CHAPTER 4

INTERNATIONAL CRIMINAL COURTS

I. INTRODUCTION

The emergence of international criminal courts is a phenomenon of the past twenty-five years. Historically, most prosecutions for violations of international criminal law, including international humanitarian law, have taken place in domestic courts. The post-World War II military tribunals at Nuremberg and Tokyo set a precedent that was unique in several respects. Beginning with the establishment of the two *ad hoc* tribunals (one for the former Yugoslavia in 1993, the other for Rwanda in 1994), the new institutions now include the International Criminal Court (which began operating in 2002) as well as a variety of "mixed" or "hybrid" courts.

This chapter summarizes the origins, structure, jurisdiction, and current status of these tribunals. The substantive law on which their decisions have been based is discussed in Chapter 5.

II. THE *AD HOC* TRIBUNALS

The International Criminal Tribunals for the former Yugoslavia ("ICTY") and for Rwanda ("ICTR") were both created by the UN Security Council, acting under Chapter VII of the UN Charter, in response to widespread armed conflict involving massive violations of human rights and humanitarian norms. They were subsidiary organs of the United Nations, conceived as temporary institutions with limited jurisdiction. Both are now effectively concluded.

The ICTR delivered its last trial judgement in December 2012. It closed at the end of December 2015 and its remaining functions (related to appeals) were assumed by a new institution, the Mechanism for International Criminal Tribunals (MICT). The ICTY's mandate expired at the end of 2017, and pending matters were similarly transferred to the MICT. See § 4–3.

While criticized for their high cost and the slow pace of proceedings, the two tribunals in fact completed a significant number of trials. The ICTY indicted 161 individuals, rendering 90 convictions, 19 acquittals, and 50 other dispositions. See *http://www.icty.org/en/about*. The ICTR indicted 93 individuals, of whom 62 were convicted. Three of the ICTR's accused remain at large. See *http://ictrcaselaw.org*. A new institution, the Mechanism for International Criminal Tribunals has assumed responsibility for the remaining proceedings from both tribunals. Generally see *http://unictr.irmct.org/en/tribunal*.

Together the *ad hoc* tribunals also produced a substantial body of decisional jurisprudence that has contributed to the progressive development of many aspects of international criminal law and procedure. In an important sense, the proceedings before these two courts served as a developmental laboratory, laying the groundwork for the International Criminal Court. The following offers a brief overview of the ad hoc Tribunals and their decisional jurisprudence. New questions of law have now been answered by the ICTY and ICTR and in doing so, new principles have emerged.

§ 4–1 THE ICTY

In 1991, the Socialist Federal Republic of Yugoslavia began to dissolve. First to secede were Slovenia and Croatia. In early 1992, the province of Macedonia declared its independence,

followed by Bosnia and Herzegovina. That spring, Serbia and Montenegro formed the Federal Republic of Yugoslavia. In this process, deep-seated ethnic tensions fueled violent conflicts, pitting various groups (such as Muslims, Serbs, Croats, and Bosnians) against each other.

Responding to reports of massive atrocities and fearful that the fighting might spread further, the U.N. Security Council eventually charged a Commission of Experts to investigate serious violations of international humanitarian law in the former Yugoslavia. The following year, acting under its peacekeeping authority and based largely on the Commission's recommendations, the Security Council created the International Criminal Tribunal for the Former Yugoslavia (the "ICTY").

1. *Jurisdiction*

The ICTY was charged with prosecuting "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Specifically, it had jurisdiction over genocide, crimes against humanity, violations of the laws and customs of war, and grave breaches of the 1949 Geneva Conventions (which apply in international armed conflicts). The ICTY's Statute did not include crimes against the peace or aggression, and the specific list of crimes against humanity in article 5 was somewhat broader than the London Charter, including imprisonment, rape, and torture "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."

The ICTY's jurisdiction was limited in several ways—by time, location and offense. In addition, it was "concurrent" with that of the national courts of the various States that today comprise the territory of the former Yugoslavia. In other words, an individual accused of a crime within the ICTY's substantive jurisdiction may also have been tried before those national courts.

However, the ICTY had "primary" jurisdiction over the latter, meaning that at any stage of proceedings, it could require those national courts to defer any proceedings they had undertaken or were contemplating in favor of the ICTY's prosecution. This arrangement reflected a concern that, given the inter-ethnic nature of the underlying conflict, if the national tribunals could assert primary jurisdiction they might insist on trying their own nationals. In practice, however, the ICTY had not exercised its right of primacy in many cases.

2. *Structure*

The Tribunal consisted of three separate organs. First were the *Chambers*. There were three separate Trial Chambers, each consisting of three judges. Their decisions were reviewed by an Appeals Chamber, a seven-member body headed by the President of the Court, which served as the final authority on matters of law. Judges came from many nations, but no two judges could be nationals of the same State. Second was the *Office of the Prosecutor.* As an independent unit, it was responsible for conducting investigations and pursing the cases. The third was the *Registry*. It managed court records, supported the court more generally, and played an important role in the assignment of defense counsel.

3. Applicable Law

The ICTY Statute itself provided essential definitions of the various crimes over which the Tribunal had jurisdiction: specifically, grave breaches of the Geneva Conventions, violations of

the laws or customs of war, genocide and crimes against humanity. It left it to the ICTY to interpret and apply those definitions in light of what it considered to be the rules of customary international law. In its decision in the *Celebici* case, the Appeals Chamber pointed out that the Security Council, when establishing the ICTR, was not creating new law but had (among other things) codified existing customary rules for the purposes of the Court's jurisdiction. *See Celebici Appeals Judgment*, IT–96–21–1 (Feb. 20, 2001) at para. 170. Nonetheless, the decisional law of the ICTY (like that of the ICTR) has contributed to the development and elaborations of those rules.

4. Legitimacy

One of the first issues confronting the ICTY was a direct challenge to the legitimacy of the tribunal itself. Dusko Tadić, a Bosnian Serb accused of crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the laws or customs of war, argued that the UN Security Council lacked the authority under Chapter VII of the UN Charter to create subsidiary bodies with judicial powers. He also argued that the ICTY lacked authority to judge its own validity. Unsurprisingly, the Tribunal ruled against him on both points, finding that (i) once the Security Council determines the existence of a "threat to the peace" it has "a wide margin of discretion" in choosing the appropriate response, including the creation of a criminal tribunal, and (ii) the ability to determine the scope and validity of its own competence is "a major part of the incidental or inherent jurisdiction of any judicial or arbitral tribunal." *See Prosecutor v. Dusko Tadić a/k/a "Dule*," IT 94–I–AR72, Decision on the Defense Motion for an Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), paras. 18, 31, 32.

5. Joint Criminal Enterprise

One of the ICTY's most significant (and controversial) contributions was the articulation of the concept of "joint criminal enterprise." The Statute itself contained no provision for convicting joint participants in specific crimes on the basis of conspiracy or related concepts. This was unsurprising since civil law jurisdictions generally lack the concept of criminal conspiracy as it exists in (for instance) the United States. Yet many of the atrocities committed during the Balkan conflict were in fact the product of joint activity.

In a series of decisions, the Tribunal developed and applied a theory of responsibility based on the notion of a "joint criminal enterprise" ("JCE"). This concept permits a chamber to hold all individuals within a group responsible for the crimes committed by the group. Fundamentally, a joint criminal enterprise consists of a common plan in which a number of individuals participate with the shared aim of committing an international crime or crimes. It was introduced in the Tadić Appeals Judgment, IT–94–1–A (July 15, 1999), paras. 185 ff. The concept is discussed in Chapter 6, part III. The ICTY also introduced the concept of "joint criminal liability: in three forms, in the case of *Popović.*

6. Duress

The ICTY faced other difficult issues relating to the culpability of defendants. For example, one member of the Bosnian Serb Army, Drazen Erdemović, was accused of killing unarmed civilians during the massacre at Srebrenica in 1995. He admitted to killing a number of individuals but invoked the defense of duress, arguing that he had been told by his superior commander either

to kill the civilians or be killed himself. The Tribunal rejected that argument, holding that duress cannot be a complete defense to crimes against humanity or war crimes. *Prosecutor v. Erdemović*, IT–96–22–A, Judgment, (Oct. 7, 1997). This prohibition on the defense of duress stemmed from policy considerations and the necessity for international law to serve as a guide to combatants during times of armed conflict. However the Court made a relevant distinction between the use of the defense by soldiers as opposed to civilians, as soldiers are held to a higher standard of accountability. (Separately, the ICTY decided that that duress can be considered a mitigating factor in assessing punishment.)

7. Milošević

Perhaps the most notorious ICTY proceeding was the prosecution of Slobodan Milošević, former president of Serbia and Yugoslavia and former Supreme Commander of the Yugoslav Army. He was charged with a number of offenses including genocide, complicity in genocide, persecutions, torture, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war involving Common Article 3 (among others). He evaded capture for several years but was eventually arrested by Serbian authorities and surrendered to the Tribunal.

