War crimes trials before international tribunals: legality and legitimacy

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I Introduction

An assessment of the historical place of any trials requires both a micro and a macro analysis. The microanalysis focuses on the internal processes and procedures of the trials. The macroanalysis focuses on the broader political and historical context. Both levels of analysis can review issues of legality and legitimacy.¹ This essay presents a comparative critique of war crimes trials before the International Military Tribunals at Nuremberg and Tokyo and the International Tribunals for the former Yugoslavia and for Rwanda. It also looks to future trials that could take place before the Permanent International Criminal Court.

Any trial can be viewed as a drama.² However, it is never an abstract drama. A trial or series of trials has to be localised in a system of criminal law and justice. International trials have to be localised in 'systems' of 'international criminal law' and 'international criminal justice'. However, the very existence of such 'systems' has been contested. This goes to the heart of issues of legality and legitimacy for international trials. For much of its history 'international criminal law', if it has existed at all, has been rudimentary, indeterminate, and ineffectual.³ It existed in the nether regions of international humanitarian law, which existed in the nether regions of public international law. A system of 'international criminal justice' might be thought to require some consensus on the existence and values of the 'international community'. The existence of such a community in this sense and its values also remain contested.⁴ What has not been contested is that the standards of legality and legitimacy by which international trials should be assessed have evolved. There has been a clear recognition of the need to comply with the human rights of defendants and to take greater account of the interests of victims.

The second section of this chapter briefly records the history of national and international trials for 'war crimes' (used in a broad sense to include war

crimes in the strict sense, crimes against humanity, genocide), and considers the various purposes of war crimes trials. The third section is a comparative examination of the establishment and functioning of the Nuremberg, Tokyo, Yugoslavian and Rwandan tribunals respectively. The fourth section highlights the principal features of the permanent international criminal court. The fifth section concludes with an assertion that war crimes trials before international tribunals have moved closer and closer towards satisfying purer norms of legality and legitimacy.

II National and international trials: an overview

National war crimes trials have a long and (un)distinguished history.⁵ National courts may appear more legitimate than international ones or vice versa. The obligation on states to prosecute certain war crimes, 'grave breaches', is a central element of international humanitarian law.⁶ National jurisdiction has also been exercised over crimes against humanity and genocide. The exercise of national jurisdiction over these three kinds of crimes would usually be based on the nationality of the offenders (nationality jurisdiction) or on the territorial location of the crimes (territorial jurisdiction). In addition, however, the three kinds of crimes are among the few areas of international law where there is general acceptance that states can, in principle, exercise jurisdiction over offences committed by any person anywhere in the world ('universal jurisdiction'). Perhaps the most famous national war crimes trial asserting universal jurisdiction remains the Israeli trial of Adolf Eichmann, who had been head of the Jewish Office of the German Gestapo.⁷ That case raised legal controversy because the Israeli court asserted jurisdiction over a German national in respect of offences which had not taken place within the territory of Israel, and indeed, in respect of offences which had taken place when Israel did not even exist as a state.⁸

After the First World War, the Versailles Treaty (1919) required Germany to try its own war criminals. The resulting Leipzig trials were widely discredited; 888 out of 901 defendants were acquitted or had their cases dismissed. After the Second World War, international trials attracted the greatest publicity. However, the largest volume of war crimes trials were held in Germany in the four Allied occupation zones under Control Council Law No. 10, which allowed each occupying authority to carry out trials of persons held in its custody. Individual states that held war crimes trials in Europe and in Asia included the US,⁹ the UK,¹⁰ Australia, Nationalist China, France, Greece, the Netherlands, Poland, and the USSR.¹¹ Since the 1940s, war crimes trials have been spasmodic at the national level but in the 1980s and 1990s there was a resurgence of prosecutions in Australia,¹² Canada,¹³ and a number of European states.¹⁴ The passage of more than half a century since the Second World War means that the possibilities of Second World War related prosecutions are fast diminishing. In 1999 Anthony Sawoniuk was the subject of the first

prosecution in the UK under the War Crimes Act 1991, which provided jurisdiction in relation to war crimes committed by non-British nationals in German-controlled territory during the Second World War.¹⁵

Like all 'trials', international war crimes trials serve a variety of purposes.¹⁶ These include deterrence, punishment, reconciliation, establishing the historical facts, making societies come face to face with the past,¹⁷ reinforcing the concept of accountability,¹⁸ re-establishing legal and moral order and an ordered system of justice, education,¹⁹ rebuilding civil society, establishing or reinforcing the supremacy of international law over national law, building an international society governed by an international rule of law,²⁰ and re-establishing international peace and security. Some of these purposes may conflict or appear to conflict at particular times.²¹

The earliest international prosecution is often suggested to have been that of Conradin von Hofenstafen in 1268 for waging aggressive war. In 1474 Governor Peter of Hagenbach was tried and condemned before a court of twenty-eight representatives of the Hanseatic cities at Breisach for various atrocities including murder, rape, pillage, and wanton confiscation.²² Some five centuries later, Article 227 of the Treaty of Versailles (1919) made provision for the trial before an international tribunal of William II of Hohenzollern, formerly the German Kaiser, for 'a supreme offence against international morality and the sanctity of treaties'. However, the Netherlands refused to hand him over for trial.²³ In substance, therefore, 'The real history of international criminal law begins after WW II, and is often a history of institutions'.²⁴ Until the 1990s, the only successful historical precedents at the international level were the International Military Tribunals (IMTs) at Nuremberg and Tokyo.

III Nuremberg, Tokyo, Yugoslavia, Rwanda: a comparative analysis

Nuremberg

The Nuremberg IMT was undertaken only after other options, such as summary executions, were considered by the major Allied powers.²⁵ It was preceded by the establishment of the UN War Crimes Commission, but the Commission was not directly involved in the establishment of the Tribunal.²⁶ The agreement of the Allies on the trial of war criminals was expressed in a number of international statements but most notably in their Moscow Declaration of 1943. Under that declaration, minor criminals were to be judged and punished in the countries where they committed their crimes. 'Major war criminals whose offences have no particular geographical location' were to be tried and punished 'by the joint decision of the Governments of the Allies'.²⁷ Major or minor status depended on rank rather than the seriousness of the crime charged. To that extent, it was intended as a show trial (in the proper sense)²⁸ of the 'big fish'. With Adolf Hitler, Heinrich Himmler, and Josef

Goebbels dead, Reich Marshal Hermann Goering and former Foreign Minister Joachim von Ribbentrop were the major political figures. Alongside them were tried a mixture of other political figures, military and naval officers, economic and financial figures, and propagandists. In this way, the Nazi system was put on trial.

Nuremberg has been described as ‘the most majestic forensic drama ever enacted on the stage of history’.²⁹ Its legality and legitimacy have been subjected to sustained critiques.³⁰ A significant number of participants have published accounts of the trial.³¹ The judgement of the Tribunal remains of seminal importance.³² The international legal authority of the Allies to set up the Tribunal can be argued to have derived from: (i) their authority as the *de facto* territorial rulers of a defeated state; (ii) from a pooling of jurisdiction that they could each have exercised over offences for which there was universal jurisdiction, or (iii) from a broader exercise of authority on behalf of the international community on the basis of universal jurisdiction. The Tribunal was established under the London Charter of 11 December 1946. This charter had been drafted by the US, the UK, France, and the USSR.³³ The later adherence of nineteen other Allied states to the charter increased its international legitimacy.³⁴ The judges and the prosecutors were appointed by the original four powers. It was intended that there would be other trials but, in the event, none was held. Article 1 of the charter provided that the defendants were to receive a ‘just and prompt trial’. They were defended by German lawyers and received extensive legal assistance. The defence could cross-examine prosecution witnesses, submit evidence, witnesses, and documents. The defendants could and did testify on their own behalf. There were consistent complaints from the defence concerning access to and use of documents. The Control Council had some important responsibilities under the charter, including the right to reduce or alter sentences, but not to increase them.

The charter stated that the Tribunal and judges could not be challenged by the prosecution or by the defendants or by their counsel. The Tribunal stressed that the Allied powers had done jointly what they might have done singly. The making of the charter was the exercise of the sovereign legislative power by the countries to which the German Reich had unconditionally surrendered. It is often curiously overlooked that the IMT was designated as a ‘military tribunal’ (there was no civil authority in Germany). The London Charter was clearly selective. There was no possibility of prosecutions in relation to Allied actions such as the carpet bombings of cities, crimes against peace and against humanity by the USSR, or war crimes by various Allied states.

It is generally accepted that the Nuremberg Tribunal sought to apply rules of international law, rather than rules of national law. Article 6 of the charter provided for jurisdiction over three categories of offence for which there was individual responsibility: crimes against peace, war crimes, and crimes against humanity. The categories overlapped to some extent and were not carefully distinguished by the Tribunal. The second and third categories have formed

the conceptual basis for the development of international criminal law since 1945.³⁵ War crimes was an accepted category in 1945 both in terms of treaty law and customary international law. Crimes against peace and crimes against humanity were much more controversial in terms of whether they violated the principle of *nullem crimen sine lege* and thus constituted retroactive criminalisation. Crimes against peace,³⁶ and in particular the waging of an aggressive war, was the most controversial in terms of whether they existed at all at the relevant time and, if they did, whether they gave rise to individual criminal responsibility as distinct from the responsibility of the state.³⁷ The Tribunal considered that the crimes did exist and in particular that international agreements had made aggressive war illegal in the 1930s. As for individual responsibility, the Tribunal stated that the maxim *nullem crimen sine lege* was not a limitation on sovereignty but merely a general rule of justice to which there could be exceptions, and the circumstances before them constituted such an exception. In its view, waging aggressive war did give rise to individual criminal responsibility. The Tribunal argued that, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'³⁸

Similarly controversial was the position in relation to crimes against humanity because this crime was concerned with a state's treatment of its own population, a matter which had classically been considered as within its domestic jurisdiction.³⁹ In the event, crimes against humanity were narrowly interpreted by reference to the terms of the charter on other offences and thus events before 1937 were excluded. On the evidence no defendant was convicted of crimes against humanity for an act committed before 1 September 1939.

