

International criminal law in an African context

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This chapter provides an overview of international criminal law as applied in national, hybrid and international courts. It is meant to be a brief introduction to international criminal practice for government legal and judicial officers, the police and practising lawyers in African states. Among other things, the chapter highlights the challenges to be faced, as well as the resources that can be relied on as a starting point for government legal and judicial officers, the police and practising lawyers in African states, when setting up or developing national institutions for investigating, prosecuting and adjudicating international crimes.

WHY IS INTERNATIONAL CRIMINAL LAW IMPORTANT FOR AFRICA?

The importance of international criminal law for the African continent is starkly highlighted by a statement made in the context of the International Criminal Court (ICC):

No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes whenever they occur (Mochochoko 2005: 249).

The ICC was not created specifically for the least developed and developing countries in Africa and Asia. Indeed, as a senior legal adviser in the ICC's Registry has said:

Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community (Mochochoko 2005: 243).

The extensive contribution of African states to the creation of the ICC is described in more detail below in the section on the negotiation of the Rome Statute that established the Court.

INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES AT NATIONAL LEVEL

Prior to the creation of the ICC in 2002 and the advent of *ad hoc* criminal tribunals such as the Special Court of Sierra Leone (SCSL) and the International Criminal Tribunal for Rwanda (ICTR), it was left to the domestic criminal courts of states to investigate and prosecute international crimes.² On several occasions this has been done by relying wholly or partly on the principle of universal jurisdiction. Some conduct violates not only the domestic legal order of a state, but also the international legal order. That is why certain crimes are designated as international crimes. States may thus exert jurisdiction over the perpetrators of such crimes on the basis that the crime committed is a crime against all humankind and in respect of which an individual places himself beyond the protection of any state.

States have jurisdiction over certain offences recognised by the community of nations as of universal concern, even where none of the usual bases of jurisdiction exist. The state may assert jurisdiction over those offences that are so serious as to qualify as crimes under international law. This principle of universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction (Princeton University Program in Law and Public Affairs 2001: principle 1(1)).

The principle gained impetus largely due to the atrocities of the world wars, and today various crimes – for example, war crimes, crimes against peace, crimes

against humanity, genocide and torture – are understood to be the subject of universal jurisdiction, either under customary international law or under treaty law in the form of the *aut dedere aut judicare* (either extradite or prosecute) principle.

For this purpose we will, first, discuss examples of investigations and prosecutions of international crimes at national level; second, discuss other responses such as truth commissions; and, third, discuss *ad hoc* and hybrid tribunals and the ICC. In this first section we set out some of the more important examples of domestic prosecutions of international crimes, including that of Adolf Eichmann, Augusto Pinochet, the Afghan asylum seekers, the Butare Four, Adolfo Scilingo, the Italian investigation into Operation Condor, Hissène Habré and the case of Mengistu Hailemariam, and briefly discuss the lessons that can be derived from them.

The case of Adolf Eichmann

Background

The trial of Adolf Eichmann is a well-known example of domestic courts exercising universal jurisdiction over international crimes. Eichmann, a member of the Austrian Nazi party and of the security service of Heinrich Himmler, was appointed head of the so-called Office for Jewish Emigration in 1938. He was later accused of, among others, being responsible for killings, extermination, slavery and deportation of the Jewish population. Eichmann reportedly organised the deportation of Jews from areas occupied by the German state from 1939 to mid-1945.³

Eichmann was abducted from Argentina by Israeli secret police in 1960 and taken to Israel to be tried (Inazumi 2005: 63).

Holdings of relevant courts and issues of interest

In 1961, Eichmann was brought to trial pursuant to the Israeli Nazis and Nazi Collaborators (Punishment) Law of 1950, a law modelled on the 1948 Genocide Convention. The district court⁴ of Jerusalem stated that Israel had jurisdiction over atrocities allegedly committed by Eichmann on the grounds that the atrocities were not domestic crimes alone but crimes against the law of nations. In its

judgment, the court was the first to explicitly rely on the notion of ‘universal jurisdiction’, stating:

The abhorrent crimes defined in this Law [the Nazis and Nazi Collaborators (Punishment) Law] are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself (“*delicta juris gentium*”). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.⁵

Importantly, Israel exercised jurisdiction over Eichmann for crimes committed outside its territory and before the state of Israel came into being – a rather unusual example, therefore, of universal jurisdiction.

The district court opined that although the method of bringing Eichmann to Israel might be disputed as being a violation of international law, that issue would be resolved between the relevant states and would not affect proceedings against Eichmann in Israel (Israel issued an apology to Argentina for the abduction of Eichmann, which was accepted). Eichmann also objected to the retroactive application of the law, but this argument was rejected by both the district and supreme courts⁶ on the basis that the crimes with which Eichmann was charged were prohibited under international law at the time of their commission. After the supreme court upheld the judgment of the district court of Jerusalem, in 1962, Eichmann received the death penalty.

While the Eichmann case is often cited as an example of ‘pure’ universal jurisdiction, it has been noted that passive personality jurisdiction and protective jurisdiction were also mentioned as bases of jurisdiction (Inazumi 2005: 65).

The Demjanjuk case

Background

John Demjanjuk was born in 1920 in Kiev in the Soviet Union. In 1951, Demjanjuk emigrated to the US and became a naturalised citizen in 1958. In 1986, he was extradited to Israel on suspicion of killing tens of thousands of people,

mostly Jews, by operating a gas chamber in a Nazi concentration camp in Poland during the Second World War (Inazumi 2005: 81). He was initially identified as Ivan the Terrible or Ivan Grozny, an infamous SS guard at the Treblinka camp.

Holdings of relevant courts and issues of interest

In October 1983 Israel issued an extradition request for Demjanjuk in order for him to stand trial in Israel under the Nazis and Nazi Collaborators (Punishment) Law of 1950. Demjanjuk was extradited to Israel on 28 February 1986. He was put on trial between 16 February 1987 and 18 April 1988. On 25 April 1988 a Jerusalem district court convicted Demjanjuk and sentenced him to death by hanging.

In granting Israel’s extradition request, the US district court and US federal circuit court recognised that Israel had universal jurisdiction over the crime of genocide.⁷ Unusually, the court recognised universal jurisdiction *in absentia* (that is, Israel did not have custody of the suspect but was still considered to be entitled to exercise universal jurisdiction).⁸

However, in 1993 the Israeli supreme court ruled that there was a reasonable doubt about Demjanjuk’s guilt due to the passage of time and the spoiling of evidence.⁹ The supreme court overturned the guilty verdict and ordered Demjanjuk’s release. It noted that a further trial would violate the double-jeopardy principle; that Demjanjuk had been extradited to stand trial for Ivan the Terrible’s crimes and not any others; that on the evidence available it was unlikely that Demjanjuk would be convicted on alternative charges; and that risking a further acquittal was not in the public interest.¹⁰

The case thus highlights the difficulties faced in investigations and prosecutions carried out decades after the alleged crime took place.

The Pinochet case

Background

When the elected Chilean president, Dr Salvador Allende, was overthrown on 11 September 1973, General Augusto Pinochet participated in the coup as the commander-in-chief of the armed forces. He commanded his forces to overthrow the government and to kill its most prominent supporters (Robertson 2002: 393).

A report by the National Commission of Truth and Reconciliation (the Rettig Commission) estimated that 3 197 persons were killed and 967 disappeared during Pinochet's rule. In 1990 Pinochet transferred power to his successor but remained commander-in-chief of the army until March 1998. Upon leaving that post, Pinochet took a senatorial position for life.

Pinochet was alleged to have taken part in Operation Condor (Robertson 2002: 394),¹¹ a campaign involving assassination and intelligence gathering allegedly conducted jointly by the security services of several South American states in the mid-1970s (for a discussion of Operation Condor, see below). He was also allegedly involved in a military unit that was supposed to have been responsible for the execution of 75 political opponents in different cities of Chile between September and October 1973 (the case of the Caravan of Death). He is also suspected of having had knowledge of the operations undertaken in Chile and abroad by a secret police agency, the National Intelligence Directorate, and its role in the implementation of Operation Condor.

In 1996 the Association of Progressive Prosecutors of Spain began a private prosecution against Pinochet and members of the Argentinean junta for genocide, terrorism and crimes against humanity.¹² Their action was taken over by Madrid investigating magistrate Balthazar Garzón.

In 1998 Pinochet travelled to the UK to receive medical treatment. On 3 November 1998, Spanish magistrate Garzón requested his extradition under the European Convention on Extradition for the crimes of genocide, terrorism and torture that took place in Chile (Robertson 2002: 396). Following the Spanish request of 16 October 1998 for Pinochet's extradition (Pinochet had planned to leave England on 17 October) in respect of various charges introduced against him in 1996 before the Spanish courts, a British magistrate issued a warrant for his arrest.

Pinochet was arrested in London on 17 October 1998. As Geoffrey Robertson, former president of the SCSL, observed, prior to the Pinochet case no former head of state, visiting another friendly country, had been held legally amenable to its criminal process (Robertson 2002: 395). In this respect, it is a landmark case.

