty-five years. Id., Appeals Judgment, July 15, 1999, 38 I.L.M. 1518 (1999) and Sentencing Judgment, Nov. 11, 1999, 39 I.L.M. 117 (2000). The Tribunal subsequently adjusted this to twenty years because Tadić had spent five years in investigative custody. Tadić's case, which began on May 7, 1996, was finally concluded on January 26, 2000; and Tadić served his sentence in Germany, one of several countries that have agreements with the I.C.T.Y. for incarceration of persons who have been convicted. For a narrative of the case through the trial, see Scharf, Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg (1997). For critical legal commentary, see

Alvarez, Rush to Closure: Lessons of the Tadić Judgment, 96 Mich. L. Rev. 2031 (1998).

On July 25, 1995, the Tribunal handed down public indictments involving twenty-four individuals. Most of these were members of the Bosnian Serb military and police forces as well as politicians and detention camp commanders accused of atrocities. Of particular note were Radovan Karadžić, the civilian leader of the Bosnian Serbs, and General Ratko Mladić, the commander of the Bosnian Serb military. Karadžić and Mladić were alleged to be responsible for the internment of thousands of Bosnian Muslims and Croats in detention facilities where they were subjected to widespread acts of physical and psychological abuse and to inhuman conditions. Karadžić and Mladić were also charged with genocide, including for allegedly orchestrating the slaughter in July 1995 of up to 8,000 Bosnian Muslims in the town of Srebrenica, which had been designated a U.N.-protected safe area. Both Karadžić and Mladić were ultimately arrested in Serbia (in 2008 and 2011) and extradited for trial at the I.C.T.Y. They were convicted in 2016 and 2017, respectively; their appeals were pending before the Mechanism for International Criminal Tribunals (see below) as of 2018.

5. Indictments of All Factions

Most indictees at the I.C.T.Y. were Serbs, but not all. For example, in 1998 the I.C.T.Y. convicted two Bosnian Muslims and one Bosnian Croat for crimes of murder, torture and rape committed while they were running the Čelebići prison camp in 1992. The two Bosnian Muslims, Hazim Delić and Esad Landžo, were sentenced to prison terms of twenty years and fifteen years, respectively. The Bosnian Croat, Zdravco Mucić, was sentenced to seven years. Kosovar Albanians were also prosecuted and convicted for crimes committed against Serbs and others.

In 2012, the I.C.T.Y. Appeals Chamber acquitted two Croatian generals, Ante Gotovina and Mladan Markač, for crimes against humanity and violations of the laws of war, determining that, in the absence of any proven unlawful artillery attacks, it was not possible to find the existence of a joint criminal enterprise whose purpose was to permanently and forcibly remove Serbian civilians from the Krajina region of Croatia.

6. Victims and Witnesses

The I.C.T.Y. Statute and Rules provided for measures to protect victims and witnesses, and the Tribunal applied these to safeguard witness identities from the public and, in exceptional cases, even from the defendant. These measures provoked intense debate between those who saw them as appropriate to prevent retraumatization of victims and perhaps even additional harm to them or their families, and those who questioned whether they were compatible with due process for defendants.

For different perspectives, see Chinkin, Due Process and Witness Anonymity, 91 A.J.I.L. 75 (1997); Leigh, Witness Anonymity Is Inconsistent with Due Process, 91 A.J.I.L. 80 (1997).

In *Furundžija*, I.C.T.Y. Case No. IT-95-17/1-A, Appeals Chamber, Judgment (July 21, 2000), a dispute arose over whether the Prosecutor should have disclosed to the defense certain materials concerning counseling that a witness had received at a treatment center in Bosnia-Herzegovina. The defense sought to impugn her testimony as arguably affected by post-traumatic stress disorder. See Askin, Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status, 93 A.J.I.L. 97, 110–115 (1999).

7. Overall Record, Completion Strategy, and Residual Mechanism

During its mandate between 1993 and 2017, the Tribunal indicted 161 individuals, of whom ninety were convicted and sentenced, nineteen were acquitted, and thirteen had their cases transferred to local courts. Another thirty-seven cases had been terminated (either because indictments were withdrawn or because the accused died). Two were in retrial and two others on appeal before the Mechanism for International Criminal Tribunals (see below) as of 2018.

Since the I.C.T.Y. was established as a temporary institution, in 2003 the Tribunal's judges devised a plan which became known as the "completion strategy" for winding down the I.C.T.Y.'s work. The plan set forth dates for completion of all investigations, trials, and appeals, but was revised repeatedly due to delays.

