

# Denver Journal of International Law & Policy

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Volume 44  
Number 2 *Winter*

Article 2

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January 2016

## Introduction

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### Recommended Citation

David Akerson & Nandish Wuetilleke, Introduction, 44 Denv. J. Int'l L. & Pol'y 83 (2016).

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## Introduction

### Keywords

Courts, Crimes, International Criminal Court

## INTRODUCTION

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This edition of the *Denver Journal of International Law and Policy* focuses on the area of international criminal law concerned with the prosecution of mass atrocities. This subset of law is sometimes referred to as the “core crimes” in international criminal law, but the field is so new that the accepted terminology remains fluid. What is not in dispute is that the field is concerned with the perpetration of four categories of crimes: genocide, war crimes, crimes against humanity and the crime of aggression.<sup>1</sup> The modern era of the core crimes is in its infancy; it is just over twenty years old. The law and practice in the field is as varied as the countries that have assumed leadership roles at the various tribunals and courts. With two decades of rulings, decisions and judgments, the process of reflection on this rich and diverse body of precedent occurs in journals around the world. This edition hopes to add to this growing scholarship.

The process of understanding the core crimes law and practice begins in the aftermath of WWI, where the terms of surrender imposed on the Germans by the Treaty of Versailles included a provision for the prosecution of the German leader Kaiser Wilhelm.<sup>2</sup> The victorious powers quickly lost their appetite to prosecute the Kaiser and the Kaiser himself was not particularly keen on the idea.<sup>3</sup> Twenty-four years later, the major allied forces of WWII revisited the notion of juridical accountability. In 1943, Winston Churchill, Franklin Delano Roosevelt and Joseph Stalin met at Tehran and fundamentally agreed on the terms for prosecuting the Third Reich once the hostilities had been concluded.<sup>4</sup> Two and half years later this

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1. See generally U.N. General Assembly, Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 1002, 2187 U.N.T.S 90.

2. Treaty of Peace between the Allied and Associated Powers and Germany art. 227, June 28, 1919, 42 Stat. 1943, <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>; see also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 3 (4th ed., 2011).

3. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 74 (2010).

4. *Moscow conference for foreign secretaries*, 1943 (secret protocol), 3 Bevans 816, 843 (1968).

resulted in the International Military Tribunal (“IMT”),<sup>5</sup> or Nuremberg trial as it is commonly known. The IMT prosecuted nineteen top surviving Nazi leaders which the world hailed as a new alternative to retributive force.<sup>6</sup> While the IMT was successful politically, it was heavily criticized in legal communities. To many legal practitioners and academicians, the IMT was the archetypal example of victor’s justice and a poor model for the establishment of an enduring rule of law.<sup>7</sup> But it created momentum for the continued development of the law as a response to force. The IMT was a baby step. The post-war optimism spawned the great thinkers of the time to visualize what future tribunals might accomplish.

This optimism was short-lived as the Cold War abruptly stopped the momentum for the next iteration of tribunals. The freeze-out would last until the demise of the Soviet Union. In 1989, a new political order was at hand and the prospect of law as a response to force was renewed. Only four years later the aspirations of international criminal law were fully realized with the United Nations creating an international tribunal to prosecute persons most responsible for the planning and commission of crimes in the former Yugoslavia (“ICTY”).<sup>8</sup> The floodgates were opened.

Some twenty-three years later, the movement that began with the ICTY has spawned a variety of tribunals and courts that have embarked on the prosecutions of core crimes. The courts have included international ad hoc tribunals such as the ICTY and the International Criminal Tribunal for Rwanda (“ICTR”);<sup>9</sup> hybrid international courts such as the Special Court for Sierra Leone (“SCSL”),<sup>10</sup> the Extraordinary Chambers in the Courts of Cambodia (ECCC)<sup>11</sup> and the Special Tribunal for Lebanon (“STL”);<sup>12</sup> domestic chambers with an internationalized

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See also Office of the Historian, *The Tehran Conference, 1943*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1937-1945/tehran-conf> (last visited Apr. 4, 2016). Office of the Historian, *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1945-1952/nuremberg> [hereinafter Office of the Historian, *The Nuremberg Trial*]; see also *International Military Tribunal at Nuremberg*, TRACK IMPUNITY ALWAYS [TRIAL] (Dec. 2, 2016), <http://www.trial-ch.org/en/resources/tribunals/international-military-tribunals/tribunal-militaire-international-de-nuremberg/creation.html>.

5. Charter of the Int’l Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279; see also Office of the Historian, *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1945-1952/nuremberg> [hereinafter Office of the Historian, *The Nuremberg Trial*] (last visited Apr. 4, 2016).

6. Office of the Historian, *The Nuremberg Trial*, *supra* note 4.

7. See generally Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT’L L. 1086 (2010).

8. S.C. Res. 808 (Feb. 22, 1993) (establishing the ICTY).

9. S.C. Res. 995 (Nov. 8, 1994) (establishing the ICTR).

10. Agreement Between the United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Sierra Leon-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137, <http://www.rscsl.org/Documents/scsl-agreement.pdf> (establishing the SCSL).

11. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-UN, June 6, 2003, 2329 U.N.T.S. 117 (establishing the ECCC).