Holdings of relevant courts and issues of interest

On 28 October 1998 the high court ruled that Pinochet was unlawfully arrested on the grounds that as a former head of state he was entitled to immunity.¹³

On 25 November 1998 Britain's highest court, the House of Lords, set aside the high court's judgment. The House of Lords reasoned that a former head of state

may only benefit from immunity for acts carried out in the exercise of legitimate state functions, which cannot include 'international crimes' such as torture (Robertson 2002: 397).¹⁴ Following this judgment, France, Belgium and Switzerland also issued extradition requests for Pinochet. On 9 December 1998 home secretary Jack Straw granted permission to proceed with Pinochet's extradition to Spain.

On 15 January 1999 the House of Lords set aside its earlier decision, due to Pinochet's claim contesting the impartiality of Lord Hoffman, one of the judges, based on the Law Lord's relationship with Amnesty International, one of the interveners in the case.¹⁵ A new panel of judges was set up, and on 24 March 1999 the House of Lords held that the international criminal law prohibition of crimes against humanity rendered ineffective the immunity that was traditionally accorded under customary international law for former state officials and heads of state.¹⁶ Twenty-seven of the 30 charges in the Spanish warrant against Pinochet were excluded on the double-criminality principle. However, the judges held that Pinochet was not entitled to immunity in extradition proceedings from those charges of torture where the alleged acts took place after Chile, Spain and the UK had become parties to the 1984 UN Convention against Torture.

On 15 April 1999 the home secretary issued a new authorisation to proceed with the extradition request. On 8 October 1999, as a result of Pinochet's extradition hearings, it was held that the crimes alleged against Pinochet constitute crimes both under British and Spanish law and, hence, allowed for extradition. However, on 11 January 2000 the home secretary concluded, on the basis of medical examinations, that Pinochet was unfit to stand trial. Soon after, on 2 March 2000, the home secretary ruled that Pinochet was not to be extradited to Spain, and Pinochet returned to Chile. Pinochet died on 10 December 2006¹⁷ without having been convicted of any crimes committed during his regime.

Although Pinochet himself was never tried for his crimes, the case demonstrates that immunity does not shield former heads of state in relation to international crimes that they may have committed.

Afghan asylum-seekers case

Background

On 14 October 2005 The Hague district court sentenced two Afghan asylum seekers for their role and participation in the torture of civilians during the Afghan

war of 1978–92 (Mettraux 2006: 362).¹⁸ One was a former head of military security and vice-minister for state security, and the other a high-ranking officer in charge of the department of interrogation of the military intelligence department. They had taken part in the torture and mistreatment of Afghan civilians. The individuals had come to the Netherlands as asylum seekers, in 1992 and 1996 respectively, and had provided what later turned out to be incriminating evidence during questioning by the Dutch immigration authorities. The Dutch immigration authorities forwarded this information to the prosecuting authorities and the two men were charged under Dutch law with, among others, the war crime of torture (Mettraux: 364–365).

Holdings of relevant courts and issues of interest

The court held in both cases that it had universal jurisdiction over violations of common article 3 of the Geneva Conventions and that the accused were guilty of torment ('foltering') and torture ('marteling') as a war crime (Mettraux 2006: 362). The two accused were sentenced to 12 and nine years' imprisonment respectively. In its judgment the court referred to the effect of international crimes on Dutch society, stating that the war crime of torture committed in Afghanistan affected the Dutch legal order not only because it is an international crime, but also because the suspect had stated on his asylum application that he intended to form part of Dutch society.

These decisions are part of a set of prosecutions of international crimes heard recently by The Hague district court.¹⁹ There is increased prosecutorial attention to international crimes in the Netherlands, boosted by legislative reforms, including the coming into force of the International Crimes Act on 1 October 2003. Previously, the genocide and torture conventions were implemented in Dutch law by the (now-repealed) Genocide Convention and the torture convention implementation acts respectively. Both statutes provided for the criminalisation of the types of conduct as set out in these two conventions.

Crimes against humanity are now criminalised under Dutch law under section 4 of the International Crimes Act.²⁰ Section 2 of the Act provides that Dutch criminal law shall apply to (a) anyone who commits any of the crimes defined in the Act outside the Netherlands, if the suspect is present in the Netherlands; (b) anyone who commits any of the crimes defined in the Act outside the Netherlands, if the crime is committed against a Dutch national; and (c) a Dutch national who

commits any of the crimes defined in the Act outside the Netherlands. Interestingly, prosecution on the basis of (c) above may also take place if the suspect becomes a Dutch national only after committing the crime.

The case of the Butare Four

Background

In 1993 Belgium passed the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Reydams 2003: 429–430). The Act accorded Belgium's courts universal jurisdiction over suspects accused of international crimes, and permitted victims to file complaints in Belgium for atrocities committed abroad.

The accused in the Butare Four case – Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera – were the first persons tried and convicted on the basis of this law (Reydams 2003: 428). The investigation and eventual prosecution were supported by Rwanda and several other countries by allowing Belgian investigators on their territories (Reydams 2003: 431).

The offences the four persons were accused of took place mostly in the Rwandan prefecture of Butare (Reydams 2003: 430).²¹ Vincent Ntezimana, a physics professor, was described as one of the ideologues of the genocide that occurred in Rwanda. Alphonse Higaniro²² was allegedly a member of the inner circle of the presidential family, at the level of cabinet minister. Consolata Mukangango (Sister Gertrude) and Julienne Mukabutera (Sister Maria Kisto) were Benedictine nuns at the Sovu monastery. During the conflict thousands of refugees sought refuge in the convent's compounds. According to the indictment, Mukangango discussed the fate of the refugees with the local Interahamwe leader and requested them to remove the Tutsi refugees from the compound. Many of the refugees were later killed in attacks on the compounds.²³

Rwanda and Belgium are parties to the 1949 Geneva Conventions and their Additional Protocol II. Moreover, Belgium's Act Concerning the Punishment of Grave Breaches of International Humanitarian Law came into operation prior to the alleged offences taking place (Reydams 2003: 435–436). The trial, before the Brussels cour d'assises, began on 17 April 2001.²⁴ The four accused were convicted on the evening of 8 June 2001.²⁵

Holdings of relevant courts and issues of interest

At the time of the trial, precedent limited the class of potential perpetrators covered by the 1949 Geneva Conventions and additional protocols to *de jure* or *de facto* state agents. Interestingly, none of the accused was a member of an armed force, and none of the accused could be regarded as official agents of the state. While Ntezimana and Higaniro were arguably *de facto* state agents, the nuns were not. This innovation was echoed later by the Appeals Chamber of the International Criminal Tribunal for Rwanda, which ruled in *Akayesu* that, under common article 3 of the 1949 Geneva Conventions, punishment ‘must be applicable to everyone without discrimination’ (Reydams 2003: 436).

Notably, the accused were convicted of war crimes even though there was, strictly speaking, no combat in Butare at the time that the relevant crimes were committed. This approach, too, was later echoed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*, where it held that ‘the rules contained in [common] Article 3 [of the 1949 Geneva Conventions] also apply outside the narrow geographical context of the actual theatre of combat operations.’²⁶ Perhaps more importantly, it has been argued that some of the war crimes of which Higaniro was convicted took place when there was no armed conflict (in the sense envisioned by the 1949 Geneva Conventions and the Additional Protocol II) at all in Rwanda (Reydams 2003: 436).

It should be noted that, since the above case was decided, the law on universal jurisdiction in Belgium has been repealed and new legislation promulgated in its place.²⁷ Under the new law Belgian courts only have jurisdiction over international crimes if the accused is Belgian or has his primary residence in Belgium; if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed; or if Belgium is required by treaty to exercise jurisdiction over the case. The new law also considerably reduces victims’ ability to obtain direct access to the courts – unless the accused is Belgian or has his primary residence in Belgium, the decision whether or not to proceed with any complaint rests entirely with the state prosecutor.²⁸

Belgium has thus restricted the reach of universal jurisdiction in its courts by adopting a law similar to or more restrictive than most European countries. The amended law did, however, preserve a limited number of cases that have already begun to move forward, including those concerning the Rwandan genocide and the killing of two Belgian priests in Guatemala, as well as the complaints filed against ex-Chadian dictator Hissène Habré. We discuss the Habré case further below.

The case of Adolfo Scilingo

Background

During the ‘dirty war’ in the period 1976–83 under the military dictatorship of Jorge Rafael Videla, between 13 000 and 30 000 people reportedly went missing in Argentina. In 1995 Adolfo Scilingo, a former Argentine naval officer, recounted on national television in Argentina his involvement in so-called ‘death flights’, in which the Navy would take live but drugged suspects into helicopters before throwing them, still alive, into the River Plate, which flows through Buenos Aires. He was also allegedly involved in the activities of the notorious Escuela Mecánica de la Armada, or Naval Mechanics School, known as the ESMA, a detention centre in Buenos Aires. In 1997 Scilingo voluntarily travelled to Madrid, Spain in order to give testimony. He provided details regarding the workings of the ESMA. Afterwards he was placed under arrest in Spain.²⁹ Although he has recanted his statement and been provided counsel through the Argentine government, he has remained in custody during several appeals (Wilson 2003).