A key step in the completion strategy for both the I.C.T.Y. and its sister tribunal for Rwanda (see *infra* subsection C) was the creation of the Mechanism for International Criminal Tribunals (M.I.C.T.). The M.I.C.T. was established by the U.N. Security Council as a small body for carrying out a number of essential functions of the two tribunals after completion of their mandates. See S.C. Res. 1966 (Dec. 22, 2010). The I.C.T.Y. branch of the M.I.C.T. began functioning in 2013, such that there was a temporal overlap as the I.C.T.Y. wound down its work. See http://unmict.org/. As of 2018, the M.I.C.T. is exercising several residual functions, including the remaining appeals as well as jurisdiction over matters such as tracking and prosecution of fugitives, and continuing protection of victims and witnesses.

For discussion of the I.C.T.Y. and its legacy, see Mettraux, International Crimes and the Ad Hoc Tribunals (2006); The Legacy of the International Criminal Tribunal for the Former Yugoslavia (Swart, Zahar, & Sluiter eds. 2011); Shahabuddeen, International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection (2012); Scheffer, All the Missing

Souls: A Personal History of the War Crimes Tribunals (2012); Symposium: The International Criminal Tribunals for the Former Yugoslavia and Rwanda, 110 A.J.I.L. 171–259 (2016) (and related pieces in 110 A.J.I.L. Unbound (2016); Milanović, Establishing the Facts About Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences, 47 Georgetown J. Int'l L. 1321 (2017).

C. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Rwanda experienced recurrent ethnic conflict between the Hutus (who comprise approximately eighty-five percent of the population) and the Tutsis (less than fifteen percent), most virulently in April 1994, shortly after the assassination of Hutu President Juvenal Habyarimana of Rwanda, when Hutu extremist troops, militia and mobs launched a genocidal wave of murder and rape against the Tutsi minority and Hutu moderates. Between April and July 1994, some 800,000 or more Tutsis and moderate Hutus were killed. For background, see Prunier, The Rwanda Crisis: History of a Genocide (1997); Gourevitch, We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda (1998); Power, "A Problem from Hell": America and the Age of Genocide (2003).

In November 1994, the U.N. Security Council established an *ad hoc* tribunal similar to the I.C.T.Y. to prosecute individuals responsible for genocide and other serious violations of international humanitarian law in the territory of Rwanda during 1994. See S.C. Res. 955 (Nov. 8, 1994). The International Criminal Tribunal for Rwanda (I.C.T.R.) was based in Arusha, Tanzania, with a presence in Kigali, Rwanda. Interestingly, while Rwanda had requested the creation of an international tribunal, the Rwandan Government (which happened to occupy a non-permanent seat on the Security Council in 1994) voted against the final formulation of Resolution 955, partly because the resolution did not authorize use of the death penalty.

1. Structure

The Statute of the I.C.T.R., which was annexed to Resolution 955, closely mirrored the I.C.T.Y. Statute. Differences between the subject matter jurisdictions of the two Tribunals derived largely from the fact that the conflict in Rwanda was essentially internal, whereas the conflict in the former Yugoslavia was in part international. The competence of the I.C.T.R. encompassed genocide, crimes against humanity, and serious violations of Common Article 3 of the Geneva Conventions of August 12, 1949 and Additional Protocol II thereto of June 8, 1977, but not grave breaches of the Geneva Conventions or war crimes under the 1907 Hague Convention, because the latter are implicated only in international conflict.

Like the I.C.T.Y., the organs of the I.C.T.R. included the judges (including a President), a prosecutor's office, and a registrar. There were three trial chambers and the Appeals Chamber (shared with the I.C.T.Y., as discussed in the prior subsection). While at one time both Tribunals were served by a single prosecutor, they later had separate prosecutors.

2. Case Law

A wide variety of persons were indicted and prosecuted by the I.C.T.R. For example, in February 1999, two former Rwandan ministers, Eliezer Niyitegeka (Information Minister) and Casimir Bizimungu (Minister of Health) were arrested in Kenya and transferred to the custody of the I.C.T.R. Niyitegeka was convicted and sentenced to life imprisonment; he is serving that sentence in Mali. By contrast, Bizimungu was acquitted and released. In August 1999, a woman, Pauline Nyiramasuhuko (former Rwandan Minister of Family and Women's Affairs) was indicted by the I.C.T.R. and charged with genocide and with rape as a crime against humanity. The rape charge was based on allegations that she knew her subordinates were raping Tutsi women and failed to take reasonable and necessary measures to stop or punish them. Her indictment was the first for a woman by an international tribunal involving a charge of rape in violation of international humanitarian law. She was convicted and sentenced to life imprisonment; on appeal, which resulted in affirmance of most but not all of the judgment, her sentence was reduced to forty-seven years. The highest level prosecution was that of former Prime Minister, Jean Kambanda—the first time a Head of Government pled guilty to genocide. He was sentenced to life imprisonment and is serving his time in Mali.