The fourth charge was of conspiracy to commit offences within the three substantive categories. This was controversial for some of the Allies and for some of the judges. In the event, conspiracy was limited to crimes against peace, was strictly construed, confined to commanders and leaders, and limited to the period from 1938 onwards.

The personal jurisdiction of the Tribunal extended to organizations. If an organisation was found to be criminal, its members could be found guilty in subsequent proceedings before the lesser (national) court of the victorious power.⁴⁰ Much debate in the Tribunal was occasioned by this offence. There were no precedents for such international liability, and the Tribunal read in safeguards of voluntariness and knowledge. The SS, the Leadership Corps of the Nazi Party, and the Gestapo/SD were declared criminal but the SA, the Reich Cabinet, and the High Command were not.

In terms of evidence, there were no exclusionary rules.⁴¹ The cases mainly rested on undisputed German documents. 'The trial had involved scrutiny of a hundred thousand documents, a hundred thousand feet of film and twenty five thousand still photographs.'⁴² Those defendants who were convicted and

hanged were effectively hoisted on the petard of Germanic efficiency in record keeping.⁴³

Twenty-four defendants were charged. One committed suicide, and one was determined to be unfit to stand trial. Twenty-two were tried, one *in absentia* (Martin Bormann). The trial lasted ten months. Three defendants were acquitted. Sentencing was at the discretion of the Tribunal.⁴⁴ Of the nineteen convicted, twelve were sentenced to death (including Bormann), three received life sentences, and four received terms of imprisonment ranging from ten to twenty years. The Control Council affirmed all of the sentences of the IMT.

Goering committed suicide. Ten were executed by hanging, a method considered dishonourable by military personnel. Pleas by a number of them to be shot by firing squad were rejected. The convictions of Julius Streicher and Admiral Karl Donitz were the most controversial.

Nuremberg is the point in the constellation from which all legal discussion of war crimes trials proceeds or reverts. That crimes against peace and crimes against humanity were retrospectively criminalised remains at best technically arguable. The purpose of the rule against retrospective criminalisation is that individuals should not be punished for actions which they could not have reasonably considered to have been subject to criminal prohibition. International law was clearly evolving in the first half of the twentieth century, and the Nuremberg charges do not offend the purpose of the prohibition.⁴⁵ The law that the IMT applied was subsequently affirmed by the international community.⁴⁶ The concept of 'crimes against humanity' is now a central part of humanitarian law, and there is no requirement for the relevant conduct to be linked to an armed conflict.⁴⁷ The Tribunal interpreted the charges cautiously. As noted, three defendants were acquitted. The concept of 'crimes against peace' has fared less well. No crime of 'aggression' was included in the International Criminal Tribunal for Yugoslavia statute. The crime of 'aggression' has been included in the jurisdiction of the International Criminal Court, but this remains dependent upon agreement on its definition. Such an agreement has not been reached.⁴⁸

Nuremberg is 'the' precedent.⁴⁹ Without Nuremberg there would almost certainly have been no Tokyo. Half a century later the light (or shadow) of Nuremberg lay on the paths to the two *ad hoc* tribunals for Yugoslavia and Rwanda, and to the International Criminal Court.⁵⁰ Nuremberg also played a crucial role in the development of international human rights law. Holding individuals responsible for violations of international law 'duties' necessarily involved regarding those individuals as subjects of international law. The atrocities committed by the Nazis were partly responsible for the notion of international human 'rights' as expressed in the UN Charter (1945), the Universal Declaration of Human Rights (1948), and subsequent myriad regional and international instruments. Lord Kilmuir, one of the British prosecutors, identified the European Convention on Human Rights of 1950 as one of the

results of Nuremberg,⁵¹ along with Nuremberg's demonstration of the dynamic of international law.⁵² The piercing of the veil of sovereignty by the notions of human rights and duties, along with extensive international procedures to implement them, has moved international law away from its classical inter-state sovereignty focus.⁵³ None of this is to gainsay that human rights violations remain extensive in practice. However, they are at least assessed against normative standards and monitored under international procedures. They are no longer regarded as matters within the domestic jurisdiction of sovereign states.

However, it is in a broader ethical and legitimisation context that Nuremberg shines most brightly. Even accepting, *arguendo*, the range of legal and legitimacy criticisms directed against it, it remains historically remarkable that after the most destructive and uncivilised conflict in human history, there should have been resort to the civilised institutional drama of a trial at law. The opening words of the US prosecutor Justice Robert H. Jackson are among the most cited and remain valid:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of law is one of the most significant tributes that power ever paid to reason.⁵⁴

Nuremberg was also part of the broader political drama. 'A moment's reflection suggests that many of the significant forces that shaped the European and American transition from war to peace appeared in microcosm during the trial'.⁵⁵

Tokyo

The Tokyo Tribunal was also a military tribunal. As Japan was solely under US control, the US effectively determined the court's establishment and functioning. The Charter for the Far East was set out in a Proclamation issued on 19 January 1946 by the Supreme Commander of the Allied Powers, General Douglas MacArthur.⁵⁶ Jurisdiction covered crimes against peace, war crimes, and crimes against humanity. The eleven judges from Allied states and territories were nominated by states but were appointed by MacArthur. There is evidence that MacArthur exercised substantial influence on the trials to ensure that they would not threaten the success of the occupation. The Tribunal applied rules of international law. The defendants were represented by Japanese counsel assisted by US attorneys.

The trial lasted two and a half years. Judgement was much more divided than at Nuremberg. There were disagreements between the judges as to whether the legal basis of the trial was (i) belligerent jurisdiction or (ii) the consent of Japan. There was no argument that it was done on the authority of the international community. The Tribunal indicted twenty-eight representative Japanese political and military leaders, and tried and convicted twenty-five of them.⁵⁷ Of the twenty-five, seven were sentenced to hang, sixteen to life in

prison, one to twenty years in prison, and one to seven and a half years in prison. Conspiracy was charged. This was controversial but was brushed aside by the Tribunal. However, there was no provision for organisations to be charged. Allied Tribunals tried over 5,000 other Japanese for war crimes. As with Nuremberg, the Tokyo trial was selective.⁵⁸ There was no possibility of Allied prosecutions, for example, in relation to the nuclear bombings of Hiroshima and Nagasaki.

Tokyo has not left the same legacy as Nuremberg, and it became the poor relation.⁵⁹ Partly this is simply because Tokyo came afterwards and therefore was following the path of Nuremberg. However, there is also a sense in which Tokyo is seen as less legitimate than Nuremberg. There was less of a break in Japanese governmental authority as the Emperor was allowed to continue. As the Cold War descended in Europe, political pressures rendered the trial an embarrassment. The judgement itself was more divided than that of Nuremberg and contained bitter dissent on some issues.⁶⁰ In historical memory, the nuclear bombings have remained more prominent than the offences for which the Japanese were tried.

*The International Criminal Tribunal for Yugoslavia (ICTY)*⁶¹

In 1993, the Security Council (SC) established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory in the Former Yugoslavia since 1991.⁶² Its establishment was part of a wide range of international legal responses to the conflict and dissolution of Yugoslavia.⁶³ A Commission of Experts had been established by the SC in 1992 to collect information and examine the evidence relating to grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.⁶⁴ A massive computer database had been established in the US. In its report to the UN Secretary-General, the Commission had recommended the establishment of an *ad hoc* tribunal.

The foundational document of the ICTY was a thirty-five-page report submitted to the SC by the Secretary-General.⁶⁵ That report was prepared at the request of SC and was unanimously adopted by it.⁶⁶ The Secretary-General presented the report on a pretty much take it or leave it basis. No options were presented. Although a number of members of the SC would have liked to propose changes, they did not do so for fear that this would engage a process of negotiation and unravelling of the report. The report asserted that the SC would not be legislating. The ICTY would only apply existing law. The legal basis for the ICTY was Chapter VII of the UN Charter, which deals with threats to the peace, breaches of the peace, and acts of aggression. Decisions under Chapter VII are legally binding on members of the UN. According to SC Resolution 827, the aims were to put an end to the crimes being committed, to bring to justice those responsible for them, and to contribute to the restoration and maintenance of peace.

The eleven judges of the ICTY, drawn from legal systems across the world, were elected by the General Assembly in September 1993 and took office on 17 November 1993.⁶⁷ The ICTY has been composed of experts in criminal law, human rights, and civil liberties protection, and has included senior judicial officers. Initially the ICTY faced financial and practical constraints. It took eighteen months to appoint the first Prosecutor. Additional courtrooms have had to be built. Additional judges have been appointed. A pool of twenty-seven *ad litem* judges was being established in 2001 to assist the ICTY to reduce the backlog.⁶⁸ The ICTY adopted a very pro-active and dynamic approach to its work. It was given the very important power to adopt its own rules of procedure and evidence⁶⁹ and took a substantial number of other practical steps. The first indictments were made public on 8 November 1994.

In Nuremberg and Tokyo the principal leaders and organisers were put on trial.⁷⁰ This has not yet occurred with the ICTY. There have been fourteen official convictions, two documented confessions, and two acquittals issued by the Tribunal. Of those detained at any time (forty-five in total), twenty-seven suspects have been of Serbian or Bosnian Serb background, fourteen of Croatian or Bosnian Croat background, three of Muslim or Bosnian backgrounds, and one of Macedonian background who also held Croatian citizenship. As of October 2002 forty-four of the suspects are in custody in the Tribunal's jail facility near The Hague, sixteen have been transferred or released. Eleven have been provisionally released. Major political and military leaders have been indicted but remain at large. However, the level of those tried has risen. In January 2001 Biljana Plavsic, former deputy to Radovan Karadzic and former President of the Bosnian Serb Republic, surrendered herself to the ICTY. She is the first woman to be indicted by the ICTY. The Milosevic trial began in 2001.