Holdings of relevant courts and issues of interest

On 3 October 2003 Adolfo Scilingo was referred for trial before a panel of judges in the Audiencia Nacional, Spain’s special court for serious international crimes. As stated, the case was referred after Baltazar Garzón, the same Spanish investigating judge who was involved in the Pinochet case, completed his examination of crimes committed during the ‘dirty war’ years in Chile and Argentina. Scilingo’s trial commenced on 14 January 2005 in Madrid. On 19 April 2005 he was sentenced to 640 years’ imprisonment.³⁰ After the case went on appeal, in early late 2007, the Spanish supreme court’s criminal chamber upheld Scilingo’s conviction for involvement in murders and illegal detentions in Argentina. The court held that Scilingo’s crimes amounted to crimes against humanity under international law. This decision was the first by a Spanish appellate court following a full trial based on universal jurisdiction (Wilson 2008).

The Italian investigation into Operation Condor

After a seven-year investigation, Italian authorities are seeking to prosecute former top officials in seven South American countries for their roles in Operation

Condor, an operation in the 1970s and 1980s by the region's security forces to crush left-wing political dissent. Judge Luisianna Figliolia in Rome issued arrest warrants for 140 former officials from Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay in late December 2007, seeking to prosecute them in connection with the disappearance of 25 Italian citizens. The acts investigated allegedly involve locating, transporting, torturing and ultimately 'making disappear' dissidents across borders, and collaboration on assassination operations. Italy reportedly bases its claim to jurisdiction on the belief that crimes occurred against its citizens (Barrionuevo 2008).

The case of Hissène Habré

Background

Hissène Habré ruled Chad from 1982 until he was deposed in 1990 by President Idriss Déby Itno (Human Rights Watch 2008). Habré's eight-year reign was marked by severe political repression. The truth commission appointed after Habré's fall to investigate his crimes estimated that he is responsible for the torture and death of 40 000 individuals. Some of these victims were reportedly massacred in their villages as a response to Habré's suspicion that a particular ethnic group opposed him; most allegedly died of torture or starvation in prisons (Sharp 2003: 167). Files of Habré's political police, the Direction de la documentation et de la sécurité, discovered in 2001, reportedly reveal the names of more than a thousand persons who died in detention. A total of more than 12 000 victims of human rights violations were reportedly mentioned in the files. After being deposed, Habré fled to Senegal (Human Rights Watch 2008).

Holdings of relevant courts and issues of interest

The legal system in Senegal allows civil suits to be joined with a criminal investigation. Thus, documents collected by a torture victims' association were used to file a 'civil party complaint' against Habré in Senegal. Seven victims participated in this initial complaint. A problem faced by this group was that several of Habré's former high-ranking officers were still in power.

Pursuant to the initial complaint filed in Dakar, a Senegalese *juge d'instruction*, Demba Kandji, restricted Habré's movements and carried out further investigation. On 4 July 2000, after numerous postponements, the Senegalese *chambre d'accusation* (the criminal appeals court) responded to Habré's request for

dismissal of the complaint. At one point, President Wade of Senegal asked Habré to leave the country (Sharp 2003: 172). However, UN secretary-general Kofi Annan requested President Wade not to permit Habré to leave.

Following deposition of a complaint in Belgium, a Belgian judge, Daniel Franssen, went to Chad in February 2002 to conduct a criminal investigation. However, the possibility of an eventual trial in Belgium was placed in doubt by the Brussels court of appeals' restrictive interpretation of Belgium's universal jurisdiction statute, whereby the statute will not permit an investigation to be opened in Belgium for war crimes, crimes against humanity or genocide unless the suspect is found in the country (Sharp 2003: 173).

In 2005 a Senegalese court ruled that it did not have the power to decide whether Habré should be extradited to Belgium. In May 2006 the UN Committee against Torture held that Senegal had breached international human rights law by not dealing with Habré for 15 years.³¹ Senegal then referred the case to the AU. In July 2006, Senegal agreed to an AU request to prosecute Habré 'on behalf of Africa' (Human Rights Watch 2008). The AU has named Robert Dossou, Benin's former foreign minister and justice minister, as an envoy to the trial. In February 2007 President Wade signed into law measures permitting Senegal to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when they are committed outside Senegal, thus removing the primary legal obstacles to Habré's trial.

In November 2007 Senegalese justice officials promised lawyers for Habré's victims that an investigating magistrate would be named to carry out the probe of Habré 'within months' (Human Rights Watch 2008). In response to a request by President Wade for international assistance in preparing the trial, on 21 January 2008 an EU delegation headed by Bruno Cathala, the Registrar of the ICC, arrived in Dakar. The delegation was to evaluate Senegal's needs and propose technical and financial help (Human Rights Watch 2008). In April 2008 Senegal amended its constitution, thereby removing the last major obstacle to prosecuting Habré. This was a move warmly welcomed by the UN High Commissioner for Human Rights, Louise Arbour, who called it 'a very positive development in the struggle to strengthen accountability and an important step forward in the never-ending fight against impunity' (United Nations 2008).

Senegal has said that the investigation and trial would cost 28 million euro, and that it would spend over 1,5 million euro on the trial. In addition to the EU, a number of individual countries, including France and Switzerland, have publicly committed to helping Senegal.³²

The case of Mengistu Haile Mariam

Background

Mengistu Haile Mariam was the most prominent officer of the Dergue, the military junta that governed Ethiopia from 1974 to 1987, and the president of the People's Democratic Republic of Ethiopia. The Dergue (Coordinating Committee of the Armed Forces, Police, and Territorial Army) was formed by junior officers of the Ethiopian army on the eve of the 1974 revolution. Once the monarchy had been brought down through a widespread popular uprising, the members of the Dergue seized power. Subsequently, they began targeting individuals and groups likely to pose a threat to military rule (Tiba 2007: 516). In 1991, shortly before his regime was toppled by a coalition of rebels, Mengistu fled to Zimbabwe. The following year, the transitional government decided to bring him and his associates to trial for crimes committed during his reign (Tiba 2007: 517).

Holdings of relevant courts and issues of interest

The sentencing judgment was issued on 11 January 2007 by the Ethiopian federal high court in the case of Mengistu Haile Mariam and his co-accused who had been tried, among others, on charges of genocide and crimes against humanity. This was the first trial on the African continent where representatives of an entire regime were investigated and tried before a national court. Twenty-five of the 55 accused were found guilty, including Mengistu (who remains in exile in Zimbabwe). The trial took 12 years. In December 2006 Mengistu was convicted by majority vote of genocide and crimes against humanity pursuant to article 281 of the 1957 Ethiopian penal code, which includes 'political groups' among the groups protected against genocide (Tiba 2007: 517).

In a precedent useful for other states on the African continent, a special prosecutor's office that was mandated to prosecute those suspected of serious crimes committed during Mengistu's reign was established in 1992 by the transitional government of Ethiopia. Its first indictment was filed in 1994 (the suspects having been in custody since 1991). The special prosecutor reportedly indicted 5 198 suspects on charges of killing 8 752 persons, causing the disappearance of 2 611 people and torturing 1 837 others. Since 1994 Ethiopian courts have convicted more than a thousand people. The reported charging strategy was to divide the accused into three categories: (1) policy and decision makers, (2) officials who passed on orders or reached decisions on their own, and (3) those directly responsible for committing the alleged crimes.

The trials of those suspected of committing offences during Mengistu's regime took place at different locations throughout the country. This was done for purposes of convenience and also in order to try some of the accused at locations where the crimes had been committed. The case that included Mengistu and his senior collaborators was tried before the first division of the federal high court. The judgment will be discussed in this chapter.

Mengistu and his co-accused were charged with 211 counts of genocide and crimes against humanity. Twenty-five of the 55 accused who were found guilty, including Mengistu, were tried in absentia. The charges filed against Mengistu and his co-accused focused on genocide in violation of article 281 of the 1957 Ethiopian penal code, or, alternatively, on aggravated homicide in violation of article 522 of the penal code (Tiba 2007: 519).

As highlighted by the defence, article 281 treats genocide as a crime against humanity; so, too, acts designed to eliminate 'political groups' and 'population transfer or dispersion' are defined as amounting to genocide. This provision, consequently, goes beyond what is provided for in the Genocide Convention.³³ The court held, however, that Ethiopia could go beyond the minimum standards laid down in the convention, finding that article 281, which was enacted to give wider human rights protection, should not be viewed as contradicting the Genocide Convention. Put differently, the court held that so long as Ethiopia did not promulgate a law that minimised the protection of rights afforded by the convention, the fact that Ethiopia is a party to the convention was held not to prohibit the government from legislating a wider range of protection than the convention. In line with this, the majority decision rendered in December 2006 did not reconsider the issue of compatibility with the Genocide Convention (Tiba 2007: 519–520).

On 12 December 2006 the court issued its judgment on the merits. Fifty-five accused were convicted, by a majority vote of two to one, of genocide, homicide and bodily injury in violation of the Ethiopian penal code.

Judge Nuru Seid, dissenting, found that the accused should have been convicted of homicide and causing wilful bodily injury, not genocide. The dissenting judge accepted the argument of the accused that their actions at the time were lawful and the measures taken against political groups and their members did not amount to genocide in international law.

