the consent of the state in question.[226] It provides states generally with advisory services in the human rights field and submits an annual report to the OAS General Assembly. Many special reports have been published dealing with human rights in particular states, e.g. Argentina, Bolivia, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, Suriname and Uruguay.[227] The Commission has also devoted attention to certain themes, such as disappearances, torture, refugees and economic and social rights.[228] Special Rapporteurs have been appointed, for example, on the rights of indigenous peoples, the rights of women and the rights of the child.[229] The Inter-American Court of Human Rights has declared that the Commission also has the authority to determine that any domestic law of a state party has violated the obligations assumed in ratifying or acceding to the Convention[230] and that the Commission may consequentially recommend that states repeal or amend the law that is in violation of the Convention. For the Commission to be able to do this, the law may have come to its attention by any means, regardless of whether or not that law is applied in any specific case before the Commission.[231] In the light of this, the Commission in 1994, for example, made a thorough study of the contempt laws (*leyes de desacato*), and concluded that many of these do not meet international human rights standards. The Commission recommended that all member states of the OAS that have such laws should repeal or amend them to bring them into line with international instruments, and with the obligations acquired

[226] In 1994, for example, with regard to Guatemala, Haiti, the Bahamas, Ecuador and Jamaica, see *Annual Report 1994*, pp. 21 ff., while in 2006 on-site visits were made to Haiti, Colombia, Bolivia, Dominican Republic, Brazil, Argentina and Peru, *Annual Report 2006*, chapter II C, paras. 34 ff.

[227] See *Annual Report 1994*, chapter IV, with regard to Colombia, Cuba, El Salvador and Guatemala, and *Annual Report 2006*, chapter IV, with regard to Colombia, Cuba, Haiti and Venezuela.

[228] See e.g. *Annual Report 1992–3*, pp. 539 ff. See also e.g. AG/Res.443, 1979, AG/Res.666, 1983, AG/Res.547, 1981, AG/Res.624, 1982 and AG/Res.644, 1983 (torture). In its *Annual Report 2000*, the Commission reported on migrant workers and made recommendations with regard to asylum and international crimes, and the promotion and protection of the mentally ill, chapter VI.

[229] *Annual Report 2006*, chapter II D, paras. 49 ff. See as to the Special Rapporteur for Freedom of Expression, *Annual Report 2006*, vol. II.

[230] *Some Powers of the Inter-American Commission on Human Rights*, Advisory Opinion OC-13/93 of 16 July 1993, Series A, No. 13, para. 26.

[231] *International Responsibility for Issuing and Applying Laws in Violation of the Convention*, Advisory Opinion OC-14/94 of 9 December 1994, Series A, No. 14, para. 39.

under those instruments, so as to harmonise their laws with human rights treaties.[232]

In 1985, the OAS General Assembly adopted the Inter-American Convention to Prevent and Punish Torture,[233] while in 1988 an Additional Protocol on Economic, Social and Cultural Rights was signed.[234] Under article 19 of this instrument, states parties agreed to provide periodic reports on the progressive measures undertaken to ensure respect for the rights set forth therein. Such reports go to the Secretary-General of the OAS, who sends them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, with a copy to both the Inter-American Commission on Human Rights and the specialised agencies of the inter-American system. Violations by a state party of the rights to organise and join trades unions (article 8(a)) and to education (article 13) 'may give rise' to application of the system of individual or inter-state petition under the Inter-American Convention on Human Rights.

A Protocol on the Abolition of the Death Penalty was adopted on 8 June 1990[235] and a Convention on Forced Disappearances of Persons was adopted on 9 June 1994.[236] Under article 13 of this Convention, states parties agree that the processing of petitions or communications presented to the Inter-American Commission alleging the forced disappearance of persons will be subject to the procedures established under the Inter-American Convention on Human Rights, the Statute and Regulations of the Commission and the Statute and Rules of the Court. Particular reference is made to precautionary measures.[237] Under article 14, when

[232] *Annual Report 1994*, pp. 199 ff.

[233] This entered into force in February 1987. Under the Convention, states parties agree to inform the Inter-American Commission of measures taken in application of the Convention, and the Commission 'will endeavour in its annual report to analyse the existing situation in the member states of the Organisation of American States in regard to the prevention and elimination of torture', article 17.

[234] This came into force in November 1999. Eleven states parties were required for the Additional Protocol to come into force. See also L. Le Blanc, 'The Economic, Social and Cultural Rights Protocol to the American Convention and its Background', 10 NQHR, 1992, 130.

[235] This entered into force the following year. It currently has eight parties. See e.g. C. Cerna, 'US Death Penalty Tested Before the Inter-American Commission on Human Rights', 10 NQHR, 1992, p. 155.

[236] This entered into force in March 1996.

[237] Article 63(2) of the Convention states that in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With

the Commission receives a petition or communication alleging forced disappearance, its Executive Secretariat shall urgently and confidentially address the respective government and shall request that government to provide as soon as possible information as to the whereabouts of the allegedly disappeared person. The OAS also adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women in 1994, which entered into force in March the following year. Article 10 provides that states parties are to include in their national reports to the Inter-American Commission of Women information on measures taken in this area, while under article 11, both states parties and the Commission of Women may request of the Inter-American Court advisory opinions on the interpretations of this Convention. Article 12 provides a procedure whereby any person, group of persons or any non-governmental entity legally recognised in one or more member states of the OAS may lodge petitions with the Inter-American Commission on Human Rights alleging violations of the duties of states under article 7 to pursue without delay and by all appropriate means policies to prevent, punish and eradicate violence against women.[238] The question of indigenous peoples has also been addressed and on 18 September 1995, the Inter-American Commission adopted a Draft Declaration on the Rights of Indigenous Peoples.[239]

The Commission itself consists of seven members elected in a personal capacity by the OAS General Assembly for four-year terms.[240] The Commission may indicate precautionary measures as provided for in article

respect to a case not yet submitted to the Court, it may act at the request of the Commission. Article 19(c) of the Statute of the Commission provides that the Commission has the power to request the Court to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons. Under article 29 of the Regulations of the Commission, the Commission may on its own initiative or at the request of a party take any action it considers necessary for the discharge of its functions. In particular, in urgent cases, when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage in cases where the denounced facts are true. Article 24 of the Rules of Procedure of the Inter-American Court provides that at any stage of the proceeding involving cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order whatever provisional measures it deems appropriate, pursuant to article 63(2) of the Convention.

[238] Note also the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999. This came into force in September 2001.

[239] See above, chapter 6, p. 298.

[240] See articles 34–8 of the Convention.

25 of the Commission's Rules of Procedure. This grants the Commission the power in serious and urgent cases, and whenever necessary according to the information available, either on its own initiative or upon request by a party, to request that the state concerned adopt precautionary measures to prevent irreparable harm to persons. The Commission may also request information from the interested parties related to any aspect of the adoption and observance of the precautionary measures.[241] Of particular interest has been the granting of precautionary measures in favour of individuals captured in connection with the US-led military operation against the former Taliban regime in Afghanistan and the Al-Qaida organisation and their detention at the US naval base at Guantanamo Bay, Cuba. Such measures were first granted on 12 March 2002 and requested that the United States take the 'urgent measures necessary to have the legal status of the detainees at Guantanamo determined by a competent tribunal'. The Commission considered that, without this determination, the fundamental and non-derogable rights of the detainees might not be recognised and guaranteed by the United States. Such measures were repeated on four separate occasions and amplified in response to information indicating the possible torture or other cruel, inhuman or degrading treatment or punishment of detainees at Guantanamo Bay or the possible removal of detainees to jurisdictions where they could be subjected to torture. As these measures were not complied with – the US arguing that the Commission lacked jurisdiction – the Commission adopted resolution no. 2/06 on 28 July 2006, noting that the failure of the United States to give effect to the Commission's precautionary measures had resulted in irreparable prejudice to the fundamental rights of the detainees at Guantanamo Bay, including their rights to liberty and to humane treatment, and urging the US to close the Guantanamo Bay facility without delay; to remove the detainees from Guantanamo Bay through a process undertaken in full accordance with applicable forms of international human rights and humanitarian law; to ensure that detainees who may face a risk of torture elsewhere are provided with a fair and independent examination of their circumstances and to ensure that any instances of torture at Guantanamo Bay are investigated, prosecuted and punished.[242]

[241] See, for recent examples, *Annual Report 2001*, chapter III C. I and *Annual Report 2006*, chapter III C I.

[242] See *Annual Report 2006*, chapter III E and see also 45 ILM, 2006, pp. 669 ff.

Where in the case of petitions received, a friendly settlement has not been achieved,[243] then under article 50 a report will be drawn up, together with such proposals and recommendations as are seen fit, and transmitted to the parties. The Commission may, under article 46 of the Rules of Procedure, adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations and report thereon. It also publishes a table indicating whether its recommendations have achieved total or partial compliance from the state concerned or whether compliance is pending.[244]

After its report, a three-month period is then available during which the Commission or the state concerned (but not the individual concerned) may go to the Inter-American Court of Human Rights.[245] The Court consists of seven judges serving in an individual capacity and elected by an absolute majority of the states parties to the Convention in the OAS General Assembly for six-year terms.[246] The jurisdiction of the Court is subject to a prior declaration under article 62. Article 63(2) of the Convention provides that, in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court, in matters not yet submitted to it, may adopt such provisional measures as it deems pertinent in matters under its consideration. Where a case has not yet been submitted to it, the Court may act at the request of the Commission. This power has been used on a number of occasions.[247]

[243] See, for examples of friendly settlement procedures, *Annual Report 2001*, chapter III C. 4.

[244] See *Annual Report 2006*, chapter III D.