The establishment of the ICTY was a unique venture for the international community. There were partial precedents from the Nuremberg and Tokyo Tribunals. However, these 'were created in very different circumstances and were based on moral and juridical principles of a fundamentally different nature'.⁷¹ The ICTY was not an organ of the victorious state, but an organ of the international community. The ICTY and the comparable Tribunal for Rwanda are technically subsidiary organisations of the Security Council,⁷² but they are operationally independent.⁷³ Much was therefore done to avoid the impression of a partial judgement by the victors of a conflict. This was particularly evident when the ICTY Prosecutor considered whether to bring prosecutions in response to the NATO bombings of Kosovo in 1999.⁷⁴ It may be stating the obvious but it was, of course, of fundamental importance that Nuremberg and Tokyo had actually taken place. Any arguments that new law was being created were of much lesser weight after these tribunals.⁷⁵

The most general critique aimed at the ICTY (and the International Criminal Tribunal for Rwanda) is an indirect one. This is that the international community only established it to salve its conscience for its failure to act to

stop the 'ethnic cleansing' which had taken place.⁷⁶ There is no international criminal offence of ethnic cleansing, nor indeed any national law with a specific offence of this title. The concept of 'ethnic' groups is more familiar to the law relating to international minority rights and international group rights.⁷⁷ The concept of genocide was also well known.⁷⁸ The primary response to the term 'ethnic cleansing' was not so much one of legal reflection but rather that it harked back to the atrocities committed by Nazi Germany in the Second World War. The systematic destruction of the Jewish population in Germany and in territories occupied by Germany was literally explained as an attempt to cleanse those territories of that ethnic group. It was the spectre that similar practices were occurring in the former Yugoslavia that so shocked the conscience of Europe and the world and was encapsulated in the expression 'ethnic cleansing'.⁷⁹

Principal legal features The place of the ICTY in international law and its general operation have been the subject of extensive investigation and analysis by international law scholars.⁸⁰ The most notable legal features of the process include the limitations on jurisdiction, the provisions for fair trials, and the punishments available.

There is concurrent jurisdiction between the ICTY and the domestic courts of the former Yugoslavia (that is, they can both exercise jurisdiction).⁸¹ However, Article 9(2) of the ICTY Statute provides that the ICTY has primacy over national courts. Primacy can include retrial by the ICTY if the trial in the national court was for an ordinary crime, or if the national proceedings were not impartial or independent because they were designed to shield the accused from the ICTY, or if the case was not diligently prosecuted.⁸² At any stage, the ICTY may formally request national courts to defer to its competence, and it has done so on a number of occasions.

The jurisdiction of the ICTY is, however, limited in several ways. The ICTY only has competence over natural persons.⁸³ Following the suggestion of the Secretary-General, the SC did not give it competence over legal persons or on the basis of membership of organizations. The focus is on individual responsibility, including command responsibility,⁸⁴ rather than vicarious or imputed liability. Therefore, organisations, legal persons, and states cannot be brought to trial. Jurisdiction is also limited to conduct since 1 January 1991. This was chosen as a neutral date in terms of whether the conflict(s) were international or not. There is no end date. Termination of the ICTY is not provided for in Resolution 827. According to the report of the Secretary-General, termination is linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and SC decisions related thereto.⁸⁵ This could prove to be problematic if the SC were to intervene to terminate politically inopportune prosecutions. As of October 2002, the Prosecutor was continuing to seek indictments.⁸⁶ Jurisdiction is also limited to the territory of the former Yugoslavia. It thus clearly covered the conflict in Kosovo in 1999.⁸⁷

In terms of substantive jurisdiction,⁸⁸ the ICTY is concerned with grave breaches of the Geneva Conventions, violations of the law and customs of war, genocide, and crimes against humanity.⁸⁹ The article on crimes against humanity is derived from Article 6 of the London Charter but adds express reference to rape⁹⁰ and torture. The Secretary-General stressed that the need to apply the principle of *nullem crimen sine lege* meant that the Statute had to be cautious and require the ICTY to apply rules that were beyond any doubt part of customary international law. However, a particular problem is that while the offences themselves may be undoubted, their constituent elements for criminal law purposes are not necessarily specified. The Statute does not expressly refer to common Article 3 of the Geneva Conventions of 1949, which would apply in a non-international armed conflict. However, the reference to 'violations of the laws or customs of war' in Article 3 of the Statute covers common Article 3.⁹¹ Genocide and crimes against humanity are difficult to prosecute. The mental element (*mens rea*) for genocide requires a specific intent, which can be hard to prove.⁹² It has been prosecuted at the ICTY but as of October 2002 there had been only one conviction (*Prosecutor v. Krstic*).⁹³

Under Article 20 of its Statute, the ICTY's trial chambers are to ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.⁹⁴ The fair trial safeguards are very extensive and draw very heavily on Article 14 of the International Covenant on Civil and Political Rights (1966).⁹⁵ The accused must be present and may be questioned only as a witness in his own defence. The accused is entitled to the presumption of innocence, and guilt must be proved beyond reasonable doubt. In practice, the proceedings before the ICTY have been more adversarial than inquisitorial.⁹⁶

Trial *in absentia* is not possible. Accused persons are held in a specially created detention unit that is housed within a Dutch prison. This is subject to the exclusive control and supervision of the UN. They are entitled to seek bail, which can be granted in exceptional circumstances. The individual facilities are provided so as not to force different ethnic groupings together. Prison sentences are served outside Yugoslavia.

There is no possibility of imposing the death penalty.⁹⁷ This reflects the principled objection of many states around the world to that form of punishment. In determining the terms of imprisonment, recourse is to be had to the general practice regarding prison sentences in the courts of the former Yugoslavia.⁹⁸ The longest sentence imposed has been forty-five years, in *Prosecutor v. Tihomir Blaskic* (2000).

Problems of implementation While many important legal powers and limitations were set out in the Statute, implementing those provisions, or interpreting the Tribunal's power in situations where the Statute was silent, proved a challenge for the ICTY. A particular difficulty in terms of dealing with the

systematic practice of ethnic cleansing was whether the ICTY could punish those who organised and instigated the policy in addition to the particular individuals who carried it out. The argument was that, 'the Tribunal will never be able to bring to justice those in command: plainly, reference is made here to those responsible for planning or ordering large-scale breaches of international humanitarian law occurring in the Former Yugoslavia, or for omitting to prevent or punish the perpetrators of such breaches.'⁹⁹ The ICTY rejected this argument.

This objection assumes that the Tribunal will be unable to bring to trial all those who, under its statute, may be charged with war crimes or crimes against humanity. That is an entirely wrong assumption: the Tribunal will proceed against any person, regardless of status and rank, against whom the Prosecutor has issued an indictment confirmed by a Judge of the Tribunal.¹⁰⁰

Nevertheless, bringing these persons to trial is difficult. Although the ICTY may issue proceeding against the leaders or organisers of those who committed large-scale breaches, if the ICTY's orders or any action taken by the SC does not secure their presence, then the individuals cannot be tried because the Statute does not permit trial *in absentia*. This has happened in relation to a number of major political and military figures including Karadzic and Ratko Mladic.

The only possibility is for the ICTY to hold 'Rule 61' hearings. Rule 61 applies when a suspect remains at large a reasonable time after an arrest warrant is issued, and the judge who issued the indictment is satisfied that the Prosecutor and the Registrar have taken all reasonable steps to bring about the arrest. In these cases a panel of three judges, including the indictment judge, can hold a hearing in which the Prosecutor's office can present all of its evidence, including witnesses. After the hearing, the panel states whether there are reasonable grounds for believing that the accused committed all or part of the crimes charged in the indictment. If there are reasonable grounds, the panel will issue an international arrest warrant. At the prosecutor's request or of its own initiative, the panel can also order a state or states to adopt provisional measures to freeze the assets of the accused. The panel may also make a determination that a state has failed to co-operate with the Tribunal with regard to the accused in certain ways required by Article 29 of the Tribunal's Statute. The President of the ICTY can bring that matter to the SC.

Rule 61 hearings allow for further pre-trial enforcement efforts and serve a documentary function. They afford a means of redress for the victims of the alleged crimes committed by the absent accused, and give them an opportunity to testify in public and to have their testimony recorded for posterity. If an international arrest warrant is issued, the suspect becomes an international fugitive. The ICTY President has stressed that what was of particular importance to the victims or relatives of victims of rape, ethnic cleansing, torture, genocide, or wanton destruction of property was the punishment of the authors

of those acts by an impartial tribunal. That, it was asserted, was at least in part a means of alleviating their suffering and anguish.¹⁰¹ There have been five Rule 61 hearings involving eight indictees: Dragan Nikolic, Milan Martić, Milan Mrksić, Miroslav Radic, Ivica Rajić, Karadžić, Mladić and Veselin Sljivancanin.

One of the remarkable features of the conflict in the former Yugoslavia is the amount of official and non-official documentation available. It is probably the best-recorded crisis in the course of human history. Notwithstanding this, the trials before the ICTY have primarily been based on oral testimony. The uniqueness of the ICTY's task and the limited scope of the express provisions of its Statute left the ICTY with a substantial amount of discretion in approaching a variety of issues ranging from matters of evidence, procedure, administration, and organisation. The ICTY approached these with a commendable degree of sensitivity and intelligence particularly in dealing with the phenomenon of 'ethnic cleansing'. The ICTY has 'attempted to strike a balance between the strictly constructionist and the teleological approaches in the interpretation of the Statute'.¹⁰² This balance is principally reflected in its rules of procedure and evidence. This is how the ICTY described its 'purpose-made set of rules'.

