INTRODUCTION

> 'I had a great evening; it was like the Nuremberg Trials.'
> Mickey (Woody Allen), after a rather grim date with Hannah's sister Holly in the film *Hannah and Her Sisters*

Human history is marked by 'turning points', associated with the emergence of new technologies, new forms of government, and new concepts. They are signposts of the progress of humanity. Centuries from now, the Nuremberg trial will be seen as one such defining moment if it is not already. In the Middle Ages, the Bavarian city of Nuremberg was the unofficial capital of the Holy Roman Empire. Hitler chose it as the site for his hysterical rallies. He built an enormous parade ground there that still exists. It is now a monument to Nazi atrocity. Above all, the town today evokes notions of justice. This was where the International Military Tribunal, established by the Allies in the weeks following the unconditional surrender of Germany in 1945, put the surviving leaders of the Nazi regime on trial. It is enough to say 'Nuremberg' for the idea to be understood.

Nuremberg stands for several big and influential concepts. Speaking to the American Bar Association in 1946, British Prosecutor Hartley Shawcross proposed three of them: to initiate a war of aggression is an international crime; individuals who lead their countries into such a war are personally responsible; individuals therefore have international duties which transcend the national duty of obedience imposed by particular states when to obey would constitute a crime against the law of nations. To this list, one other, drawn from the human rights movement that was also emerging at the time, might be added: atrocities committed by a government against its own people are punishable as an international crime. Nuremberg also contains the suggestion that international responsibility is imposed upon states to ensure that perpetrators of international crimes are brought to justice.

For several decades, Nuremberg stood as an interesting but nevertheless isolated occurrence. At the time of the trial, its enthusiasts dreamed of a permanent institution. But while efforts to pursue this objective continued for a number of years after the judgment, the project stumbled and then died with the dawn of the Cold War. When I studied law, in the early 1980s, the Nuremberg trial was more a curiosity than a model. The human rights movement was at the time unsure whether Nuremberg should be revered as a defining moment, or whether it was better forgotten. The tradition of Nuremberg was only properly revived by the United Nations General Assembly in late 1989, in the days that followed the fall of the Berlin Wall. This was hardly a coincidence.

Since 1989, the use of international judicial institutions to hold accountable those who are accused of perpetrating atrocities has burgeoned. The establishment of ad hoc tribunals for the former Yugoslavia and Rwanda, in the early 1990s, initially looked like an experiment. But the idea had astounding dynamism. In 1998 the Rome Diplomatic Conference concluded with the adoption of the legislative framework of a permanent body. The Rome Statute of the International Criminal Court entered into force in 2002. Within a year, judges and a prosecutor had been elected and the institution was operational.

Increasingly, international justice is viewed as an indispensable component of efforts by the United Nations and by regional organizations to bring an end to conflict and to promote lasting peace. For example, in February 2011 when Libya's brutal regime seemed likely to put an end to the 'Arab spring', the United Nations Security Council turned to the International Criminal Court as one of the central mechanisms available to it. Weeks later, it did the same for civil war in Côte d'Ivoire. The International Criminal Court and the ad hoc tribunals are quite central to this activity. But there are also a number of so-called hybrid or internationalized institutions. And at the level of national courts, there is greatly increased reliance on international criminal law offences and concepts when justice systems respond to atrocities committed by those associated with past regimes. More limited in scope, but a source of endless fascination and media attention, is prosecution of international crimes committed outside national territory by virtue of universal jurisdiction.

This modest volume attempts to speak to some of the controversies that surround modern atrocity trials. It is written by a lawyer, but one with a bent for interdisciplinarity and a poorly concealed penchant for iconoclasm. Its ambition is to set out the complexity and the inscrutability of some of the big issues in the field that is now known generally as international criminal law. Hopefully, this discussion will stimulate the reflection

of policy makers, diplomats, and journalists, as well as academics and students. Experts from these cognate disciplines are frequently intimidated by the international lawyers, who make self-assured comments about the imperatives of customary international law, often couched in confident resort to mysterious Latin maxims. One function here is to demystify some of the legal arguments.

Above all, this is a book about the policy and the politics of criminal justice. These are dimensions that lawyers often shy away from, preferring to leave the matter to other disciplines. Sometimes, they simply pretend that politics is alien to the pursuit of justice, dismissing it as a vile taint to be shunned rather than one that is to be mastered and understood. At the national level, noble efforts are made to insulate the courts from politics. Indeed, independence and impartiality of judges and prosecutors are the hallmarks of fair justice. Nevertheless, legislatures and governments necessarily intervene in policy choices. This limited role is accepted, provided that it is not driven by improper motives.

At the international level, policy and politics seem to sit much closer to the centre of the justice agenda. This is what makes international justice distinct, even peculiar. The international war crimes tribunals as well as the related initiatives are an exercise of the policy of states, individually or through collective bodies like the United Nations Security Council. Their goals are often framed with policy-oriented language: the pursuit of international peace and security, the prevention of conflict, and the transition to democratic governance. The interaction of law and politics generates several of the important issues addressed in this book, such as the selection of situations for prosecution, the 'victors' justice' critique, labelling of atrocity with loaded terms such as genocide, the tension with the prerogatives of peace, and the relationship between crimes of individuals and the state itself.

There is no pretence here at exhaustiveness. Several comprehensive textbooks already exist on the modern phenomenon of international criminal justice. Rather, this book is concerned with issues. Each of the chapters addresses a distinct conundrum. In the course of the discussion, many basic notions are explored and explained. In that sense, it is my hope that this volume may provide a useful introduction to the field. But beyond that, its objective is to provoke reflection about some of the postulates that underpin the system.