[245] Article 51. If this does not happen and the matter is not settled with the state concerned, the Commission by a majority vote may set forth its own opinion and conclusions on the matter, which may be published. See, for example, *Annual Report 1983–4*, pp. 23–75.

[246] Articles 52–4. See also Davidson, *Inter-American Court*; C. Cerna, 'The Structure and Functioning of the Inter-American Court of Human Rights (1979–1992)', 63 BYIL, 1992, p. 135, and L. E. Frost, 'The Evolution of the Inter-American Court of Human Rights', 14 HRQ, 1992, p. 171.

[247] The first time was in January 1988, against Honduras, following the killing of a person due to testify before it and concerns expressed about the safety of other witnesses, H/Inf. (88) 1, p. 64. See also the provisional measures adopted by the Court against Peru, in similar circumstances, in August 1990, 11 HRLJ, 1990, p. 257, and the *Alemán Lacayo* v. *Nicaragua* case, Series E, Order of 2 February 1996; the *Álvarez et al.* v. *Colombia* case, Series E, Order of 22 July 1997, and the *Constitutional Court* case, Series E, Order of 14 August 2000. See also *Hilaire and Others* v. *Trinidad and Tobago*, Judgment of 21 June 2002. The Court also granted provisional measures, for example, to protect the lives and personal integrity of witnesses in the *Mapiripán Massacre* case against Colombia, see

Under article 64, the Court also possesses an advisory jurisdiction with regard to the interpretation of the Inter-American Convention and other conventions concerning the protection of human rights in the American states at the request of any member state of the OAS. The Court has dealt with a variety of important issues by way of advisory opinions.[248] In *Definition of Other Treaties Subject to the Interpretation of the Inter-American Court*,[249] the Court took the view that the object of the Convention was to integrate the regional and universal systems of human rights protection and that, therefore, any human rights treaty to which American states were parties could be the subject of an advisory opinion. In *The Effect of Reservations*,[250] the Court stressed that human rights treaties involve the establishment of legal orders within which obligations are created towards all individuals within their jurisdiction and concluded that an instrument of ratification of adherence containing a reservation compatible with the object and purpose of the Convention does not require acceptance by the other states parties and the instrument thus enters into force as of the moment of deposit.[251] In a manner reminiscent of and clearly influenced by the European Court of Human Rights, the Inter-American Court stated that human rights treaties were different in nature from traditional multilateral treaties, since they focused not upon the reciprocal exchange of rights for the mutual benefit of the contracting states, but rather upon the protection of the basic rights of individuals. The obligations were *erga omnes*, rather than with regard to particular other states.[252]

In an important discussion of freedom of expression in the *Licensing of Journalists* case,[253] the Court advised that the compulsory licensing of journalists was incompatible with article 13, the freedom of expression provision in the Convention, if it denied any person access to the full use of the media as a means of expressing opinions. The Court emphasised that freedom of expression could only be restricted on the basis of 'compelling governmental interest' and that the restriction must be 'closely tailored

Annual Report of the Inter-American Court of Human Rights 2005, p. 39, and in the case of the *Children and Adolescents Deprived of Liberty in the 'Complexo do Tatuapé' of FEBEM* against Brazil, *ibid*., p. 41.

248 Of the nineteen advisory opinions issued between 1959 and 2005, twelve concerned the interpretation of the Convention, four concerned the interpretation of other treaties and three concerned the compatibility between domestic laws and international instruments: see *Annual Report 2005*, p. 60.

249 22 ILM, 1983, p. 51; 67 ILR, p. 594.

250 22 ILM, 1983, p.33; 67 ILR, p. 559.

251 Para. 37. See article 74 of the Convention.

252 *Ibid.*, para. 29. See also below, p. 937.

253 7 HRLJ, 1986, p. 74; 75 ILR, p. 31.

to the accomplishment of the legitimate governmental objective necessitating it'.[254] In the *Habeas Corpus* case,[255] the Court declared that the writ of habeas corpus was a non-suspendable 'judicial guarantee' for the protection of rights from which no derogation was permitted under the Convention under article 27. Reference was made to the 'inseparable bond between the principle of legality, democratic institutions and the rule of law'. The Court also emphasised that only democratic governments could avail themselves of the right to declare a state of emergency and then only under closely circumscribed conditions. The Court has also addressed the issue of the relationship between itself and the American Declaration of the Rights and Duties of Man, 1948 in the *Interpretation of the American Declaration* case.[256] In an opinion likely to be of significance in view of the fact that, for example, the USA is not a party to the Convention but, as a member of the OAS, has signed the Declaration, the Court stressed that in interpreting the Declaration regard had to be had to the current state of the Inter-American system and that, by a process of authoritative interpretation, the member states of the OAS have agreed that the Declaration contains and defines the human rights norms referred to in the OAS Charter.[257] Since the Charter was a treaty, the Court could, therefore, interpret the Declaration under article 64.[258] This rather ingenious argument is likely to open the door to a variety of advisory opinions on a range of important issues.

In the *Right to Information on Consular Assistance* opinion requested by Mexico,[259] the Court declared that article 36 of the Vienna Convention on Consular Relations, 1963, providing for the right to consular assistance of detained foreign nationals,[260] was part of international human rights law and that the state must comply with its duty to inform the detainee of the rights that the article confers upon him at the time of his arrest or at least before he makes his first statement before the authorities. Further, it was held that the enforceability of the right was not subject to the protests of the sending state and that the failure to observe a detained foreign national's right to information, recognised in article 36(1)(b) of

[254] *Ibid.*, para. 45. See also the *Sunday Times* case, European Court of Human Rights, Series A, vol. 30, 1979.

[255] 9 HRLJ, 1988, p. 94; 96 ILR, p. 392. [256] 28 ILM, 1989, p. 378; 96 ILR, p. 416.

[257] *Ibid.*, pp. 388–9. See also T. Buergenthal, 'The Revised OAS Charter and the Protection of Human Rights', 69 AJIL, 1975, p. 828.

[258] The problem was that the Declaration clearly was not a treaty and article 64 provides for advisory opinions regarding the Convention itself and 'other treaties'.

[259] Series A 16, OC-16/99, 1999. [260] See further below, chapter 13, p. 773.

the Vienna Convention, was prejudicial to the due process of law. In such circumstances, imposition of the death penalty constituted a violation of the right not to be deprived of life 'arbitrarily', as stipulated in the relevant provisions of the human rights treaties,[261] involving therefore the international responsibility of the state and the duty to make reparation.

The exercise of the Court's contentious jurisdiction was, however, less immediately successful. In the *Gallardo* case,[262] the Court remitted the claim to the Commission declaring it inadmissible, noting that a state could not dispense with the processing of the case by the Commission, while in the *Velásquez Rodríguez*[263] and *Godínez Cruz*[264] cases the Court in 'disappearance' situations found that Honduras had violated the Convention.[265] In the former case, it was emphasised that states had a legal responsibility to prevent human rights violations and to use the means at their disposal to investigate and punish such violations. Where this did not happen, the state concerned had failed in its duty to ensure the full and free exercise of these rights within the jurisdiction.[266] In *Loayza Tamayo* v. *Peru*, the Court held Peru responsible for a number of breaches of the Convention concerned with the detention and torture of the applicant and for the absence of a fair trial.[267] In *Chumbipuma Aguirre* v. *Peru*, the *Barrios Altos* case, the Court tackled the issue of domestic amnesty laws and held that the Peruvian amnesty laws in question were incompatible with the Inter-American Convention and thus void of any legal effect.[268] The Court has also addressed the question of indigenous peoples in several cases, in which it has emphasised the close ties of such peoples with their traditional lands and the natural resources associated with their culture in the context particularly of the right to the use and enjoyment of property in article 21 of the Convention. It has concluded that the traditional possession of their lands by indigenous peoples has equivalent effects to those of a state-granted full property title; that traditional possession entitles indigenous peoples to demand official recognition and registration

[261] I.e. article 4 of the Inter-American Convention on Human Rights and article 6 of the International Covenant on Civil and Political Rights.

[262] 20 ILM, 1981, p. 1424; 67 ILR, p. 578. [263] 9 HRLJ, 1988, p. 212; 95 ILR, p. 232.

[264] H/Inf (90) 1, p. 80; 95 ILR, p. 320 (note).

[265] Note also the award of compensation to the victims in both of these cases, *ibid.*, pp. 80–1.

[266] At paras. 174–6. See also *Castillo Páez* v. *Peru*, Series C, No. 34, 1997; 116 ILR, p. 451.

[267] Series C, No. 33, 1997; 116 ILR, p. 338.

[268] Judgment of 14 March 2001, 41 ILM, 2002, p. 93. See also generally C. Martin, 'Catching Up with the Past: Recent Decisions of the Inter-American Court of Human Rights Addressing Gross Human Rights Violations Perpetrated During the 1970–1980s', 7 *Human Rights Law Review*, 2007, p. 774.

of property titles; that members of such peoples who have been obliged to leave their traditional lands maintain property rights thereto even though they lack legal title, unless the lands have been lawfully transferred to innocent third parties; and that in the latter instance, such members are entitled to restitution thereof or to obtain other lands of equal extension and quality.[269] In the period between 1959 and 2005, the Court issued 62 orders of provisional measures, 19 advisory opinions and 139 judgments.[270]

The Banjul Charter on Human and Peoples' Rights[271]

This Charter was adopted by the Organisation of African Unity in 1981 and came into force in 1986. Currently all fifty-three members of the African Union (as the OAU was renamed in 2000) are parties.[272] The Charter contains a wide range of rights, including in addition to the traditional civil and political rights, economic, social and cultural rights and

[269] See e.g. *Sawhoyamaxa Indigenous Community* v. *Paraguay*, Judgment of 29 March 2006. See further above, chapter 6, p. 293.