As an ad-hoc institution, the Tribunal has been able to mould its uses and procedures to fit the task in hand. The Tribunal is charged with sole responsibility for judging the alleged perpetrators of some of the most reprehensible crimes known to man, committed not on some foreign battlefield but on their own home ground, acts of terror and barbarism committed against their own neighbours. The tribunal therefore decided, when preparing its rules, to take into account the most conspicuous aspects of the armed conflict in the former Yugoslavia. First among these is the fact that, in the former Yugoslavia, it is not simply a matter of wars between the armies of two belligerent States or even between a single disciplined force with clear command structure and a civilian population. Instead, there are a number of parties involved in the conflict, ranging from the regular armies of States to military and paramilitary groups, with conspicuous uncertainty about who is in control of the latter. Secondly, an internecine strife is under way, aggravated by ethnic and religious conflict, genocide, mass rape and other manifestations of large scale and widespread breaches of human rights. Ethnic hatred springs afresh to turn friend into foe and places the claims of ancient blood above those of common humanity and decency. Thirdly, the unbearable abuses perpetuated in the region have spread terror and deep anguish among the civilian population. It follows that witnesses of massacres and atrocities may be deterred from testifying about those crimes or else be profoundly worried about the possible negative consequences that their testimony could have for themselves or for their relatives. In drafting the rules of procedure and evidence, the judges of the Tribunal have endeavoured to incorporate rules that address issues of particular concern arising from those

aspects of the conflict, namely patterns of conduct, the protection of witnesses and sexual assault.

The rules of evidence thus adopted made provision for the admissibility of evidence relating to 'patterns of conduct'. Such evidence was considered to be particularly relevant in establishing coercion sufficient to vitiate any alleged consent in matters of sexual assault, and in establishing one of the basic requirements of genocide, namely 'the intent to destroy, in whole or in part, a group'. When the intent had not been expressly and specifically manifested, one of the means of ascertaining its existence could lie in investigating the consistent behaviour of groups or units, so as to determine whether that intent could be inferred from their 'pattern of conduct'.

A number of rules were concerned with the protection of witnesses, given an expected reluctance to appear before the Tribunal to testify. The principal witness against the perpetrator of a crime would often be the victim, who could feel threatened, either directly or indirectly, and who might still have family within an area held by forces sympathetic to an accused. To enable witnesses to testify freely provision was made for the submission of evidence by deposition. These could be made locally and taken by means of video-conference, if appropriate. In order to protect the 'equality of arms' (and, in particular, the rights of the accused), the procedure for taking depositions allowed for cross-examination of the witness. Arrangements have been made for the identity of witnesses who may be at risk not to be disclosed to the accused until such time as the witness can be brought under the protection of the ICTY. Witnesses may also be protected from public identification, if appropriate.

An important and innovative provision for the protection of witnesses was the establishment of a Victims and Witnesses Section within the Registry.¹⁰³ This was created to provide counselling, not only on legal rights but also to give psychological help and support, and to recommend protective measures, where required. The section has mainly dealt with female victims of rape and sexual assault. Its programmes cover over 300 witnesses or related persons from over twenty different countries.

As part of the special emphasis on crimes against women in the rules of procedure there are special provisions as to the standard of evidence, and matters of credibility of the witness, which may be raised by the defence. In particular, no corroboration of the victim's testimony is required in matters of sexual assault. The victim's previous sexual conduct is irrelevant and inadmissible. If a defence of consent is raised, the Tribunal may take note of factors that vitiate consent, including physical violence, and moral or psychological constraints. The rules are clearly gender-friendly.¹⁰⁴ Where trial before the ICTY is not possible because there are real practical or psychological difficulties in getting women to testify, an alternative recourse is to some form of Truth and Reconciliation Commission which would at least seek to achieve some record

and atonement of the wrongs done.¹⁰⁵ The idea is being considered but has not proved politically acceptable to date.¹⁰⁶

The ICTY has followed the pattern of the Nuremberg and Tokyo trials in that there are no technical rules for the admissibility of evidence. It did not wish to shackle itself to restrictive rules. The judges are thus responsible for weighing the probative value of the evidence before them. This is a common approach in international law. On this basis all relevant evidence maybe admitted to the ICTY unless its probative value is substantially outweighed by the need to ensure a fair trial, or where the evidence was obtained by a serious violation of human rights. Evidence could thus be excluded where it was obtained, for example, by torture, or inhumane or degrading treatment or punishment. An interesting addition is that the ICTY may order the production of additional or new evidence of its own motion. This is not normally the case in adversarial proceedings. The ICTY explained this by stating that 'it was felt that, in the international sphere, the interest of justice is best served by such a provision and that the diminution, if any, of the parties' rights is minimal by comparison'.¹⁰⁷ Finally, there are no rules on the granting of immunity or on plea-bargaining. Substantial co-operation by an accused, however, can be taken into account by the Chambers as a mitigating factor in sentencing as well as by the President for the purpose of granting pardon or commutation of sentence.

The ICTY has adopted a largely adversarial approach, but there are elements more familiar to inquisitorial systems. There is no investigating judge to collect the evidence. As in a common law regime, this task falls to the Prosecutor. After confirmation of the indictment by a judge, the defence is entitled to collect and to have access to all relevant evidence. Both the prosecution and the defence are reciprocally bound to disclose all documents and witnesses. In *Prosecutor v. Furundzia* (1998) the Prosecutor had failed to disclose that witness A had had psychological counselling. The trial chamber subsequently found that A's memory had not been affected by any psychological disorder she may have had. Individuals, organisations, or governments may, by leave, present written or oral submissions as *amici curiae*, and a number of such briefs have been submitted. This is unusual in a common law adversarial context of a prosecutor against the defence without any third party intervention. It is more common in continental systems of law. The third parties must be seen as representing the wider interests of victims or the values of elements of the international community.

Co-operation with the ICTY In accordance with SC Resolution 827 (1993) 'all states shall cooperate fully' with the ICTY and its organs, and shall take any measures necessary under their domestic law to implement the provisions 'and to comply with requests for assistance or orders issued by a trial chamber'.¹⁰⁸ States are thus under a binding legal obligation to co-operate with the ICTY in terms, for example, of arrest, search, surrender, or transfer of persons

to the ICTY. Some states needed to enact implementing legislation to meet these requirements, while others claimed that they did not need to do so. Co-operation has generally been good, but there have been particular problems with the Federal Republic of Yugoslavia, Croatia, and Republika Srpska (the Serb part of Bosnia).¹⁰⁹

Obligations on states stemming from the Statute 'shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal' that may exist under national legal systems. A common national obstacle is that some constitutions or national laws prevent the extradition of nationals. This principle is in conformity with international law given the large number of states who follow the practice. In the *Lockerbie Case*, the International Court of Justice ruled that the obligation under Article 103 of the UN Charter that 'In the event of a conflict between the obligations of the Members of the United Nations under, the present Charter and their obligations under any other international agreement, the obligations under the present Charter shall prevail' overrode any rights of Libya under the Montreal Convention on aircraft hijacking.¹¹⁰ Presumably, given that SC Resolution 827 (1993) was a binding decision adopted under Chapter VII, then the same argument would apply. The ICTY president explained that

a few countries have laid down an *ad hoc* procedure, while others planned to apply *mutatis mutandis* their national provisions relating to extradition, though only as regards questions of procedure and without making the transfer of the accused to the ICTY subject to the same restrictions that apply to extradition (e.g. non-extradition of nationals or of persons accused of political crimes). In certain countries, provision has been made for appeals against or review of decisions of national courts on the ICTY's request for transfer.¹¹¹

As suggested, though, this could raise some difficult issues of national law. In terms of methods of transfer to the ICTY, seven persons have been arrested by national police, fourteen have voluntarily surrendered, and twenty have been detained by international forces.

The other main area of domestic co-operation has been financial. In addition to UN funding, the ICTY has been supported by substantial financial contributions from individual states (\$17.5 million). The largest voluntary contributor has been the UK (over \$3 million). It contributed very substantial financing for the building of a second courtroom.

Legality and legitimacy Three of the principal issues of legality and legitimacy of the ICTY were raised in the *Tadic Case*.¹¹² First, Tadic argued that the Tribunal had not been lawfully established. The drafters of the UN Charter had not envisaged such a tribunal, the General Assembly had not been involved in its creation, the Council had not consistently created tribunals in other instances, the Council could not act in relation to individuals, there was no real threat to the peace, the Tribunal would not promote peace, and a political body could

not create a judicial organ.¹¹³ Secondly, the primacy over national courts which the SC resolution gave to the Tribunal was unlawful and violated the national sovereignty of the states affected. Thirdly, the Tribunal lacked subject matter jurisdiction in respect of the charges against the defendant.¹¹⁴ The trial chamber and the appellate chamber rejected these arguments but differed in their legal arguments for doing so.¹¹⁵ The most interesting part of the legal analysis was that the appellate chamber accepted that it had jurisdiction to determine whether it had been lawfully established (*la compétence de la compétence*). In principle, at least, this raised the possibility that the tribunal could have decided that it had been unlawfully established. It is difficult to determine the legal consequences in such a situation for the Tribunal, the judges, the Prosecutor and, not least, the defendants and indictees.¹¹⁶ The political consequences for the SC's strategy would presumably have been devastating. Fortunately, the appellate chamber decided that the establishment of the ICTY was within the SC's powers under Article 41 of the Charter, and that the ICTY had been lawfully established. It took a broad, but not unlimited, view of the powers of the SC. It considered that the Tribunal had been 'established by law'.¹¹⁷ All of Tadic's other arguments were also rejected.¹¹⁸

The ICTY has faced challenges to its credibility and effectiveness. Its progress has been painfully slow. Trials have been long and complicated involving substantial numbers of witnesses (over a hundred in a number of cases) and huge amounts of documentation. The longest trial to date was 223 days (*Blaskic*). The 2002–3 budget totals \$223 million. As of May 2002, there were 1,248 staff members from eighty-two countries. The cost per person tried has been astronomical. Over one hundred individuals have been indicted. Fifty-five accused are in proceedings before the Tribunal; eleven have been provisionally released. Twenty-one indictees remain at large, including the two major figures.