Milošević never acknowledged the ICTY's legitimacy. He refused legal counsel and chose to represent himself through most of the proceedings. His abusive approach to the proceedings and his ill-health caused repeatedly delays in the trial. After five years in custody, and only weeks before a verdict was expected, he died in March 2006. His death prompted a wave of public criticism of the ICTY for being too slow. His death also caused disappointment due to the fact that many considered his trial as "*the trial for which the [Tribunal] was created.*"

§ 4–2 THE ICTR

The genocide which took place in Rwanda during the spring and early summer of 1994 is well-known. It occurred in the context of longstanding conflict between the two main ethnic groups, the majority Hutu and the minority Tutsi. While estimates vary, between 800,000 and a million people died and perhaps half a million women were raped during the 100 days of that appalling conflict. Most of the victims were Tutsis, and most of the perpetrators were Hutus.

In November 1994, the UN Security Council acted under Chapter VII to establish an *ad hoc* tribunal, the International Criminal Tribunal for Rwanda (ICTR), for "the sole purpose of prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994." *See* UN Sec. Coun. Res. 955 (1994).

Like the ICTY, the substantive jurisdiction of the ICTR covered genocide and crimes against humanity (although the definition of the latter included an additional element of discrimination). In contrast to the ICTY, however, the ICTR's Statute reached only serious violations of Common Article 3 and Additional Protocol II of the Geneva Conventions (which apply to internal—or "non-international"— conflicts). The reason was that, unlike the Balkan conflict, the Rwandan genocide occurred primarily within a single country between different ethnic groups of Rwandans and did not involve a significant international dimension.

Like the ICTY, the ICTR had concurrent jurisdiction with Rwandan courts but also had

"primacy" meaning that it could require national courts to surrender cases to it. *See* ICTR Statute, art. 8(1).

The Tribunal was headquartered in Arusha, Tanzania, and was thus more distant, both geographically and symbolically, from the people in Rwanda than the ICTY is from the people in the former Yugoslavia. Structurally, the Tribunal was similar to the ICTY, with Trial Chambers, an Appeals Chamber, a Registry, and an independent prosecutor's office. Under article 13(4) of the Statute, the ICTY's Appeals Chamber also served as the ICTR's Appeals Chamber. In 2002, in an effort to speed up the work of the Tribunal, the Security Council amended the Statute to permit the election of *ad litem* judges to sit in the Chambers. *See* ICTR Statute article 12. The tribunal was finally closed at end of December 2015, having convicted 62 of the 93 persons indicted for crimes under the statute.

1. *Genocide*

In *Prosecutor v. Akayesu*, ICTR 96–4–T2, Judgment (Sept. 2, 1998), the Tribunal became the first international tribunal to interpret and apply the definition of genocide as set forth in the 1948 Genocide Convention. The Trial Chamber offered a lengthy factual description of the violence which had occurred in Taba Province in 1994 and of Akayesu's responsibility as communal leader (or *bourgmestre)* in and for those acts, which it found were aimed at "the complete disappearance of the Tutsi people." Akayesu was convicted of (and sentenced to life imprisonment for*)* committing and being complicit in genocide, for direct and public incitement to commit genocide, and for crimes against humanity. The ICTR was the first tribunal to recognize rape as a means of perpetuating genocide, and in the case of *Nyiramasuhuko et al.*, ICTR-98-42-A (Dec. 14, 2015) convicted a woman for the very first time of the crime of genocide and rape.

2. *Rape and Sexual Assault as Genocide*

In addition, the *Akayesu* judgment held that rape (defined as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive") and other forms of sexual assault can constitute acts of genocide when committed with the necessary genocidal intent. Specifically, it found that sexual assault had formed an integral part of the effort to destroy the Tutsi as an ethnic group and that the rape had been systematically committed against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide.

3. *Direct and Public Incitement*

In what came to be known as the "Media Case," the Tribunal convicted three individuals of direct and public incitement to commit genocide. Ferdinand Nahimana and Jean-Bosco Barayagwiz had been deeply involved in Radio Television Libre des Mille Collines, the radio station that effectively branded Tutsis as the enemy. Hassan Ngeze owned and edited a popular newsletter that published anti-Tutsi messages. The Appeals Chamber also determined, *inter alia*, that in certain circumstances hate speech could constitute the "persecution" crime against humanity. *Prosecutor v. Nahimana et al*., ICTR 99–52–A, Appeals Chamber Judgment, (Nov. 28, 2007). *See Prosecutor v. Karemera et al.*, ICTR 98–44–T, Decision on Motions for Judgment of Acquittal, (Mar. 19, 2008) para. 15.

4. *Government Officials*

In *Kambanda v. The Prosecutor*, ICTR 97–23–A (Oct. 19, 2000), the Appeals Chamber affirmed a judgment against Rwanda's former prime minister Jean Kambanda. In 1998, in what was then the first international decision against a former head of government for genocide, the Trial Chamber had sentenced Kambanda to life imprisonment after he pled guilty to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and complicity in genocide, as well as to two counts of crimes against humanity for murder and extermination.

Owing to the horrific and polarized leadership in the country, several measures of procedural and constitutional reforms were also introduced in Rwanda with the help of nations and non-governmental organizations, in order to introduce the international rule of law standards in Rwanda, for example the introduction of rules of customary international law in the Constitution. More recently, the Trial Chamber sentenced Augustin Ngirabatware, Rwanda's former Minister of Planning, to thirty-five years imprisonment for genocide, direct and public incitement to commit genocide and rape as a crime against humanity. The Chamber also found him guilty of participating in a joint criminal enterprise with the purpose of destroying, in whole or in part, the Tutsi ethnic group, and more particularly exterminating the Tutsi civilian population in the Nyamyumba commune. *Prosecutor v. Ngirabatware*, ICTR 99–54– T (Dec. 20, 2012).

5. *Crimes Against Humanity*

While many of its judgments have involved genocide, the ICTR has also addressed various aspects of crimes against humanity (including murder, rape, and extermination) and the problem of cumulative charges and convictions. In *Prosecutor v. Ndindiliymana*, ICTR 00–56–T, Judgment, (May 17, 2011), para. 92, for example, it affirmed that an accused can be held responsible for multiple crimes based on the same underlying conduct but "only where each crime may be distinguished by a materially distinct element."

§ 4–3 THE INTERNATIONAL RESIDUAL MECHANISM

For several years, concern had built over the slow pace of proceedings in the *ad hoc* tribunals. In 2002, the Security Council endorsed a broad strategy for the transfer of cases to relevant national courts to help the ICTY to complete its work by 2010. The ICTR was given a similar deadline. When it became clear that goal would not be met, the Council established an International Residual Mechanism for Criminal Tribunals. In UN Sec. Coun. Res. 1966, adopted on December 22, 2010, the Council asked both Tribunals "to expeditiously complete all their remaining work" no later than the end of 2014 and decided that the Mechanism would assume their jurisdiction, rights, obligations and essential functions, effective on July 1, 2012 with respect to the ICTR and on July 1, 2013 for the ICTY. The Mechanism was given an initial mandate of four years.

Under its Statute, this new Mechanism will continue the functions of the ICTY and of the ICTR, including the prosecution of persons already indicted who are "among the most senior leaders suspected of being most responsible for the crimes" within their respective jurisdictions. With minor exceptions, the Mechanism is not authorized to initiate new prosecutions.

The Statute specifies the Mechanism's structure (including its division into separate branches for Rwanda and the former Yugoslavia), the qualification of judges, its rules of evidence

and procedure, the rights of the accused, and transitional arrangements governing the completion of trials, referrals and appeals pending before the *ad hoc* tribunals when the respective branches of the Mechanism come into force. Article 28 directs States to cooperate with the Mechanism in its investigations and prosecutions and to comply with its requests for assistance.

§ 4–4 DOCUMENTATION

The ICTY's official website is *http://www.icty.org/*. The ICTR's statute, rules, judgments and other documentation are available at its official website at *http://www.ictr.org*. The website for the IRM is at *http://www.icty.org/sid/10874*.

III. THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court ("ICC") is the first permanent or "standing" tribunal to be established expressly for the purpose of prosecuting genocide, war crimes and crimes against humanity. Unlike the ICTY and ICTR, it was created not by the UN Security Council but instead by a multilateral treaty known as the Rome Statute, which was concluded at a diplomatic conference on July 17, 1998.

The ICC became operational in 2002. As of the end of 2018, eleven different "situations" were under investigation and twenty eight separate cases had been instituted before the ICC (*see* **§** 4–17 below). Some 45 individuals had been indicted and verdicts rendered in 6 cases, resulting 8 convictions and 2 acquittals. Sixteen people had been detained in the ICC's detention center and had appeared before the Court; fifteen others remained at large.