[270] See *Annual Report 2005*, p. 57.

[271] See e.g. U. O. Umozurike, *The African Charter on Human and Peoples' Rights*, The Hague, 1997; R. Murray, *The African Commission on Human and Peoples' Rights*, London, 2000; *The African Charter on Human and Peoples' Rights* (eds. M. Evans and R. Murray), Cambridge, 2002; Rehman, *International Human Rights Law*, chapter 9; Steiner, Alston and Goodman, *International Human Rights*, p. 1062; E. Ankumah, *The African Commission on Human and Peoples' Rights*, Dordrecht, 1996; R. Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis', 22 Va. JIL, 1981, p. 667; Robertson and Merrills, *Human Rights in the World*, p. 242; U. O. Umozurike, 'The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights', 1 *African Journal of International Law*, 1988, p. 65; A. Bello, 'The African Charter on Human and Peoples' Rights', 194 HR, 1985, p. 5; S. Neff, 'Human Rights in Africa', 33 ICLQ, 1984, p. 331; U. O. Umozurike, 'The African Charter on Human and Peoples' Rights', 77 AJIL, 1983, p. 902; B. Ramcharan, 'The Travaux Préparatoires of the African Commission on Human Rights', HRLJ, 1992, p. 307; W. Benedek, 'The African Charter and Commission on Human and Peoples' Rights: How to Make It More Effective', 14 NQHR, 1993, p. 25; C. Flinterman and E. Ankumeh, 'The African Charter on Human and Peoples' Rights' in Hannum, *Guide to International Human Rights Practice*, p. 171; M. A. Baderin, 'Recent Developments in the African Regional Human Rights System', 5 *Human Rights Law Review*, 2005, p. 117, and C. Beyani, 'Recent Developments in the African Human Rights System 2004–2006', 7 *Human Rights Law Review,* 2007, p. 582. See also F. Ouguergouz, 'La Commission Africaine des Droits de l'Homme et des Peuples', AFDI, 1989, p. 557; K. Mbaye, *Les Droits de l'Homme en Afrique*, Paris, 1992, and M. Hamalengwa, C. Flinterman and E. Dankwa, *The International Law of Human Rights in Africa – Basic Documents and Annotated Bibliography*, Dordrecht, 1988.

[272] See www.achpr.org/english/ratifications/ratification_african%20charter.pdf.

various peoples' rights. In this latter category are specifically mentioned the rights to self-determination, development and a generally satisfactory environment.[273] The reference to the latter two concepts is unusual in human rights instruments and it remains to be seen both how they will be interpreted and how they will be implemented.

One question that is immediately posed with respect to the notion of 'peoples' rights' is to ascertain the definition of a people. If experience with the definition of self-determination in the context of the United Nations is any guide,[274] and bearing in mind the extreme sensitivity which African states have manifested with regard to the stability of the existing colonial borders,[275] then the principle is likely to be interpreted in the sense of independent states. This was confirmed in the *Katangese Peoples' Congress* v. *Zaire*,[276] where the Commission declared that Katanga was obliged to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of Zaire.

The African Charter is the first human rights convention that details the duties of the individual to the state, society and family.[277] Included are the duties to avoid compromising the security of the state and to preserve and strengthen social and national solidarity and independence. It remains to be seen whether this distinctive approach brings with it more problems than advantages.

The Charter set up the African Commission on Human and Peoples' Rights, consisting of eleven persons appointed by the Conference of the Heads of State and Government of the OAU for six-year renewable terms, to implement the Charter. The Secretary to the Commission is appointed by the Secretary-General of the Organisation of African Unity. The Commission has important educational and promotional responsibilities,[278] including undertaking studies, organising conferences, disseminating information and making recommendations to governments. This is quite unlike the European Commission as it used to be prior to Protocol 11, but rather more similar to the Inter-American Commission. The African Commission has developed a range of special mechanisms, including the appointment of Special Rapporteurs (not being independent experts but

[273] See articles 19–22. [274] See above, chapter 5, p. 256.
[275] See e.g. M. N. Shaw, *Title to Territory in Africa*, Oxford, 1986.
[276] Case No. 75/92: see 13 NQHR, 1995, p. 478. [277] See articles 27–9.
[278] See article 45 and Rule 87 of the Rules of Procedure 1995. See also A. Bello, 'The Mandate of the African Commission on Human and Peoples' Rights', 1 *African Journal of International Law*, 1988, p. 31.

Commission members)[279] and working groups;[280] and the adoption of country and thematic resolutions.[281]

The Commission may hear as of right inter-state complaints.[282] The first such complaint was brought in 1999 by the Democratic Republic of the Congo alleging *inter alia* that it had been the victim of aggression perpetrated by Burundi, Rwanda and Uganda. The Commission held that the respondent states had contravened the principle of the peaceful settlement of disputes and had violated article 23 of the African Charter concerning the right to peace. It concluded that the three states concerned had occupied parts of the Congo in violation of the Charter and had committed a series of human rights violations as a consequence.[283]

Other, non-state, communications may also be sent to the Commission and the terminology used is far more flexible than is the case in the other regional human rights systems.[284] Where it appears that one or more communications apparently relates to special cases which reveal the existence of a series of serious or massive violations of rights, the Commission will draw the attention of the Assembly of Heads of State and Government to these special cases. The Commission may then be asked to conduct an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.[285] The Commission

[279] Covering topics such as the rights of women, refugees, asylum seekers and internally displaced persons in Africa; freedom of expression; human rights defenders in Africa, and prisons and conditions of detention in Africa: see e.g. Beyani, 'Recent Developments', p. 588.

[280] Covering issues such as economic, social and cultural rights; indigenous populations and communities; and the death penalty: e.g. *ibid.*, p. 589.

[281] Such as the resolutions expressing deep concern about the violation of human rights and international humanitarian law in Darfur, e.g. ACHPR/Res.74(XXXVII)05, 2005 and about the continued attacks on the independence of the judiciary by the government of Zimbabwe, e.g. resolution adopted by the Executive Council of the African Commission on Human and Peoples' Rights, 9th Ordinary Session, June 2006, Ex. CL/279 (ix), Annex III, p. 99. See also Beyani, 'Recent Developments', pp. 592 ff., and the resolution concerning the protection of human rights defenders in Africa, ACHPR/Res.69(XXXV)04, 2004.

[282] Articles 47–54. See also Rules 88 ff. of the Rules of Procedure.

[283] Communication 227/99, African Commission, *Twentieth Activity Report*, EX.CL/279 (IX), Annex IV, pp. 111 ff. See also Beyani, 'Recent Developments', pp. 598 ff.

[284] See article 55. There are a number of admissibility requirements: see article 56. For recent decisions on communications, see African Commission, *Twentieth Activity Report*.

[285] Article 58(1) and (2). Further, a case of emergency duly noted by the Commission shall be submitted to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study, article 58(3).

is able to suggest provisional measures where appropriate.[286] The Commission adopted Rules of Procedure in 1988, which were amended in 1995.[287] A number of important individual communications have been dealt with.[288] In addition, there is an obligation upon states parties to produce reports every two years upon the measures taken to implement the rights under the Charter.[289] The Commission was given authority by the OAU to study the reports and make observations upon them and has indeed adopted guidelines. However, to date, it is fair to conclude that the reporting procedure has encountered serious problems, not least in that many states have failed to submit reports or adequate reports,[290] while the financial resources difficulties faced by the Commission have been significant. No provision was made for a Court in the Charter, but a Protocol on the Establishment of an African Court of Human and Peoples' Rights was signed in 1998.[291] Under this Protocol, the Court has advisory, conciliatory and contentious jurisdiction. The African Commission, states parties and African intergovernmental organisations have automatic access to the Court,[292] but not individuals or non-governmental organisations, whose access depends upon the state concerned having made

[286] Rule 111. See e.g. G. J. Naldi, 'Interim Measures of Protection in the African System for the Protection of Human and Peoples' Rights', 2 *African Human Rights Law Journal*, 2002, p. 1. The Commission has taken the view that the adoption of interim measures is binding on the parties: see e.g. *Saro-Wiwa* v. *Nigeria*, 7 *International Human Rights Reports*, 2000, p. 274.

[287] See 40 *The Review, International Commission of Jurists*, 1988, p. 26.

[288] See e.g. *Lawyers for Human Rights* v. *Swaziland*, Communication 251/2002, 13 *International Human Rights Reports*, 2006, p. 887, concerning the overthrow of constitutional democracy and the banning of political parties. See also *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, African Commission, *Twenty-First Activity Report*, Annex III, pp. 54 ff. See S. Gumedz, 'Bringing Communications Before the African Commission on Human and Peoples' Rights', 3 *African Human Rights Law Journal*, 2003, p. 118.

[289] Article 62. See also Rules 81–6.

[290] See e.g. G. Oberleitner and C. Welch, 'Africa: 15th Session African Commission on Human and Peoples' Rights', 12 NQHR, 1994, p. 333; Rehman, *International Human Rights Law*, p. 255, and M. Vans, T. Ige and R. Murray, 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights' in *The African Charter on Human and Peoples' Rights* (eds. M. Evans and R. Murray), Cambridge, 2002, p. 36.

[291] This came into force on 25 January 2004. Judges were elected in 2006. See e.g. D. Padilla, 'An African Human Rights Court: Reflections from the Perspective of the Inter-American System', 2 *African Human Rights Law Journal*, 2002, p. 185; R. W. Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights', 2 *African Human Rights Law Journal*, 2002, p. 223, and R. Murray, 'A Comparison Between the African and European Courts of Human Rights', 2 *African Human Rights Law Journal*, 2002, p. 195.