Much of the atrocities in Rwanda in 1994 were encouraged through mass media. On July 23, 1999, Kenyan authorities arrested Georges Ruggiu, a Belgian journalist whose broadcasts had urged Hutus to kill Tutsis and Hutu moderates. Ruggiu, the first non-Rwandan to be indicted by the I.C.T.R., pled guilty to the crime of direct and public incitement to commit genocide and a crime against humanity (persecution). He was sentenced in June 2000 to two concurrent twelve-year sentences. Similarly, three media leaders were convicted for crimes of speech through radio broadcasts and newspaper publications, a judgment upheld by the Appeals Chamber in November 2007. See MacKinnon, International Decision: Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-92-A, 103 A.J.I.L. 97 (2009).

3. Overall Record, Completion Strategy, and Residual Mechanism

Through its closure in late 2015, the Tribunal had indicted ninety-three individuals and completed proceedings with regard to eighty of them:

twelve were acquitted and sixty-three pled guilty or were convicted, of which sixteen had appeals pending. Ten indictees had their cases transferred to local courts, two indictments were withdrawn, and two indictees died while in custody; nine indictees remained at large. See http://www.unictr.org/Cases/tabid/204/Default.aspx.

Like the I.C.T.Y., the I.C.T.R. was a temporary institution whose essential residual functions have now been assumed by the U.N. Mechanism for International Criminal Tribunals.

For discussion of the I.C.T.R.'s successes and failures, see Van Den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law (2005); Kendall & Nouwen, Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda, 110 A.J.I.L. 212 (2016); The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments (Sterio & Scharf eds., forthcoming 2019).

4. Rwandan National Proceedings

In parallel with the international proceedings, Rwanda conducted under its national law prosecutions of genocide suspects: indeed, approximately 125,000 (roughly ten percent of the adult male Hutu population) had been detained through the late 1990s. In 1996, Rwanda enacted legislation to facilitate the processing of this overwhelming number of cases. Ironically, the most senior alleged perpetrators have been indicted by the I.C.T.R., where they could not face the death penalty, while more junior persons are exposed to the Rwandan national system where such punishment is available. On the relationship between the international and national proceedings in respect of Rwanda, see Dubois, Rwanda's National Criminal Courts and the International Tribunal, 321 Int'l Rev. Red Cross 717 (1997); Alvarez, Crimes of State/Crimes of Hate: Lessons from Rwanda, 24 Yale J. Int'l L. 365 (1999); Drumbl, Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials, 29 Colum. Hum. Rts. L. Rev. 545 (1998); Drumbl, Punishment, Postgenocide: From Guilt to Shame to *Civis* in Rwanda, 75 N.Y.U. L. Rev. 1221 (2000).

D. OTHER *AD HOC* TRIBUNALS

In the wake of the establishment of the I.C.T.Y. and I.C.T.R., recurrent demands arose for the creation of new tribunals to address atrocities that occurred in other contexts. Yet the costs of operating the I.C.T.Y. and I.C.T.R. led some to see "tribunal fatigue" at the Security Council, and hence a preference for greater reliance on national processes. Further, often the state where the atrocities occurred wished to maintain greater control and involvement in the tribunal, sometimes for internal political reasons, sometimes to have justice dispensed "closer to home," and

sometimes due to a distrust of fully internationalized processes. Such circumstances led to the creation of a variety of *ad hoc* tribunals that had greater or lesser degrees of "internationalization." The defining feature of all these tribunals is some level of international oversight or involvement, but with a heavy dose of national control by the state in which the atrocities occurred.

Only a highly selective summary of a few "hybrid" tribunals can be given here. How would you assess the advantages and disadvantages of using such "hybrid" *ad hoc* tribunals?

Cambodia Extraordinary Chambers. With U.N. encouragement, in 2001 Cambodia enacted a law to establish "extraordinary chambers" within its courts to try former leaders of the Khmer Rouge, a communist organization that ruled Cambodia from 1975 to 1979. The extreme brutality of the Khmer Rouge regime had resulted in the death of an estimated 1.7 million people in Cambodia in just a few years—a level of atrocity that warranted international response and participation. In 2003, Cambodia and the United Nations concluded an agreement on U.N. involvement with the Extraordinary Chambers of the Courts in Cambodia (ECCC), pursuant to which international judges and prosecutors have assisted Cambodian judges and prosecutors in the prosecution of serious violations of Cambodian criminal law and international humanitarian law committed between April 1975 and January 1979. Trial chambers and an appeals chamber of the ECCC are constituted with a majority of Cambodian judges and minority of international judges; convictions require a supermajority in which one or more international judges need to vote in the affirmative.