The trial, besides being overly lengthy, encountered several logistical problems. The availability of appropriate legal assistance for the defence was one significant

concern. Debebe Hailegabriel, one of the judges in the trial, expressed misgivings regarding this issue after resigning from the court.

OTHER RESPONSES: TRUTH COMMISSIONS AND RESTORATIVE JUSTICE MODELS

Before discussing the prosecution of international crimes before international and so-called mixed (national and international) criminal tribunals, it is useful to consider truth commissions and other restorative models as responses to international crimes.

Function

Truth commissions, in terms of function, 'stand half-way between international human rights bodies and international criminal tribunals' (Buergenthal 2006–07: 221). That is because they generally deal with human rights violations committed by both governments and by individuals. However, they tend not to be judicial bodies. They are usually fact-finding bodies set up to investigate serious violations of human rights and international criminal law, often committed during an internal armed conflict or during the time that a repressive regime has been in power (Buergenthal 2006–07: 221).

Mandate

The mandates of truth commissions differ from situation to situation, depending on the nature of the conflict investigated. Some are empowered to attribute individual responsibility for serious crimes, for example, 'naming names'; others do not have such power. Generally, truth commissions are required to propose methods for the compensation of the victims of the crimes investigated, and to recommend measures for fostering national reconciliation. Occasionally truth commissions are empowered to recommend the prosecution of persons suspected of serious crimes. Some, such as the South African Truth and Reconciliation Commission, are empowered to offer immunity from prosecution if the offenders confess their guilt and ask for forgiveness (Buergenthal 2006–07: 221–222).

Types of truth commission

Three types of truth commissions, depending on their composition, could be identified: national truth commissions, mixed commissions and international

commissions. The South African Truth and Reconciliation Commission was a well-known national truth commission. National commissions were previously established in Argentina and Chile to investigate the massive violations of human rights that had been committed in these countries during rule by their respective military regimes. The Guatemalan Historical Clarification Commission, which consisted of a foreign chairman and two Guatemalan nationals, was a mixed truth commission. It was established pursuant to an agreement negotiated between the government of Guatemala and the insurgent forces under the auspices of the UN. International commissions – truth commissions composed entirely of foreign nationals – are rare. The UN Truth Commission for El Salvador is one example (Buergenthal 2006–07: 222).

Relative merits of the various types

The appropriateness of a particular type of commission will hinge on the characteristics, such as political climate, of the relevant country. Generally, a national commission set up through agreement among all major political groups tends to enjoy national legitimacy and receive broad support for its findings and recommendations. In the absence of such consensus, and where composition of the commission is controversial, the commission may suffer from insufficient credibility, which may hamper its ability to have an impact. This may happen, for example, in states where the regime investigated remains in power or remains in control of the security services.

An international commission may often be useful for a small country, where the population remains polarised along political lines, and where it is difficult to find a group of nationals of the country who would be considered by the population to be impartial. This is the case in El Salvador and explains why the parties to the Salvadoran peace agreement preferred to have a truth commission composed only by foreign nationals.

In mixed commissions the foreign members will be able to rely on their colleagues who are nationals of the relevant country to gain an understanding of the historical, political and social context of the conflict. However, mixed commissions may face disadvantages similar to those of national commissions. Unless their national members are viewed by the population as impartial, the commission will have difficulties gathering the information required to prepare a credible report because it will not be trusted and, indeed, any report it provides may not have much legitimacy or impact.

Comparison between truth commissions and courts

Truth commissions have been described as exercising ‘macro-fact-finding’ functions, that is, they investigate entire conflicts that have resulted in the large-scale commission of international crimes. International criminal courts, on the other hand, carry out ‘micro-fact-finding’ functions and adjudication of specific criminal charges (Buergethal 2006–07: 222).

Depending upon the context, a truth commission can provide information regarding widespread occurrence of genocide, disappearances, extrajudicial executions, torture and rapes, conditions in detention camps, massacres, etc. It can establish and name the state military or non-state insurgent units responsible for such acts. It can also explore the social, political and other causes for the conflict, and set out a historical overview of these events. This function can promote national reconciliation. Commissions can also recommend and, hence, be a precursor to further steps, such as the payment of compensation to victims, prosecution of alleged perpetrators and the provision of amnesties (Buergethal 2006–07: 223).

Mixed or international criminal courts, whose activities are described below, have a more focused role. They establish individual criminal responsibility and mete out appropriate punishment. Their judgments have ‘practical and symbolic value’ since they exact retribution, attach a stigma to the conduct that resulted in the punishment, and act as deterrents by showing potential offenders the consequences of criminal activity. Decisions of such criminal courts also indicate publicly that the international community considers the acts committed to be criminal, politically unacceptable and morally reprehensible.

It is difficult for international or mixed criminal courts to provide a comprehensive historical overview of the events that transpired in a country, and of the causes that precipitated the crimes or violations they produced, in the same way that a truth commission can, due to the focused nature of its activities. Courts are also limited in terms of the number of offenders who can be investigated and tried. In Rwanda, for example, some 100 000 individuals allegedly took part in the genocide, but no international or mixed court could try that many defendants. Due to the person-specific focus of courts, their approach to the facts before them is necessarily narrower than that of truth commissions, whose mandates are broader. Courts are also generally not well equipped to make policy recommendations in the same way that truth commission are (Buergethal 2006–07: 223).

On the other hand, truth commissions are not judicial bodies and lack the ability to investigate, try and, if appropriate, convict and sentence persons accused of criminal offences. Only a court can do this (Buergethal 2006–07: 223–224).

On the basis of the above, it is accordingly better to understand that in many post-conflict situations the work of truth commissions is able to complement the work of criminal courts, and vice versa. Naturally, there are practical problems involving due process and evidentiary issues that arise when both a court and a truth commission deal with the same situation. But despite such challenges, in many situations a truth commission and a court, working in the same environment, can set out findings that will enable a country to ‘put the past behind it without sweeping the truth under the rug’ (Buergethal 2006–07: 224).

THE ADVENT OF THE *AD HOC* AND MIXED TRIBUNALS

In our earlier discussion of domestic prosecution of international crimes we noted that certain states, including African states, have felt compelled to take action against individuals guilty of international crimes such as genocide, war crimes and crimes against humanity. However, as we have seen above, there are many practical, diplomatic and legal obstacles that can stand in the way of states seeking to prosecute international crimes on the basis of universal jurisdiction or on the basis of the active or passive personality principle. Partly as a result of this, in certain exceptional circumstances following large-scale atrocities, courts were created by the UN to try persons guilty of international crimes (for example, the Nuremberg and Tokyo tribunals and the Rwanda, Yugoslavia and Sierra Leone tribunals). The ICC itself has now been established on a permanent basis to prosecute those most guilty of serious international crimes.

The purpose of the following section is to consider the rise of these international criminal tribunals, and to identify the lessons they provide for Africans working in the field of international criminal justice. The tribunals discussed owe their creation in large measure to the legacy begun at Nuremberg. The war conducted by Germany and the crimes committed by its officials and soldiers during the Second World War prompted the creation by the Allied powers of an *ad hoc* international military tribunal at Nuremberg³⁴ (a similar tribunal was constituted in Tokyo (Brackman 1988) in respect of crimes committed by Japan’s leaders).

The establishment of the Nuremberg and Tokyo international military tribunals, which tried the principal leaders of the Nazi and Japanese regimes after

the Second World War for crimes against the peace, war crimes and crimes against humanity, marked an important turning point in the development of international criminal justice. The UN was energised by the work of these tribunals, and in 1948 adopted a resolution mandating the International Law Commission to begin work on the draft statute of an international criminal court (Schabas 2004: 8). The enthusiasm generated by Nuremberg and Tokyo for a permanent court in the immediate post-war period was, however, abandoned during the cold war.

However, at the end of the cold war, the world, for a variety of reasons, witnessed a steady proliferation of international and hybrid/mixed criminal courts, and Nuremberg's legacy was taken forward. The setting up and the practice of these courts are examined below. We will examine the ICTY, the ICTR, Panels with Exclusive Jurisdiction over Serious Offences in East Timor (the special panels of the Dili district court), the SCSL, Extraordinary Chambers in the Courts of Cambodia (ECCC), and, finally, the ICC. We do so in order to, firstly, highlight the challenges to be faced. But by considering the experience of these tribunals we also demonstrate the resources that can be relied on as a starting point for government legal and judicial officers, the police and practising lawyers in African states, when setting up or developing national institutions for investigating, prosecuting and adjudicating international crimes.

The International Criminal Tribunal for the former Yugoslavia

The ICTY was established by the UN Security Council acting under chapter VII of the UN Charter. Its creation was in response to the international crimes (including grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity) that had been committed on the territory of the former Yugoslavia since 1991 (United Nations 1993a).