[292] Article 5.

a declaration accepting the jurisdiction of the Court to hear relevant applications.[293]

The Arab Charter on Human Rights[294]

An Arab Charter on Human Rights was adopted by the Council of the League of Arab States on 15 September 1994 and a revised version was adopted by the League of Arab States in May 2004. It affirms the principles contained in the UN Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and the Cairo Declaration on Human Rights in Islam.[295] Reference is made to the national identity of the Arab states and the right to self-determination is affirmed. A number of traditional human rights are also provided for, including the right to liberty and security of persons, equality of persons before the law, fair trial, protection of persons from torture, the right to own private property, freedom to practise religious observance and freedom of peaceful assembly and association.[296] The Charter also provides for the election of a seven-person Arab Human Rights Committee to consider states' reports.[297] The Charter came into force on 24 January 2008 upon the seventh ratification.[298]

[293] Article 34(6).

[294] See e.g. M. Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?', 5 *Human Rights Law Review*, 2005, p. 361, and R. K. M. Smith, *Textbook on International Human Rights*, Oxford, 2002, p. 87. See also Robertson and Merrills, *Human Rights in the World*, p. 238, and A. A. A. Naim, 'Human Rights in the Arab World: A Legal Perspective', 23 HRQ, 2001, p. 70.

[295] Adopted in 1990 by the Nineteenth Islamic Conference of Foreign Ministers. This Declaration emphasises that all rights and freedoms provided for are subject to Islamic Shari'ah (article 24), which is also 'the only source of reference for the explanation or clarification of any of the articles in the Declaration' (article 25).

[296] Articles 8, 11, 12, 13, 14, 30, 31 and 35. The right to development is proclaimed as a fundamental human right, see article 37.

[297] Articles 45 and 48.

[298] Note, however, the statement by the UN High Commissioner for Human Rights expressing concern with regard to the incompatibility of some of the provisions of the Arab Charter with international norms and standards. These concerns included the approach to the death penalty for children and the rights of women and non-citizens. The High Commissioner also noted that in equating Zionism with racism, the Arab Charter was 'not in conformity with General Assembly resolution 46/86, which rejects that Zionism is a form of racism and racial discrimination': see statement of 30 January 2008, www.unhchr.ch/huricane/huricane.nsf/0/6C211162E43235FAC12573E00056E19D?opendocument.

Suggestions for further reading

The *African Charter on Human and Peoples' Rights* (eds. M. Evans and R. Murray), Cambridge, 2002

Guide to International Human Rights Practice (ed. H. Hannum), 4th edn, Ardsley, 2004

Jacobs and White: The European Convention on Human Rights (eds. C. Ovey and R. C. A. White), 4th edn, Oxford, 2006

J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, 2003

H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, 3rd edn, Oxford, 2008

P. Van Dijk, G. J. H. Van Hoof, A. Van Rijn and L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, 4th edn, Antwerp, 2006

8

Individual criminal responsibility in international law[1]

The rise of individual criminal responsibility directly under international law marks the coming together of elements of traditional international law with more modern approaches to human rights law and humanitarian law, and involves consideration of domestic as well as international enforcement mechanisms. Although the rights of individuals in international law have evolved significantly in the post-1945 era, the placing of obligations directly upon persons as opposed to states has a distinct, if narrow, pedigree.[2] Those committing piracy or slave trading[3] have long been regarded as guilty of crimes against international society bearing direct responsibility, for which they may be punished by international tribunals or by any state at all. Jurisdiction to hear the offence is not confined to, for example, the state on whose territory the act took place, or the national state of the offender or the victim. This universal jurisdiction over piracy constitutes a long-established principle of the world community.[4]

[1] See e.g. A. Cassese, *International Criminal Law*, 2nd edn, Oxford, 2008; W. Schabas, *An Introduction to the International Criminal Court*, 3rd edn, Cambridge, 2007; R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge, 2007; I. Bantekas and S. Nash, *International Criminal Law*, 2nd edn, London, 2003; G. Werle, *Principles of International Criminal Law*, The Hague, 2005; C. de Than and E. Shorts, *International Criminal Law and Human Rights*, London, 2003; S. R. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd edn, Oxford, 2001; K. Kittichaisaree, *International Criminal Law*, Oxford, 2001, and *Justice for Crimes Against Humanity* (eds. M. Lattimer and P. Sands), Oxford, 2003.

[2] See e.g. M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd edn, The Hague, 1999. As to state responsibility for international offences, see below, chapter 14.

[3] See as to slave trading, article 99 of the Law of the Sea Convention, 1982 and below, chapter 11, p. 616.

[4] See e.g. *In re Piracy Jure Gentium* [1934] AC 586; 7 AD, p. 213. See also D. H. Johnson, 'Piracy in Modern International Law', 43 *Transactions of the Grotius Society*, 1957, p. 63, and G. E. White, 'The Marshall Court and International Law: The Piracy Cases', 83 AJIL, 1989, p. 727. See also the Separate Opinion of Judge Guillaume in *Congo* v. *Belgium*, ICJ

All states may both arrest and punish pirates, provided of course that they have been apprehended on the high seas[5] or within the territory of the state concerned. The punishment of the offenders takes place whatever their nationality and wherever they happened to carry out their criminal activities.

Piracy under international law (or piracy *jure gentium*) must be distinguished from piracy under municipal law. Offences that may be characterised as piratical under municipal laws do not necessarily fall within the definition of piracy in international law, and thus are not susceptible to universal jurisdiction (depending of course upon the content and form of international conventions). Piracy *jure gentium* was defined in article 15 of the High Seas Convention, 1958 (and reaffirmed in article 101 of the 1982 Convention on the Law of the Sea) as illegal acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or private aircraft and directed against another ship or aircraft (or persons or property therein) on the high seas or *terra nullius*.[6] Attempts to commit such acts are sufficient to constitute piracy and it is not essential for the attempt to have been successful.[7]

However, the range of offences under international law for which individuals bore international responsibility was narrow indeed.[8] It is doubtful whether it had extended beyond piracy and slave trading by the turn of the twentieth century. Even then, jurisdiction was exercisable in practice only by domestic courts. It is a modern phenomenon to establish international courts or tribunals to exercise jurisdiction directly over individuals with regard to specified crimes. As will be seen in chapter 12, domestic courts are indeed exercising a greater jurisdiction with regard to offences with international elements, for example, with regard to torture or war crimes committed outside of the territory of the state concerned provided that the alleged offender is within the territory of the state, but this is only where an international treaty authorises states to exercise such

Reports, 2002, pp. 3, 37–8; 128 ILR, pp. 60, 92–4, and *R* v. *Jones* [2006] UKHL 16; 132 ILR, p. 668.

[5] Article 105 of the Law of the Sea Convention, 1982 (reproducing article 19 of the Geneva Convention on the High Seas, 1958).

[6] See further below, chapter 11, p. 615.

[7] *In re Piracy Jure Gentium* [1934] AC 586; 7 AD, p. 213.

[8] See the advisory opinion of the Inter-American Court of Human Rights in the *Re-Introduction of the Death Penalty in the Peruvian Constitution* case, 16 HRLJ, 1995, pp. 9, 14, noting that individual responsibility may only be invoked for violations that are defined in international instruments as crimes under international law.

jurisdiction and this has been brought into effect internally.[9] However, the focus of this chapter is upon courts established internationally or with an international element in order to prosecute individuals directly accused of international offences.

International criminal courts and tribunals

After the conclusion of the First World War, a commission set up by the Allied Powers recommended that as the defeated powers had violated the laws of war, high officials, including the Kaiser, be prosecuted for ordering such crimes and on the basis of command responsibility. It was also suggested that an Allied High Tribunal be established to try violations of the laws and customs of war and the laws of humanity.[10] Accordingly, the Treaty of Versailles, 1919 noted that the German government recognised the right of the Allied and Associated Powers to bring individuals accused of crimes against the laws and customs of war before military tribunals (article 228) and established the individual responsibility of the Kaiser (article 227). In the event, the Netherlands refused to hand over the Kaiser and only a few trials were held before German courts in Leipzig with, at best, mixed results.[11]

The Charter annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals, 1945 provided specifically for individual responsibility for crimes against peace, war crimes and crimes against humanity. There was also a conspiracy charge.[12] The Nuremberg Tribunal, composed of four principal judges (from the US, UK, USSR and France) and four alternates, was the first international criminal

[9] See below, p. 673.

[10] See the Report of the Commission to the Preliminary Peace Conference, 14 AJIL, 1920, p. 95. See also Cryer *et al.*, *Introduction to International Criminal Law*, pp. 91–2, and T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', 100 AJIL, 2006, p. 551.

[11] See C. Mullins, *The Leipzig Trials*, London, 1921. See also e.g. the International Convention for the Protection of Submarine Telegraph Cables, 1884; the Agreement for the Suppression of the Circulation of Obscene Publications, 1910; the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications 1924; the Agreement Concerning the Suppression of Opium-Smoking, 1931; the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, and the International Convention for the Suppression of Counterfeiting Currency, 1929 with regard to the establishment of individual responsibility in the case of specific issues.