After an introduction that considers the history of international prosecution and the specificity of international criminal tribunals, the first chapter explores the general concept of international crimes. The international crimes considered here are generically referred to as 'war crimes',

especially in a colloquial context. But specialists make distinctions of importance between genocide, crimes against humanity, war crimes in the technical sense, and the crime of aggression. These four categories make up the subject-matter jurisdiction of the International Criminal Court. Two of them, genocide and the crime of aggression, are examined in greater detail in distinct chapters.

Genocide, sometimes labelled the 'crime of crimes', is a source of considerable mystique. Chapter 4 ('The Genocide Mystique') considers its unique importance, offering an explanation rooted in the history of the concept and of its intriguing relationship with the cognate, crimes against humanity. Chapter 8 deals with the scope of the crime of aggression, or 'crimes against peace' as it was known at Nuremberg. At Nuremberg, the International Military Tribunal declared 'crimes against peace' to be the 'supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'. The place of the crime of aggression within the core crimes of international criminal law was recently confirmed by the amendments to the Rome Statute adopted at the 2010 Kampala Review Conference.

Critics of the international tribunals have frequently focussed upon their retroactive nature. This has often been an inevitable consequence of their political dimension, and their as yet incomplete structures. The decision to prosecute is made when the crisis is already underway, and when there is already evidence that the crimes have been committed. This is normal enough. It is no different for criminal justice at the domestic level, except that the laws and institutions already exist. Although the issue of retroactivity is likely to be less and less important, given the existence of a permanent International Criminal Court with largely prospective jurisdiction, difficulties continue to arise, especially when international crimes are prosecuted at the national level. International human rights law allows prosecution even for offences that were not codified at the time in national legislation to the extent that they were recognized as international crimes. This is frequently the subject of great debate in transitional states, challenged to deal with crimes committed by previous regimes. These questions are the subject of the second chapter, entitled '*Nullum Crimen Sine Lege*', which is the Latin formulation of the prohibition on retroactive prosecution.

The third chapter brings the reader to what may well be the greatest challenge to international justice: the selection of situations for prosecution. Because of its unavoidable political dimension, international justice (including its exercise at the national level) is by necessity not a comprehensive venture. Decisions must be made concerning those who are to

be brought to justice. Inevitably, comparisons of the relative gravity and importance of atrocities perpetrated in different parts of the world must be made. This is profoundly different from the situation at the domestic level, where we assume that all serious crimes against the person will be addressed by the criminal courts. The chapter takes as its title 'Victors' Justice?', a pejorative epithet that has commonly been invoked by critics of international justice. Those who defend the system tend to shrink in shame at the charge. They often attempt to show that the choices of targets for prosecution are based upon objective criteria, or at least insist that this is the intention. But it is a tortuous argument, because in fact highly subjective decisions are often at the origin of international prosecutions.

An important thesis of the author is the significance of state policy in our understanding of the nature of international crimes. This issue is further explored in Chapter 5, which is entitled '*Mens Rea*, *Actus Reus*, and the Role of the State'. The significance of state policy is also considered with respect to the definitions of crimes. It is surely most evident concerning the crime of aggression. The new definition of the crime makes explicit the notion that only leaders capable of controlling the actions of a state can actually be prosecuted for aggression. But the link is also important for other international crimes. Without a state party component, it is difficult to distinguish between genuine crimes against humanity and the acts of serial killers, motorcycle gangs, and organized criminal networks.

The sixth chapter deals with the role of international justice in the creation of narratives about conflict. This has increasingly been understood as an element of an emerging human right to the truth. In particular, it is said that victims of atrocities are entitled to learn the circumstances of their victimization. Truth is also held out as an important component in the search for reconciliation within societies emerging from conflict. This leads naturally to the seventh chapter, which speaks to the amnesty quandary. Amnesty is used in a broad sense, describing a range of political and legal initiatives by which prosecution is put aside permanently or temporarily suspended. The difficulty has been present since Japan refused to surrender, in July 1945, unless the United States promised to leave its emperor unpunished. There have been many examples in recent times. The civil war in Sierra Leone was brought to an end with a peace agreement that pledged amnesty. In 2011 Britain and France toyed with letting the Libyan leader Muammar Gaddafi avoid prosecution at the International Criminal Court if he would peacefully leave power. While impunity under such circumstances offers immense benefits in exchange, there are several more sinister examples of self-proclaimed amnesties for tyrants, especially in Latin America. This is an issue where rigid and formulaic solutions are

inadequate. Wise determinations driven by policy rather than strict principles are necessary in order to ensure that a maximum of both peace and justice is delivered.

Together, the eight chapters attempt to sketch a portrait of international criminal justice that brings out the complex relationship between policy and law. It consists of a series of canvases focussed on different themes rather than a systematic attempt to demonstrate a particular thesis or comprehensively to present the subject matter. The eight chapters are related in the same sense as a series of paintings by a single artist working with the same medium.

THE BEGINNINGS

Scholars occasionally invoke medieval precedents from the time of the Holy Roman Empire in order to show the ancient origins of international criminal prosecutions. But in reality, the phenomenon that we know today, whose institutional homes are the International Criminal Court and the United Nations ad hoc tribunals, traces its beginnings to the First World War and its aftermath. For many decades, indeed centuries, there had been an international dimension to criminal law. It was focussed on the apprehension of fugitives and their extradition to the proper jurisdiction. Where there was no traditional jurisdictional link, in the form of territory or nationality, prosecution was allowed. This was an exception to the general rule that prohibited a state from punishing crimes absent a jurisdictional nexus, that is, if it was not committed on the state's territory or by its citizens. Pirates are the classic example. There were also a few anomalous trials, but hardly anything to suggest something that was anything but ephemeral.