The ECCC has indicted ten individuals, but several proceedings were terminated due to death or ill health of the defendants. In 2010, the trial chamber convicted Kaing Guek Eav (known as "Duch") for crimes against humanity and grave breaches of the 1949 Geneva Conventions; after appeals by both the defendant and prosecutor, he is serving a sentence of life imprisonment. In November 2018, defendants Nuon Chea and Khieu Samphan were convicted of genocide, crimes against humanity, and grave breaches of the Geneva Conventions and sentenced to life imprisonment; their appeals and several other cases were pending as of late 2018.

Kosovo Specialist Chambers. Following the 1999 NATO intervention in Kosovo (see Chapter 15, Section 4) and the establishment of a U.N. interim administration, U.N. administrators promulgated regulations allowing foreign judges to sit with Kosovar judges on special panels in criminal proceedings. After Kosovo declared independence in 2008 (see Chapter 5, Section 3), this system was replaced with a new law providing for judges and prosecutors from a European Union rule of law mission in Kosovo (EULEX) to assist in proceedings. Most recently, the Kosovo

Specialist Chamber and Specialist Prosecutor's Office, was established in 2017 pursuant to a constitutional amendment and a new law, with the purpose of conducting trials for allegations of serious violations of international law that occurred between 1998 and 2000. The Specialist Chambers and Specialist Prosecutor's Office are staffed with international judges, prosecutors, and officers, with a seat in The Hague, the Netherlands, and are to function according to relevant Kosovo laws as well as customary international law and international human rights law.

Special Court for Sierra Leone (SCSL). This hybrid tribunal functioned between 2002 and 2013 for the purposes of addressing serious crimes against civilians and U.N. peacekeepers committed during Sierra Leone's civil war. Unlike the tribunals discussed above, it was not part of a national legal system but rather was established by an international agreement between the United Nations and the Sierra Leone government which provided for a majority of judges and the chief prosecutor to be appointed by the U.N. Secretary-General and a minority of judges and the deputy prosecutor to be appointed by the Sierra Leone government. The SCSL completed proceedings against twenty-two defendants, notably including Liberian President Charles Taylor, whose military forces were implicated in cross-border raids and human rights abuses in neighboring states, including Sierre Leone. Taylor was charged with war crimes, crimes against humanity and other serious violations of international humanitarian law committed in Sierra Leone, including murdering and mutilating civilians and using women and girls as sex slaves. He was found guilty in April 2012 and sentenced to fifty years in prison; in September 2013, the verdict was upheld on appeal. Taylor has been serving his sentence in a U.K. prison.

Special Tribunal for Lebanon (STL). This tribunal was set up in 2007 by the U.N. Security Council at the request of the government of Lebanon, in order to assist Lebanon in the investigation and prosecution of those responsible for a car bombing in Beirut in February 2005 which resulted in the deaths of former Lebanese Prime Minister Rafiq Hariri and more than twenty others, Unlike the other *ad hoc* tribunals, this tribunal is charged with applying Lebanese law against terrorism, rather than the international law of war crimes, crimes against humanity, or genocide. The STL began functioning in March 2009, with both Lebanese and international judges (the latter being in the majority) and a joint prosecutorial office; it is based in the Netherlands with a Beirut office. As of late 2018, a trial that began in 2014 against four defendants had concluded the presentation of evidence after 406 trial days and the judges' deliberations were in progress.

NOTES

1. *Difficult Cost/Benefit Analysis.* The creation of the Cambodian Extraordinary Chambers came decades after the atrocities of the Khmer Rouge and many significant Khmer Rouge leaders died before being brought to trial. Even so, more than 240,000 Cambodians have attended the ECCC's proceedings, with extensive victim participation involving several thousand as complainants or civil parties. The cost of the investigations and trials from 2006 to 2018 had reached approximately $300 million. See http://www.eccc.gov.kh/en. Do you think trials of this kind merit such costs? Or, if possible, would you prefer that such resources be channeled to the victims of the atrocities?

2. *Lebanon Tribunal and Trials* In Absentia. A unique element of the Special Tribunal for Lebanon is that it can conduct trials *in absentia*, an ability denied to all other *ad hoc* international tribunals and present in only a handful of national jurisdictions (e.g., Italy). Article 22 of the Tribunal's statute provides that such trials may be conducted if the accused has waived the right to be present, has absconded, or cannot be found, and all reasonable steps have been taken to obtain his or her presence. For the decision by the Tribunal's Appeals Chamber upholding the legality of trials *in absentia*, see *Prosecutor v. Ayyash*, Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial *In Absentia* Decision, STL-11-01/PT/AC/AR126.1 (Nov. 1, 2012), in 52 I.L.M. 204 (2013).

3. *East Timor Special Panels.* For information on other *ad hoc* tribunals, such as the East Timor Special Panels established under the U.N. Transitional Administration in East Timor to address serious crimes committed in 1999 and which functioned until 2006 see Murphy, Principles of International Law ___–___ (3rd ed. 2018).