[12] See article 6, 39 AJIL, 1945, Supp., p. 259. See also H. Lauterpacht, *International Law and Human Rights*, London, 1950, p. 6, and Cryer *et al.*, *Introduction to International Criminal Law*, pp. 92 ff.

tribunal and marks the true starting-point for international criminal law. It affirmed in ringing and lasting terms that 'international law imposes duties and liabilities upon individuals as well as upon states' as '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'. Included in the relevant category for which individual responsibility was posited were crimes against peace, war crimes and crimes against humanity.[13] In addition, a number of war crimes trials were instituted within Allied-occupied Germany under the authority of Control Council Law No. 10.[14] The International Military Tribunal for the Far East was established in January 1946 to deal with Japanese war crimes.[15] This Tribunal was composed of judges from eleven states[16] and it essentially reaffirmed the Nuremberg Tribunal's legal findings as to, for example, the criminality of aggressive war and the rejection of the absolute defence of superior orders.[17] The Charter of the Tribunal also provided for individual responsibility with regard to certain crimes.[18]

The provisions of the Nuremberg Charter can now be regarded as part of international law, particularly since the General Assembly in 1946 affirmed the principles of this Charter and the decision of the Tribunal.[19] The Assembly also stated that genocide was a crime under international

[13] See 41 AJIL, 1947, p. 220. See also I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963, p. 167; T. Taylor, *An Anatomy of the Nuremberg Trial*, London, 1993, and A. Tusa and J. Tusa, *The Nuremberg Trial*, London, 1983.

[14] 36 ILR, p. 31. Twelve major US trials took place in Nuremberg, see H. Levie, *Terrorism in War: The Law of War Crimes*, New York, 1992, pp. 72 ff., while trials took place in the British occupied sector of Germany under the Royal Warrant of 1946, see A. P. V. Rogers, 'War Crimes Trials under the Royal Warrant, British Practice 1945–1949', 39 ICLQ, 1990, p. 780, and see also *R* v. *Jones* [2006] UKHL 16, para. 22 (Lord Bingham); 132 ILR, p. 679, and *Re Sandrock and Others* 13 ILR, p. 297.

[15] Established by a proclamation by General MacArthur of 19 January 1946, so authorised by the Allied Powers in order to implement the Potsdam Declaration: see *Hirota* v. *MacArthur* 335 US 876 and TIAS, 1946, No. 1589, p. 3; 15 AD, p. 485.

[16] US, UK, USSR, Australia, Canada, China, France, India, the Netherlands, New Zealand and the Philippines.

[17] See e.g. B. V. A. Röling and A. Cassese, *The Tokyo Trial and Beyond*, Cambridge, 1992, and S. Horowitz, *The Tokyo Trial*, International Conciliation No. 465 (1950). But see as to criticisms of the process, R. Minear, *Victor's Justice: The Tokyo War Crimes Trial*, Princeton, 1971.

[18] Article 5.

[19] Resolution 95(I). See also the International Law Commission's Report on Principles of the Nuremberg Tribunal, *Yearbook of the ILC*, 1950, vol. II, p. 195, and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968.

law bearing individual responsibility.[20] This was reaffirmed in the Genocide Convention of 1948, which also called for prosecutions by either domestic courts or 'an international penal tribunal'.[21] The International Law Commission produced a Draft Code of Offences against the Peace and Security of Mankind in 1954, article 1 of which provided that 'offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable'.[22]

Individual responsibility has also been confirmed with regard to grave breaches of the four 1949 Geneva Red Cross Conventions and 1977 Additional Protocols I and II dealing with armed conflicts. It is provided specifically that the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of a series of grave breaches.[23] Such grave breaches include wilful killing, torture or inhuman treatment, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, unlawful deportation or transfer of protected persons and the taking of hostages.[24] Protocol I of 1977 extends the list to include, for example, making the civilian population the object of attack and launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life or damage to civilians or their property when committed wilfully and causing death or serious injury; other activities such as transferring civilian population from the territory of an occupying power to that of an occupied area or deporting from an occupied area, apartheid and racial discrimination and attacking clearly recognised historic monuments, works of art or places of worship, may also constitute grave breaches when committed wilfully.[25]

[20] Resolution 96(1).

[21] Note that the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 declared apartheid to be an international crime involving direct individual criminal responsibility.

[22] A/2693, and 45 AJIL, 1954, Supp., p. 123.

[23] See article 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention and article 146 of the Fourth Geneva Convention. See further below, chapter 21, p. 1199.

[24] See e.g. article 50 of the First Geneva Convention, article 51 of the Second Geneva Convention, article 130 of the Third Geneva Convention and article 147 of the Fourth Geneva Convention. See also L. C. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000, chapter 18.

[25] See article 85 of Protocol I.

Any individual, regardless of rank or governmental status, would be personally liable for any war crimes or grave breaches committed, while the principle of command (or superior) responsibility means that any person in a position of authority ordering the commission of a war crime or grave breach would be as accountable as the subordinate committing it.[26] The International Law Commission in 1991 provisionally adopted a Draft Code of Crimes Against the Peace and Security of Mankind,[27] which was revised in 1996.[28] The 1996 Draft Code provides for individual criminal responsibility[29] with regard to aggression,[30] genocide,[31] a crime against humanity,[32] a crime against United Nations and associated personnel[33] and war crimes.[34] The fact that an individual may be responsible for the crimes in question is deemed not to affect the issue of state responsibility.[35] The Security Council in two resolutions on the Somali situation in the early 1990s unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held 'individually responsible' for them,[36] while Security Council resolution 674 (1990) concerning Iraq's occupation of Kuwait, reaffirming Iraq's liability under the Fourth Geneva Convention, 1949 dealing with civilian populations of occupied areas, noted that such responsibility for grave breaches extended to 'individuals who commit or order the commission of grave breaches'.[37]

The International Criminal Tribunal for the Former Yugoslavia (ICTY)[38]

It was, however, the events in the former Yugoslavia that impelled a renewal of interest in the establishment of an international criminal court, which had long been under consideration, but in a desultory fashion.[39]

[26] See further below, pp. 404 and 408. [27] A/46/10 and 30 ILM, 1991, p. 1584.
[28] A/51/10, p. 9. [29] See article 2. [30] See article 16. [31] Article 17.
[32] Article 18. [33] Article 19. [34] Article 20. [35] Article 4.
[36] Resolutions 794 (1992) and 814 (1993).
[37] See also e.g. the Special Section on Iraqi War Crimes, 31 Va. JIL, 1991, p. 351.
[38] See e.g. W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge, 2006; V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for Former Yugoslavia*, New York, 1995; R. Kerr, *The International Criminal Tribunal for Former Yugoslavia: An Exercise in Law, Politics and Diplomacy*, Oxford, 2004; the series of articles on the ICTY published in 2 *Journal of International Criminal Justice*, 2004, pp. 353 ff. and 37 *New England Law Review*, 2002–3, pp. 865 ff.
[39] See e.g. B. Ferencz, 'An International Criminal Code and Court: Where They Stand and Where They're Going', 30 *Columbia Journal of Transnational Law*, 1992, p. 375.

The Yugoslav experience, and the Rwanda massacres of 1994, led to the establishment of two specific war crimes tribunals by the use of the authority of the UN Security Council to adopt decisions binding upon all member states of the organisation under Chapter VII of the Charter, rather than by an international conference as was to be the case with the International Criminal Court. This method was used in order both to enable the tribunal in question to come into operation as quickly as possible and to ensure that the parties most closely associated with the subject-matter of the war crimes alleged should be bound in a manner not dependent upon their consent (as would be necessary in the case of a court established by international agreement). The establishment of the Tribunal was preceded by a series of steps. In Security Council resolutions 764 (1992), 771 (1992) and 820 (1993) grave concern was expressed with regard to breaches of international humanitarian law and the responsibilities of the parties were reaffirmed. In particular, individual responsibility for the commission of grave breaches of the 1949 Conventions was emphasised. Under resolution 780 (1992), the Security Council established an impartial Commission of Experts to examine and analyse information concerning evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia. The Commission produced a report in early 1993 in which it concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, 'ethnic cleansing', mass killings, torture, rape, pillage and destruction of civilian property, the destruction of cultural and religious property and arbitrary arrests.[40]

The Security Council then adopted resolution 808 (1993) calling for the establishment of an international tribunal to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'. The Secretary-General of the UN produced a report incorporating a draft statute and commentary,[41] which was adopted by the Security Council in resolution 827 (1993) acting under Chapter VII of the UN Charter.[42]

[40] See S/25274. See also M.C. Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', 88 AJIL, 1994, p. 784.

[41] S/25704 (1993).

[42] The Statute has been subsequently amended: see Security Council resolutions 1166 (1998), 1329 (2000), 1411 (2002), 1431 (2002), 1481 (2003), 1597 (2005) and 1660 (2006).

The Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (articles 1 and 8 of the Statute). The absence of a closing date meant that the later conflict in Kosovo could be the subject of prosecutions.[43] The Tribunal consists of three main organs: the Registry, the office of the Prosecutor and the Chambers.[44] The Registry is the administrative body,[45] while the Office of the Prosecutor is responsible for investigations, issuing of indictments and bringing matters to trial. There are currently three Trial Chambers, each consisting of a presiding judge and two other judges, and an Appeals Chamber, consisting of seven members but sitting in a panel of five, headed by a President. Of the seven, five come from the ICTY and two from the International Criminal Tribunal for Rwanda.[46] The Chambers have a maximum of sixteen permanent judges and a maximum of twelve *ad litem* judges drawn from a pool of twenty-seven such judges elected by the General Assembly for four-year renewable terms.[47]

Articles 2 to 5 of the Statute lay down the crimes with regard to which the Tribunal can exercise jurisdiction. These are: grave breaches of the Geneva Conventions of 1949, violation of the laws or customs of war, genocide and crimes against humanity.[48]

Article 7 establishes that persons who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution' of crimes listed in articles 2 to 5 shall be individually responsible for the crime. This article also provides that the official position of any accused person is not to relieve a person of criminal responsibility nor mitigate punishment, while the fact that a subordinate committed the crime is not to relieve a superior of responsibility if the latter knew or had reason to know that the subordinate was about to or had committed the crime and the superior failed to take the necessary and reasonable measures to prevent the acts or to punish the perpetrators thereof. It is also stipulated that the fact that an accused person acted pursuant to an order of a government or of a superior will not relieve him of criminal responsibility, although this may constitute a mitigating factor if the Tribunal determines that justice so requires. The Appeals Chamber of the Tribunal

[43] See Security Council resolution 1160 (1998) and *Milutinović*, ICTY, A. Ch. 8 June 2004. See also as to events in the Former Yugoslav Republic of Macedonia, *In re: The Republic of Macedonia I*, ICTY, T. Ch. 4 October 2002.