In May 1915, upon reliable reports from diplomats and other sources that the Armenian population in the Ottoman Empire was being massacred, Britain, France, and Russia issued a warning: 'In view of these new crimes of Turkey against humanity and civilization, the allied Governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.'[1] The

[1] 'The Ambassador in France (Sharp) to the Secretary of state, Paris, 28 May 1915', in US Foreign Relations, 1915, Supplement, p. 981. For a slightly different version, although with no substantive distinctions, see: United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948, p. 35.

American Ambassador in Istanbul communicated the message to the Grand Vizier on behalf of the three European powers. He reported that the Ottoman leader 'expressed regret at being held personally responsible and resentment at attempted interference by foreign governments with the sovereign rights of the Turkish Government over their Armenian subjects'. Meanwhile, the ambassador added that 'persecution against Armenians [is] increasing in severity'.[2]

The great themes of contemporary international criminal law are all present in this legendary diplomatic demarche. In a substantive sense, we have the first reference in international relations to crimes against humanity, a notion that had long been used by journalists and politicians but one with no previously established legal meaning. An equivalent today might be the word 'atrocity'. The message from the three governments speaks of international accountability and is addressed to individuals and not just the state as such. Previously, defeated tyrants had often been punished, but by summary execution or exile, not by a court of law. In addition to individual citizens, the message contemplates a head of state, something the Grand Vizier understood immediately. There could be—and still is—an argument whether such persons are immune from prosecution. Immunity is a concept that is firmly anchored in international law. Indeed, it was around long before international law suggested that there was an imperative of prosecution. It is closely linked to the other great objection, national sovereignty, often raised by those whose prosecution is contemplated or by their governments.

The Grand Vizier did not say so explicitly, but he implied that the threat of criminal prosecution was politically motivated. He might have added that if Britain, France, and Russia were prepared to punish him for massacres committed against subjects of the Ottoman Empire, something more even-handed ought to have been envisaged. That way, all such persecutions, whoever the perpetrator, would be dealt with by the courts. Perhaps the leaders of Britain, France, and Russia might then have felt themselves exposed to trial for crimes perpetrated against vulnerable minorities over whom they had jurisdiction. In any event, when the war ended, the threat of criminal prosecution lingered only for those who lost the battle. In the end, Britain, France, and Russia never did make good on their promise. The Treaty of Sèvres, which was negotiated in Paris in 1919, envisaged trial of those 'responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on

[2] 'The Ambassador in Turkey (Morgenthau) to the Secretary of state, Constantinople, 18 June 1915', in US Foreign Relations, 1915, Supplement, p. 982.

1 August 1914', including the possibility that this would take place before a criminal tribunal to be created by the League of Nations. But the Treaty of Sèvres was never ratified by Ataturk's new regime. Some of the perpetrators of the Armenian massacres were brought to justice before Turkey's own courts, but most went unpunished. The unhealed wound continues to haunt Ankara's international relations nearly a century later.

The other losers in the war, the Germans, were also earmarked for prosecution. According to article 227 of the Treaty of Versailles, the victors were to create a 'special tribunal' composed of five judges, to be appointed by each of the five victorious Allied and Associated Powers, that is, the United States, Britain, France, Italy, and Japan. It was to have only one defendant, the former German Emperor, and to prosecute only one crime, 'a supreme offence against international morality and the sanctity of treaties'. The provision spoke of a 'duty to fix the punishment which it considers should be imposed'—unfortunate wording to the extent that it implies that the outcome of the trial was not in doubt. The tribunal was never actually established. Kaiser Wilhelm obtained asylum in the Netherlands, and its government refused to extradite the accused on the grounds that this would constitute retroactive punishment. The tribunal was 'international' in nature because it was established with the agreement and participation of five states, and with the consent of Germany, which, although there was much lingering unhappiness, had accepted the Treaty of Versailles.

In a sense, this is an important precedent, because it was the first international criminal tribunal to be seriously proposed. But the fact that five victorious powers and Germany might agree to something is not enough to create international law applicable to other states. That the authors of the Treaty of Versailles contemplated an international criminal tribunal to try a former head of state for a vaguely defined crime does not bring us much closer to knowing whether the victorious Allied Powers had the right to do so in the absence of Germany's consent.

The Treaty of Versailles also pledged prosecution of individuals for violations of the 'laws and customs of war'. The victors had hoped to do this before their own courts, but eventually gave in to German insistence that it be conducted by the national tribunals of the vanquished power sitting in Leipzig. A list of about 1,000 suspects was whittled down to a handful, and in the end only a few perfunctory trials took place. The defendants were U-boat captains and prisoner of war camp commanders rather than the senior leaders. The few accused who were convicted received short sentences. The trials were international in the sense that they were dictated by treaty. Moreover, the judges applied the 'laws and customs of war', a body of law whose source was not national legislation. Otherwise, German courts

did nothing very different from what national tribunals had been doing for centuries.