The ICTY benefited from the Nuremberg legacy. Indeed, those who called for the tribunal relied on the precedent set by Nuremberg. In May 1991 Mirko Klarin, a Yugoslav reporter, called for 'a tribunal ... similar to the one at Nuremberg' (Futamura 2008: 27). Madeleine Albright, representing the US, said in the Security Council during the adoption of resolution 808 (1993) which provided for the ICTY's establishment, that there was '... an echo in the chamber today. The Nuremberg principles have been reaffirmed. We have preserved the long-

neglected compact made ... 48 years ago ... to create the United Nations and enforce the Nuremberg principles', and that 'the Nuremberg Principles on war crimes, crimes against peace, and crimes against humanity were adopted by the General Assembly in 1948. ... [W]ith resolution 808 (1993), the Security Council has shown that the will of this organisation can be exercised, even if it has taken nearly half a century for the wisdom of our earliest principles to take hold' (Futamura 2008: 27).

The rules of procedure and evidence of the ICTY were promulgated by the judges of the tribunal (United Nations 1993b: article 15). The judges themselves are elected by the General Assembly of the UN, from a list submitted by the Security Council (United Nations 1993c: article 13*bis*). The prosecutor of the ICTY is appointed by the Security Council on the basis of nomination made by the secretary-general (United Nations 1993b: article 16).

The stated mission of the ICTY is fourfold: (1) to bring to justice persons allegedly responsible for serious violations of international humanitarian law; (2) to render justice to the victims; (3) to deter further crimes; and (4) to contribute to the restoration of peace by holding accountable persons responsible for serious violations of international humanitarian law.

On its website, the ICTY summarises some of its 'core achievements': (1) strengthening the shift from impunity to accountability, (2) establishing the facts regarding the atrocities committed in the former Yugoslavia, (3) bringing justice to thousands of victims and giving them a voice, (4) accomplishments in international law, and (5) strengthening the rule of law.³⁵

The International Criminal Tribunal for Rwanda

The ICTR was established by the Security Council acting under chapter VII of the charter of the UN in light of offences committed in Rwanda during the mass-scale atrocities that took place in the months following 6 April 1994 (United Nations 1994). For security reasons, the Security Council decided to locate the seat of the tribunal in Arusha, Tanzania (Mose 2005: 2–3). The first accused arrived in Arusha in May 1996 and his trial commenced in January 1997 (Mose 2005: 3).

The crimes within its jurisdiction include genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and of Additional Protocol II. The jurisdiction of the court is limited to crimes committed between 1 January and 31 December 1994. In terms of personal and territorial jurisdiction, the crimes must be those committed by Rwandans in the territory of Rwanda and

in the territory of neighbouring states, or committed in Rwanda by non-Rwandan citizens.

The ICTR adopted the rule of procedure and evidence of the ICTY, with such changes as were necessary. The judges are elected by the UN General Assembly from a list submitted by the Security Council (United Nations 1993b: article 13*bis*).

In August 2003, the Security Council adopted a completion strategy and decided that both the ICTR and the ICTY shall complete all investigations by 2004, all trials by 2008, and all appeals by 2010. The statutes of the ICTR and ICTY originally provided for a common prosecutor, as well as a common Appeals Chamber. In August 2003, the Security Council decided to establish a separate prosecutor for the ICTR. For reasons of efficiency it was considered necessary to divide up the work performed by the prosecutor as the two tribunals entered into the stage of implementing the completion strategy (United Nations 1993b: 11).

The challenges faced by the ICTR in the early years may be especially relevant for investigators and prosecutors working on the African continent. These included limitations in general infrastructure. There was:

- A lack of sufficient tarred roads that hampered speedy work
- Unstable electricity and water supplies
- Problems with availability/reliability of telephone and fax lines
- A lack of availability of requisite information technology, resulting in delays

The investigation unit in Kigali had to function in an environment with limited infrastructure (United Nations 1993b: 3).

These impediments notwithstanding, the ICTR has set several significant legal precedents. By way of example:

- The judgment in *Prosecutor v Akayesu* was the first in which an international criminal tribunal interpreted the definition of genocide as set out in the Genocide Convention
- The *Akayesu* judgment was also innovative in its affirmation of rape as an international crime; this and subsequent judgments are notable for finding that rape may comprise a constituent act of genocide (United Nations 1993b: 5–6)
- Importantly, after Nuremberg, the ICTR was the first international criminal tribunal to convict a head of government – the court convicted Jean Kambanda, the prime minister of Rwanda from April to July 1994, of genocide (United Nations 1993b: 6)

- *Nahimana*, the ‘media case’, was the first post-Nuremberg case to examine the role of the media in the context of mass crimes, and the line between freedom of expression and incitement to international crimes.¹⁶ This case was the first pronouncement by an international tribunal on such issues after the case of Julius Streicher at Nuremberg (United Nations 1993b: 6)

Cooperation with African states

The ICTR also provides examples of cooperation on the African continent in international criminal investigation and prosecution. Alleged perpetrators of events in 1994 were arrested, among others, through cooperation with several West African countries in 1998 (United Nations 1993b: 4). Arrests have taken place in, among others, Cameroon, Kenya, Togo, Mali, Tanzania, Benin, Angola, Congo, Burkina Faso, South Africa, Zambia, Côte d’Ivoire, Uganda, Gabon, Senegal and Namibia.³⁶ This regional cooperation indicates the willingness and ability of African states to cooperate in international criminal investigations and prosecutions.

In the latest annual report of the ICTR to the General Assembly and the Security Council, it was reported that the prosecutor has handed 30 case files to the government of Rwanda for prosecution before the Rwandan national courts. At the time of reporting, the prosecutor, pursuant to rule 11*bis* of the rules of procedure and evidence,³⁷ also filed motions for the transfer of one case that was before the ICTR for prosecution by the national criminal courts in Rwanda (International Criminal Tribunal for Rwanda 2007).

Panels with Exclusive Jurisdiction over Serious Offences in East Timor (the special panels of the Dili district court)

The special panels of the Dili district court is a hybrid tribunal (with Timorese and international staff) created in 2000 by the UN Transitional Administration in East Timor. The special panels functioned in the period 2000 to 2006.

The special panels were set up under the authority given to the special representative of the secretary-general under Security Council resolution 1272 (1999) of 25 October 1999 (United Nations 1999). The crimes within its jurisdiction included genocide, war crimes, crimes against humanity, murder, sexual offences and torture.

The rules of procedure and evidence that were applicable to the special panels were the transitional rules of criminal procedure promulgated by the UN special representative after consultation in the national consultation council.³⁸ The judges and the chief prosecutor were appointed by the transitional administrator, taking into consideration the recommendation of the transitional judicial service commission.

Each panel was composed of two international judges and one East Timorese judge. A serious crimes unit was also created by the transitional administration to investigate and prosecute the relevant offences. Indictments for almost 400 persons were issued. Some 55 trials involving 88 accused persons were held by the special panels. Four persons were acquitted and 84 were convicted.

Special Court for Sierra Leone

The SCSL was established by agreement between the UN and the government of Sierra Leone pursuant to Security Council resolution 1315 of 14 August 2000 in order to try those who bear greatest responsibility for the war crimes and crimes against humanity committed in Sierra Leone after 30 November 1996 during the Sierra Leone civil war (United Nations 2000).

The crimes within its jurisdiction include crimes against humanity, violations of article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, and certain crimes under Sierra Leonean law. Interestingly, with regard to the offences under Sierra Leonean law, individual criminal responsibility is to be established in accordance with Sierra Leone law (Special Court for Sierra Leone, article 6(5)).

The rules of the ICTR in existence at the time of the establishment of the SCSL are applicable *mutatis mutandis* to the SCSL. Where the applicable rules are inadequate, judges of the SCSL as a whole are empowered to amend/adopt the rules (Special Court for Sierra Leone: articles 14(1) and 14(2)).

True to its status as a mixed international/national tribunal, the judges of the SCSL are appointed as follows: to the Trial Chamber, one judge is appointed by the government of Sierra Leone and two judges by the UN secretary-general; and to the Appeals Chamber, two judges are appointed by the government of Sierra Leone and three judges by the UN secretary-general. The prosecutor is appointed by the secretary-general (Special Court for Sierra Leone: see article 12).

Like the ICTR, the SCSL has contributed in significant ways to the jurisprudence of international criminal law. For instance, on 31 May 2004, the

SCSL, in *Prosecutor v Sam Hinga Norman*,³⁹ handed down the first judgment regarding recruitment of child soldiers. The conflict in Sierra Leone has been marked by the use of children as soldiers. It is estimated that around 10 000 children under the age of 15 have served in the armies of the main warring factions.⁴⁰ Sam Hinga Norman was arrested and charged under the statute of the SCSL with the crime of '[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities'. The court found that the act of recruiting child soldiers was a war crime outlawed under international humanitarian law. The court concluded:

... the Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law.⁴¹

The judgment also prefigures the work of the ICC and the prosecution of those who recruit child soldiers and use them to participate in hostilities under the Rome Statute of the ICC.⁴²

Extraordinary Chambers in the Courts of Cambodia

In 1997 the government of Cambodia requested the UN to assist in establishing a court to prosecute the senior leaders of the Khmer Rouge,⁴³ a regime that came to power on 17 April 1975 and was overthrown on 7 January 1979 and that was allegedly involved during that time in the large-scale perpetration of atrocities in Cambodia.⁴⁴ Subsequently, in 2001, the Cambodian national assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime. The court was named the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC).⁴⁵

An agreement between Cambodia and the UN was reached in June 2003 detailing how the international community will assist and participate in the functioning of the ECCC.⁴⁶

The ECCC features several innovations:

- Importantly, the ECCC is the first hybrid tribunal to be established in a civil law system;⁴⁷ consequently, the practice emerging from the ECCC may be especially useful to states in Africa that possess civil law systems
- The ECCC is the first hybrid court to provide for victim participation as civil parties⁴⁸

The crimes within the jurisdiction of the court include genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions and other crimes as defined in chapter II of the law on the establishment of the extraordinary chambers of 10 August 2001.