4. *Supreme Iraqi Special Tribunal.* After the U.S.-led intervention in Iraq in 2003 (see Chapter 15, Section 5(B)(3)), coalition authorities appointed an Iraqi governing council which decided to establish a special criminal tribunal with international advisors to try high-level officials of the former Iraqi regime, including former president Saddan Hussein. After the end of the occupation, the Iraqi interim government passed a new statute for a differently-named tribunal, with optional involvement of non-Iraqi advisors. The tribunal tried and convicted Saddam Hussein on charges relating to a massacre at the town of Dujail; after an unsuccessful appeal, he was executed by hanging on December 30, 2006. The tribunal also tried and convicted several other defendants and released one. See Newton & Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein (2008).

5. *Further Reading.* See Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia (Romano et al. eds. 2004); Jalloh, Special Court for Sierra Leone: Achieving Justice?, 32 Mich. J. Int'l L. 395 (2011).

E. OTHER ACCOUNTABILITY MECHANISMS

The United Nations and regional institutions continue to innovate in the search for mechanisms to bring about accountability for violations of crimes of international concern. Recall, for example, the trial in Senegal, with the support of the African Union (after decisions of the International Court of Justice concerning the U.N. Convention Against Torture), of Chad's former ruler, Hissène Habré, as discussed in Section 2 of this Chapter. Recall also the pending plan under the Malabo Protocol to the African Charter on Human and People's Rights to establish an African Court of Justice and Human Rights as a regional court with criminal jurisdiction, as discussed in Chapter 13, Section 3(C). Creation of such an African institution would provide an alternative to the International Criminal Court (see next Section) and respond to recurrent criticisms of the I.C.C. from various quarters in Africa.

Another African model is the Special Criminal Court (S.C.C.) for the Central African Republic (CAR), which was established by law in 2015 within the CAR's domestic judicial system, to be staffed with a combination of international and CAR personnel, in order to address atrocity crimes committed in the CAR since 2003. Although the S.C.C. is not a U.N. tribunal, it has been endorsed by the U.N. Security Council, e.g. in Resolution 2448 (Dec. 13, 2018), paras. 20, 40(e), in the context of the Council's continuing efforts to restore and maintain peace in CAR. The S.C.C. held its inaugural session on October 22, 2018.

Efforts toward accountability for the staggering atrocities in Syria have recently focused on a mechanism created pursuant to U.N. General Assembly Resolution 71/248 (Dec. 21, 2016), with the unwieldy title "International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011" (IIIM). The IIIM has a mandate "to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law" (G.A. Res. 71/248, para. 4). It began its work in 2017.

Crimes committed by the so-called Islamic State in Iraq and the Levant (ISIL, otherwise known as the Islamic State in Iraq and Syria or Da'esh), including allegations of genocide against the Yazidi population, were being addressed as of 2018 by an Investigative Team in support of domestic Iraqi efforts, as requested by the U.N. Security Council in Resolution 2379 (Sept. 21, 2017). See U.N. Doc. S/2018/118 (Feb. 14, 2018),

Annex: "Terms of reference of the Investigative Team to support domestic efforts to hold Islamic State in Iraq and the Levant (Da'esh) accountable for acts that may amount to war crimes, crimes against humanity and genocide committed in Iraq, established pursuant to Security Council resolution 2379 (2017)."

Efforts to address atrocity crimes in Myanmar committed against its Rohingya Muslim population included an Independent International Fact-Finding Mission established by the U.N. Human Rights Council in March 2017 (U.N. Doc. A/HRC/RES/34/22 (Apr. 3, 2017). The mission released its report in September 2018, with recommendations for investigation and prosecution of Myanmar's top military leaders for genocide, crimes against humanity, and war crimes.

4. THE INTERNATIONAL CRIMINAL COURT

A. BACKGROUND, STRUCTURE AND JURISDICTION

1. Creation

After years of groundwork by the International Law Commission and more than a year of meetings by special preparatory committees, a U.N.-sponsored conference in Rome in 1998 finalized a statute for a permanent international criminal court. More than 160 countries participated with contributions from scores of non-governmental organizations. After five weeks of difficult negotiations, the conference adopted the Rome Statute of the International Criminal Court (I.C.C.), July 17, 1998, 2187 U.N.T.S. 3, by a vote of 120 states in favor and seven opposed. The United States voted against approval, as did China, Israel, and four other states. The Rome Statute entered into force on July 1, 2002. As of late 2018, 123 states were parties to the Rome Statute; notably absent from the list of parties are China, India, Russia, and the United States. (On notices of withdrawal, see below.)

Under Article 1 of the Rome Statute, the I.C.C. is a permanent institution vested with competence to try individuals for the "most serious crimes of international concern," as specified in Article 5. The I.C.C. is based in The Hague, the Netherlands and, though a treaty-based institution, has a relationship with the United Nations by agreement.