§ 4–5 BACKGROUND

Efforts to create such an institution extend as far back as the League of Nations following World War I. An initial attempt to establish a tribunal to prosecute war crimes failed in 1937. Although efforts continued in the early years of the United Nations, they were stymied mostly by Cold War antagonisms. The issue was raised again by Trinidad and Tobago in 1989, when it proposed an international forum for prosecuting drug traffickers. Eventually, in 1992, the UN General Assembly asked the International Law Commission to prepare a statute for a tribunal with broader jurisdiction. Building on earlier efforts as well as the recently created *ad hoc* tribunals, the ILC adopted a proposed text in 1994. *See* Report of the ILC, 46th sess., May 2–22, 1994, UN Doc. A/49/10; U.N. GAOR, 49th Sess., Supp. No. 10 (1994). That text served as the basis for consideration by a UN preparatory committee held between 1996 and 1998.

The Rome Statute itself was adopted in 1998 at a formal diplomatic conference held in Rome by a final vote of 120-7 (with twenty-one abstentions). The Statute came into force on July 1, 2002. As of the end of 2018, 123 States had become Parties to the Rome Statute (through ratification or accession) and an additional fifteen had signed (but not ratified or acceded), including the Russian Federation, Egypt, the Islamic Republic of Iran, Israel, Sudan, the Syrian Arab Republic and the United States. Still, a quarter of the UN's 194 Member States have neither signed nor ratified, including the India, Pakistan, Turkey, and the People's Republic of China.

The Rome Statute is a lengthy, detailed and complex multilateral treaty, divided into thirteen parts and 128 articles. It directs the Court to conduct investigations and prosecutions for crimes of genocide, crimes against humanity, war crimes and aggression (as discussed below, the

provisions on aggression are not yet in effect). The operation of the Court also requires reference to other instruments, including the Elements of Crimes and the Rules of Procedure and Evidence.

§ 4–6 THE STRUCTURE OF THE COURT

The International Criminal Court is an independent entity with its own "international legal personality." It is composed of four "organs": (1) the Presidency, (2) the Chambers, (3) the Office of the Prosecutor, and (4) the Registry. The Assembly of States Parties also plays a key role.

1. *The Presidency*

The Presidency consists of the President and the two Vice-Presidents, who are responsible for the Court's overall operation and administration. They are elected by the Court's eighteen judges. In addition to assigning cases to the Chambers and overseeing the work of the Registry, the Presidency manages the Court's external relations.

The eighteen judges are elected by a two-thirds majority vote of the Assembly of States Parties for non-renewable terms of nine years. The judges must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." In making their selection, the States Parties must take into account the need for representation of the principal legal systems of the world, equitable geographical representation; and (iii) a fair representation of female and male judges.

2. The Chambers (or *Judicial Divisions)*

The Chambers consist of an Appeals Division (four judges), a Trial Division (eight judges) and a Pre-Trial Division (six judges). The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court in specific cases. Assignment of judges to Divisions is made on the basis of the nature of the functions each Division performs and the qualifications and experience of the judge.

3. *The Office of the Prosecutor*

The "OTP" is responsible for examining allegations about crimes within the Court's jurisdiction, conducting the necessary investigations, and directing prosecutions before the Court. The Prosecutor is independent from the judges and is elected by an absolute majority of the Assembly of States Parties to a non-renewable nine-year term. The current Prosecutor is Ms. Fatou Bensouda from Gambia.

4. *The Registry*

The Registry provides support services to the Court, including the administration of legal aid matters, court management, victims and witnesses' matters, defense counsel, detention unit, and other kinds of support such as finance, translation, building management, procurement and personnel.

5. *The Assembly of States Parties*

The "ASP") also plays an important role in the overall functioning of the Court, although it is not formally one of the ICC's "organs." Comprising representatives of those States that have ratified or acceded to the Rome Statute, it provides overall management oversight with respect to issues related to budget, finance and human resources. The ASP decides such issues such as amendments to the Statute, the adoption of normative texts, approval of the budget, and the election of the judges and of the Prosecutor and the Deputy Prosecutor(s). Each State Party has one vote in the ASP, although every effort has to be made to reach decisions by consensus both in the Assembly and the Bureau.

As of December 2018, the staff of the Court totaled over 900 persons in the professional and general services categories. The professional staff included more than a hundred nationalities. The approved budget for 2018 exceeded €147,431,500.

§ 4–7 JURISDICTION

The International Criminal Court is a court of limited and specific jurisdiction. Its authority to hear cases is both enabled and constrained by several fundamental rules. Taken separately, each of these rules is fairly simple, but in the context of any given situation, they produce a rather complicated analysis. The following discussion endeavors to provide a "user friendly roadmap."

1. *Jurisdiction Ratione Materiae*

Substantively, the ICC has jurisdiction only over the four "core" crimes of genocide, war crimes, crimes against humanity and aggression. They are introduced here for clarity, and they are discussed in greater detail in Chapter 5.

A. Genocide

The definition of genocide in article 6 of the Rome Statute is drawn directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It states: "For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

B. Crimes Against Humanity

In contrast, no current multilateral treaty contains an accepted definition of the term "crimes against humanity" (although in 2017 the International Law Commission competed its first reading of a draft of such a treaty). Article 7 of the Rome Statute thus represents one of the first "codifications" of the term. It defines the term to mean any of a number of specific acts (such as murder, extermination, torture, rape or sexual slavery, or persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds) "when committed as part of a widespread or systematic attack directed against any civilian

population, with knowledge of the attack."

C. War Crimes

Article 8 contains a detailed definition of the acts which constitute war crimes within the Court's jurisdiction "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." It draws heavily on the 1949 Geneva Conventions and customary international humanitarian law, including the distinction between international and non-international armed conflicts. As to the former, article 8(a) covers "grave breaches" of the 1949 Geneva Conventions, and article 8(b) lists "other serious violations of the laws and customs applicable in international armed conflict."

Article 8(c) applies "[i]n the case of an armed conflict not of an international character" and covers "serious violations of article 3 common to the four Geneva Conventions of 12 August 1949," listing several particular acts "committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed out of combat (*hors de combat)* by sickness, wounds, detention or any other cause." Article 8(e) lists "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." These two provisions apply to armed conflicts not of an international character but not to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Arts. 8(d) and (e).

D. Aggression

Initially the crime of aggression was left undefined, but in 2010, at the Kampala conference, the ASP agreed on both a definition and the rules under which the Court will exercise jurisdiction over this crime after (a) at least thirty States Parties have accepted the amendments and (b) a decision is taken by two-thirds of States Parties to activate the jurisdiction after January 1, 2017. By December 2017 the necessary adherences had been obtained and the ASP had taken required decision, so that the core crime of aggression was "activated" as of December 2018.

As adopted in article 8(*bis*), 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." In turn, "act of aggression" is defined to include "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." The article lists a number of acts which, "regardless of a declaration of war," shall qualify as an act of aggression. The definition is drawn largely from UN G.A. res. 3314 (XXIX) (Dec. 14, 1974).

Article 15bis provides, however, that the Court may exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party *unless* that State Party has previously declared that it does not accept ("opts out of") such jurisdiction.

2. Jurisdiction Ratione Personae

Article 1 of the Rome Statute gives the Court "jurisdiction over persons for the most serious

crimes of international concern." As emphasized in article 25, this jurisdiction *ratione personae* extends only to "natural persons" who can be held "individually responsible and liable for punishment." The ICC's jurisdiction thus rests on the basic concept of individual criminal responsibility. Accordingly, cases cannot be brought against States or governments, or against non-State entities such as organizations, institutions or corporations.

The Statute recognizes no immunity based on an individual's official capacity or position, including that of Head of State or Government. As stated in art. 27(2), "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

This aspect of the Court's jurisdiction is subject to an important limitation. In exercising its authority under Chapter VII to refer situations to the Court (described in greater detail below), the UN Security Council has the authority to exclude specific individuals from the Court's jurisdiction. It has in fact done so on two occasions: first, in UN Sec. Coun. Res. 1593 (2005), by which it referred "the situation in Darfur since 1 July 2002" to the Prosecutor, and second, in UN Sec. Coun. Res. 1970 (2011), by which it referred "the situation in the Libyan Arab Jamahiriya since 15 February 2011" to the Prosecutor.

These two resolutions contained virtually identical statements that "nationals, current or former officials or personnel from a State outside [Sudan or Libya] which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in [Sudan or Libya] established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State."

A. Nationality and Territoriality

Subject to some important exceptions, the ICC may only consider cases involving allegations of the four "core crimes" which were committed either (a) within the territory of a State Party to the Rome Statute or (b) by a national of a State Party to the Rome Statute. In analyzing the Court's jurisdiction over a particular circumstance or "situation," therefore, the starting point will be to determine whether the crime took place in, or was committed by a national of, a State Party to the Rome Statute.