The rules of procedure and evidence are to be Cambodian law. Where the procedural rules are inadequate or ambiguous, the ECCC is empowered to seek guidance from international rules of procedure. International judges are appointed by the supreme council of the magistracy from a list proposed by the UN secretary-general (Extraordinary Chambers in the Courts of Cambodia 2004). The international co-prosecutors are appointed by the supreme council from a list of two nominees forwarded by the UN secretary-general (Extraordinary Chambers in the Courts of Cambodia 2004: see article 18(new)). The law requires that there will be one international prosecutor and one Cambodian prosecutor, as co-prosecutors.

On 18 July 2007 the first introductory submission was made by the co-prosecutors to the co-investigating judges. All the suspects named in the submission have subsequently been arrested, charged and detained by the judicial organs of the ECCC. With these arrests, the judicial activity of the court has increased considerably. Many hearings have taken place in the cases of these five suspects – Kaing Guek Eav (alias Duch), Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan – including their initial appearances, detention hearings and ongoing interviews. Appellate hearings took place before the Pre-trial Chamber in November 2007 on an appeal by Duch against an order of provisional detention by the co-investigating judges (Extraordinary Chambers in the Courts of Cambodia 2007).

THE INTERNATIONAL CRIMINAL COURT

The ICC was set up as a permanent institution to exercise its jurisdiction over persons for the ‘most serious crimes of international concern’ and is to be

‘complementary to national criminal jurisdictions’ (International Criminal Court 2002: see the preamble). The ICC was created via the Rome Statute of 17 July 1998, which entered into force on 1 July 2002.

Unlike the *ad hoc* tribunals discussed above, the ICC is intended as a court of last resort, investigating and, if necessary, prosecuting only where national courts are unwilling or unable to investigate or prosecute a case (International Criminal Court 2002: see article 17).

The crimes within its jurisdiction are genocide, crimes against humanity, war crimes and, potentially, aggression. The court’s jurisdiction over aggression will only become operative once the definition of the crime and the conditions under which the court may exercise jurisdiction over the crime have been agreed upon.

The judges of the court are elected by secret ballot at a meeting of the Assembly of States Parties. The Prosecutor is elected by secret ballot by an absolute majority of the assembly (International Criminal Court 2002: see article 36). It is significant that four Judges (Judge Diarra of Mali, Judge Kuenyehia of Ghana, Judge Nsereko of Uganda and Judge Pillay of South Africa) of the total of 18 Judges are drawn from African states. Moreover, one of the authors of this chapter, who serves as the Deputy Prosecutor of the Court, is also African.

African involvement in the creation of the ICC

African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised. The Court enjoys continued support in the region, as evidenced by the growing number of ratifications of the statute. Already,⁴⁹ 30 African states have ratified the Rome Statute: Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

In the period leading up to the Rome diplomatic conference, various ICC-related activities were organised throughout the continent. Regional approaches such as these were viewed not only as enhancing universal support, but also as fostering a better understanding of the substantive issues raised by the draft text of the statute (Mochochoko 2005: 246). Radio talk shows, interviews and seminars were conducted in countries such as Botswana and South Africa. Some 90 African

organisations based in, among others, Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia joined the NGO Coalition for an International Criminal Court. They lobbied in their respective countries for the early establishment of an independent and effective international criminal court (Mochochoko 2005: 248).

Fourteen nations of the Southern African Development Community (SADC) had been very active in ICC-related negotiations at the time that the International Law Commission presented a draft statute for an international criminal court to the General Assembly in 1993. Experts from the group met in Pretoria, South Africa in September 1997 to discuss their negotiation strategies and to agree on a common position in order to make a meaningful impact on the outcome of negotiations. This meeting provided impetus for a continent-wide consultation process on the creation of the court (Mochochoko 2005: 248).

The participants agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement. The principles included the far-reaching suggestions that:

- The court should have automatic jurisdiction over genocide, crimes against humanity and war crimes
- The court should have an independent prosecutor with power to initiate proceedings *proprio motu*
- There should be full cooperation of all states with the court at all stages of the proceedings
- Stable and adequate financial resources should be provided for the court and that states should be prohibited from making reservations to the statute

On the basis of the principles submitted to them, SADC ministers of justice and attorneys-general issued a common statement that became a primary basis for the SADC's negotiations at Rome (Maqungo 2000). These principles also appeared in the Dakar declaration on the ICC and other declarations (Mochochoko 2005: 248–249). At a meeting on 27 February 1998, the council of ministers of the Organisation of African Unity (OAU, now the African Union) took note of the Dakar declaration and called on all OAU member states to support the creation of the ICC. This resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.

During the Rome conference itself, several circumstances resulted in African states having a significant impact on the negotiations; for example, African

delegates participating in the Rome conference had two guiding documents: the SADC principles and the Dakar declarations. Both the SADC principles and the Dakar declaration were in line with the principles of the 'like-minded group', the members of which were committed to a court independent from Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes (Mochochoko 2005: 250).

Most of the work of the conference was carried out in working groups and informal working sessions. It is notable that Africans took the lead in either chairing or coordinating various issues. For instance:

- The Lesotho delegate was elected one of the vice-chairpersons of the conference and also coordinated the formulation of part 9 of the Rome Statute
- South Africa was a member of the drafting committee of the conference and coordinated the formulation of part 4 of the Rome Statute. As a consequence, South Africa was frequently invited to participate in the meetings of the bureau of the conference
- Zambia was a member of the credentials committee of the conference (Maqungo 2000)

It is thus beyond doubt that African states had the opportunity to ensure that the principles enshrined in the SADC and Dakar declarations were implemented to the extent possible. Regular African group meetings also contributed towards a coordinated effort.

After the statute was completed, in February 1999, Senegal became the first State Party to ratify the Rome Statute. Africa's commitment to the ICC, and to the cause of international justice, continues to this date. In this context it is important that the strategic partnership agreement signed at the EU-Africa summit in Lisbon in December 2007 says that 'crimes against humanity, war crimes and genocide should not go unpunished and their prosecution should be ensured.'⁵⁰

Comparison of *ad hoc* tribunals with the ICC

The *ad hoc* tribunals – the ICTR and the ICTY – are in some ways the older siblings of the ICC. This is due to the following:

- The *ad hoc* tribunals lacked contemporary models (Johnson 2004: 369)⁵¹ to learn from. They had to look back to Nuremberg, which took place almost half

a century earlier (Johnson 2004: 369). Consequently, the creation and development of the *ad hoc* tribunals were, to some extent, a process of trial and error. In contrast, the drafters of the Rome Statute possessed the opportunity to observe the functioning of the *ad hoc* tribunals. Hence, the ICC, much like the younger child in a family, had the advantage of being able to identify pitfalls and gain ideas via its older siblings.

- Parents gain experience from bringing up their first child, and hence are more adept at dealing with the second. Similarly, the international community is now more prepared to deal with the ICC, having viewed firsthand the growing pains of its siblings. The innovations featured in the ICC may also serve as a useful starting point for government legal and judicial officers, the police and practising lawyers in African states when setting up or developing national institutions for investigating, prosecuting and adjudicating international crimes.

A different and more comprehensive procedural system

The procedural regime of the ICC, composed of the statute, rules as well as the regulations, has also built on the basic documents and jurisprudence of the *ad hoc* tribunals. For example, the procedures regarding victims have been augmented and developed in the Rome Statute, most notably by the provision for representation of victims (Fernández de Gurmendi 2001: 256).

Moreover, it has been said that ‘the framers attempted to avoid an often criticised bias in favour of common law procedures, choosing instead to blend aspects of the adversarial and inquisitorial systems and innovate where neither system had a rule that fit the Court’s needs’ (Sadat 2002–03: 1076).

A more comprehensive set of general principles/substantive laws

Part 3 of the Rome Statute is devoted to setting out general principles of criminal law applicable to trials before the ICC, and deals with, among others: (1) *nullum crimen sine lege* (no criminal offence without a [pre-existing] law), (2) *nulla poena sine lege* (no punishment for a criminal offence without a [pre-existing] law), (3) individual criminal responsibility, (4) irrelevance of official capacity, (5) responsibility of commanders and other superiors, (5) the mental requirements for the crimes within the jurisdiction of the court, (6) grounds for excluding criminal responsibility, and (7) the defence of mistake of fact or mistake of law.

These general principles, therefore, build on the basic documents and jurisprudence of the *ad hoc* tribunals and ensure that the statute lays down requirements for criminal liability that conform to the basic tenets of certainty and predictability.