JUSTICE AT NUREMBERG

Following the First World War, the idea of international criminal prosecution, for what the Paris Peace Conference had labelled violations of the laws and customs of war and 'massacres', rapidly waned. The revival of the idea of international prosecution was to depend upon the second great global conflict. During the inter-war period, several international bodies, most of them professional or unofficial, considered the proposals for the establishment of a permanent international criminal court. These included the International Law Association and the *Association internationale de droit pénal*. Individuals such as Henri Donnedieu de Vabres and Vaspasien Pella were involved. In 1937 the League of Nations actually adopted an agreement aiming at the establishment of an international criminal court, although the treaty never entered into force.

After proclamation of the Atlantic Charter in mid-1941, Churchill threatened to hold Nazi leaders responsible for 'the crime without a name'. In October 1943 Roosevelt, Stalin, and Churchill spoke in the Moscow Declaration of 'evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled'. They promised that German suspects would be returned to the countries where crimes had been committed and 'judged on the spot by the peoples whom they have outraged', while those whose offences were more generalized and without any particular geographic location would be punished by joint decision of the governments of the Allies.

Roosevelt, Stalin, and Churchill all seem to have toyed with summary execution of Nazi leaders as the way to deliver justice. It is hard to know how serious these thoughts really were. Perhaps they were more in the nature of off-hand remarks following periods of enormous tension. But as late as April 1945, as preparations were underway for the London Conference, the British government circulated an *aide-mémoire* that said:

1. HMG assume that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetrated or have authorized in the conduct of the war. It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with with equal severity. This is really involved in the concluding sentence of the Moscow Declaration on

this subject, which reserves for the arch-criminals whose offences have no special localization treatment to be determined in due course by the Allies.

2. It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of tribunal claiming to exercise judicial functions, or whether the decision taken by the Allies should be reached and enforced without the machinery of a trial. HMG thoroughly appreciate the arguments which have been advanced in favour of some form of preliminary trial. But HMG are also deeply impressed with the dangers and difficulties of this course, and they wish to put before their principal Allies, in a connected form, the arguments which have led them to think that execution without trial is the preferable course.[3]

Yet in reality, the victors of the Second World War could never turn their backs on the precedent set at Versailles. In 1919 a tribunal had been promised. They could do no less in 1945.

The International Military Tribunal was established in 1945 by a treaty to which only four powers—France, the United Kingdom, the United States, and the Soviet Union—were the initial parties. Several of their allies later acceded to the instrument, enhancing its claim to multilateralism if not universality. Known as the London Agreement, it provided for the first genuinely international criminal prosecution in that it was conducted by a tribunal created by treaty between several states, where the accused were prosecuted not for ordinary crimes but for offences against international law. The institution is often known as the Nuremberg Tribunal, because that is where its only trial was held. Actually, the official seat of the court was Berlin, where its first formal session took place. Though 'international' in name, in the final judgment issued on 30 September and 1 October 1946 the judges said that the four powers had done collectively what they were entitled to do individually. Indeed, they were the occupying powers in a state that had surrendered unconditionally, and there seemed no doubt that they were empowered to create a tribunal to prosecute those whom they had defeated.

Most of the literature, and particularly that in the English language, suggests that the dominant role was played by the United States. This may be a cultural bias, however. If we had access to as much scholarship and as many memoirs in Russian, perhaps we might see the trial through a different lens. The Tribunal's subject-matter jurisdiction was confined to three categories: crimes against peace, war crimes, and crimes against humanity. A fourth count, known as the conspiracy charge, made leaders, organizers, instigators,

[3] 'Aide-Mémoire from the United Kingdom, April 23, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington: US Government Printing Office, 1949, p. 18.

and accomplices who participated in the formulation or execution of a common plan or conspiracy to commit any of the other crimes individually responsible, but it was always linked to one of the other three crimes.

There was debate before the Tribunal as to whether these were truly international crimes, but the defendants did not contest the fact that if the answer was affirmative, then the prosecutions were lawful and legitimate. It was the international dimension that provided an answer to the challenge that this was retroactive law because much, if not all, of what was done by the Nazis was under the cover of legislation, however perverse.

Each of the four powers named its own prosecutor as well as two judges, one of them an alternate. The alternates participated in the deliberations and in the delivery of the judgment. The defendants complained that neutrals were not named to the bench, and that all of the eight judges had been appointed by the four victorious powers. Nobody argued that the prosecution of senior officials of a sovereign state violated rules of immunity, however. Twenty-four defendants were identified by agreement of the four prosecutors. One was soon found to be unfit to stand trial, a second committed suicide before the trial began, and a third, Martin Bormann, was tried in absentia. Bormann was never apprehended; years later, genetic evidence established that he was dead before the trial had even started. Thus, twenty-one men stood in the dock when the trial began. Three were acquitted, twelve were sentenced to death, and the others received custodial terms ranging from ten years to life.

A broadly similar institution was created at Tokyo: the International Military Tribunal for the Far East. Its legislative framework was a slightly modified version of the statute used at Nuremberg. The Tokyo Tribunal was established by decree of the American occupiers. Nevertheless, the judges were drawn from several allied powers, including Canada, the Netherlands, China, Australia, New Zealand, the Philippines, and France. The Indian judge, Radhabinob Pal, voted to acquit, offended at the idea that the victorious powers were punishing those whom they had defeated for crimes that they too had themselves committed.

When the great Nuremberg trial of the 'major war criminals' was completed, the Americans took over the courtroom and held a series of thematic trials. Nazi doctors, judges, and political leaders were tried along with senior officers from various military units such as the Wehrmacht and the SS. These were American military tribunals, and in a strictly legal sense they were no different from the war crimes courts held by most of the other countries involved in the European and Asian theatres. However, they prosecuted essentially the same crimes that were listed

in the Charter of the International Military Tribunal. Probably for that reason history has accorded them a special importance. They were 'internationalized' even if the tribunals were not genuinely international. This marked the start of another important phenomenon: the implementation of international criminal law by domestic courts. The case law generated at these internationalized trials, as well as that of other national military tribunals, is generally considered to be part of the substance of international criminal law.