As a general rule, the Court may not consider cases involving States which are not party to the Rome Statute. There are a few exceptions, however. The Court may do so for crimes committed on the territory of *non-party* States (i) when they were committed by nationals of a State which is a party, or (ii) when they are part of a "situation" referred by the Security Council acting under Chapter VII, or (iii) when the non-party State "opts in" pursuant to article 12(3).

These jurisdictional concepts differ from the normal rules applicable to States as discussed *supra* in Chapter 3. Generally, international criminal law permits States to exercise domestic jurisdiction over crimes committed within their territory or by their nationals. These two grounds provide the most widely exercised bases for prosecutions of international crimes at the domestic level. Strictly speaking, however, they are not applicable to the International Criminal Court, since it is an international organization, not a State, and has no ties of territoriality or nationality.

Moreover, the Court clearly does not exercise "universal jurisdiction" as that concept is normally used, since its jurisdiction is limited by connections of nationality, territoriality, and action of the UN Security Council or the State concerned.

B. Temporal Jurisdiction

The Court has jurisdiction "only with respect to crimes committed after the entry into force of this Statute." *See* art. 11 (1). As this statute came into force on July 1, 2002, only crimes committed after that date will fall under the scope of the ICC's jurisdiction. Thus, in contrast to the ICTY and ICTR, which were established to prosecute individuals for crimes which had already been committed during clearly defined periods, the ICC's temporal jurisdiction (jurisdiction *ratione temporis***)** is prospective and open-ended.

The crimes in question must also have taken place after the Statute has entered into force for the particular State in question. *See* art. 11(2): "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3." Generally, that will occur on the first day of the month after the sixtieth day following the deposit by such State of its instrument of ratification, acceptance, approval or accession. *See* art. 126(2). Thus, it is not possible for a State to ratify the Statute in order to submit to the Court a situation which has already taken place on its territory.

No statute of limitations applies to the crimes within the Court's jurisdiction. *See* Art. 29.

A special rule applies to war crimes. A State may, upon ratification of the Statute, declare that it does not accept the jurisdiction of the Court over war crimes committed on its territory or by its nationals for a period of seven years after the Statute enters into force for it. Art. 124. Only two States, France and Colombia, have made use of this "war crimes opt out," although France withdrew its declaration in 2008. An effort to delete the provision was turned back at the Kampala Review Conference in 2010.

§ 4–8 TRIGGERING THE JURISDICTION

How do specific cases get started? What is the process for initiating proceedings? As indicated above, the Statute provides three separate mechanisms. Which mechanism is used to "trigger" the Court's jurisdiction has an effect on the specific jurisdictional prerequisites.

Under art. 13, the Court's substantive jurisdiction over the four "core crimes" may be invoked in one of three ways: (1) if a State Party to the Statute refers "a situation in which one or more of such crimes appears to have been committed" to the Prosecutor, (2) if the UN Security Council refers such a situation to the Prosecutor by taking a decision under Chapter VII of the Charter, or (3) if the Prosecutor has initiated an investigation on his or her own authority (*proprio motu*).

In the first two instances, the process begins with specific charges against named individuals but rather by referral of "a situation in which one or more of [the core] crimes appears to have been committed." Art. 13. In the third, the Prosecutor is authorized to initiate "investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." Art. 15(1). That information may be generated by the OTP itself or provided to it by others. Some recent examples of *proprio motu* are (1) the launching of investigations in the state of Burundi in 2017 for alleged crimes against humanity by its nationals and (2) the initiation of investigations against US military forces in 2018 for alleged atrocities committed in Afghanistan.

§ 4–9 REFERRAL BY A STATE PARTY

A State Party may refer to the Prosecutor "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed by requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes." Art. 14(1). It also requires that "[a]s far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation." Art. 14(2).

To date, six situations have been presented under this mechanism by the States concerned ("self-referrals"): the Central African Republic (2004 and 2014), Uganda (2004), the Democratic Republic of Congo (2004), Mali (2012), and in May 2018 Palestine, which is a a State Party to the Rome Statute, referred "the situation in Palestine since 13 June 2014." Even more recently, in September 2018 Argentina, Canada, Colombia, Chile, Paraguay and Peru referred the situation "relating to crimes against humanity ….that would have been committed in the Bolivarian Republic of Venezuela (hereinafter, Venezuela) since February 12, 2014, for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."

A referral by a State Party does not necessarily result in an investigation, much less a prosecution. Under article 53, the Prosecutor must initiate an investigation *unless s*he determines that there is no "reasonable basis to proceed." That determination turns on whether crimes within the Court's jurisdiction appear to have been committed, the potential case(s) would be admissible, and prosecution would be in the interests of justice.

§ 4–10 REFERRAL BY THE SECURITY COUNCIL

Article 13(b) authorizes the UN Security Council to refer situations to the Court by exercising its Chapter VII powers. This provision reflects the need for the international community to address situations quickly and effectively even in the absence of referrals by (or over the objections of) the States directly concerned. Under article 53, such a referral requires the Prosecutor to initiate an investigation *unless* he determines that there is no reasonable basis to proceed.

To date the Security Council has exercised this authority twice. In September 2004, it referred the "situation in Darfur" and in February 2011, it referred the "situation in Libya." In case of Libya, of the 3 cases, only one arrest has been made, and the other two cases are still in the pre-trial stage. *See* UN Sec. Coun. Res. 1593 and 1970. Neither Sudan nor Libya is a party to the Rome Statute.

§ 4–11 PROSECUTORIAL INITIATIVE

The Rome Statute permits the Prosecutor to initiate investigations on his or her own authority (*proprio motu)* on the basis of information provided to the Court, without a referral by a State Party or the Security Council.

This authority is subject to several constraints. Investigations *proprio motu* must be based on an affirmative determination that there is a "reasonable basis" for proceeding. Article 53(1) requires the Prosecutor to consider whether the case would be admissible in accordance with article 17 and whether, "taking into account the gravity of the crime and the interests of victims," there are "substantial reasons to believe that an investigation would not serve the interests of justice." He or she must also seek the approval of the Pretrial Chamber before proceeding. *See* Arts. 13(c),

15(4), and 53(l)(a). The Prosecutor is limited to initiating investigations in cases involving either conduct on the territory of States Parties or acts committed by the nationals of such States. He must also defer to an investigation being conducted by national parties unless the Pretrial Chamber decides that those authorities are either unwilling or unable genuinely to investigate or prosecute. *See* Arts. 12, 17 and 18.

In conducting the investigation, the Prosecutor is required "to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally." Art 54(1)(a). He or she must "respect the interests and personal circumstances of victims and witnesses, including age, gender . . . and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children." Art 54(1)(b). He or she has extensive powers to collect and examine evidence, to question suspects, victims and witnesses, and to seek the cooperation of any State or intergovernmental organization.

Giving these *proprio motu* powers to the Prosecutor generated considerable controversy at the 1998 Rome Conference. Some States were concerned about the possibility of investigations by a "rogue" or politically motivated prosecutor. The majority, however, thought it a necessary complement to referrals by the Security Council and States Parties since in given situations States may reluctant to refer cases involving their own nationals or those of another State (especially if doing so might interfere with diplomatic or economic relations) and since action by the Security Council under Chapter VII is subject to the veto power of its five permanent members.

To date the OTP has thus far opened investigations in the states of Kenya (2010), Cote d'Ivoire (2011), Georgia (2016) and Burundi (2017).

In November 2017, the Prosecutor sought authorization from Pre-Trial Chamber III to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in the Islamic Republic of Afghanistan since May 1, 2003, as well as regarding similar crimes sufficiently linked to that "situation" but committed on the territory of other States Parties since July 1, 2002.

§ 4–12 DEFERRAL BY THE SECURITY COUNCIL

Under article 16, the Security Council also has the power to instruct the Court to defer any investigation or prosecution for a renewable twelve month period when it is actively considering the particular situation. As in the case of referrals, the Security Council must take such decisions under Chapter VII of the UN Charter. In 2010 and then again in 2015, Kenya requested the UNSC to defer ICC cases against Kenyan nationals citing that the ICC proceedings 'continue to undermine the immediate and long term political stability of Kenya' and that Kenya was putting up a credible judicial mechanism to try the suspects locally. UNSC's refusal to defer the above case has invited significant African opposition to the ICC's applicability in the region.

§ 4–13 COMPLEMENTARITY AND ADMISSIBILITY

Like the two *ad hoc* tribunals, the Court's jurisdiction is "concurrent" or "shared" rather than "exclusive," in the sense that the crimes which it covers can also be prosecuted in the domestic courts of States Parties to the Statute. However, the Rome Statute incorporates a structural preference for prosecution of cases at the national level. This preference is given effect through the related principles of complementarity and admissibility.