The former President of the ICTY has examined the ICTY's development on three levels.¹¹⁹ First, from an operational point of view, trial and appellate proceedings are regularly held, and decisions on 'both procedural and substantive matters are on the cutting edge of the development of international humanitarian law'.¹²⁰ For example, the decision in the *Tadic* appeal has had a worldwide impact on practice and doctrine. The ICTY has also developed an extensive jurisprudence on the narrower technical 'lawyers law'.¹²¹ This includes the power and effect of ICTY decisions on individuals and on states,¹²² command responsibility,¹²³ whether violations of the law of internal armed conflict can lead to criminal responsibility,¹²⁴ whether crimes against humanity require a connection with an international armed conflict,¹²⁵ abduction, whether rape could constitute torture,¹²⁶ and whether there is a distinction between the seriousness of a crime against humanity and that of a war crime.¹²⁷ Secondly, its experience has laid down the foundations for the establishment of a practical and permanent system of international justice. Without the ICTY there would probably have been no international tribunal

in Rwanda. Without the two *ad hoc* tribunals there would almost certainly be no international criminal court. Thirdly, it is slowly beginning to have an impact on the former Yugoslavia. The ICTY's legitimacy has not been accepted by the Federal Republic of Yugoslavia, but co-operation is improving. March 2001 saw the first official handover by Yugoslavia of a suspect to the ICTY. The ICTY has an extensive outreach programme to inform the population in the region about its work and its significance.

Finally, in terms of a wider international law, it is of significance that the SC characterised violations of international humanitarian law as threats to international peace and security and therefore opened the door to collective action.

*The International Criminal Tribunal for Rwanda (ICTR)*¹²⁸

The ICTR was established by the SC in 1994,¹²⁹ again after a report by a Commission of Experts.¹³⁰ Its establishment was in response to the massive number of killings and atrocities committed in Rwanda in 1994.¹³¹ The perpetrators were mainly from the Hutu ethnic group, and the victims were mainly from the Tutsi ethnic group but also included pro-Tutsi Hutus. Interestingly, although the ICTR Statute was modelled on that of the ICTY, it was not drafted by the SC. Rather it was drafted by the US and New Zealand governments with some input from the government of Rwanda. As with the ICTY the argument is made that the establishment of the ICTR was partly due to embarrassment at the failure of the international community to intervene to stop the atrocities.¹³²

The ICTR has fourteen judges, five of whom are assigned to the appeal chamber but are based at the seat of the Tribunal in Arusha, Tanzania. It shares the appellate judges and the Prosecutor with the ICTY. The argument for this sharing of personnel was that it was useful to try to develop a body of specialised expertise. In practical terms the effect of the arrangement was to render administration and the role of Deputy Prosecutors crucial, one based at each Tribunal. The investigatory and prosecutorial units of the ICTR are in Kigali, the capital of Rwanda, and the trial chambers sit in Arusha. For 2002–3, the ICTR's budget is \$177 million and there are 810 staff representing over eighty nationalities.

With regard to jurisdiction, trial provisions, and punishment, the ICTR is similar, but not identical, to the ICTY. For example, as with the ICTY, the ICTR has concurrent but primary jurisdiction.¹³³ The jurisdiction of the ICTR is also restricted to natural persons. In terms of location, the Tribunal's authority is limited to crimes committed in the territory of the Rwanda or in the territory of neighbouring states in respect of serious violations of international humanitarian law committed by Rwandan citizens.¹³⁴ The Tribunal can only try crimes committed between 1 January 1994 and 31 December 1994. The principal effect of the limitation could be that offences of planning, preparation, or of aiding or abetting offences under Articles 2 to 4 of the Statute could be

excluded.¹³⁵ If substantive offences occurred during 1994 then the prior planning would be within the ICTR's temporal jurisdiction. Presumably, the ICTR will terminate its operations when there are no outstanding investigations related to its temporal jurisdiction.

The subject-matter jurisdiction of the ICTR is different from that of the ICTY because the conflict was essentially a non-international one. The offences covered are genocide, crimes against humanity, and violations of common Article 3 of the 1949 Geneva Conventions and of Additional Protocol II (1977) to those Conventions.¹³⁶ Incitement to genocide appears as a freestanding offence which is not linked to the actual occurrence of subsequent acts of genocide.¹³⁷ The SC rejected Rwanda's view that jurisdiction should be confined to genocide. This avoided the appearance that the Tribunal would only be used against opponents of the government. In practice, no cases at the ICTR have involved members of the ruling government (Rwandan Patriotic Front).

The testimony of witnesses has been the principal form of evidence before the ICTR. More than 230 prosecution and defence witnesses from various African, European, and American countries have testified before the Tribunal. Like the ICTY, the ICTR has a Witnesses and Victims Support Section. It receives considerable assistance from non-governmental organisations.

The Statutes of both the ICTY and the ICTR prohibit the imposition of the death penalty.¹³⁸ ICTR sentences can be served in Rwanda if human rights standards for imprisonment are met. The tribunal maintains supervision over the sentence while it is being served.

The ICTR has indicted political, military, and media leaders, as well as senior governmental administrators. The ICTR rendered the first convictions by an international tribunal for genocide (*Prosecutor v. Akayesu*). In *Prosecutor v. Bayagwiza* the trial chamber in 1998 denied a motion to nullify Bayagwiza's arrest and detention. The appeal chamber in 1999 directed his release and dismissed the indictment against him with prejudice to the Prosecutor. That decision was heavily criticised. In 2000 the appeal chamber reviewed its decision ordering release and ordered a continuation of the proceedings. It reasoned that it had misunderstood the factual basis of the case. Bayagwiza has appealed. Over forty individuals accused of involvement in the 1994 genocide in Rwanda have been arrested. At present over fifty detainees are held at the ICTR's detention facility. June 2001 saw the first acquittal by the ICTR (Iganace Bagilishema).

Co-operation between the ICTR and states has generally been very good. The Tribunal's relationship with the government of Rwanda, however, has been somewhat problematic. Interestingly, the request for the ICTR's establishment came from the new Tutsi government of Rwanda, though the government then proceeded to disagree with a number of aspects, including the temporal limitation on jurisdiction. Eventually it was the only member of the SC to vote against its establishment.¹³⁹ Despite its vote, the government expressed the intention to support the ICTR and to co-operate with it.

Rwanda introduced a specific law to deal with national prosecutions for genocide. It came into force on 1 September 1996. This was in a context where the effective functioning of the Rwandese national judicial system had ceased. The law grouped the offences into four categories of seriousness and fixed penalties for each category with the possibility of substantial reductions for guilty pleas at various stages. The pleas had to be accompanied by an accurate and complete confession, disclosure of accomplices, and an apology. This serves a number of purposes in terms of establishing an accurate historical record.¹⁴⁰ An apology serves as part of the process of national reconciliation. In Rwanda only an offender charged with the most serious offences (Category One) of being one of the leaders and organisers of genocide and the perpetrators of particularly heinous murders or sexual torture could be subject to the death penalty. The national proceedings in Rwanda have raised major human rights concerns in terms of conditions of imprisonment and the possibility of fair trials. In 1995, the main prison in Kigali, designed for 750 persons, was holding 6,400. As of July 2001, 120,000 persons were in detention. Detention is based solely on denunciation. Western states have provided substantial financial assistance to Rwanda to fund national prosecutions. The Rwandan government objected to the absence of the death penalty under the ICTR because under the Rwandan Penal Code there was provision for the death penalty.¹⁴¹ Their argument that those tried by the ICTR would face lesser penalties than those tried under Rwandan law has been borne out. In 1998, Rwanda held a public execution of twenty individuals found guilty of genocide.¹⁴²

The legality of the establishment of the ICTR was challenged in *Prosecutor v. Kanyabashi (Jurisdiction)*.¹⁴³ The challenge was rejected with the ICTR ruling that the determination of a threat to peace was within the discretion of the SC, and that the creation of the ICTR was within the SC's powers under Article 41 of the Charter.

The work of the ICTR could have been allocated to the ICTY, but there were some fears that the situation in Rwanda would then be getting a second-class treatment. Nonetheless, the perception of the ICTR has always been that of the poor relation to the ICTY. It faced severe financial limitations and was blighted by maladministration and inefficiency. More specifically, the number of translators has been inadequate, and Rwanda has criticised the absence of the death penalty and the lack of a separate Prosecutor or Appeal Chamber. That judgements have not been translated into local languages has made it difficult for the work of the ICTR to appear relevant to the situation in Rwanda.

IV The Permanent International Criminal Court (ICC)

The idea of a permanent international criminal court has been discussed since at least the 1920s.¹⁴⁴ It had been on the UN's agenda almost since its inception but little progress was made. However, events in Yugoslavia and Rwanda

transformed political thinking and, with the end of the Cold War, progress was astonishingly quick.¹⁴⁵ Agreement on a permanent international criminal court was reached in the Rome Statute in 1998.¹⁴⁶ The Statute has been signed by 139 states. It required ratification by sixty states before it came into force in July 2002. Although Germany had suggested Nuremburg as the location for an ICC, it is located in The Hague.

It is helpful in comparative terms to outline the principal features of the ICC which are central to its legality and legitimacy:¹⁴⁷ First of all, it is a permanent court. It has a relationship agreement with the UN but it is not a UN body. Under the Statute, the SC has power to refer situations to the ICC, and it also has the power to suspend investigations or proceedings at the ICC.¹⁴⁸ The jurisdiction of the court is based on a treaty, and reservations to the treaty are not permitted. There is, however, a limited possibility for a state to opt out of the court's jurisdiction in respect of war crimes for a period of seven years.¹⁴⁹ The conditions for the exercise of jurisdiction are based on the exercise of nationality jurisdiction or territorial jurisdiction. The ICC is based on the principle of 'complementarity'. It is only supposed to exercise jurisdiction when national courts are unable or unwilling to do so.