2. Jurisdiction

The Rome Statute provides that the I.C.C. may exercise jurisdiction over only certain specified crimes. Article 5 of the Statute provides for the jurisdiction of the Court to be

> limited to the most serious crimes of concern to the international community as a whole, namely:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

Separate articles in the Rome Statute define what is meant by these crimes: genocide (Article 6); crimes against humanity (Article 7); and war crimes (Article 8); the definition of the crime of aggression could not be resolved at the 1998 Rome conference and was postponed until a subsequent review conference (see next two paragraphs). In order to clarify further the definitions, Article 9(1) provides for "Elements of Crimes" to assist the Court in interpretation. The Elements of Crimes, I.C.C. Doc. ICC-ASP/1/3, part II-B (2002), deal with such matters as the perpetrator's knowledge and intent, the connection of the perpetrator's actions to the actions of others (e.g., to interpret the term "widespread or systematic attack directed against any civilian population" in Article 7's definition of crimes against humanity), and the meaning of terms such as "forcibly" (which is not restricted to physical force, but may include threat of force or coercion). The elements of the crime of rape and other sexual crimes are defined in detail, drawing on the jurisprudence of the I.C.T.Y. and I.C.T.R.

As indicated above, the I.C.C. would have jurisdiction to try individuals for the crime of aggression only after the states parties agreed on a definition of the crime and on the conditions to be fulfilled before the I.C.C. could exercise jurisdiction over it. A review conference of the Assembly of States Parties held in 2010 in Kampala, Uganda reached major decisions toward that end, settling upon definitions for "act of aggression" and "crime of aggression," and making the jurisdiction potentially available even in the absence of a referral from the Security Council. Specifically, the review conference adopted a resolution on the crime of aggression (Resolution RC/Res. 6), to which were annexed four amendments to the Rome Statute (Annex I), as well as certain amendments to the "Elements of Crimes" previously adopted by the Assembly of States Parties (Annex II), and certain interpretive understandings (Annex III). Under a new Article 8–bis to the Rome Statute, the "crime of aggression" means

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

See International Criminal Court Assembly of States Parties, Review Conference, Resolution RC/Resolution 6 (June 11, 2010); see also The Travaux Préparatoires of the Crime of Aggression (Barriga & Kress eds.

2012). The Kampala amendments required thirty ratifications to become effective; that target was reached in 2017, and as of late 2018 there are thirty-seven ratifications.

Importantly, the states parties also decided that the I.C.C.'s jurisdiction over the crime of aggression would not become operative until after January 1, 2017, pursuant to a further decision by the states parties which was ultimately taken by the Assembly of States Parties in December 2017. Even so, the I.C.C.'s jurisdiction will be limited over this crime, since there are exceptions available for states parties who wish to avoid exposure to such jurisdiction and the jurisdiction will not extend to states that are not parties to the Rome Statute (such as the United States). For commentary, see Kress & von Holtzendorff, The Kampala Compromise on the Crime of Aggression, 8 J. Int'l Crim. Justice 1179 (2010); Barriga & Grover, A Historic Breakthrough on the Crime of Aggression, 105 A.J.I.L. 517 (2011); Van Schaack, *Par in Parem Imperium Non Habet*: Complementarity and the Crime of Aggression, 10 J. Int'l Crim. Justice 133 (2012); Zimmermann, Amending the Amendment Provisions of the Rome Statute, 10 J. Int'l Crim. Justice 209 (2012); Murphy, The Crime of Aggression, in Oxford Handbook on the Prohibition on the Use of Force in International Law (Weller ed. 2014); Koh & Buchwald, The Crime of Aggression: The United States Perspective, 109 A.J.I.L. 257 (2015).

Other crimes, such as terrorism or drug trafficking, were not included in the Rome Statute, since some states believed the I.C.C. should remain narrowly focused in order to succeed. Do you think that the states parties should revisit including additional crimes in the I.C.C.'s jurisdiction?

3. Limits on Jurisdiction

There are additional limitations to the I.C.C's jurisdiction beyond subject matter. First, the I.C.C. only has jurisdiction over crimes committed after the Rome Statute entered into force; crimes committed prior to July 1, 2002 do not fall within its ambit. Moreover, states that ratify or accede to the Rome Statute after July 1, 2002, are only exposed to the I.C.C.'s jurisdiction after the Statute enters into force for them, unless they grant the I.C.C. jurisdiction retroactively to July 1, 2002 (Rome Statute, Article 11).

Second, under Articles 12–14 of the Rome Statute, the I.C.C. may only investigate and prosecute acts when one of several situations arises: (1) the state where the alleged crime was committed is a party to the Rome Statute (including where the crime was committed on an aircraft or vessel of the state); (2) the person suspected of committing the crime is a national of a party to the Rome Statute; (3) the state where the alleged crime was committed, or whose national is suspected of committing the crime, consents *ad hoc* to the jurisdiction of the I.C.C.; or (4) the crime is referred

to the I.C.C. by the Security Council under Chapter VII of the U.N. Charter, even though the state is not a party to the Rome Statute.