1. *Complementarity*

In contrast to the *primary* jurisdictional authority of the earlier tribunals (in the sense that they could require a State to surrender a proceeding even if it was in the process of investigating or prosecuting), the ICC's jurisdiction is *complementary*, meaning that the ICC is required to defer to national courts unless it makes certain determinations. Thus, the Court is not intended to be a substitute for national courts but rather to provide a forum of "last resort" when national criminal jurisdictions fail to do their job.

2. *Admissibility*

Even if a particular situation falling within the Court's temporal and substantive jurisdiction has been properly referred to it, another step remains — the determination of *admissibility*. Under article 17, the Court must determine that a case is *inadmissible* in any of four circumstances: (1) when the case is being investigated or prosecuted by a State which has jurisdiction over it, *unless* the State is unwilling or unable genuinely to carry out the investigation or prosecution; (2) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, *unless* the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (3) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; or (4) the case is not of sufficient gravity to justify further action by the Court. Art. 17(1).

3. *Unwilling or Unable*

The standard for finding "unwillingness" to investigate or prosecute is high. In making this determination, the Court is directed to consider whether the decision by national authorities "was made for the purpose of shielding the person concerned from criminal responsibility," whether there was "unjustified delay in the proceedings," or whether the proceedings "were not or are not being conducted independently or impartially" or "in a manner . . . inconsistent with an intent to bring the person concerned to justice." Art. 17(2). In deciding if the State is "unable" to prosecute, the Court must consider "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." Art. 17(3).

4. *Gravity*

The "gravity threshold" under art. 17(1)(d) has been the subject of considerable analysis and speculation. It remains unclear just what factors might prompt the Court to conclude that a given situation is "not of sufficient gravity to justify further action" and is therefore inadmissible. It is interesting that under article 53 the Prosecutor may similarly determine a case is not in the "interests of justice," taking into account "the gravity of the crime and the interests of victims."

Thus, specific cases are "inadmissible" (even though squarely within the Court's jurisdiction) if they are in fact being investigated or prosecuted by a State Party with jurisdiction. While these decisions obviously require a measure of judgment, they are not discretionary.

Recently, in 2015, the Union of Comoros appealed to the Pre-trial chambers of the ICC to look into the OPT's decision not to initiate investigations in the region owing to the 'gravity threshold'. Several factors determine the decision to not prosecute or indict due to lack of gravity of crimes. This mechanism is important to limit the Court's attention to truly grave crimes of international significance.

5. *Challenges*

While the Court can always consider on its own motion whether it should defer to national proceedings, challenges to the admissibility of a case may be made by an accused, or by a State which has jurisdiction (on the grounds that it is investigating or prosecuting the case or has done so), or by a State from which acceptance of jurisdiction is required under article 12. Art. 19(2).

§ 4–14 APPLICABLE LAW

Article 21(1) of the Statute contains a hierarchy of applicable law. It provides that the Court *shall* apply (a) "in the first place, the Statute, Elements of Crimes and the Rules of Procedure and Evidence;" (b) "in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;" and (c) "failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

In addition, under article 21(2), the Court *may* apply "principles and rules of law as interpreted in its previous decisions." The Statute thus rejects the strict reliance on decisional precedent (*stare decisis*) which is a hallmark of Anglo-American common law.

Finally, article 21(3) states that "the application and interpretation of law must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

§ 4–15 STATE COOPERATION WITH THE ICC

Under article 86, States Parties to the Rome Statute have a treaty obligation to cooperate fully in the investigation and prosecution of crimes within the ICC's jurisdiction. The procedure for requests by the Court is set out in article 87; the obligation of States to surrender persons is contained in article 89; the specific procedures by which the Court may make a request for provisional arrests are indicated in article 92; and the obligations of States Parties with respect to other forms of cooperation are indicated in article 93.

As with the *ad hoc* tribunals, cooperation has posed problems. The Court necessarily relies on assistance from States and international organizations in a number of areas. But in specific cases, States have been less than fully cooperative. Most notably, while the Court has issued arrest warrants for the situation in Uganda, the arrests have not occurred, even though the defendants' locations are generally known. In addition, the Court has had to conclude supplementary arrangements with States on issues concerning witness and enforcement of sentences.

There has been increased criticism regarding the ICC's involvement in Africa, in particular on the basis that the OTP has been unduly focused on African issues. In 2017 the African Union called for a mass withdrawal of its member states from ICC membership. However justified the circumstances, a sense of disproportionate regional focus may damage the Court's reputation for impartiality. Given recent referrals, this perception may soon be reversed.

§ 4–16 VICTIM PARTICIPATION AND REPARATIONS

Unlike the *ad hoc* tribunals (which did not permit victim participation except as witnesses), the Rome Statute gives victims an independent right to participate in proceedings. Article 68(3) permits the Court to allow the views and concerns of victims to be presented and considered, where the victims' personal interests are affected, at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Under article 75(2), the Court may order convicted individuals to make reparations to victims, including restitution, compensation and rehabilitation. In accordance with article 79, a Trust Fund has been established by the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. The Court can order money and other property collected through fines or forfeiture to be transferred to the Fund. Technically, the Trust Fund is independent of the Court and can act for the benefit of victims of crimes, regardless of whether there is a conviction by the ICC. Recently, reparations were in fact awarded in the Katanga case, where victims were awarded modest individual and collective reparations.

§ 4–17 SITUATIONS

As of December 2018, proceedings were under way before the Court with regard to eleven separate situations: the Democratic Republic of the Congo, Uganda, Darfur (Sudan), Central African Republic (two proceedings), Kenya, Libya, Côte d'Ivoire, Mali, Georgia and Burundi. Preliminary investigations had begun on Afghanistan, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Bangladesh/Myanmar, Ukraine and Venezuela. See *https://www.icc-cpi.int/Pages/Main.aspx*.

§ 4–18 U.S. CONCERNS AND OPPOSITION

From the outset, there has been both substantial support for, and concern about, the ICC in various political circles in the United States. The United States participated actively in the negotiation of the Rome Statute and President Clinton signed it on December 31, 2000, the last day it was open for signature. In May 2002, however, before the Statute entered into force, President George W. Bush "unsigned" by declaring that the United States had no intention of ratifying the treaty, thereby arguably releasing the United States from any obligations thereunder. (The issue concerns the responsibilities of treaty "signatories" under art. 18 of the Vienna Convention on the Law of Treaties.) For its part, the Obama administration has pursued a more positive approach, participating in the Kampala review conference, abstaining on the referral of Sudan, and co-sponsoring the referral of Libya.

Nonetheless, it seems unlikely that the current administration would submit the Rome

Statute to the Senate for advice and consent to ratification in the foreseeable future or that, if it did, the Senate would provide its advice and consent to ratification.

For opponents, the main objections concern possible interference with prerogatives of national sovereignty, a fear of politically motivated prosecutions, and worries that members of the U.S. military engaged in international operations (including peacekeeping and humanitarian missions authorized under Chapter VII of the Charter) would be subject to ICC jurisdiction.

Critics have noted that unlike national prosecutors, the ICC Prosecutor is not accountable to any outside agency and thus can wield considerable authority in exercising his power to initiate investigations. (Her *propio motu* investigations do require approval of the Pretrial Chamber.) Indeed, the ICC as a whole is not checked by any elected legislature or by an established tradition of international criminal justice. Under article 12 of the Statute, the ICC may take jurisdiction over nationals of a State not a party to the Statute without that State's consent and in the absence of a Security Council referral, if either the State of the territory where the crime was committed or the State of nationality of the accused consents. In some situations, this will expose individuals of non-party States (like the United States) to prosecution before the Court.

§ 4–19 *"ARTICLE 98" AGREEMENTS*

In an effort to avoid ICC jurisdiction, the United States undertook (for a period of time) to negotiate bilateral non-surrender agreements with various countries. These agreements sought to take advantage of article 98 of the Statute, which provides that the Court may not proceed with a request for surrender of a suspect or fugitive if that request would require the requested State "to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State" is first required. In other words, State A is not obliged to honor an ICC request to turn over a national of State B if States A and B have previously agreed that their nationals cannot be surrendered to the Court without their prior consent.

Over the course of several years, more than 100 such "article 98" agreements were concluded. They typically provided that a national of one party present in the territory of the other cannot be surrendered or transferred to the Court for any purpose. For several years, the U.S. Congress endeavored to promote the conclusion of such agreements by suspending certain kinds of bilateral foreign assistance to countries which were unwilling to conclude article 98 agreements with the United States. *See* the so-called "Nethercutt Amendment" to the Foreign Operations, Export Financing, and Related Programs Appropriations Act. That provision lapsed in 2009.

The program of negotiating such agreements gradually came to an end, and no new agreements have been concluded for the past several years.