The ICC only has jurisdiction over natural persons. The crimes within its jurisdiction are genocide, crimes against humanity, war crimes, and aggression. Exercise of jurisdiction over aggression is dependent on agreement on a definition of the offence. No agreement has been reached as of October 2002. Agreement has, however, been reached by states on the 'Elements of Crimes'.¹⁵⁰ These are to be submitted to the judges of the ICC. Agreement has also been reached by states on Rules of Procedure and Evidence.¹⁵¹ Extensive consideration of gender issues and the interests of victims are reflected in the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence.

V Conclusions

Nuremberg has ensured that the Holocaust remains 'the' defining event of the twentieth century.¹⁵² In a small number of countries it is a criminal offence to deny the Holocaust or the Nuremberg judgement.¹⁵³ With hindsight, Nuremberg and Tokyo have become precedents in the increasing criminalisation of international law.¹⁵⁴ This has taken place alongside the growth of the human rights movement and a decline of concepts of absolute sovereignty. There has been a move away from immunity and from amnesties for gross human rights violations. This is also reflected in transnational criminal prosecutions, such as in the *Pinochet* case,¹⁵⁵ and in civil claims. The ICC will not operate retrospectively, and there may still be *ad hoc* international or mixed national/international tribunals in the interim, such as for Cambodia and for Sierra Leone.¹⁵⁶ In principle, the ICC should spur national prosecutions so as to avoid ICC jurisdiction. The statute of the ICC, the Elements of Crimes, and its detailed rules of Procedure and Evidence go a long way towards satisfying standards of

certainty and accessibility in the law. Its normative standards are already being cited by national and international tribunals. It is submitted in conclusion that war crimes trials before international tribunals have moved closer and closer towards satisfying purer norms of legality and legitimacy.

Notes

I am grateful to Catherine Le Mageuresse, David Turns, and Christine Byron for their comments on a draft of this chapter. Responsibility for the views expressed is mine alone.

- 1 See T. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).
- 2 Some post-modern legal analysis has focused on the function of trials as 'storytelling'.
- 3 See J. J. Paust *et al.* (eds), *International Criminal Law – Cases and Materials* (Durham: Carolina Academic Press, 1996); C. Greenwood, 'Historical development and legal basis', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1999), pp. 1–38; J. Barboza, 'International criminal law', *Receuil Des Cours – Collected Courses of the Hague Academy of International Law*, 278 (1999), 9–200.
- 4 See B. Simma, 'From bilateralism to community interest in international law', 250 *Receuil Des Cours – Collected Courses of the Hague Academy of International Law*, 250 (1994-IV), 217–384.
- 5 See T. L. H. McCormack and G. J. Simpson (eds), *The Law of War Crimes - National and International Approaches* (The Hague: Kluwer, 1997); Paust *et al.* (eds), *International Criminal Law*, pp. 707–857; H. McCoubrey, 'War crimes jurisdiction and a permanent international criminal court: advantages and difficulties', *Journal of Armed Conflict Law*, 3 (1998), 19–26.
- 6 Each of the Geneva Conventions of 1949 specifies what are grave breaches, as does Protocol I of 1977. See R. Wolfrum, 'Enforcement of humanitarian law', in Fleck (ed.), *The Handbook of Humanitarian Law*, pp. 517–50 at pp. 530–40; L. C. Green, *The Contemporary Law of Armed Conflict*, 2nd edn (Manchester: Manchester University Press, 2000), pp. 286–316. There is no acceptance yet of a general duty to prosecute for any war crime.
- 7 *Attorney-General of the Government of Israel v Eichmann* (1961) 36 I.L.R. 5. See P. Papadatos, *The Eichmann Trial* (London: Stevens, 1964); G. Bach, 'The trial of Adolf Eichmann', *Judicial Studies Board Journal* (1997), 15–17; J. N. Wenig, 'Enforcing the lessons of history: Israel judges the Holocaust', in McCormack and Simpson (eds), *The Law of War Crimes*, pp. 103–22 (this essay also discusses the *Damjanjuk Case* (1985) 79 I.L.R. 535).
- 8 The Jerusalem District Court found that the jurisdiction to try crimes under international law was universal.
- 9 See F. M. Buscher, *The U.S. War Crimes Trial Programme in Germany 1945–55* (New York: Greenwood, 1989).
- 10 See A. P. V. Rogers, 'War crimes trials under the royal warrant: British practice 1945–1949', *International and Comparative Law Quarterly*, 39 (1990), 780–800.

- 11 See J. Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merrill, 1954).
- 12 See G. Triggs, 'Australia's war crimes trials: all pity choked', in McCormack and Simpson (eds), *The Law of War Crimes*, pp. 123–49.
- 13 See S. A. Williams, 'Laudable principles lacking application: the prosecution of war criminals in Canada', in McCormack and Simpson (eds), *The Law of War Crimes*, pp. 151–70.
- 14 See A. Marschik, 'The politics of persecution: European national approaches to war crimes', in McCormack and Simpson (eds), *The Law of War Crimes*, pp. 65–101; L. S. Wexler, 'The interpretation of the Nuremberg principles by the French court of cassation: from Touvier to Barbie and back again', *Columbia Journal of Transnational Law*, 32 (1994), 289–380.
- 15 See *R v. Sawoniuk (Anthony)*, [2000] *Criminal Law Review* 506. The investigations unit under the act has been wound up. The passage of the act was itself controversial.
- 16 National war crimes trials will have similar though usually more limited purposes.
- 17 Debate has continued on the role of the German people in Nazism. See D. Goldhagen, *Hitler's Willing Executioners – Ordinary Germans and the Holocaust* (London: Little, Brown, 1996); M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Atrocity* (Boston: Beacon Press, 1999).
- 18 See S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford: Oxford University Press, 1997).
- 19 'When education and understanding have spread through the family of nations there may be no need for international law'. G. Lawrence, Lord Oaksey, 'The Nuremberg trials and the progress of international law' (Birmingham: Holdsworth Club, 1947) p. 16.
- 20 See C. Bassiouni and C. Blakesley, 'The need for an international criminal court in the new world order', *Vandenberg Journal of Transnational Law*, 25 (1992), 151–82.
- 21 See A. D'Amato 'Peace vs accountability in Bosnia', *American Journal of International Law*, 88 (1994), 500–6; A. J. Colson, 'The logic of peace and the logic of justice', *International Relations*, 15: 1 (2000), 51–62; Symposium: 'State reconstruction after civil conflict', *American Journal of International Law*, 95 (2001), 1–119.
- 22 See G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 2: *Armed Conflict* (London: Stevens, 1968), pp. 462–6. Hagenbach was convicted and beheaded.
- 23 The Netherlands was not a party to the Versailles Treaty. It further stated that the extradition would have violated Dutch law and its tradition of asylum.
- 24 R. Cryer, 'Towards an integrated regime for the prosecution of international crimes', (Ph.D. thesis, University of Nottingham, 2000), 315.
- 25 See B. F. Smith, *The American Road to Nuremberg – The Documentary Record 1944–45* (Stanford: Hoover Press, 1982); Smith, *The Road to Nuremberg* (New York: Basic, 1981); M. R. Marrus (compiler), *The Nuremberg War Crimes Trials, 1945–46: a Documentary History* (Boston: Bedford Books, 1997).
- 26 See E. Schwelb, 'The UN war crimes commission', *British Yearbook of International Law*, 23 (1946), 363–76.

- 27 Anglo-Soviet-American Communiqué from the Tripartite Conference in Moscow, 1 November 1943, *American Journal of International Law*, 38 (supplement, 1944), 3.
- 28 There were not show trials in the Stalinesque sense, see G. H. Hodos, *Show Trials: Stalinist Purges in Eastern Europe, 1948–1954* (New York: Praeger, 1987).
- 29 J. H. Morgan, *The Great Assize – an Examination of the Law of the Nuremberg Trials* (London: John Murray, 1948), 1. On the forensic aspects of the trial, see A. D. Gibb, *Perjury Unlimited* (Edinburgh: Green, 1954).
- 30 R. Ginsberg, *The Nuremberg Trial and International Law* (Dordrecht: Nijhoff, 1990); R. E. Conot, *Justice at Nuremberg* (London: Weidenfeld, 1983); A. Tusa and J. Tusa, *The Nuremberg Trial* (London: Macmillan, 1983); R. K. Woetzel, *The Nuremberg Trials in International Law* (London: Stevens, 1962); R. S. Clark, 'Nuremberg and Tokyo in contemporary perspective', in McCormack and Simpson (eds), *The Law of War Crimes*, pp. 171–87.
- 31 These include T. Taylor, *The Anatomy of the Nuremberg Trials* (New York: A. Knopf, 1992); B. F. Smith, *Reaching Judgment at Nuremberg* (London: Deutsch, 1977); D. A. Sprecher, *Inside the Nuremberg Trial: a Prosecutor's Comprehensive Account*, 2 vols, (Lanham, Md: Univ. Press of America, 1999).
- 32 See *Judgement of the International Military Tribunal for the Trial of German Major War Criminals*, 1946, (H.M.S.O., Cmd 6964); Proceedings, vols 1–23 (1946–51); H. Stimson, 'The Nuremberg trial: landmark in law', *Foreign Affairs*, 25 (1947), 179–89. The soviet judge dissented from parts of the Tribunal's legal analysis, the three acquittals, and the imposition of a life sentence rather than the death penalty for Rudolf Hess.
- 33 For the international agreement on establishing the Tribunal and the London Charter, see 82 United Nations Treaty Series, 279, 284.
- 34 In accordance with Article 5 of the charter.
- 35 See Paust *et al.* (eds), *International Criminal Law*, pp. 967–1080.
- 36 *Ibid.*, pp. 861–966.
- 37 For some broadly contemporary accounts see Oaksey, 'The Nuremberg trials' (supportive); Viscount Kilmuir, 'Nuremberg in retrospect' (Birmingham: Holdsworth Club, 1956, supportive); Morgan, *The Great Assize* (critical of references to international law rather than acts of *de facto* sovereigns and of the counts of conspiracy, aggressive war and crimes against humanity, and generally intemperate).
- 38 Judgement of the IMT, p. 223. A reverse argument is before the International Court of Justice (hereafter ICJ) in the case between Bosnia and Yugoslavia (Serbia and Montenegro). The latter has argued that genocide only bears individual criminal responsibility and not state responsibility. See *Case Concerning Application of the Convention on the Prevention*, I.C.J. Reports (1993), 3 and 325 (interim measures), I.C.J. Reports (1996), 595 (jurisdiction), I.C.J. Reports (1997) (counterclaim), I.C.J. Reports (2000) (request for revision).
- 39 See E. Schwelb, 'Crimes against humanity', *British Yearbook of International Law*, 23 (1946), 178–226.
- 40 See *Case of Ulrich Greifelt*, *Law Reports of Trials of War Criminals*, vol. 13, (London: H.M.S.O.), pp. 1–69.
- 41 Article 19 of London Charter.
- 42 See Tusa and Tusa, *The Nuremberg Trials*, pp. 487–8.
- 43 See J. Mendelson, 'Trial by document: the problem of due process for war criminals at Nuremberg', *Prologue*, 7 (1975), 227–34.