[44] Article 11. [45] Article 17. [46] Article 14.

[47] Articles 12 and 13. [48] See further below, p. 430.

in the *Tadić* case confirmed that customary international law had imposed criminal responsibility for serious violations of humanitarian law governing internal as well as international armed conflicts.[49]

The Tribunal and national courts have concurrent jurisdiction with regard to the prosecution of relevant accused persons, but the Tribunal has primacy over national courts, so that the former may request the latter to defer to its competence.[50] States are obliged to co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law and must comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including the identification and location of persons; the taking of testimony and the production of evidence; the arrest or detention of persons; and the surrender or the transfer of the accused to the International Tribunal.[51] No person may be tried by a national court for acts constituting serious violations of international humanitarian law under the Statute, for which he or she has already been tried by the International Tribunal, but the Tribunal may try a person for relevant acts after trial by a national court where the act for which he or she was tried was characterised as an ordinary crime; or where the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[52]

Investigations into alleged offences under the Statute are initiated by the Prosecutor either *ex officio* or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organisations. Information received is assessed by the Prosecutor, who then decides whether there is a sufficient basis to proceed. The Prosecutor may question suspects, victims and witnesses, collect evidence and conduct on-site investigations.

[49] See IT-94-1-AR72, 2 October 1995, p. 70; 105 ILR, p. 419. See further below, chapter 21, p. 1194.

[50] Article 9. Under Rule 9 of the Rules of Procedure and Evidence as amended, deferral of national proceedings may be requested where the act being investigated or which is the subject of those proceedings is characterised as an ordinary crime; or there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal. See as to the different situation with regard to the International Criminal Court, below, p. 410.

[51] Article 29. [52] Article 10.

Where it is determined that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged, and this indictment is then transmitted to a judge of the Trial Chamber, who will review it. If satisfied that a *prima facie* case has been established by the Prosecutor, the judge will confirm the indictment. If not so satisfied, the indictment shall be dismissed. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial. It will then be for the Trial Chambers to ensure that the 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.[53] Judgment will then be reached by the Trial Chamber concerned and punishment, limited to imprisonment, imposed upon conviction.[54] Appeal is to the Appeals Chamber on the grounds either of an error of law invalidating the decision or of an error of fact occasioning a miscarriage of justice. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.[55]

The Tribunal has dealt with a number of significant issues.[56] In an early case, the Appeal Chamber held that it had the power to review the question of the legality of the establishment of the Tribunal and noted that the Security Council had adopted a decision under Chapter VII of the UN Charter binding on all member states to create the Tribunal in the framework of the restoration of international peace and security.[57]

As of early March 2008, the Tribunal had issued 161 indictments; 111 proceedings had been concluded, with regard to which 53 individuals had been sentenced, 9 acquitted and 36 indictments withdrawn (including where the accused had died). Four persons indicted were still at large, including Radovan Karadžić and Ratko Mladić, the leaders of the Bosnian Serbs during the war.[58] However, the UN Security Council has

[53] Articles 18–20. [54] Article 24. [55] Article 25. [56] See further below, pp. 435 ff.

[57] *Tadić*, IT-94-1-AR72, 2 October 1995, p. 70, paras. 30 ff.; 105 ILR, p. 419. After this decision, the Dayton Peace Agreement was signed, which includes the obligation placed upon all states of the former Yugoslavia to co-operate with the Tribunal: see Article X, Annex 1-A.

[58] See www.un.org/icty/glance-e/index.htm. Note the death in custody of the Yugoslav President Slobodan Milošević on 11 March 2006 during his trial on sixty-six counts of violations of the Statute including genocide: see ICTY Annual Report 2006, A/61/271 – S/2006/666, para. 55. After the text above was written, Radovan Karadžić was arrested in Belgrade and sent to the Tribunal, who assigned his case to a Trial Chamber: see IT-95-5/18-I, 22 July 2008.

confirmed a completion strategy which is intended to ensure a phased and co-ordinated completion of the Tribunal's mission by the end of 2010.[59] Under this strategy, the ICTY has concentrated on the prosecution and trial of the most senior leaders while referring other cases involving intermediate and lower-rank accused to national courts. Two main categories of cases have been referred to national courts in the region of the former Yugoslavia, being those cases that were investigated to different levels by the Tribunal's Prosecution which did not result in the issuance of an indictment by the ICTY and the small number of cases that were investigated by the Tribunal's Prosecution and that resulted in the confirmation of indictments by the Tribunal and the transfer of accused persons to the Tribunal's custody. Cases began to be transferred to the national courts of successor states to the former Yugoslavia, particularly Bosnia and Croatia, in 2005.[60] By mid-2007, thirteen 'lower to mid-level accused' had been transferred to local courts.[61]

The International Criminal Tribunal for Rwanda (ICTR)[62]

Following events in Rwanda during 1994 and the mass slaughter that took place, the Security Council decided in resolution 955 (1994) to establish an International Criminal Tribunal for Rwanda, with the power to prosecute persons responsible for serious violations of international humanitarian law. The Statute of this Tribunal was annexed to the body of the Security Council resolution and bears many similarities to the Statute of the Yugoslav Tribunal.

[59] See resolutions 1503 (2003) and 1534 (2004). Under the resolutions the Trial Chambers were required to complete their business by 2008 and the Appeals Chamber by 2010. See also D. Raab, 'Evaluating the ICTY and Its Completion Strategy', 3 *Journal of International Criminal Justice*, 2005, p. 82.

[60] See M. Bohlander, 'Referring an Indictment from the ICTY and ICTR to Another Court – Rule 11 *bis* and the Consequences for the Law of Extradition', 55 ICLQ, 2006, p. 219. See also below, pp. 409 ff.

[61] See ICTY Annual Report 2007, A/62/172 – S/2007/469, para. 10.

[62] See e.g. UN Secretary-General Reports S/1994/879 and S/1994/906 and the Report of the Special Rapporteur for Rwanda of the UN Commission on Human Rights, S/1994/1157, annex I and annex II, and the Report of the Commission of Experts, S/1994/1125. See also V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda*, New York, 1998; L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, The Hague, 2005; L. Sunga, 'The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda', 16 HRLJ, 1995, p. 121, and R. S. Lee, 'The Rwanda Tribunal', 9 *Leiden Journal of International Law*, 1996, p. 37.

The Rwanda Tribunal consists of three Trial Chambers, an Office of the Prosecutor and a Registry with the same functions as those of the Yugoslav Tribunal.[63] The Chambers are composed of sixteen permanent independent judges, no two of whom may be nationals of the same state, and a maximum at any one time of nine *ad litem* independent judges. The ICTR and the ICTY share a joint Appeals Chamber, two members of whom are members of the Rwanda Tribunal.[64]

Articles 2 to 4 stipulate the crimes over which the Tribunal has jurisdiction. Article 2 deals with genocide; article 3 with crimes against humanity, being the crimes of (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds; and article 4 deals with violations of article 3 common to the Geneva Conventions and of Additional Protocol II.[65] Article 6 provides for individual criminal responsibility with regard to persons planning, ordering, committing or aiding the crimes listed, while provisions similar to the Statute of the Yugoslav Tribunal with regard to the absence of immunity for persons holding official positions, command responsibility and superior orders apply.

The Tribunal has jurisdiction with regard to serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.[66] As is the case with the ICTY, the ICTR has concurrent jurisdiction with national courts and has primacy over national courts of all states, while at any stage of the procedure, the Tribunal may formally request national courts to defer to its competence.[67] Similarly, no person may be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Criminal Tribunal for Rwanda, while a person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the Tribunal only if either the act for which

[63] Article 10.

[64] See Security Council resolution 1329 (2000). The two Tribunals shared a Prosecutor until a separate Prosecutor was appointed to the ICTR in 2003; see Security Council resolution 1503 (2003).

[65] See below, chapter 21, p. 1194. [66] Article 7. [67] Article 8.

he or she was tried was characterised as an ordinary crime; or the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[68]

After several difficult early years, during which problems of mismanagement with regard to the Office of the Prosecutor and the Registry predominated,[69] the Tribunal began to produce some significant decisions. These commenced with the *Kambanda* case,[70] which was the first time that a former head of government was convicted for the crime of genocide (after having pleaded guilty), and the *Akayesu* case,[71] in which for the first time an international tribunal was called upon to interpret the definition of genocide in the Genocide Convention, 1948 and to define the crime of rape in international law. However, the rate of progress has been disappointing and tensions with Rwanda have surfaced from time to time.[72]

As in the case of the ICTY, the Rwanda Tribunal has formulated a completion strategy, which has been affirmed by Security Council resolutions 1503 (2003) and 1534 (2004), although it had in 2002 adopted Rule 11 *bis* of the Rules of Procedure permitting the transfer of cases to national jurisdictions. The Security Council, as with the ICTY, increased the number of *ad litem* judges and various other management decisions were taken. A separate Prosecutor for the ICTR was appointed in 2003. Attention was focused upon the prosecution of individuals who allegedly were in positions of leadership, and those who allegedly bore the greatest responsibility for the genocide, while the Prosecutor is continuously reviewing his files to determine which cases may be suitable for referral to national jurisdictions for trial. Such decision is for judicial determination. The Prosecutor also holds discussions with states, including Rwanda, regarding the referral of cases to national jurisdictions for trial, in particular with respect to accused persons who were investigated but not indicted by his office. Considerations of fair trial in the state concerned are also a relevant factor, as well as the alleged status and extent of participation of the individual during the genocide, the alleged connection that the individual may have had with other cases, the need to cover the major geographical areas of Rwanda, the availability of evidence with regard to

[68] Article 9.