Duty to investigate both incriminating and exonerating circumstances

The prosecutors of the *ad hoc* tribunals do not have an explicit obligation to investigate both incriminating and exonerating circumstances equally (Tochilovsky 2002: 268–275 at 270). However, the Prosecutor of the ICC is required, in order to establish the truth, to extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility, and, in so doing, to investigate incriminating and exonerating circumstances equally (International Criminal Court 2002: article 54(1)(a)). This transforms the Prosecutor from a partisan actor often envisioned in common law litigation into a neutral seeker of the truth.

In practical terms, this may involve interviewing ‘exonerating’ witnesses, following specific avenues of investigation that may provide exonerating information, as well as developing processes to record actions taken in connection with exonerating information.

Greater responsibility towards victims and a broader role for victims

The Rome Statute requires the Prosecutor to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses (International Criminal Court 2002: article 68(1)). This is so especially in the context of crimes that involve sexual or gender violence or violence against children.⁵² For example, the Prosecutor can audio or video record the questioning of a person where, among others, the use of such procedures could assist in reducing any subsequent traumatisation of a victim of sexual or gender violence or a child or a person with disabilities in providing their evidence (International Criminal Court 2000: rule 112). The rationale for such recording has been said to be that ‘the recorded testimonies of such persons might be later used at trial, if the court so allowed’.⁵³

A significant departure from the practice of the *ad hoc* tribunals is the possibility for victims to have their own representatives in order for their views and concerns to be presented where their personal interests are affected (International Criminal Court 2002: article 68(3)). Interestingly, drafters of the ICTY statute considered provisions on the appointment of a counsel for victims, but the proposal was not accepted (Tochilovsky 2002: 273, citing Morris and Scharf 1995: 167). The inclusion of such a provision in the Rome Statute indicates an evolution in legal thinking, and the recognition of victims' rights as one of the rationales for international criminal law.

Greater judicial participation in the pre-trial phase

Another Rome Statute innovation that differs from the *ad hoc* model is the Pre-trial Chamber. Among other functions, this chamber:

- Issues orders and warrants required for the purposes of an investigation, at the request of the Prosecutor (International Criminal Court 2002: article 57(3)(a)); this may include search warrants, arrest warrants, etc.
- Issues orders necessary to assist a person in the preparation of his or her defence, when a person who has been arrested or has appeared pursuant to a summons requests assistance (International Criminal Court 2002: article 57(3)(b))
- Provides for the protection and privacy of victims and witnesses (International Criminal Court 2002: article 57(3)(c))
- Provides for the preservation of evidence (International Criminal Court 2002: article 57(3)(c))
- Provides for the protection of persons who have been arrested or appeared in response to a summons (International Criminal Court 2002: article 57(3)(c))
- Provides for the protection of national security information (International Criminal Court 2002: article 57(3)(c))
- May authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that state (International Criminal Court 2002: article 57(3)(d))

The Pre-trial Chamber thus allows for greater supervision of the pre-trial phase than in the *ad hoc* model. This innovation appears to be based, among others, on a desire to provide judicial authority to the actions of the Prosecutor, and to have

a body to decide on requests for state cooperation (United Nations 1996: paragraph 228).

BEST PRACTICES DERIVED FROM THE PRACTICE OF THE INTERNATIONAL AND HYBRID TRIBUNALS

Several tribunals are actively participating in the working group constituted by the ICC with representatives from other international criminal tribunals to create a best-practices manual for international prosecutors. Moreover, the ICTY, with the assistance of the UN Interregional Crime and Justice Research Institute, will draft a compilation of its best practices. The document will include all of the ICTY's expertise on its proceedings, from the investigation stage until the stage of enforcement of sentences, and draw from the work of all organs of the court.⁵⁴

When available, the end products of these projects could serve as very useful resources for government legal and judicial officers, the police and practising lawyers in African states.

CONCLUSION

To sum up briefly, as we stated at the beginning of this chapter, no other continent has suffered more than Africa due to the absence of legitimate institutions of law and accountability. There is a growing international will, of which the Africa continent is an integral part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.

The struggle to fight impunity is not a neo-colonial exercise; it is one that has received support from, and has been shaped by, the people of the African continent. National, hybrid and international jurisdictions from the African continent have made a significant contribution to international criminal practice and jurisprudence. The continent has also played a major role in the creation of the permanent ICC.

As a result of the gradual transition from the age of impunity to the age of enforcement, there is a large reservoir of jurisprudence, practice and institutional knowledge from national, hybrid and international institutions now in existence. It is imperative that today's African professionals who work in the area of international criminal law make use of these resources – to learn from the

mistakes and the successes of the past, and to create innovative solutions for the future.

NOTES

- 1 The authors would like to express their gratitude to Pubudu Sachithanandan, assistant trial lawyer of the ICC, for his assistance with the preparation of this chapter.
- 2 For a discussion of international crimes more generally, and the ICC's crimes in particular, see chapter 3, 'International crimes'.
- 3 A summary of Eichmann's background can be found at http://www.trial-ch.org/en/trial-watch/profile/db/facts/adolf_eichmann_138.html.
- 4 *Attorney General of the Government of Israel v Eichmann* [1961] 36 ILR 18, 50 (1968) (District Court of Jerusalem).
- 5 *Ibid.*, paragraph 12.
- 6 *Attorney General v Eichmann* [1962], 36 ILR 277, 282-83 (1968) (Supreme Court of Israel).
- 7 See *Demjanjuk v Petrovsky*, 612 F. Supp. 571 (N.D. Ohio 1985) and *Demjanjuk v Petrovsky*, 776 F.2d 771 (6th Cir. 1985) at paragraph 32 (<http://www.altlaw.org/v1/cases/498741>).
- 8 *Ibid.*, 80.
- 9 *Demjanjuk v Israel*, Crim. App No. 347/88 (Sup. Ct. July 29, 1993).
- 10 <http://www.nizkor.org/hweb/people/d/demjanjuk-john/israeli-data/demjanjuk-s4.html>.
- 11 The trial summary on Trial Watch provides a helpful summary of the facts of this case. Available at http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto_pinochet-ugarte_50.html.
- 12 See Derochos Human Rights, 1998 for the full procedural history of these prosecutions.
- 13 *In the matter of an application for a writ of habeas corpus ad subjicendum, re: Augusto Pinochete Ugarte and in the matter of an application for leave to move for judicial review, R. v (1) Nicholas Evans (Metropolitan Stipendiary Magistrate); (2) Ronald Bartle (Metropolitan Stipendiary Magistrate); (3) The Secretary of State for the Home Department, Ex parte Augusto Pinochet Ugarte*, High Court of Justice for England and Wales, 28 October 1998. See Robertson (2002: 397) and http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto_pinochet-ugarte_50.html for a discussion of and introduction to this case.
- 14 See further http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto_pinochet-ugarte_50.html.
- 15 *In re Pinochet* [1999] UKHL 1; [2000] 1 AC 119, 15 January 1999.
- 16 *R v Bartle and the Commissioner Of Police For The Metropolis And Others (Appellants) ex parte Pinochet (Respondent) and R v Evans and Another and The Commissioner Of Police for the Metropolis and others (Appellants) ex parte Pinochet (Respondent) (On Appeal From A Divisional Court Of The Queen's Bench Division)*, UKHL, 24 March 1999.
- 17 http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/augusto_pinochet-ugarte_50.html.
- 18 See further [District Court of The Hague, 14 October 2005, LJN: AV1489 and LJN: AV1163].
- 19 Other examples include the prosecution of Guus Kouwenhoven, a supplier of mustard gas to Iraq who was acquitted on appeal [District Court of The Hague, 23 December 2005, LJN: AX6406] and the prosecution of Frans van Anraat, a Dutch businessman who sold raw materials for the production of chemical weapons during the regime of Saddam Hussein. [Court of Appeal, The Hague, 9 May 2007, LJN: BA4676].
- 20 An English version of the Act can be found at http://www.nottingham.ac.uk/shared/hrlcicju/Netherlands/International_Crimes_Act__English_.doc.
- 21 For Tutsis and internally displaced persons, Butare was both a way station to Burundi and a refuge in itself since, initially, the violence had not reached the area. This changed with the removal of the Tutsi prefect on 17 April 1994; in the following weeks tens of thousands of people were massacred.
- 22 On 11 January 1996, the ICTR requested Belgium to transfer the criminal proceedings it had taken up against Higaniro and two other accused persons. But in a ruling dated 8 August 1996, the judges of the ICTR refused to ratify the indictment presented by the prosecutor. Consequently, the Belgian court of appeal entrusted the Brussels investigation judge to continue the inquiry into the Higaniro case. See http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/alphonse_higaniro_163.html.
- 23 http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/vincent_ntezimana_162.html.
- 24 http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/vincent_ntezimana_162.html.
- 25 http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/alphonse_higaniro_163.html.
- 26 *Prosecutor v Duško Tadić*, case no. IT-94-1-A, Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction 2 October 1999 at paragraph 69. See Reydams (2003) for further discussion of this.
- 27 See, in this context, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002. In this case the International Court of Justice found that the issuance of an arrest warrant on the basis of universal jurisdiction by Belgium for the serving minister of foreign affairs of Democratic Republic of the Congo was a breach of Belgium's legal obligation towards the Congo as it failed to respect the incumbent minister's immunity from prosecution. Although the court did not expressly address the issue of universal jurisdiction, it was feared that the case might deter states exercising such jurisdiction. Some time after the case, in August 2003, Belgium repealed its