No matter the nature of the situation, the Rome Statute accords the Security Council the ability, by a resolution adopted under Chapter VII, to request that an investigation or prosecution be delayed for a period of one year (Article 16). In November 2013, the Security Council declined to request such a deferral of the trial of Kenyan President Uhuru Kenyatta and Deputy President William Ruto despite a request that it do so from both Kenya and the African Union. (The cases were later closed.)

Third, under the principle of "complementarity," the I.C.C. is to regard a case as inadmissible if there is a state with jurisdiction that is willing and genuinely able to carry out an investigation or prosecution (Rome Statute, Articles 1 & 17). The fact that a state has investigated a matter and decided against prosecution is not a basis for the I.C.C. to exercise jurisdiction, unless there is something disingenuous about the state's conduct. See Stahn & El Zeidy, The International Criminal Court and Complementarity: From Theory to Practice (2011).

4. Exercise of Jurisdiction

If the Court has temporal and subject matter jurisdiction, and there are no other limits to the exercise of its jurisdiction, the I.C.C. prosecutor may commence an investigation of a particular "situation" (i.e., a particular crisis where crimes are thought to have occurred) as follows. First, the prosecutor can initiate an investigation on the basis of a referral from any state party. Second, the prosecutor can initiate an investigation on the basis of a referral from the U.N. Security Council. In either instance, the prosecutor can decline to pursue the matter if she determines that there is no reasonable basis to proceed under the Rome Statute (Article 53). Third, the prosecutor can initiate an investigation *proprio motu* on the basis of information received from individuals or organizations, though again she must first conclude that there is a reasonable basis to proceed (Article 15).

5. Preliminary Examinations, Investigations, and Cases

The sequence of steps to initiate a case involves in the first instance the prosecutor's decision to open a preliminary examination into the matter. The Office of the Prosecutor issues an annual "Report on Preliminary Examination Activities" outlining the situations in relation to the phase of consideration. For example, as of December 2017, she was examining subject-matter jurisdiction for the Gabonese Republic, Palestine, and Ukraine; admissibility for Colombia, Guinea, Iraq (U.K. personnel), and Nigeria; and had completed preliminary examinations for Afghanistan, Burundi, and complaints about the Israel/Gaza "flotilla incident" submitted by the Comoros Islands. Greece, and Cambodia in respect of their registered vessels. By December 2018, certain of these

situations had moved to the next stages (in particular Afghanistan and Palestine, discussed in the Notes below) or had been closed. More situations had also been added, including Bangladesh/Myanmar for aspects of the Rohingya conflict, the Philippines for alleged crimes against humanity involving widespread extrajudicial killing of suspected drug offenders, and Venezuela.

If the prosecutor finds in favor of subject-matter jurisdiction and also determines that there would be a reasonable basis to commence an investigation, she must then notify all states parties and all states which would normally exercise jurisdiction over the crimes concerned. Those states then have one month to inform the prosecutor that it is investigating or has investigated the crimes in question. Upon request from such a state, the prosecutor shall defer to the state's investigation, unless the pre-trial chamber on the prosecutor's application decides to authorize the investigation (Article 18). The purpose of the requirement is to ensure application of the principle of complementarity (explained above, with reference to Articles 1 & 17). During an investigation, each situation is assigned to a pre-trial chamber. If the prosecutor requests, the pre-trial chamber may issue a warrant of arrest or a summons to appear if there are reasonable grounds to believe a person has committed a crime within the jurisdiction of the Court. Once a wanted person has been surrendered to or voluntarily appears before the Court, the pre-trial chamber holds a hearing to confirm the charges that will be the basis of the trial.

6. Trials and Appeals

Once the charges are confirmed, the case is assigned to a trial chamber of three judges, which conducts the trial. Under the Rome Statute, the defendant has a right to be present during the trial (Article 63) and is presumed innocent until proven guilty by the prosecutor beyond reasonable doubt (Article 66). The accused has the right to a public trial without undue delay, and to conduct his or her defense in person or through counsel of his or her choosing (Article 67). Victims may also participate in proceedings directly or through their legal representatives.

Upon conclusion of the trial, the trial chamber issues its decision, acquitting or convicting the accused by at least a majority vote (Article 74). If the accused is convicted, the trial chamber issues a sentence for a specified term of up to thirty years or, when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, life imprisonment (Article 77). The trial chamber may also order reparations to victims (Article 75). Throughout the proceedings, either the accused or the prosecutor (or even a concerned state) may appeal decisions of the chambers as specified by the statute (Articles 81–83). All appeals are decided by an Appeals Chamber of five judges.