The Nuremberg trial is probably understood today as an exercise in accountability for Nazi atrocities perpetrated against civilians and in particular the attempted extermination of the Jews of Europe. Actually, the focus was on the launching of the war of aggression itself. In his opening address to the Tribunal, the American prosecutor, Robert Jackson, said the trial 'represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times—aggressive war'. The Charter of the Tribunal addressed this under the rubric of 'crimes against peace', which was explained as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. The definition echoed the words in article 227 of the Treaty of Versailles, the unimplemented provision by which the German Emperor was to have been brought to justice following the First World War. The Tribunal dismissed objections from the Nazi lawyers who charged that this was retroactive criminal prosecution. The categories that today are at the heart of international prosecutions—war crimes and crimes against humanity—actually played a somewhat secondary role in the Nuremberg trial.

After the Second World War, with the success at Nuremberg and its sister institution in Tokyo, there were attempts to codify norms and principles of international criminal law as well as to establish a permanent international tribunal. The United Nations International Law Commission prepared a draft Code of Offences Against the Peace and Security of Mankind, and also examined procedural issues relating to the operation of an international court. By the mid-1950s, the enthusiasm generated at Nuremberg had abated. It is difficult to pinpoint the moment when this ardour for international justice began to wane.

In 1952 a committee of the United States Congress investigated the famous massacre of Polish officers and political leaders at Katyń, whose responsibility was denied by the Soviet Union at the time, but which has since been admitted. The American politicians described it as 'one of the most barbarous international crimes in world history', and recommended

that those responsible be tried 'before the International World Court of Justice for committing a crime at Katyń which was in violation of the general principles of law recognized by civilized nations'.[4] They also called upon the American President 'to seek the establishment of an international commission which would investigate other mass murders and crimes against humanity'.[5] The report was tinged with Cold War rhetoric, and its exaggerated language sat comfortably within the anti-communist hysteria that prevailed at the time. But if Nuremberg had left the Soviets with any lingering taste for the international criminal justice project, this was quickly dampened by initiatives like those of the United States Congress concerning Katyń. The Katyń forest massacre is discussed in more detail in Chapter 6. 'History, International Justice, and the Right to Truth'.

It would be unfair to blame the Soviets exclusively. In Western Europe the British and French empires were in their death throes. Credible reports emerged of atrocities perpetrated by colonial police and soldiers in places such as Kenya and Algeria. Political figures in the United States feared that international justice might deal with the persecution of African Americans. In 1951 Paul Robeson presented a petition to the United Nations entitled 'We Charge Genocide' that insisted upon accountability for the lynching of black Americans, an officially tolerated practice that had yet to be eradicated in the American south. A nervous United States Congress baulked at ratifying the 1948 Genocide Convention (it would not do so for forty years). Thus, what had seemed a noble idea when it was being imposed upon the vanquished Turks in 1919, and the Germans and Japanese in 1945, was fraught with danger for all of the major powers of the post-war world if the principles and institutions of international criminal justice were to be applied universally and without distinction.

The idea of international criminal tribunals lay largely dormant for the next forty-five years. International criminal justice went into its second period of hibernation (the first was in the 1920 and 1930s). Things only began to revive in the 1980s. Developments then were propelled by the growing human rights movement, which came to insist that perpetrators of atrocities be held accountable in order to vindicate the fundamental rights of their victims and to deter future violations. This represented an important shift from an almost exclusive emphasis on defendants and prisoners as victims of an essentially oppressive criminal justice system. Instructed by the General Assembly, in the early 1980s the International Law Commission resumed work on the Code of Offences Against the

[4] Final Report of the Select Committee to Conduct an Investigation and Study of the Facts, Evidence, and Circumstances on the Katyń Forest Massacre, Pursuant to H. Res. 390 and H. Res. 539 (82nd Congress), p. 2.

[5] Ibid., p. 13.

Peace and Security of Mankind that had been suspended in 1954. It soon told the General Assembly that there was not much point in defining international crimes if there was no institution capable of prosecuting them.

THE THIRD PHASE: AD HOC TRIBUNALS

In 1989 the General Assembly finally gave the green light to the International Law Commission to proceed with drafting the statute of a permanent court. The end of the Cold War provided a fertile environment for the renaissance of international criminal justice. Even before the Commission submitted its final report to the General Assembly, in 1994, there were impatient calls to create temporary institutions until the permanent body could be set up. That justice and accountability had taken a big place on the international agenda became increasingly apparent. In 1990 there were cautious efforts by the United States and the United Kingdom, and subsequently by the European Union, to create an international court with jurisdiction over Iraq's aggression against Kuwait in 1990. The idea was dropped, probably because the conflict ended in a military stalemate. With Iraq defeated, attention shifted to the Balkans, where the break-up of Yugoslavia was accompanied by appalling reports of war crimes, ethnic cleansing, and gender violence. In February 1993 the Security Council voted to create the International Criminal Tribunal for the former Yugoslavia.