[69] See e.g. Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, A/51/789 and ICTR Annual Report 1997, A/52/582 – S/1997/868.

[70] ICTR T. Ch. 4 September 1998. [71] ICTR T. Ch. 1 2 September 1998.

[72] As of May 2007, twenty-seven judgments, involving thirty-three accused, had been rendered: see ICTR Annual Report 2007, A/62/284 – S/007/502.

the individual concerned and the availability of investigative material for transmission to a state for national prosecution.[73]

The International Criminal Court (ICC)[74]

Article VI of the Genocide Convention, 1948 provided for persons charged with genocide to be tried either by a court in the territory where the act had been committed or by an 'international penal tribunal' to be established. The International Law Commission was asked to study the possibility of the establishment of such an international court and a report was produced.[75] The matter was then transmitted to the General Assembly which produced a draft statute.[76] However, the question was postponed until a definition of aggression had been achieved and the draft Code of Offences completed. Due primarily to political reasons, no further progress was made until Trinidad and Tobago proposed the creation of a permanent international criminal court to deal with drug trafficking in 1989. Given additional urgency by the developing Yugoslav situation in the early 1990s, the International Law Commission adopted a Draft Statute for an International Criminal Court in 1994.[77] This draft statute proposed that an international criminal court be established with jurisdiction not only over genocide, war crimes, crimes against humanity and aggression, but also over certain 'treaty crimes' such as terrorism and drugs offences found in UN conventions. The draft statute was also less expansive than the International Criminal Court Statute proved to be in a number of ways, including not providing for the Prosecutor to initiate investigations on his or her own authority. However, the ILC draft proved very

[73] See Report on the Completion Strategy of the ICTR 2007, S/2007/676, paras. 32 ff. Of the fourteen indicted persons still at large, five have been earmarked for trial at the Tribunal on the basis of the leadership roles they played during the 1994 genocide, *ibid*., para. 38.

[74] See e.g. Schabas, *International Criminal Court*; *The Permanent International Criminal Court: Legal and Policy Issues* (eds. D. McGoldrick, P. Rowe and E. Donelly), Oxford, 2004; *The Rome Statute of the International Criminal Court* (eds. A. Cassese, P. Gaeta and J. R. W. D. Jones), Oxford, 2002; M. C. Bassiouni, 'The Permanent International Criminal Court' in Lattimer and Sands, *Justice for Crimes Against Humanity*, p. 173; B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, 2003, and *The International Criminal Court: The Making of the Rome Statute* (ed. R. Lee), The Hague, 1999.

[75] See General Assembly resolution 260 (III) B and A/CN.4/15 and A/CN.4/20 (1950).

[76] UNGAOR A/2645.

[77] See Report of the ILC on the Work of its 46th Session, A/49/10, pp. 43 ff. See in particular J. Crawford, 'The ILC's Draft Statute for an International Criminal Court', 88 AJIL, 1994, p. 140, and Crawford, 'The Making of the Rome Statute' in *From Nuremberg to The Hague: The Future of International Criminal Justice* (ed. P. Sands), Cambridge, 2003, p. 109.

influential and a Preparatory Committee was convened in December 1995.[78] The work of this Committee[79] led to the Rome Conference in 1998, which produced after some effort the Rome Statute on the International Criminal Court on 17 July 1998.[80] Sixty states were needed to ratify the Rome Statute in order for it to come into force and this duly happened on 1 July 2002. Unlike the two international criminal tribunals (for the former Yugoslavia and for Rwanda), the ICC is the product not of a binding Security Council resolution, but of an international treaty. This was essentially because states, while being prepared to accept the creation of geographically limited and temporally constrained (in Rwanda's case) tribunals by Security Council action, were not willing to be so bound by the establishment of a permanent international criminal court with much more extensive jurisdiction without express consent. Secondly, it is to be noted that the range and content of the Rome Statute is far greater than those of the two international criminal tribunals. The Rome Statute contains 128 articles, while the ICTY Statute contains 34 articles and the ICTR Statute 32 articles

The Statute provides that the jurisdiction of the International Criminal Court is limited to the 'most serious crimes of concern to the international community as a whole', being genocide, crimes against humanity, war crimes and aggression,[81] and that a person who commits a crime within the jurisdiction of the Court 'shall be individually responsible and liable for punishment' in accordance with the Statute.[82] The ICC only has jurisdiction with respect to crimes committed after the Statute came into force and with respect to states which have become parties to the Statute.[83]

[78] General Assembly resolution 50/46. See also resolutions 51/207 and 52/160.

[79] See A/51/22 and A/CONF.183/13 (III), p. 5.

[80] See Schabas, *International Criminal Court*, pp. 18 ff.

[81] Article 5. These provisions are further defined in detail in articles 6–8 and see below, p. 430. In addition, article 9 provides for the preparation of Elements of Crimes to assist the Court in the interpretation and application of articles 6, 7 and 8. This was adopted on 9 September 2002 by the Assembly of States Parties, together with the Rules of Procedure and Evidence. However, jurisdiction cannot be exercised with regard to the crime of aggression until the Statute has been amended by its definition and the acceptance of conditions for jurisdiction. A review conference is due to take place in 2009 during which the issue is to be discussed.

[82] Article 25.

[83] Article 11. Note, however, that a state may make a declaration under article 12(3) to permit the Court to exercise jurisdiction in the particular case as from 1 July 2002. Note also that under article 124, a state may, upon ratification, decide not to accept the jurisdiction of the ICC over war crimes with regard to its nationals or to crimes committed on its territory for a period of seven years. In fact, only France and Colombia have taken advantage of this provision.

Further, jurisdiction may only be exercised provided either the state on the territory of which the conduct in question occurred (or if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft) or the state of which the person accused of the crime is a national is a party to the Statute.[84] This means that the jurisdiction of the ICC is not universal, but territorial or personal in nature. It also means that the national of a state which is not a party to the Statute may be prosecuted where the crime is committed in the territory of a state which is a party. However, the Court may also have jurisdiction where a situation has been referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter, which is thereby binding and in which case it is unnecessary that a relevant state be a party to the Statute.[85] This has happened with regard to the situation in Darfur, Sudan, which was referred to the Prosecutor on 31 March 2005 by the Security Council in resolution 1593. After a preliminary examination of the situation, an investigation was opened on 1 June 2005 and after a twenty-month investigation into crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor presented evidence to the judges and a summons to two named Sudanese individuals, one being a government minister and the other a military officer, to appear was issued with regard to charges alleging the commission of war crimes and crimes against humanity.[86] Warrants of arrest were issued on 27 April 2007 against the two individuals by Pre-Trial Chamber I.[87]

In addition to the Security Council referral, the ICC is also able to exercise its jurisdiction with regard to one or more of the crimes in question where the situation in which one or more of these crimes appears to have been committed has been referred to the Prosecutor by a state party to the Statute,[88] or the where Prosecutor has himself or herself initiated an investigation.[89] In the latter case, where the Prosecutor concludes, after having analysed the seriousness of the information received, that there is a reasonable basis to proceed to an investigation, a request for authorisation of an investigation, together with any supporting material collected, will be submitted to the Pre-Trial Chamber. Victims may also make representations to the Pre-Trial Chamber, in accordance with the

[84] Article 12(2). [85] Article 13(b).

[86] See www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf.

[87] See ICC-02/05-01/07-2 01-05-2007 1/16 CB PT and ICC-02/05-01/07-3 01-05-2007 1/17 CB PT. See also Schabas, *International Criminal Court*, pp. 47 ff. The Prosecutor applied for a warrant of arrest against the President of Sudan on 14 July 2008 alleging genocide, war crimes and crimes against humanity, ICC-OTP-20080714-PR341-ENG.

[88] Articles 13(a) and 14. [89] Article 13(c).

Rules of Procedure and Evidence. Where the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.[90]

There have been three examples to date of referral by a state party. In December 2003, Uganda referred to the Prosecutor the situation with regard to the Lord's Resistance Army;[91] in April 2004, the Democratic Republic of the Congo referred to the Prosecutor the situation of crimes committed in its territory;[92] and in December 2004, the Central African Republic referred the situation in its country during the armed conflict of 2002–3 to the Prosecutor.[93]

However, in a concession to obtain the support of states to the ICC, article 16 provides that no investigation or prosecution may be commenced

[90] Article 15. The refusal of the Pre-Trial Chamber to authorise the investigation will not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

[91] In July 2004, an investigation was opened by the Prosecutor, and on 8 July 2005, warrants of arrest for crimes against humanity and war crimes against five senior commanders of the Lord's Resistance Army were issued under seal by Pre-Trial Chamber II. These warrants were made public on 13 October 2005: see www.icc-cpi.int/library/cases/ICC_20051410-056-1_English.pdf and Schabas, *International Criminal Court*, pp. 36 ff.

[92] See ICC-OTP-20040419-50-En. An investigation was opened in June 2004, the first such investigation by the Prosecutor: see ICC-OTP-20040623-59-En. An arrest warrant was issued in early 2006 against Thomas Lubanga Dyilo, who was charged on various counts concerning the recruitment and use of child soldiers: see *ICC Newsletter*, No. 10, November 2006. However, a stay on proceedings was ordered and the accused released due to fair trial considerations. An appeal is pending, ICC-01/04-01/06, 2 July 2008. An arrest warrant was issued against Germain Katanga on 2 July 2007 and he was transferred to the custody of the Court in October that year: see www.icc-cpi.int/library/cases/DRC-18-10-07_En.pdf. An arrest warrant was issued against Mathieu Ngudjolo Chui on 7 July 2007 and he was transferred to the custody of the Court in February 2008: see www.icc-cpi.int/pressrelease_details&id=329.html. Both the latter individuals are also charged with regard to the situation in the Congo. See also Schabas, *International Criminal Court*, pp. 42 ff.