- 44 Article 27 of London Charter.
- 45 'The ambiguous legacies of Nuremberg linger at the margins of our unreliable moral memories; they inspire but also burden the conscience of our politics', D. Luban, 'The legacies of Nuremberg', *Social Research*, 54 (1987), 779–829 at 829. See also *S.W. v. UK*, (1995) 335-B ECHR, where it was held that judicial abolition of the common law marital rape exemption did not violate Article 7 of European Convention on Human Rights.
- 46 See General Assembly Resolution 95(I) (1946) and the International Law Commission's formulation of the Nuremberg Principles (1950).
- 47 See G. Robertson, *Crimes Against Humanity* (London: Penguin, 2000).
- 48 See D. Turns and C. Byron, 'The preparatory commission for the international criminal court', *International and Comparative Law Quarterly*, 50 (2001), 420–34.
- 49 H. Kelsen, 'Will the judgment at Nuremberg constitute a precedent?', *International and Comparative Law Quarterly*, 1 (1947), 153–71; G. Lawrence (President of the IMT), 'The Nuremberg trial', *International Affairs*, 23 (1947), 151–64; Q. Wright, 'The law of the Nuremberg trial', *American Journal of International Law*, 41 (1947), 38–72; G. Best, *Nuremberg and After: the Continuing History of War Crimes and Crimes Against Humanity* (Reading: University of Reading, 1984).
- 50 See C. Tomuschat, 'International criminal prosecution: the precedent of Nuremberg confirmed', in *Criminal Law Forum*, 5 (1994), 237–47. For an early call for permanent judicial machinery for enforcement of the Nuremberg law, see W. E. Jackson, 'Putting the Nuremberg law to work', *Foreign Affairs*, 25 (1947), 550–65.
- 51 See A. W. B. Simpson, *Human Rights and the End of Empire – Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001).
- 52 See Kilmuir, 'Nuremberg in retrospect'.
- 53 See S. L. Paulson, 'Classical legal positivism at Nuremberg', *Philosophy and Public Affairs*, 4 (Winter 1975), 132–58.
- 54 *Nuremberg Trial, Proceedings*, vol. 1, p. 49. See also *Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, London, 1945* (Washington, 1949).
- 55 B. F. Smith, *American Road*, p. xvi.
- 56 U.S. State Department, Publication No. 2675. See P. Lowe in this volume and the literature cited there; Lord Russell of Liverpool, *The Knights of Bushido: a Short History of Japanese War Crimes* (London, Cassell, 1958).
- 57 Two died and one became ill. Neither the Emperor nor any industrialists were indicted.
- 58 On rape and the use of comfort women by the Japanese, see D. Boling, 'Mass rape, enforced prostitution and the Japanese imperial army: Japan eschews international legal responsibility?' *Columbia Journal of Transnational Law*, 32 (1995), 533–90.
- 59 See S. Horwitz, 'The Tokyo trial', *International Conciliation* (November, 1950), 473–584.
- 60 See E. Kopelman, 'Ideology and international law: the dissent of the Indian justice at the Tokyo war crimes tribunal', *New York University Journal of International Law and Politics*, 23 (1991), 373–444.
- 61 C. Blakesley, 'Atrocity and its prosecution: the ad hoc tribunals for the former Yugoslavia and Rwanda', in McCormack and Simpson (eds), *The Law of War Crimes*, pp. 189–228; K. Lescure, *International Justice for Former Yugoslavia: the*

- Workings of the International Criminal Tribunal of the Hague* (The Hague: Kluwer, 1996); V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Irrington NY: Transnational Publishers, 1995); J. C. O'Brien, 'The international tribunal for violations of international humanitarian law in the former Yugoslavia', *American Journal of International Law*, 87 (1993), 643–59; [Symposium], 'A critical study of the International Tribunal for the former Yugoslavia', *Criminal Law Forum* 5 (1994). For the internet sites see www.un.org/icty/ and www.un.org/icty/. These contain the annual reports of the tribunals to the General Assembly (hereafter GA) and the Security Council (hereafter SC).
- 62 SC Resolutions 808 (1993), 827 (1993). The Statute was amended by SC Resolutions 1166 (13 May 1998) and 1329 (30 November 2000).
- 63 See D. McGoldrick, 'The tale of Yugoslavia: lessons for accommodating national identity in national and international law', in S. Tierney (ed.), *Accommodating National Identity: New Approaches in International and Domestic Law* (The Hague: Kluwer, 2000), pp. 13–64; C. Greenwood, 'The prosecution of war crimes in the former Yugoslavia', *Bracton Law Journal*, 26 (1994), 13–22; T. Meron, 'The case for war crimes trials in Yugoslavia', *Foreign Affairs*, 72: 3 (Summer 1993), 122–35.
- 64 SC Resolution 780 (1992). See C. Bassiouni, 'The commission of experts established pursuant to SC Resolution 780: investigating violations of international humanitarian law in the former Yugoslavia', *Criminal Law Forum*, 5 (1994), 279–340.
- 65 United Nations Document S/25704 (1993); 32 I.L.M. (1993), 1159.
- 66 The secretary-general received reports from the Conference on Security Co-operation in Europe (S/25307) (1993), France (S/25266) (1993), and Italy (S/25300) (1993) and a number of states and non-governmental organisations made comments during the drafting of the report.
- 67 The list is submitted to the GA by the SC. The number was later increased to fourteen. The ICTY has had three female judges.
- 68 See SC Resolution 1329 (2000).
- 69 See ICTY, *Rules of Procedure and Evidence*, IT/32/REV.19; J. Katz Cogan, 'The problem of obtaining evidence for international criminal courts', *Human Rights Quarterly*, 22 (2000), 404–27.
- 70 See Smith, *Reaching Judgment*, 171–298.
- 71 First Annual Report of the Tribunal, submitted to the GA and SC, UN Doc. A/49/342, 29 August 1994.
- 72 See D. Sarooshi, *The United Nations and the Development of Collective Security* (Oxford: Oxford University Press, 1999), pp. 92–109; 'The legal framework governing United Nations subsidiary organisations', *British Yearbook of International Law*, 67 (1996), 413 at 428–31, 453–8.
- 73 There is necessarily some indirect UN control in terms of financing, appointment of judges and staff.
- 74 See 'Final report to the Prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia' (ICTY, The Hague, June 2000). The bombings were in response to Serb human rights violation in Kosovo. See S. Tierney, 'The road back to hell: the international response to the crisis in Kosovo', in Tierney (ed.), *Accommodating National Identity*, pp. 89–130.

- 75 This did not preclude debate as to the applicable humanitarian law in respect of particular situations in the former Yugoslavia.
- 76 For a helpful collection of historical statements, see A. Cassese (ed.) *Path to The Hague* (The Hague: ICTY, 1996).
- 77 See P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), pp. 158–63; N. Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Nijhoff, 1991).
- 78 W. Schabas, *Genocide in International Law: the Crime of Crimes* (Cambridge: Cambridge University Press, 2000).
- 79 See D. Petrovic, 'Ethnic cleansing – an attempt at methodology', *European Journal of International Law*, 5 (1994), 342–59.
- 80 See A. Cassese, 'On the current trend towards criminal prosecution and punishment of breaches of international humanitarian law', *European Journal of International Law*, 9 (1998), 2–17.
- 81 Article 9(1) ICTY Statute.
- 82 Article 10 ICTY Statute. The ICTR Statute contains the same provision.
- 83 Article 7 ICTY Statute. Article 6 ICTR Statute is the same.
- 84 See I. Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester: Manchester University Press, 2002).
- 85 UN Doc. S/25704, para. 28.
- 86 See the annual reports of the ICTY for 1999 and 2000. For the trial of Slobodan Milosevic, see McGoldrick, in this collection.
- 87 On 10 March, 1998 the chief prosecutor, in a public statement, stated that the tribunal's jurisdiction covered the violence in Kosovo. Subsequently, the ICTY prosecutor requested the SC to amend Article 5 of ICTY Statute so as to cover events after the armed conflict in Kosovo.
- 88 See J. Paust, 'Applicability of international criminal laws to events in the former Yugoslavia', *American Journal of International Law and Policy*, 9 (1994), 499–521.
- 89 See Articles 2–5 of the Statute. Article 5 retains the link with an armed conflict. See C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd edn (Dordrecht: Nijhoff, 1999).
- 90 On the controversy over rape, see C. Chinkin, 'The rape and sexual abuse of women in international law', *European Journal of International Law*, 5 (1994), 326–41; C. P. M. Clieren and M. E. M. Tijssen, 'Rape and other forms of sexual assault in the armed conflict in the former Yugoslavia: legal, procedural and evidential issues', *Criminal Law Forum* 5 (1994), 471–506.
- 91 See *Tadic Case*, Case IT-94-1, Appeals Chamber, para. 137 (2 October 1995); T. Meron, 'War crimes in Yugoslavia and the development of international law', *American Journal of International Law*, 88 (1994), 78–87; T. Meron, 'The international criminalization of internal atrocities', *American Journal of International Law*, 89 (1995), 554–77; D. Turns, 'War crimes without war? The applicability of international humanitarian law to atrocities in non-international armed conflicts', *African Journal of International and Comparative Law*, 7 (1995), 804–30.
- 92 See ICJ's decisions on interim measures and jurisdiction concerning eight member states of NATO and relating to NATO's intervention in Kosovo in 1999, I.C.J. Reports (2000).