Senior lawyers in the United Nations had their doubts about whether the Security Council was empowered by the Charter of the United Nations to create an international criminal tribunal. Any concerns were put to rest when one of the first defendants challenged the Tribunal's creation and the judges confirmed the legality of its existence. The International Criminal Tribunal for the former Yugoslavia was more unequivocally international than its predecessors at Nuremberg and Tokyo, because of the near-universal authority of its progenitor, the United Nations Security Council. At the time of the International Tribunal's establishment, there was no victor in the conflict and, in any event, the judges were selected from various parts of the world, designated by a credible and transparent procedure that involved both the Security Council and the General Assembly. The Secretary-General specified that the Tribunal would only judge crimes that were unquestionably recognized under international law, using the precedents of the 1940s as its reference point so that this would be beyond dispute.

The Yugoslavia Tribunal was barely operational when genocide ravished the Tutsi minority of Rwanda, in 1994. A second tribunal was quickly formed by the Security Council. It was joined at the hip to that for Yugoslavia by an almost identical statute, a shared prosecutor, and a combined Appeals Chamber. The crimes were defined slightly differently, and there was an acknowledgement that the Council was doing more than simply codifying offences that had been prosecuted at Nuremberg. In particular, it was expressly given jurisdiction over war crimes perpetrated in internal armed conflict, a proposition that was still controversial as a statement of existing customary international law. The two Tribunals have operated in parallel since then, with the inevitable nuances between them in terms of legal precedent and practice. To the non-specialist, they are indistinguishable.

Although the ad hoc tribunals were thriving by the late 1990s, there was also growing dissatisfaction with their cost, and a sense that this was not an ideal model. Faced with a call to establish a tribunal for Sierra Leone, the United Nations opted for a leaner institution. The Special Court for Sierra Leone had a dramatically reduced budget compared with the other two United Nations criminal tribunals, and was designed to handle only a few trials. It was created by treaty between the United Nations and the Government of Sierra Leone rather than by resolution of the Security Council. Reflecting the joint ownership of the institution, some of the judges and the deputy prosecutor were to be appointed by the Government of Sierra Leone. The prosecutor and the international judges were appointed by the Secretary-General of the United Nations, and not elected by the General Assembly, as was the case for the Yugoslavia and Rwanda tribunals. Defence lawyers argued unsuccessfully that these features of its creation meant the Special Court did not have the same powers as the tribunals established by the Security Council, nor the required independence from the government, whose own senior officials might even be suspects. Some similar issues presented themselves with respect to the Special Tribunal for Lebanon, which also had participation of the local government in the appointment of its officials.

The Sierra Leone and Lebanon tribunals also differ from the earlier institutions in terms of funding. The first two ad hoc tribunals operate out of the general budget of the United Nations, whereas the latter two are financed by voluntary contributions from states and, in the case of the Lebanon tribunal, a contribution from the government. This form of financing is unsatisfactory for a judicial institution because of the danger

that the government that pays the piper may be seen to call the tune. Like judges of national courts, those at international tribunals need to be reassured that their salaries will be paid and that their future livelihood does not depend upon whether an interested state is satisfied that the tribunal is delivering the goods. It seems too easy for the United Nations to refuse to participate in such institutions until states guarantee funding for the life of the institution. The resistance of the funders to making such commitments only confirms the fact that their ongoing financial support for the tribunals is linked to 'performance'.

In late 2010 a fifth ad hoc international criminal court was created, the International Residual Mechanism for International Tribunals. In reality, it continues the work of the Yugoslavia and Rwanda Tribunals, whose doors will close when the final trials and appeals are completed. In particular, the International Residual Mechanism ensures that there will always be a judge and a prosecutor for the few indicted fugitives who remain at large at the Rwanda tribunal (all of the suspects on the Yugoslavia Tribunal's 'most wanted' list have been apprehended), as well as an avenue for reconsideration should new evidence come to light that might exonerate a convict. A residual court has also been planned for the Special Court of Sierra Leone when its trials are completed.

THE INTERNATIONAL CRIMINAL COURT

During the 1990s, as the fledgling ad hoc tribunals for the former Yugoslavia and Rwanda were navigating in largely uncharted waters, negotiations on the establishment of a permanent international criminal court made rapid progress. Indeed, the speedy pace of the work could not have been predicted. The draft statute finalized by the International Law Commission in 1994 went through three years of intense scrutiny in a series of meetings held under the auspices of the United Nations General Assembly. During this period, the vision of the Court evolved, from that of an institution essentially subservient to the Security Council to that of a more independent body, able to set its own priorities without the entrenched domination of the great powers and the remaining superpower. In 1998 some 160 countries assembled in Rome to negotiate the Statute of the International Criminal Court. Although there was broad consensus on most of the content, when the Statute was put to a vote only 120 of the participating countries concurred. Seven of them, including the United States, China, and Israel, voted against the Statute, and another twenty-one abstained.

The most significant distinction that separates the International Criminal Court from all of the preceding international criminal justice institutions is the freedom given to the Prosecutor. He or she is elected to a nine-year term by the Court's members and has the authority to select 'situations' for investigation and trial. The targets of each of the earlier tribunals had been designated by the political body that established them: the Nazi or Japanese leaders, the Yugoslavia conflict, the Rwandan genocide, the Sierra Leone civil war, and the assassinations in Lebanon. In the International Criminal Court, a tribunal has been created with the autonomous authority to identify those crises, conflicts, and countries upon which its attentions are to be focussed. The only remnant of the political guidance that characterized the earlier tribunals is the possibility for the United Nations Security Council or a member state to refer a situation to the Prosecutor. But even then, the Prosecutor has the discretion to decline to investigate if he or she thinks it would not be in the interests of justice'. There is a mild degree of judicial supervision over this extraordinary prosecutorial power. In theory, at any rate, the entire process of selecting situations is supposed to obey strictly judicial criteria. In practice, it still seems profoundly subjective but in addition, by contrast with the earlier institutions, quite opaque. At the other international criminal tribunals, the selection of targets was unapologetically political. The challenges that arise with the identification of situations by the Prosecutor are considered in Chapter 3, 'Victors' Justice?'.