12. S.C. Res. 1757, Annex (May 30, 2007) (establishing the STL).

component such as the Bosnian War Crimes Chambers;<sup>13</sup> regional organization sponsored courts such Extraordinary African Chambers (“EAC”)<sup>14</sup> in Senegal; and internationalized courts authorized by states functioning under U.N. administrations, such as The Special Panels of the Dili District Court in East Timor.<sup>15</sup> Moreover, in 1998 the dream of a permanent court came true with the creation of the International Criminal Court (“ICC”) in 1998.<sup>16</sup>

These different tribunals and courts that have ventured into the realm of international criminal law quickly realized that international law does not occur in a vacuum. Every tribunal has had to balance an array of legal, political, social and cultural considerations. They must balance punishment and retribution with reconciliation and institution building. They must balance the benefit of international involvement against the need to have a national process for reconciliation. And they must balance the expectation of international norms of due process against their need to deliver justice in a form that is familiar to their constituents.

The complicated process of addressing all of these competing concerns leads to each tribunal having its own form and peculiarities. The articles presented in this edition elegantly speak to these variations. Beth van Schaack’s article, *The Building Blocks of Hybrid Justice*, comprehensively studies the structural, political and cultural differences between the tribunals and courts and how these differences affects performance.<sup>17</sup> But in addition, Ms. Van Schaack examines the nuances and subtle pressures that have played an underappreciated role in determining how these judicial enterprises ultimately function.<sup>18</sup>

Kerstin Bree Carlson’s article, *Reconciliation Through a Judicial Lens: Competing Legitimation Frameworks in the ICTY’s Plavšić and Babić Judgments*, examines how a single tribunal could take similar cases and produce two different results.<sup>19</sup> In marked contrast to the Van Schaack, Carlson looks at variations

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13. Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* 40-41 (2008), <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>.

14. *Statut des Chambres Africaines Extraordinaires au sein des Juridictions Sénégalaises pour la Poursuite des Crimes Internationaux Commis au Tchad durant la Période du 7 Juin 1982 au 1er Décembre 1990* [Statute of the Extraordinary African Chambers in the Senegalese courts for the prosecution of international crimes committed in Chad during the period from 7 June 1982 to 1 December 1990], art 2, HUMAN RIGHTS WATCH (Jan. 30, 2013), <http://www.hrw.org/node/248651> (establishing the EAC).

15. UNTAET Reg. No. 2000/15, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000). (establishing The Special Panels of the Dili District Court in East Timor); see also UNTAET Reg. No. 2000/11, U.N. Doc. UNTAET/REG/2000/11 ¶ 9.5 (Mar. 6, 2000).

16. Rome Statute of the International Criminal Court, art. 125(3), Jul. 17, 1998, 2187 U.N.T.S. 38544 (establishing the ICC).

17. Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT’L L. & POL’Y 169 (2015).

18. *Id.*

19. Kerstin Bree Carlson, *Reconciliation Through a Judicial Lens: Competing Legitimation Frameworks in the ICTY’s Plavšić and Babić Judgments*, 44 DENV. J. INT’L L. & POL’Y 279 (2015).

within a tribunal, as opposed variations between tribunals.<sup>20</sup> Carlson's scholarship looks for ways to reconcile two seminal judgments in the comparable cases of Biljana Plavšić and Milan Babić.<sup>21</sup> As Carlson points out, the cases were relatively congruent in timing and gravity but the ICTY viewed them radically differently.<sup>22</sup> While Van Schaack's article is unprecedented in its exhaustive study of variations between tribunals, Carlson's approach is similarly thorough in its study of the functioning in a single institution. Moreover, Carlson's article examines in depth how a tribunal's own politics and social considerations subtly shift from month to month.

Lastly, the undersigned authors offer their own submission to complement the other superb works. Our article is entitled *A Digest of the Case Law of Contempt of Court at International Criminal Tribunals and the International Criminal Court*. This piece is an exhaustive compilation of the jurisprudence on cases of contempt of court that have occurred at the various tribunals and courts prosecuting core crimes.<sup>23</sup> It is written in the style of two major works done by Human Rights Watch. One was a compilation of digests of the law from the judgments at the ICTY called *Genocide, War Crimes and Crimes Against Humanity, A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia*.<sup>24</sup> A similar work was done for the ICTR.<sup>25</sup> In the view of the authors, these two articles are two of the most important works of scholarship ever done on law of the *ad hoc* tribunals. They did not cover the law on contempt, however, and we hope our article is a worthy addition.

Aside from what we anticipate is the utility of the articles in this edition of the *Denver Journal of International Law and Policy*, we hope these articles have another lesson for readers. Namely, that no matter what the questions of legitimacy and performance are that may dog a particular tribunal, the decisions and judgments emanating from a tribunal become part of international law. So while the institutions themselves may remain subject to debate, the fact that the decisions and judgments issued by their courts continue add to the growing body of international criminal law is beyond dispute. .

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20. See generally Carlson, *supra* note 19; but see generally Van Schaack, *supra* note 17.

21. See generally, Carlson, *supra* note 19.

22. *Id.*

23. David Akerson & Nandish Wijetilleke, *A Digest of the Case Law of Contempt of Court at International Criminal Tribunals and the International Criminal Court*, 44 DENV. J. INT'L L. & POL'Y 87 (2015).

24. See generally HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2006), <https://www.hrw.org/reports/2006/icty0706/ICTYweb.pdf>.

25. See generally HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2010), <https://www.hrw.org/sites/default/files/reports/ictr0110webwcover.pdf>.