§ 4–20 AMERICAN SERVICE MEMBERS PROTECTION ACT

In 2002, the U.S. Congress adopted the so-called American Service Members Protection Act, which *inter alia* prohibited U.S. accession to the Rome Statute except by means of the treaty provisions of the U.S. Constitution (which require the Senate's advice and consent). It also limited U.S. cooperation with and support for the Court, precluded the extradition of any person from the United States to the Court, and restricted transfer of classified national security information as well as law enforcement information. It precluded U.S. military assistance to countries which had ratified the Rome Statute, subject to important exceptions for NATO members, other major U.S. allies, and countries which concluded article 98 agreements with the United States. The statute

authorized the President to permit military aid when it was in the U.S. national interest.

In addition, the statute allowed the President to authorize military force to free any U.S. military personnel held by the ICC (causing some opponents to describe it as "The Hague Invasion Act"). It was subsequently amended to eliminate restrictions on bilateral military assistance and in 2008 all military sanctions provisions were removed. The current version of the statute may be found at 22 U.S.C.A. §§ 7401–02 and §§ 7421–33.

§ 4–21 FURTHER READING

The ICC's official website is at *www.icc-cpi.int*. The Rome Statute, UN Doc. A/CONF.183/9 (1998), is reprinted in 37 I.L.M. 999 (1998) and is available at *http://www.un.org/law/icc/index.html*.

IV. THE MIXED TRIBUNALS OR HYBRIDS

Truly international tribunals (like the *ad hocs* or the ICC) are not the only means of dealing with violations of international criminal law. In the past several decades, other alternatives have emerged in the context of post-conflict accountability. In some cases, the choice has been to create specialized courts or chambers within the relevant domestic legal system; in others, the tribunals are free-standing, essentially independent of the domestic legal system. Under either approach, proceedings can be "internationalized" through provision of assistance from other countries or even the appointment of foreign judges. When that occurs, such tribunals are neither domestic nor international but take on features of both.

The following paragraphs provide brief summary descriptions of the various "hybrid" or "internationalized" courts in summary fashion. A significant body of literature has emerged about these courts and tribunals, as well as a spirited debate over their structures, legitimacy and utility.

§ 4–22 LOCKERBIE

Perhaps the first such tribunal arose out of the bombing of Pan Am Flight 103 on December 21, 1988. The aircraft, *en route* from London to New York City, exploded over the village of Lockerbie in Scotland. All 259 passengers and crew (mostly Americans) were killed, as were eleven Scots on the ground.

An extensive investigation pointed to the involvement of two Libyan agents, Abdel Basset Ail Al-Megrahi (the former Director of Security for Libyan Airlines) and Al-Amin Khalifa Fhimah (the Director of the Libyan Airlines office in Malta). They denied the accusations, as did their government, but the United States and the United Kingdom demanded their surrender. When Libya refused, the UN Security Council imposed sanctions on Libya, including a travel ban and an embargo against oil-industry spare parts and technology. *See* UN Sec. Coun. Res. 748 (1992) and 883 (1993). Eventually, in April 1999, agreement was reached on a unique solution: a criminal trial would be held, in The Hague, before a Scottish court and under Scottish law.

For this solution to work, Scottish law had to be amended to allow its courts to conduct an extraterritorial proceeding. The necessary authority was given to the Scottish High Court by legislation, and a special bilateral agreement was concluded between the United Kingdom and the Netherlands to permit the court to sit in The Hague. Under this agreement, *reprinted* at 38 I.L.M. 926 (1999), the court, prosecution and applicable law were all Scottish; otherwise, Dutch law

applied.

Libya surrendered the accused and trial began in May 2000. In January 2001, following an 84-day trial, Al-Megrahi was convicted of conspiracy and sentenced to life imprisonment; Fhimah was acquitted. That verdict was upheld on appeal in March 2002. *See Al Megrahi v. HM Advocate*, (2002) J.C. 38 (Scot.). In August 2009, Al-Megrahi returned home to a hero's welcome in Libya after the Scottish government released him from prison on compassionate grounds. Medical examinations indicated that he would die from prostate cancer within a few months; in fact, he survived the next two years and died only in May 2012.

§ 4–23 SIERRA LEONE

The Special Court for Sierra Leone ("SCSL") presented a very different model. It was established in January 2002 by a treaty between the United Nations and the Government of Sierra Leone to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." It concluded operations in 2013 but, by agreement with the United Nations, its functions continue to be carried out by a Residual Special Court. See the RSC website at *http://www.rscsl.org.*

The SCSL was separate from the Sierra Leonean justice system but shared "concurrent jurisdiction" with it. It applied Sierra Leonean as well as international humanitarian law and (like the *ad hoc* tribunals) could assert "primacy" over Sierra Leonean courts in specific cases. Jointly administered by the UN and the Sierra Leonean government, it included a majority of international judges. The Chief Prosecutor was appointed by the UN Secretary General.

The Court was organized into a Trial Chamber and an Appeal Chamber, the Prosecutor's office and the Registry. Under art. 20(3) of its Statute, the Appeals Chamber was "guided" by the decisions of the ICTR's Appeals Chamber except in respect of the interpretation and application of the laws of Sierra Leone, in which case the decisions of the Supreme Court of Sierra Leone applied.

The Court's substantive jurisdiction covered crimes against humanity, violations of common article 3 of the Geneva Conventions and Additional Protocol II, "other serious violations of international humanitarian law," and certain crimes under Sierra Leonean law, including abuse of girls and wanton destruction of property. Uniquely, article 4(c) of the Statute authorized the Court to prosecute persons for "conscripting or enlisting children under age 15 into armed forces or groups or using them to participate actively in hostilities." This practice was widespread during the Sierra Leone conflict. The SCSL was the first tribunal to prosecute such crimes.

In May 2004, the SCSL Appeals Chamber ruled that the prohibition against child recruitment had crystallized as a rule of customary international law by 1996, thus eliminating any problem regarding retroactivity. *See Prosecutor v. Noonan*, SCSL– 2004–14–AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para. 53 (May 31, 2004).

As of 2018, the Prosecutor had indicted 23 persons, for whom 22 proceedings have been completed: seven are serving their sentences, one died while serving his sentence, eight have finished their sentences, three have been acquitted, and three died prior to the conclusion of the proceedings against them. Proceedings against one person, Johnny Paul Koroma, contitnue; he remains a fugitive and may be deceased. Some were tried on such charges as murder, rape,

extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on UN peacekeepers and humanitarian workers. Their cases were consolidated into four separate trials: the Revolutionary United Front (RUF) trial, the Civil Defense Forces trial, the Armed Forces Revolutionary Council (AFRC) trial, and the trial of Charles Taylor, all of which have now concluded.

Taylor, former President of Liberia, was accused of backing the civil war in Sierra Leone by providing arms and training to the RUF in exchange for diamonds. He was charged with mass murder, mutilation, rape, sexual slavery, and use of child soldiers. His trial began in June 2007. In 2009, the SCSL rejected his claim of Head of State immunity. In April 2012, the Trial Chamber convicted him on all counts, finding that he had participated in the planning of and aiding and abetting crimes committed by rebel forces in Sierra Leone. Its 2,500 page judgment was issued in May 2012, and shortly thereafter, the Chamber sentenced Taylor to a prison term of fifty years. In September 2013 the Appeals Chamber confirmed his guilt and the sentence. His motion to be moved to Rwanda from a British prison was denied and he was ordered to continue serving his sentence in the U.K. In 2017 it was found that he had been making phone-calls from the prison to provide guidance to the National Patriotic Party and threaten some of his enemies

The Appeals Chamber broke new ground by deciding that the term "other inhumane acts" in article 2 of the Statute is inclusive and, as a matter of customary international law, covers such acts as forcible transfer of persons, sexual and physical violence perpetrated upon dead human bodies, other serious physical and mental injury, forced undressing of women and marching them in public, forcing women to perform exercises naked, and forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions. In the context of the Sierra Leone conflict, it said, the term "forced marriage" describes "a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim." Such conduct is criminal and constitutes an "other inhumane act" capable of incurring individual criminal responsibility in international law. *See Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL–2004–16–A, Judgment (Feb. 22, 2008), paras. 196, 203.

§ 4–24 EAST TIMOR

In May 2002, East Timor (Timor-Leste) gained its independence from Indonesia after decades of violence. By some accounts, as many as 200,000 East Timorese were killed during the Indonesian occupation. Immediately after the 1999 UN-supervised referendum on independence, more died and hundreds of thousands were displaced. Two separate processes were eventually established for the purpose of bringing the responsible persons to justice.

The first initiative came from the United Nations. Acting under Chapter VII of the Charter, the UN Security Council established the UN Transitional Administration in East Timor (UNTAET) to serve, in effect, as an interim government. In 2000, UNTAET created the "Special Panels for Serious Crimes" to prosecute individuals accused of war crimes, crimes against humanity, genocide and other serious crimes committed in East Timor between January 1, 1999 and October 25, 2000. The Special Panels (sometimes referred to as the "East Timor Tribunal") operated as part of the District Court of Dili (the capital city of East Timor) and were composed of one Timorese and two international judges. To conduct the necessary investigations, a Serious

Crimes Unit (SCU) was also created consisting of international police investigators. In addition, a Defense Lawyers Unit (DLU) was established to represent the defendants.