The Rome Statute entered into force on 1 July 2002 after obtaining its sixtieth ratification. A year later, following election of the judges and the Prosecutor, it became fully operational. As of September 2011, it had been accepted by 116 states. As its tenth anniversary approached, the Court was active in several countries, all of them located in Africa. It is hardly a secret that in its early years the Court has struggled to find its way. The selection of appropriate situations has seemed to be easier said than done. The first trials have faltered upon evidentiary issues. The delays at every stage have exceeded anything at the ad hoc tribunals, despite the extraordinarily light case load.

WHAT MAKES A CRIMINAL TRIBUNAL 'INTERNATIONAL'?

Some of the war crimes tribunals include the word 'international' in their name: for example, the International Military Tribunal, the International Criminal Tribunal for the former Yugoslavia, and the International

Criminal Court. Others do not: the Special Court for Sierra Leone, the Special Tribunal for Lebanon. Obviously the name given to a tribunal is not decisive. Judges at the Special Court for Sierra Leone have ruled that they were just as 'international' as the ad hoc tribunals established by the United Nations Security Council to deal with the former Yugoslavia and Rwanda. The Sierra Leone and Lebanon tribunals owe their existence to agreements between the respective governments and the United Nations, although with the imprimatur of the Security Council. The International Criminal Court owes its existence to its treaty, the Rome Statute.

The fashionable term 'hybrid tribunal' is useful to the extent that it communicates the intermingling of the national and the international in this process. There are two main dimensions to this phenomenon; one of them concerns the personnel employed by the tribunal while the other focusses on the law that is applied. On a structural level, the tribunals for Lebanon and Sierra Leone are sometimes labelled 'hybrid' (or 'mixed-model') because of a combination of national and international involvement in selecting judges and prosecutors. They are grouped in this category along with institutions such as the Extraordinary Chambers of the Court of Cambodia, where there is also a combination of national and international judges. However, the latter is an emanation of the Cambodian legal system, as its name suggests. Some of its judges are drawn from abroad and appointed by the United Nations. The presence of non-nationals does not make a tribunal international. Many national justice systems allow for the participation of foreign citizens in their judiciary. This has long been the case with Commonwealth countries. Cyprus even has a constitution that provides that the president of the Constitutional Court must be a foreign national, although the provision has fallen into desuetude. The Constitutional Court of Cyprus is a national body, not a 'hybrid' or an international institution.

But just as the structure and personnel of a tribunal do not suffice to make it international in nature, nor does the applicable law provide a means to distinguish. Even the purest of the international tribunals provide some space for the application of national law, and especially the national law of the country concerned. Admittedly, the legislative framework may vary somewhat from one international tribunal to another depending upon the territory over which it is exercising jurisdiction. For example, the Special Court for Sierra Leone has some particular common law features, right down to the judges who like to be called 'Justice'. The Special Tribunal for Lebanon, on the other hand, has a very French bouquet, particularly at the procedural level. Even the Rome Statute of the International Criminal Court recognizes the application of 'general principles of law derived by

the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime'. Such deviation from symmetry or universality does not make the International Criminal Court a hybrid.

The International Military Tribunals and the first two ad hoc tribunals, as well as the International Criminal Court, only exercise jurisdiction over international crimes. But there is nothing to stop a state from establishing its own national tribunal with the same specialization, and some have done so. The fact that a national judicial institution only deals with international crimes is not enough to make it an international court. Nor does there seem to be a requirement that the jurisdiction of an international criminal court be restricted to international crimes. The Special Court for Sierra Leone was enabled to prosecute crimes under the laws of Sierra Leone in addition to war crimes and crimes against humanity, although the prosecutor chose to confine the indictments to crimes under international law. The jurisdiction of the Special Tribunal for Lebanon is limited exclusively to crimes under Lebanese law.

As a result, the 'hybrid' or 'mixed' designation to define a middle ground between the genuinely international and the purely national is a source of confusion that conceals significant distinctions. Rather than confound the difference between international and national tribunals, it is better to draw a bright line that separates them. The test should be whether the tribunal can be dissolved by the law of a single country. If that is the case, as it is in Cambodia, then the tribunal is national. Cambodia has an agreement with the United Nations by which it pledges cooperation. The agreement has been endorsed by a General Assembly resolution. Nevertheless, the legal framework of the Extraordinary Chambers is profoundly national. What the Cambodian legislator can do it can also undo. By contrast, the Special Court for Sierra Leone and the Special Tribunal for Lebanon are clearly international in nature. Not only are their statutes annexed to a treaty, they have also been blessed by Security Council resolutions. The governments of Sierra Leone and Lebanon have helped set in motion a process that they cannot, acting alone, bring to an end. The only way to conclude the work of the Sierra Leone and Lebanon tribunals is by mutual agreement of the parties that created them, or by Security Council resolution. Acting unilaterally, neither government has the power to stop the work of the institutions.