- 93 See *Tadic*, and *Prosecutor v. Jelusic*, Case IT-95-10 (14 December 1999); G. Verdrame 'The genocide definition in the jurisprudence of the ad hoc tribunals', *International and Comparative Law Quarterly*, 49 (2000), 578–98.
- 94 See C. Warbrick, 'International criminal courts and fair trial', *Journal of Armed Conflict Law*, 3 (1998), 45–64.
- 95 For the extensive jurisprudence of the Human Rights Committee on Article 14, see D. McGoldrick, *The Human Rights Committee* (Oxford: Oxford University Press: 1991), pp. 395–458.
- 96 See M. Findlay, 'Synthesis in trial procedures? The experience of the international criminal tribunals', *International and Comparative Law Quarterly*, 50 (2001), 26–53.
- 97 Article 24 ICTY Statute.
- 98 *Ibid.* See D. Turns, 'The international criminal tribunal for the former Yugoslavia: the Erdemovic case', *International and Comparative Law Quarterly*, 47 (1997), 461–74; W. A. Schabas, 'Perverse effects of the *nulla poena* principle: national practice and the ad hoc tribunals', *European Journal of International Law*, 11 (2000), 521–39.
- 99 UN Doc. A/49/342, para. 48.
- 100 *Ibid.*, para. 49.
- 101 *Ibid.*, para. 51.
- 102 *Ibid.*, para. 53. A more purposive approach to interpretation is often taken by international human rights bodies.
- 103 There are also a Defense Counsel Unit and a Judicial Support Services Unit.
- 104 See K. D. Askin, 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: current status', *American Journal of International Law*, 93 (1999), 97–100; H. Charlesworth and C. Chinkin, *The Boundaries of International Law – a Feminist Analysis* (Manchester, Manchester University Press, 2000), pp. 324–37.
- 105 See P. B. Hayner, 'Fifteen truth commissions – 1974–1994: a comparative assessment', *Human Rights Quarterly*, 16 (1994), 597–655.
- 106 See ICTY Annual Report (1998), para. 225. A conference on the proposal was held in Bosnia in May 2001.
- 107 UN Doc. A/49/342, para. 73.
- 108 See Article 29 of the statute and rule 58 of the rules of procedure and evidence.
- 109 An Article in the Dayton Peace Agreement on the former Yugoslavia prohibits persons indicted before the Tribunal from holding political office. Radovan Karadic eventually stood down because of this. As of June 2001 co-operation with the Federal Republic of Yugoslavia was improving; a new law on co-operation was passed and former President Milosevic was surrendered to the ICTY. See McGoldrick in this volume
- 110 I.C.J. Reports (1992), 3 and 114.
- 111 UN Doc. A/49/342, para. 180.
- 112 *Prosecutor v. Tadic (Jurisdiction)* 35 I.L.M. (1996), 35.
- 113 See R. Kerr, 'International judicial intervention: the international criminal tribunal for the former Yugoslavia', *International Relation*, 15: 2 (2000), 17–26.
- 114 See C. Greenwood, 'International humanitarian law and the *Tadic* case', *European Journal of International Law*, 7 (1996), 265–83.

- 115 See G. H. Aldrich, 'Jurisdiction of the international criminal tribunal for the Former Yugoslavia', *American Journal of International Law*, 90 (1996), 64–9; J. E. Alvarez, 'Nuremberg revisited: the *Tadic* case', *European Journal of International Law*, 7 (1996), 245–64.
- 116 See E. Lauterpacht, 'The legal effects of illegal acts of international organizations', in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (London: Stevens, 1965), pp. 88–112.
- 117 'For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments', *Tadic*, 35 I.L.M. 35 (1996) para. 45.
- 118 Judge Li dissented on the first issue arguing that ICTY had no competence to decide the issue. Judge Sidhwa dissented on the third issue. *Tadic* was later convicted and sentenced to twenty years, after an appeal on sentencing.
- 119 ICTY Annual Report, (1999); UN Doc. A/54/187.
- 120 *Ibid.*, para. 201.
- 121 See A. Klip and G. Sluiter (eds), *The International Criminal Tribunal for the Former Yugoslavia, 1993–1998 – Annotated Leading Cases of International Criminal Tribunals* (Antwerp: Intersentia, 1999).
- 122 See *Blaskic Case*, IT-95-14 (15 July 1994); S. Furuya, 'Legal effect of rules of the international criminal tribunals and court upon individuals: emerging international law of direct effect', *Netherlands International Law Review*, 47 (2000), 111–45.
- 123 See D. Sarooshi, 'Command responsibility and the *Blaskic* case', *International and Comparative Law Quarterly*, 50 (2001), 452–65; Bantekas, *Principles*.
- 124 The answer was yes, see *Tadic Case*.
- 125 The answer was no, see *ibid.*
- 126 The answer was yes, in certain circumstances, *Prosecutor v. Delalic and others*, IT-96-21 (16 November 1998), *Prosecutor v. Kunaric, Kovac, and Vokovic (Foca)*, IT-96-23 and IT-96-23/1 (22 February 2001).
- 127 The answer was no (by majority), *Prosecutor v. Tadic* (appeal on sentencing) (26 January 2000).
- 128 See Blakesley, *Atrocity and its prosecution*; J. Karhilo, 'The establishment of the international tribunal for Rwanda', *Nordic Journal of International Law*, 64 (1995), 683–713; 'Judging genocide', *The Economist* (14 June 2001).
- 129 SC Resolution 955 (1994).
- 130 SC Resolution 935 (1994).
- 131 See G. Prunier, *The Rwanda Crisis* (1995); *African Rights, Death, Despair and Defiance*, rev. ed (London: Hurst, 1995); *The Administration of Justice in Post-Genocide Rwanda* (United Nations High Commissioner for Human Rights, Field Operation in Rwanda, UN Doc. HRFOR/JUSTICE/June 1996/E; A. J. Kuperman, 'Rwanda in retrospect', *Foreign Affairs*, 79: 1 (2000), 94–118.
- 132 See J. Alvarez, 'Crime of hate/ crimes of state: lessons from Rwanda', *Yale Journal of International Law*, 24 (1999), 365–483.
- 133 Article 8 ICTR Statute. See M. H. Morris, 'The trials of concurrent jurisdiction: the case of Rwanda', *Duke Journal of Comparative Law*, 7: 2 (1997), 349–74.
- 134 Article 7 ICTR Statute.

- 135 Unless the tribunal took the view that the substantive commission of the offence in 1994 brought all elements of it within its jurisdiction.
- 136 Article 4 ICTR Statute.
- 137 See Article 2(3)(c) ICTR Statute.
- 138 Article 24 ICTY Statute; Article 37 ICTR Statute.
- 139 It was purely coincidental that Rwanda was one of the non-permanent members of the SC at the time of the establishment of the ICTR. China abstained because it felt that there had not been enough consultation with Rwanda.
- 140 The same purpose can and has been served by post-conflict truth commissions in jurisdictions such as Chile, Argentina, and South Africa. See Minow, *Between Vengeance*.
- 141 Republic of Rwanda, Decret-Loi 21/77, Code Penal, Article 26.
- 142 There were international pleas to Rwanda not to carry out the executions but these were ignored.
- 143 ICTR-96-15-T (18 June 1997). See V. Morris, 'International decisions: *Prosecutor v. Kanyabashi*', *American Journal of International Law*, 92 (1998), 66–70.
- 144 See J. Briery, 'Do we need an international criminal court?', *British Yearbook of International Law*, 8 (1927), 81–8.
- 145 See J. Dugard, 'Obstacles in the way of an international criminal court', *Cambridge Law Journal*, 56 (1997), 329–42.
- 146 See A. Cassese (ed.), *The Rome Statute for an International Criminal Court* (forthcoming, Oxford: Oxford University Press, 2001); D. McGoldrick, 'The permanent International Criminal Court: an end to the culture of impunity?', *Criminal Law Review*, (1999), 627–55.
- 147 See G. Boas, 'Comparing the ICTY and the ICC: some procedural and substantive points', *Netherlands International Law Review*, 47 (2000), 267–92.
- 148 This requires a decision under Chapter VII of the charter and is thus subject to the veto.
- 149 As on June 2001 only France has exercised this opt-out.
- 150 UN Doc. PCNICC/2000/1/Add.2.
- 151 UN Doc. PCNICC/2000/1/Add.1.
- 152 See P. Baldwin (ed.), *Reworking the Past: Hitler, the Holocaust and the Historians' Debate* (Boston, Mass.: Beacon, 1990); L. L. Langer, *Admitting the Holocaust: Collected Essays* (New York: Oxford University Press, 1995).
- 153 See D. McGoldrick and T. O'Donnell, 'Hate-speech laws: consistency with national and international human rights laws', *Legal Studies*, 18 (1998), 453–85.
- 154 See T. Meron, 'Is international law moving towards criminalization?', *European Journal of International Law*, 9 (1998), 18–31; T. Meron, *War Crimes Law Comes of Age* (Oxford: Oxford University Press, 2000).
- 155 *R. v. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [No.3] [1999] 2 All E.R. 97: no immunity for ex-head of state charge with torture. See D. Turns, 'Pinochet's fallout: jurisdiction and immunity for criminal violations of international law', *Legal Studies*, 20 (2000), 566–91.
- 156 See M. Frulli, 'The special court for Sierra Leone: some preliminary comments', *European Journal of International Law*, 11 (2000), 833–56; website of the Coalition for International Justice: www.cij.org