All investigations were concluded in November 2004, and the Special Panels closed in May 2005. All told, some 95 indictments were filed involving nearly 400 persons, and 284 arrest warrants were issued. When the mandate terminated, the Special Panels had completed 55 trials involving 88 persons; four were acquitted and 84 convicted, 24 of whom pleaded guilty. Most of the accused, however, remained outside East Timor and were never prosecuted, including former Indonesian Minister of Defense and Commander of the Indonesian National Military Wiranto, six senior military commanders, and the former Governor of East Timor.

Independently, an *Ad Hoc* Human Rights Court for Timor-Leste in Jakarta was established by the Government of Indonesia to try individuals responsible, *inter alia*, for crimes against humanity committed in April and September of 1999 in Timor-Leste. This court indicted eighteen individuals from the military and the police who were directly in command in East Timor at the material time, as well as two civilian government officials and a militia leader.

§ 4–25 CAMBODIA

The Extraordinary Chambers in the Courts of Cambodia (ECCC) offer yet another model. Created to address crimes committed in that country during the Khmer Rouge regime (1975–79), they form part of the Cambodian legal system, include both Cambodian and foreign judges, and apply a combination of international law and Cambodian criminal law and procedure.

Between 1975 and 1979, nearly two million people are thought to have died in Cambodia (then known as Democratic Kampuchea) as a result of starvation, disease, overwork or atrocities committed during the rule of the Khmer Rouge. Eventually, Pol Pot and his followers were ousted by the Vietnamese army, but little was done to bring the responsible individuals to justice. The scale of the atrocities, and the clearly destructive intent that motivated the violence, led some commentators to classify the acts as genocide. Yet the indiscriminate nature of the violence, and the fact that it was not directed against a particular religious, national, ethnic or cultural group, appeared to exclude it from the definition in the 1948 Genocide Convention.

In 1997, the Cambodian government sought UN assistance in creating a domestic tribunal. In 2001, the Cambodian Parliament adopted a Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea. In 2003, Cambodia and the United Nations concluded a bilateral agreement providing for UN assistance.

The ECCC's mandate is to prosecute those "most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia that were committed during the period from 17 April 1975 to 06 January 1979." The offenses include genocide under the 1948 Genocide Convention, crimes against humanity as defined in the ICC Statute, grave breaches of the 1949 Geneva Conventions, and certain other crimes (homicide, torture and religious persecution) under the 1956 Cambodian Penal Code. The agreement with the United Nations included a commitment by the Cambodian Government not to request "an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement."

While some former Khmer Rouge leaders have died (including Pol Pot), others are alive and subject to prosecution. Four trials have been initiated. The first case involved charges of crimes against humanity and grave breaches of the Geneva Conventions against Kaing Guek Eav, alias

"Duch," the former head of the notorious S–21 prison. On July 26, 2010, Duch was convicted and sentenced to thirty-five years' imprisonment. On appeal, his sentence was increased to life imprisonment. The second case involved charges against former foreign minister Ieng Sary, his wife Ieng Thirith, former Khmer Rouge ideological leader Nuon Chea, and former Head of State of Democratic Kampuchea Khieu Samphan. The case against Ieng Sary was terminated in March 2013 following his death; Ieng Thirith was declared unfit to stand trial in November 2011, owing to dementia. The trial of Nuon Chea and Khieu Samphan continues and has spawned Cases 003 and 004 as new investigations have been initiated against new co-accused.

The ECCC has pioneered efforts to increase victim participation during the proceedings, including establishing a Victims Support Section for that purpose. The Internal Rules allow victims to join as civil parties, receive compensation and make appeals. However, due to its ground-breaking nature and the lack of specificity in the Rules, the civil parties' participation has added considerably to confusion and slow pace of the proceedings. In the span of 11 years 300 Million US dollars were spent on the Extraordinary Chambers of which 3 convictions resulted. The work of the Chambers has also been hampered by financial shortfalls.

The official website of the Extraordinary Chambers in the Courts of Cambodia is at *https://www.eccc.gov.kh/en/node/39457*. The website of the independent Documentation Center of Cambodia, a depository of evidence and documentation regarding the ECCC, is at *http://www.dccam.org*.

§ 4–26 IRAQI SPECIAL TRIBUNAL

An Iraqi Special Tribunal was established by the Iraqi Governing Council (and promulgated by the Coalition Provisional Authority) in December 2003 to prosecute former Iraqi President Saddam Hussein and other Iraqi leaders for war crimes, crimes against humanity, and aggression. The court was later renamed the Iraqi High Tribunal by the Iraqi Transitional National Assembly when, in August 2005, it adopted the legislation approving the Tribunal's Statute and Rules. Initially independent of the Iraqi court system, the Tribunal is now integrated into the domestic judicial system of Iraq. Its membership consists exclusively of Iraqi judges, although they have been assisted by international experts.

The Tribunal's jurisdiction extended from July 1968 (when the Ba'athists seized power) to May 2003 (when U.S. President Bush declared an end to major hostilities in Iraq). Its subject matter jurisdiction includes genocide, crimes against humanity, and war crimes (all defined almost exactly as in the ICC Statute) as well as violations of certain Iraqi laws. The Tribunal's jurisdiction *ratione loci* is not confined to Iraqi territory, permitting prosecution for crimes committed in connection with Iraq's war against Iran and its invasion of Kuwait.

Multiple cases were brought in the Iraqi High Tribunal. The most notorious began in October 2005, in which Saddam Hussein and eleven other former high-ranking officials were prosecuted in connection with the execution of 148 Shiite civilians in Dujail. Saddam was convicted of crimes against humanity in November 2006 and sentenced to death. After his appeal was rejected, he was hanged. For an English translation of the Judgment in the Dujail Case (Nov. 26, 2006), *see http://www.law. case.edu/saddamtrial/dujail/opinion.asp*.

The second trial began in August 2006 and dealt with atrocities committed against Iraqi Kurds during the so-called Anfal campaign, involving the use of chemical warfare against the Kurdish population in northern Iraq. Over 100,000 individuals perished. In June 2007, the Tribunal convicted former Iraqi Defense Minister Ali Hassan al-Majid (known as "Chemical Ali") and five

others of international crimes including genocide. A translation of the Judgment is available at *http://www.law.case.edu/grotian-moment-blog/anfal/ opinion.asp*.

§ 4–27 LEBANON

On February 14, 2005, former Lebanese Prime Minister Rafiq Hariri and twenty-two others were killed by a massive bomb killed in Beirut. The UN Security Council established a Commission to assist the Lebanese authorities in their investigation into the event. The Commission recommended creation of a Special Tribunal for Lebanon. *See* Report of the Secretary-General on the establishment of a Special Tribunal for Lebanon, U.N. Doc. S/2006/893 (Nov. 15, 2006).

After extended negotiations, an agreement was concluded between the United Nations and the Lebanese Republic on the establishment of such a tribunal. The UN Security Council approved the creation of a tribunal in May 2007. *See* UN Sec.Coun. Res. 1757 (2007), to which is annexed the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (STL).

The Special Tribunal's jurisdiction is unique in several important respects. First, it is charged with prosecuting those responsible for a single event (the assassination of an important political figure) in a particular country. By comparison, other tribunals have been given jurisdiction over situations involving large scale crimes committed in countries over a substantial period of time. Second, the STL has been given explicit authority to expand its temporal jurisdiction. Article 1 of the Agreement provides that, if the Special Tribunal determines that other attacks occurring in Lebanon between October 1, 2004 and December 12, 2005, were "connected in accordance with the principles of criminal justice" and were "of a nature and gravity similar to the attack of 14 February 2005," then it may also prosecute those persons. The relevant period of time may be further expanded by agreement of the Parties and with the consent of the Security Council.

Third, although it is treaty-based and approved by the UN Security Council, the STL is not part of the United Nations or the Lebanese judicial system. It consists of Lebanese and international judges. Its substantive jurisdiction is based on Lebanese law and it has concurrent jurisdiction with the Lebanese courts except that, for matters within its jurisdiction, it will have "primacy over the national courts of Lebanon." *See* art. 4(1) of its Statute. Finally, the STL's jurisdiction is exclusively based on crimes defined under Lebanese domestic law and it does not have jurisdiction over any international crime. Notably, however, the first orders rendered suggest that the STL is "embedding international standards in a domestic jurisdiction."

The Tribunal opened on March 1, 2009. The current docket and other information are available at the Tribunal's website, *http://www.stltsl.org/en*.