7. Current "Situations" and "Cases"

As of late 2018, the I.C.C. was actively engaged in cases arising from situations involving ten states: Burundi, Central African Republic (CAR); Côte d'Ivoire; Democratic Republic of the Congo (DRC); Georgia; Kenya; Libya; Mali; Sudan (relating to Darfur); and Uganda. With respect to those situations, four states parties to the Rome Statute (CAR, DRC, Mali, and Uganda) had referred the situations concerning alleged atrocities by rebel groups occurring on their territories, while the Security Council had referred the situations in Sudan (Darfur) and in Libya. A pre-trial chamber had granted the prosecutor authorization for investigations *proprio motu* concerning the violence that occurred in Kenya during its 2007 elections and in Côte d'Ivoire during its 2010–2011 elections, as well as the situation in Burundi or by nationals of Burundi between April 26, 2015 until October 26, 2017 (the latter date being the effective date of Burundi's notification of withdrawal; see below)

In the same time frame, twenty-eight cases had been brought, involving forty-four individual defendants, arising from those situations. Of those cases, there had been rather few final dispositions; most remained at either the pre-trial or trial stage as of 2018. Several cases had been dropped by the prosecutor due to insufficient evidence, or the pre-trial chamber did not confirm the charges or required the charges to be vacated (as happened with the Kenyan situation, noted above). As for convictions, defendant Thomas Lubanga was convicted of the war crimes of enlisting and conscripting child soldiers; his appeal was denied in 2014 and he is serving a fourteen-year sentence. Defendant Ahmad Al Mahdi acknowledged guilt at the beginning of his war crimes trial arising from the situation in Mali and was given a nine-year sentence in September 2016. Defendant Jean-Pierre Bemba Gombo was convicted and sentenced in 2016 on charges of crimes against humanity (murder and rape) and war crimes (murder, rape, and pillaging) in the CAR conflict, but the Appeals Chamber decided by majority in June 2018 to acquit him and he has been released from custody. In a related case, Bemba and several co-defendants were convicted for offenses against the administration of justice (witness intimidation) in connection with Bemba's trial; after appeal, new sentences of brief terms of imprisonment with monetary fines were imposed.

8. Operating Rules and Budget

A series of rules have also been developed to govern the operations of the I.C.C., including Rules of Procedure and Evidence; Regulations of the Court; Regulations of the Registry; Code of Professional Conduct for Counsel; and Code of Judicial Ethics. The I.C.C.'s expenses are funded primarily by its states parties, though it also receives voluntary contributions from governments, international organizations, individuals, corporations, and other entities.

9. Withdrawals and Attempts to Withdraw from Jurisdiction

Several states have given a one-year notice of withdrawal from the Rome Statute in accordance with Article 127(1), but only one such withdrawal had become effective as of late 2018. South Africa deposited a notice of withdrawal on the instruction of President Jacob Zuma in October 2016, but the notice was retracted after a ruling of the South African Constitutional Court concerning the lack of presidential authority to take the decision on withdrawal. Gambia gave notice of withdrawal in November 2016 but retracted the notice before it became effective, following a change in government. Burundi notified its withdrawal on October 27, 2016, which became effective as of October 27, 2017; the prosecutor is continuing her investigation of charges through the latter date, on the (presumably correct) assumption that the withdrawal has no effect on jurisdiction in respect of conduct that took place prior to the effective date of withdrawal. Finally, the Philippines gave notice of withdrawal on March 17, 2018, which is to take effect on March 17, 2019. The withdrawals notified by Burundi and the Philippines were evidently motivated by the fact that the prosecutor had begun looking into the situations in those countries.

NOTES

1. *African Blowback.* Some supporters have expressed concern and some opponents have expressed criticism that until recently, almost all of the situations before the I.C.C. in its first twenty years have related to Africa. Yet I.C.C. supporters note that four of the nine African situations before the Court were referred by African states themselves and that the I.C.C. Chief Prosecutor is a Gambian national, Fatou Bensouda.

2. *Curious Case of Palestine.* Article 12(3) of the Rome Statute envisages the possibility of a state that is not a party to the Rome Statute nevertheless making a declaration to the I.C.C. accepting the Court's jurisdiction over crimes committed on its territory or by its nationals. In 2009, the Minister of Justice of the Government of Palestine, Ali Khashan, filed a declaration with the I.C.C. recognizing its jurisdiction for "acts committed on the territory of Palestine since 1 July 2002." In April 2012, the I.C.C. Office of the Prosecutor issued a statement noting that Palestine had not as of that time been accepted as a U.N. member state and its legal status in terms of Article 12's jurisdictional requirement was unresolved

> 8. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.

Office of the Prosecutor, Situation in Palestine, paras. 7–8 (Apr. 3, 2012).