Is this of any importance, other than as a useful criterion in classifying the panorama of judicial institutions involved in international justice? Are there any legal consequences to the distinction between international and national courts? Indeed there are, according to the International Court

of Justice. It concerns the classic immunities recognized under customary international law to heads of state and certain other senior government officials. In a celebrated 2002 decision, the Court said that national courts were required to respect the immunity to which foreign leaders were entitled. However, such individuals were not immune from prosecution. In particular, the International Court of Justice said they could be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.[6]

Thus, there is legal importance in being able to identify 'certain international criminal courts, where they have jurisdiction'. It may be that distinctions must be made even among the international criminal tribunals. Some of them may have the power to ignore immunities, as the International Court of Justice has maintained, while others may not.

The Nuremberg judges explained that in establishing the International Military Tribunal, the four 'great powers' had 'done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law'.[7] To the extent that international criminal tribunals are created by sovereign states, they can have no more authority or jurisdiction than the states that create them already possess. The four ad hoc tribunals derive their authority from the United Nations itself, and have a good claim to operate on behalf of the international community. They are more than the product of an agreement between a group of states that have decided to do together what any one might do singly. On the other hand, the International Criminal Court is created by a treaty that binds its own members but cannot, in principle, do any more.

The International Court of Justice seemed to lump the International Criminal Court together with the ad hoc tribunals, giving all three the label of 'certain international criminal courts'. The Court's proposition concerning immunity makes good sense for the Security Council-created

[6] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium)* [2002] ICJ Reports 3, para. 61.

[7] *France* et al. v *Göring* et al. (1948) 22 IMT 411, at p. 461.

tribunals, because they are created by the international community acting collectively. The logic cannot be quite the same for the International Criminal Court. If heads of state benefit from immunity before the courts of other states, then surely those other states cannot circumvent this immunity by banding together to create an 'international' tribunal. They cannot give the international court more rights and authority than they already possess.

Yet this seems to be what happened with the issuance of an arrest warrant by the International Criminal Court against President El Bashir of Sudan in March 2009 (and again with Muammar Gaddafi of Libya in June 2011). The judges offered an inadequate and rather superficial explanation when they ruled that El Bashir was without immunity before the Court. At the time the arrest warrant was issued against El Bashir, the British newspaper *The Guardian* presciently observed that this also meant the heads of state of other non-member states, like the United States, might be subject to prosecution by the Court. However enthusiastic Washington may now be about the arrest warrants directed at El Bashir and Gaddafi, it is doubtful that this extends to a general recognition that no head of state benefits from immunity before the Court, including its own. The United States undoubtedly takes the view that the International Criminal Court cannot exercise jurisdiction over its own president. Why then should the same rule not apply to the presidents of Sudan and Libya?

WHY IS INTERNATIONAL JUSTICE DIFFERENT?

Of course, international criminal law does not require international criminal tribunals any more than public international law in general requires a world court. International law existed long before there was an international judicial institution. International law, including international criminal law, is alive and well in domestic courts. For many years, human rights activists have encouraged the exercise of universal jurisdiction, which is one mechanism with the potential to bring international criminal law into the sphere of national justice institutions. Implementing the legislation of the Rome Statute has also enhanced the profile of international criminal law within the domestic legal sphere. The growing number of judges and lawyers who work at the international level and then return to their own justice systems is also not without its effect. They bring back the lessons they have learned before international courts and apply them in their old, familiar environments.

In principle, national criminal justice systems address themselves to 'outlaws', that is, individuals whose behaviour is incompatible with the

shared values of the society in which they live. Those who violate these norms expose themselves to criminal prosecution and punishment. In the case of the most serious crimes against the person, such as murder, modern societies assume that punishable acts will be investigated and the perpetrators brought to book, more or less without exception. Modern-day human rights law says this is a duty owed to the victim. Usually relatively lengthy terms of imprisonment are imposed, with varying justifications, including deterrence of the perpetrator and of others, delivering the 'just deserts' to the offender, and protecting society by isolating dangerous individuals.

International criminal justice is different from 'ordinary' prosecution at the domestic level in several respects. First and foremost, the crimes are not the same. In one sense, international crimes such as genocide resemble ordinary crimes such as murder. But they also require additional elements of context, intent, scale, or gravity. While so-called ordinary crimes are the work of social deviants, international crimes usually require some degree of involvement by the state, that is, by the very organ whose purpose it is to protect society. Serial killers may perpetrate monstrous and horrible crimes, but we do not expect this to require international intervention. Their crimes inspire awe, yet nothing compels their internationalization.

It is the involvement of the state or of a state-like body that lifts ordinary crimes into the international arena, a subject explored in detail in Chapter 5 ('*Mens Rea*, *Actus Reus*, and the Role of the State'). Often the state itself operates as a giant criminal organization. Invariably, international prosecution is selective rather than comprehensive, focussing on organizers and leaders. More often than not, it comes in the aftermath of a conflict and is meted out to those who have been defeated rather than in a balanced manner as would be the case with ordinary crimes. And what is its purpose? As with ordinary crimes, it is difficult to prove a significant deterrent effect because we can more easily identify those who continue to violate the law than those who may have been convinced that crime does not pay. It may also be retributive, delivering just deserts to offenders and providing victims with a measure of acknowledgement. International justice is also said to promote the goals of the international community, and in particular the quest for a world without war, where disputes are settled peacefully. This is a huge burden, and one that is not associated with the prosecution of ordinary crimes.

In addressing all of these dimensions of international justice, there is a tendency towards mechanistic transposition to the international level of ideas and principles that have been derived from national criminal justice.

But international justice is different. Its political dimensions are inescapable. Its objectives necessarily involve goals related to conflict prevention and conflict resolution. It is this political aspect of the process that makes international justice so unique, and so fascinating. If it can work effectively, there is the potential to contribute to addressing some of the great problems of our time.