- far-reaching universal jurisdiction laws in a move that provoked a strong response from human rights organisations. See Human Rights Watch (2003).
- 28 See Loi du 5 août 2003 relative à la répression des infractions graves au droit international humanitaire. Available at <http://www.ulb.ac.be/droit/cdi/Site/334F616D-37AB-47FB-B715-4722072B3AA4.html>, in particular articles 15 and 16.
- 29 http://www.trial-ch.org/en/trial-watch/profile/db/facts/adolfo_scilingo_258.html.
- 30 http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/adolfo_scilingo_258.html.
- 31 *Suleymane Guengueng et al. v Senegal*, Communication No 181/2001, dated 19 May 2006, UN Doc CAT/C/36/D/181/2001.
- 32 <http://hrw.org/english/docs/2008/01/19/senega17778.htm>.
- 33 Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide states that genocide means any of the acts listed at (a)–(e) when ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’ and does not include political groups. The acts listed at (a)–(e) do not include population transfer or dispersion.
- 34 See generally Taylor (1992). The judgment of the Nuremberg tribunal is published in Nuremberg International Military Tribunal 1947.
- 35 <http://www.un.org/icty/glance-e/index.htm>.
- 36 See the ICTR’s Web site at <http://69.94.11.53/ENGLISH/factsheets/detainee.htm>.
- 37 Under rule 11bis (A), ICTR indictees can only be transferred to states with territorial, personal or subject-matter jurisdiction for the crimes charged in the indictment.
- 38 See preamble of the transitional rules of criminal procedure at <http://www.un.org/peace/etimor/untaetR/reg200030.pdf>.
- 39 *Prosecutor v Sam Hinga Norman*, decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, case no. SCSL-2004-14-AR72(E); see further the *amicus* brief of the UN Children’s Fund that was filed in the course of this case.
- 40 See the judgment (dissenting) of Judge Robertson in *Prosecutor v Sam Hinga Norman*, *op. cit.*, paragraph 7.
- 41 *Ibid.*, per the judgment of Justice Ayoola, paragraph 52, concurred in by Justice King (Justice Robertson dissenting).
- 42 See, for example, *Prosecutor v Thomas Lubanga Dyilo*. For further information, see Du Plessis (2004).
- 43 http://www.eccc.gov.kh/english/about_eccc.aspx.
- 44 *Ibid.*

- 45 *Ibid.*
- 46 *Ibid.*
- 47 Speech by Kong Srim, president of the plenary session, 28 January 2008, Raffles Hotel Le Royal, Phnom Penh.
- 48 *Ibid.*
- 49 As of 24 April 2008.
- 50 <http://hrw.org/english/docs/2007/12/04/africa17466.htm>.
- 51 Johnson mentions the lack of contemporary models in the context of the report of the secretary-general regarding the establishment of an international tribunal for the territory of the former Yugoslavia.
- 52 *Ibid.*
- 53 See paragraph 30 of The Africa-EU Strategic Partnership: available at http://ec.europa.eu/development/center/repository/EAS2007_joint_strategy_en.pdf#zoom=100.
- 54 <http://www.un.org/icty/pressreal/2008/pr1242e.htm>.

REFERENCES

- Barrionuevo, A 2008. Italy follows trail of secret South American abductions. *The New York Times*, 22 February.
- Brackman, A C 1988. *The other Nuremberg: The untold story of the Tokyo war crimes trials*. William Morrow & Co.
- Buergenthal, Judge T 2006–07. Truth commissions: Between impunity and prosecution. Transcript of the Frederick K. Cox International Law Center lecture in global legal reform, *Case Western Reserve Journal of International Law*.
- Du Plessis, M 2004. Children under international criminal law. *African Security Review*, 13(2). \ Available at www.iss.co.za/pubs/ASR/13No2/EduPlessis.pdf.
- Extraordinary Chambers in the Courts of Cambodia 2007. Yearly financial and activity progress reports. Available at http://www.eccc.gov.kh/english/cabinet/fileUpload/34/ECCC_Yearly_Financial_and_Activity_Progress_Reports_2007.pdf.
- 2004. Law on the establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea. Available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.
- Fernández de Gurmendi, S A 2001. Elaboration of the rules of procedure and evidence. In R Lee (ed), *The International Criminal Court: Elements of crimes and rules of procedure and evidence*. New York: Transnational Publishers.

- Futamura, M 2008. *War crimes tribunals and transitional justice, the Tokyo trial and the Nuremberg legacy*. Routledge.
- Human Rights Watch 2008. EU to aid Senegal in preparing Hissène Habré's trial, 19 January. Available at <http://hrw.org/english/docs/2008/01/19/senega17778.htm>.
- Inazumi, M 2005. Universal jurisdiction in modern international law: Expansion of national jurisdiction for prosecuting serious crimes under international law. *School of Human Rights Research Series*, 19. University of Utrecht School of Law.
- International Criminal Court 2002. Rome Statute. 1 July.
- 2000. Rules of Procedure and Evidence. UN Doc. PCNICC/2000/1/Add.1 (2000).
- International Criminal Tribunal for Rwanda 2007. Twelfth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994. Available at <http://69.94.11.53/ENGLISH/annualreports/a62/s-2007-502-e.pdf>.
- Johnson, L 2004. Ten years later: Reflections on the drafting. *Journal of International Criminal Justice*, 2.
- Maqungo, S 2000. The establishment of the International Criminal Court: SADC's participation in the negotiations. *African Security Review*, 9(1). Available at <http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html>
- Mettraux, G 2006. Dutch courts' universal jurisdiction over violations of common article 3 qua war crimes. *Journal of International Criminal Justice*, 4(2). May.
- Mochochoko, P 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds). *African perspectives on international criminal justice*. Ghana: Africa Legal Aid.
- Morris, V and Scharf, M 1995. *An insider's guide to the International Criminal Tribunal for the former Yugoslavia: A documentary history and analysis*.
- Mose, E 2005. The ICTR: Experiences and challenges. *New England Journal of International and Comparative Law*, 12(1), Fall. Available at <http://www.nesl.edu/intljournal/vol12/MOSE.pdf>.
- Princeton University Program in Law and Public Affairs 2001. *The Princeton Principles on universal jurisdiction*.
- Reydams, L 2003. Belgium's first application of universal jurisdiction: The Butare Four case. *Journal of International Criminal Justice*, 1(2). August.
- Robertson, G 2002. *Crimes against humanity: The struggle for international justice*. 2nd ed. New York: New Press.
- Sadat, L 2002–03. The legacy of the ICTY: The International Criminal Court. *New England Law Review*, 37(4).
- Schabas, W A 2004. *An introduction to the International Criminal Court*. Cambridge: Cambridge University Press.
- Sharp, D 2003. Prosecutions, development, and justice: The trial of Hissène Habré. *Harvard Human Rights Journal*, 16. Spring.
- Special Court for Sierra Leone. Statute of the Special Court for Sierra Leone. Available at <http://www.sc-sl.org/Documents/scsl-statute.html>.
- Taylor, T 1992. *The anatomy of the Nuremberg trials*.
- Tiba, F Kebede 2007. The Mengistu genocide trial in Ethiopia. *Journal of International Criminal Justice*, May.
- Tochilovsky, V 2002. Proceedings in the International Criminal Court: Some lessons to learn from the ICTY experience. *European Journal of Crime, Criminal Law and Criminal Justice*, 10(4).
- United Nations 2008. Senegal constitutional change paves way for Habré trial, 11 April.
- 2000. Security Council resolution 1315 of 14 August. UN Doc. S/RES/1315 (2000).
- 1999. Security Council resolution 1272 of 25 October. UN Doc. S/RES/1272 (1999).
- 1996. Report of the preparatory committee on the establishment of an international criminal court. Proceedings of the preparatory committee during March-April and August 1996, 1. UN Doc. A/51/22[Vol-I](Supp). 13 September.
- 1994. Security Council resolution 955 of 8 November. UN Doc. S/RES/955 (1994) at <http://www.un.org/ictt/english/Resolutions/955e.htm>.
- 1993a. Security Council resolution 827 of 25 May. UN Doc. S/RES/827 (1993). Available at http://www.un.org/ictt/legaldoc-e/basic/statut/S-RES-827_93.htm.
- 1993b. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991. UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).
- Wilson, R 2008. Spanish supreme court affirms conviction of Argentine former naval officer for crimes against humanity. *ASIL Insights*, 12(1). 30 January. Available at <http://www.asil.org/insights/2008/01/insights080130.html>.
- Wilson, R 2003. Argentine military officers face trial in Spanish courts. *ASIL Insights*, Volume (Issue). December. Available at <http://www.asil.org/insights/insigh122.htm>.