On February 16, 2011, the STL's Appeal Chamber published a ruling setting out the definition of terrorism that would guide the tribunal in its deliberations. The Chamber suggested that there existed a customary international law definition of the crime of terrorism in times of peace, consisting of the following elements: "(i) the intent (dolus) of the underlying crime and (ii) the special intent (dolus specialis) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational." *See* Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, and Cumulative Charging, see *https://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936*. The Chamber argued that this customary international law definition was consistent with that under Lebanese law, and that in any case the gravity of the crimes and the fact

that they had occupied the attention of the Security Council demanded adoption of a definition of terrorism in accordance with international law.

§ 4–28 KOSOVO

Yet another approach was adopted by the UN Interim Administration Mission in Kosovo (UNMIK), concerning prosecution of individuals responsible for atrocities committed during the armed conflict in Kosovo in 1999. Neither the ICTY nor the Kosovar domestic justice system could handle the possible caseload. UNMIK responded by creating panels comprising at least two international judges and one Kosovar judge to adjudicate cases where it is "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice." Known as "Regulation 64 Panels," they were intended to function within the overall context of the existing Kosovar court system to hear cases under Kosovar law involving serious crimes committed during the conflict including war crimes trials against Kosovo Serbs. The panels conducted over two dozen war crimes trials, including the trials of Milo Jokić and Dragan Nokolić. Regulation 64 panels have been set up to deal with 20 cases thus far. Additional information can be found at the United Nations Interim Administration Mission in Kosovo (UNMIK) website: *www. unmikonline.org*.

§ 4–29 BOSNIA-HERZEGOVINA

Unlike the Regulation 64 Panels, the War Crimes Chamber of the State Courts of Bosnia and Herzegovina is an entirely domestic court to which the ICTY can refer cases against lower level individuals accused of crimes against Croatian civilians. Created in January 2005, and located in Sarajevo, the Chamber operates under domestic law. Several former soldiers in the Bosnian Serb army have been convicted by the Chamber. Several cases have been referred to the Cantonal Court in Sarajevo. For additional information, *see www.sudbih.gov.ba*.

§ 4–30 SENEGAL/CHAD

Hissène Habrè, the former President of Chad, was accused of more than 40,000 political killings and more than 20,000 cases of torture during his eight years in office. After he was deposed in 1990, Senegal came under pressure from the international community to prosecute him. He was convicted *in absentia* in Chad in 2011 and indicted in Belgium in 2005. In July 2012, at the instance of Belgium, the International Court of Justice ordered Senegal to prosecute Habrè for torture in fulfillment of its obligations under the Convention against Torture. *See Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 1, para. 121 (July 20, 2012).

In 2012, in cooperation with the African Union, the Extraordinary African Chambers in the Senegalese Courts were established. Senegal's reluctance to initiate the prosecution was largely related to concerns regarding funding and was finally addressed by a November 2010 agreement between international donors regarding funding. The Court's Statute allowed it to exercise jurisdiction over genocide (defined as under the Genocide Convention), crimes against humanity (defined as under the Rome Statute), war crimes, (defined as under the Rome Statute) and torture (defined as under the Convention against Torture), restricted crimes committed on the territory of

Chard during Habrè's tenure as President. The Court initiated investigations in early 2013, the trial began in 2015, and in \ 2016 President Habrè was convicted and sentenced to life imprisonment by the Extraordinary African Chambers. The judgment was confirmed on appeal in April 2017.

§ 4–31 BANGLADESH

In 2009, the government of Bangladesh constituted a special International Crimes Tribunal to prosecute those responsible for atrocities committed during the 1971 Bangladeshi war of liberation from Pakistan. In that conflict, thousands of civilians died at the arms of the Pakistani army and its collaborators. However, the Tribunal has been plagued by confusion and conflict. Among other difficulties, the presiding judge resigned in the midst of allegations that he had sought advice from an expatriate Bangladeshi international law expert, undermining the tribunal's independence.

The first convictions (in late 2012 and early 2013) sparked unrest in the Bangladeshi capital Dhaka and provoked criticism that the tribunal is a political device being manipulated by the government. So far 11 persons have been indicted by the International crimes tribunal in Bangladesh. International human rights groups have expressed serious concerns about the Tribunal's independence and impartiality, the extent of governmental interference, and the conditions of detention for those accused and convicted.

§ 4–32 GACACA COURTS

Another unique version of international criminal adjudication came along in Rwanda in 2005 in the form of Gacaca courts. This mechanism was meant to cause healing and cooperation between the residents of the traumatized community of Rwanda and to conclude trials against accused persons by way of lowering penalties for remorseful individuals and reconciliation at grassroots levels to bring about peaceful settlement of disputes. As discussed earlier, several persons have criticized this exercise of pardon and gracious acceptance of former war criminals into the very communities they hoped to eradicate.

In Rwanda, a very different type of post-conflict mechanism was established, called *gacaca* (literally, "justice from the grass"), as a domestic supplement to the formal processes of the ICTR. These courts were more representative of truth and reconciliation commissions than formal prosecutorial mechanisms. Founded on customary law and practice, and focused at the local or community level, the *gacaca* courts aimed at revealing the truth about what happened and contributing to reconciliation within Rwanda. They were formally closed in 2012.

§ 4–33 RESTORATIVE JUSTICE MECHANISMS

As the examples indicate, international criminal justice mechanisms often find application in situations where entire societies have been torn apart by conflict and large numbers of people are either perpetrators or victims of violent crimes. Formal prosecutions are typically aimed at punishing the leaders and instigators of the worst atrocities. In some situations, however, determining individual criminal responsibility can be impossible and undesirable, both because of the severe logistical and financial challenges involved and because prosecution and punishment of a large section of society (often members of the some community) might cripple the human resources of that society and deepen its pre-existing rifts.

When that is the case, other types of transitional justice mechanisms may be appropriate, including truth and reconciliation commissions, official fact-finding commissions, amnesties, etc. These mechanisms aim primarily to "tell the story" by uncovering the truth, identifying perpetrators, and achieving some measure of reconciliation between victims and perpetrators—without necessarily imposing criminal punishments on all who may bear responsibility.

Depending on the particular circumstances, these alternatives can provide a different and constructive approach to post-conflict justice. In lieu of criminal prosecutions, they may provide non-adversarial mechanisms for conducting investigations, establishing the facts, determining accountability, and promoting social healing and forgiveness. They can furnish an opportunity for victims (and even perpetrators) to come forward with their stories to help establish the factual record of the atrocities, for recommending compensation, and for formulating reforms to prevent a repeat of past violence. They may be empowered to grant amnesties to encourage former perpetrators to come forward. In some cases the option of criminal prosecution may be retained.

However important these goals, some critics nonetheless contend that failure to convict and punish the guilty means the triumph of "impunity," so that alternative mechanisms can never be acceptable substitutes for genuine criminal trials.

The paradigmatic example of a truth and reconciliation commission is the one set up on South Africa following the end of apartheid. However, different types of commissions have also been experimented with in one form or another in Guatemala, Peru, Chile, Haiti, South Korea, Timor-Leste, Liberia, Mauritius, Canada, Morocco, Argentina, El Salvador, Germany, Ghana, Sierra Leone, Paraguay, Ecuador, Mauritius, the Solomon Islands, Togo, Kenya, Mozambique, Cambodia, Uganda, Bolivia, Uruguay, Zimbabwe, Philippines, Nepal, Chad, Sri Lanka, Nigeria, Panama, Yugoslavia and Congo.

§ 4–34 FURTHER READING

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Milena Sterio and Michael Scharf (eds.), THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW: ASSESSING THE ICTY'S AND THE ICTR'S MOST SIGNIFICANT LEGAL ACCOMPLISHMENTS (Cambridge 2019); Anne-Marie de Brouwer, THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Elgar 2016).

Peter Manning, TRANSITIONAL JUSTICE AND MEMORY IN CAMBODIA: BEYOND THE KHMER ROUGE (Routledge 2017); Meisenberg and Stegmiller, ed., THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Asser 2016); Sellars, ed., TRIALS FOR INTERNATIONAL CRIMES IN ASIA (Cambridge 2016).

Anna Meijknecht, "Hague Case Law: Latest Developments," 65 Neths. Int'l L. Rev. 79 (2018); William Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (5th ed. Cambridge 2017); Kai Su, "Addressing Post-Atrocity Conflict: The Tension Between Peace and Justice," 848 Stetson L. Rev. 141 (2018); Steinberg, CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT (Brill Nijhoff 2016); Cherif Bassiouni, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT (2d rev. ed, Brill Nijhoff 2016); Evely

Ankumah, THE INTERNATIONAL CRIMINAL COURT AND AFRICA: ONE DECADE ON (Intersentia 2016).

Several excellent on-line sources for more information on the topics in this chapter can be found at

- *https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html*,
- *https://research.un.org/en/docs/law/courts*,
- *https://research.un.org/en/docs/law/courts* and
- *https://www.icrc.org/en/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals.*