[93] An investigation was opened by the Prosecutor in May 2007: see www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf and Schabas, *International Criminal Court*, pp. 51–2.

or proceeded with for a period of twelve months after the Security Council, in a resolution adopted under Chapter VII of the Charter, has so requested the Court. Such request may be renewed by the Council under the same conditions.[94] Article 98(2) provides that the Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court can first obtain the co-operation of the sending state for the giving of consent for the surrender. The provision, which was intended to deal with conflicting obligations, such as the position of soldiers stationed overseas under Status of Forces agreements which allow the sending state to exercise elements of criminal jurisdiction with regard to its soldiers, has been used by the US for a much broader purpose. The US has signed a number of bilateral agreements with states, some parties to the Rome Statute and some not, which provide that no nationals, current or former officials, or military personnel of either party may be surrendered or transferred by the other state to the ICC for any purpose. This tactic has been widely criticised and is highly controversial.[95]

A key feature of the ICC, and one that distinguished it from the two international criminal tribunals, is that it is founded upon the concept of complementarity, which means essentially that the national courts have priority. A case will be inadmissible and the Court will be unable to exercise jurisdiction in a number of situations.[96] These are, first, where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the

[94] See Security Council resolution 1422 (2002) calling for the ICC to defer any exercise of jurisdiction for twelve months if a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a UN established or authorised operation. This was renewed for a further twelve months in resolution 1487 (2003), but not subsequently: see e.g. D. McGoldrick, 'Political and Legal Responses to the ICC' in McGoldrick *et al. The Permanent International Criminal Court*, p. 415. However, resolutions 1497 (2003) and 1593 (2005) provide that personnel from a state not a party to the Rome Statute will be subject to the exclusive jurisdiction of that state for all acts related to the multinational force or UN force in Liberia and Darfur respectively: see Cryer *et al.*, *Introduction to International Criminal Law*, pp. 142 ff.

[95] See e.g. Cryer *et al.*, *Introduction to International Criminal Law*, pp. 144–5; M. Benzing, 'US Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court', 8 *Max Planck Yearbook of United Nations Law*, 2004, p. 182, and Schabas, *International Criminal Court*, pp. 29 ff.

[96] Article 17. See also the *Thomas Lubanga Dyilo* case, ICC-01/04-01/06, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006.

investigation or prosecution; secondly, where the case is being investigated or prosecuted by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness[97] or inability[98] of the state genuinely to prosecute; and thirdly, where the person concerned has already been tried for conduct which is the subject of the complaint, unless the proceedings before the court other than the ICC were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC or where those proceedings were not conducted independently or impartially.[99]

The Court consists of four organs. These are respectively the Presidency; an Appeals Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor; and the Registry.[100] The eighteen judges elected must be independent and serve on a full-time basis,[101] have competence in criminal law or in relevant areas of international law and must represent the principal legal systems in the world, as well as reflect equitable geographical representation and the need for a fair representation of male and female judges. The judges are elected by the Assembly of States Parties using rather complicated voting rules.[102] The Presidency, consisting of the President and the First and Second Vice-Presidents, is responsible for the proper administration of the Court (apart from the Office of the Prosecutor),[103] while the Registry is responsible for the non-judicial aspects of the administration and servicing of the Court.[104] The Office of the Prosecutor acts independently as a separate organ of the Court. It is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.[105] The Office is headed by the Prosecutor who is elected by secret ballot by members of the Assembly of States Parties and assisted by one or more Deputy Prosecutors.[106]

[97] In order to determine this, the Court must consider whether the proceedings were being undertaken or the decision made in order to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC; whether there has been an unjustified delay in the proceedings, and whether the proceedings have been conducted independently or impartially, article 17(2)a–c.

[98] In order to determine this, the Court must consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, article 17(3).

[99] Article 20(3). [100] Article 34. [101] Article 40. [102] Article 36.
[103] Article 38. [104] Article 43. [105] See further articles 53–5. [106] Article 42.

The Pre-Trial Division is composed of judges with predominantly criminal trial experience, who serve in the Division for a period of three years. The Pre-Trial Chamber is composed either of a single judge or of a bench of three judges[107] and confirms or rejects the authorisation to commence an investigation and makes a preliminary determination that the case falls within the jurisdiction of the Court, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. The Pre-Trial Chamber may also review a decision of the Prosecutor not to proceed with an investigation either on its own initiative, or at the request of the state making a referral under article 14, or the United Nations Security Council under article 13(b),[108] and can issue warrants of arrests and summons to appear before the Court at the request of the Prosecutor, issue orders to grant the rights of the parties in the proceeding, and, where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information. Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber holds a hearing in the presence of the Prosecutor, the person charged and his/her counsel to confirm or reject the charges. Once the Pre-Trial Chamber has confirmed the charges and committed the person for trial by the Trial Chamber, the Presidency will establish a Trial Chamber to conduct subsequent proceedings.

The Trial Division is also predominantly composed of judges with criminal trial experience who serve for a period of three years. Three judges of the Division carry out the judicial functions of the Trial Chamber.[109] The primary function of the Trial Chamber is to ensure that a trial is fair and expeditious, and is conducted with full respect for the rights of the accused with regard for the protection of victims and witnesses.[110] The Trial Chamber will determine whether the accused is innocent or guilty. In the latter case, imprisonment for a specified number of years, which may not exceed a maximum of thirty years or a term of life imprisonment, may be imposed. Financial penalties may also be imposed[111] and the Trial Chamber can also order a convicted person to pay money for compensation, restitution or rehabilitation for victims.[112] The trial must be held in public unless special circumstances require that certain proceedings be in

[107] Article 39(2)(b)(iii). [108] Article 53. [109] Article 39(2)(b)(ii).
[110] Article 64. [111] Article 77. [112] Article 75(2).

closed session to protect confidential or sensitive information to be given in evidence, or to protect victims and witnesses.[113]

The Appeals Division is composed of judges with established competence in relevant areas of international law and the Appeals Chamber is composed of all the judges assigned to the Appeals Division.[114] The Prosecutor or the convicted person can appeal against the decisions of the Pre-Trial and Trial Chambers to the Appeals Chamber. A sentence may be appealed on the ground of procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision. Further, a sentence may be appealed on the ground of disproportion between the crime and the sentence.[115] The Appeals Chamber may decide to reverse or amend the decision, judgment or sentence, or order a new trial before a different Trial Chamber.[116]

Hybrid courts and other internationalised domestic courts and tribunals[117]

In addition to the temporary and geographically limited international criminal tribunals and the permanent International Criminal Court, a new style of judicial institution has made an appearance recently in which both international and national elements co-exist in varying combinations. Such institutions, which may for convenience be termed hybrid courts, exist primarily to enhance legitimacy and increase acceptability both locally and internationally, invariably in difficult post-conflict situations where reliance upon purely domestic mechanisms carries significant political risks or costs. However, as will be seen, there are a number of models adopted which differ as to formal legal origin, constitutional status, applicable law and structure. Some of these mechanisms may more

[113] Article 68. [114] Article 39(2)(b)(i).

[115] Article 81. Either party may appeal against decisions as to, for example, jurisdiction or admissibility; decisions as to the grant or denial of the release of the person being investigated or prosecuted; and decisions of the Pre-Trial Chamber to act on its own initiative under article 56(3): see article 82.

[116] Article 83. The revision of the sentence can be requested if new evidence has been discovered which was not available at the time of the trial and is sufficiently important or decisive for the Appeals Chamber to revise or amend the sentence: see article 84.

[117] See e.g. *Internationalized Criminal Courts* (eds. C. P. R. Romano, A. Nollkaemper and J. K. Kleffner), Oxford, 2004; Cryer *et al.*, *Introduction to International Criminal Law*, chapter 9; Schabas, *The UN International Criminal Tribunals*; and L. A. Dickinson, 'The Promise of Hybrid Courts', 97 AJIL, 2003, p. 295.

correctly be termed internationalised courts or tribunals[118] as the balance between the international and the domestic tips far to the latter. They are essentially domestic courts applying domestic law, but with a heightened international element in terms, for example, of their function or origins, the basis of their applicable law or the use of international experts. Some courts are difficult to place along the spectrum, but together this category marks an extension of international concern and involvement in issues focusing upon individual criminal responsibility for what are international crimes, even if subsequently incorporated into domestic law.

The Special Court for Sierra Leone

The Special Court for Sierra Leone was established, following a particularly violent civil war, by virtue of an agreement between the UN and Sierra Leone dated 16 January 2002, pursuant to Security Council resolution 1315 (2000), in order to prosecute persons bearing 'the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996' on the basis of individual criminal responsibility.[119] However, it is stipulated that any transgressions by peacekeepers and related personnel present in the country by virtue of agreements with the UN or other governments or regional organisations or otherwise with the consent of the Sierra Leonean government are within the 'primary jurisdiction' of the sending state.[120]

The Special Court consists of the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor and the Registry. Three judges serve

[118] See for this terminology, M. P. Scharf, 'The Iraqi High Tribunal', 5 *Journal of International Criminal Justice*, 2007, pp. 258, 259.

[119] Article 1 of the Agreement contained in S/2002/246, Appendix II, and articles 1 and 6 of the Statute of the Special Court, contained in S/2002/246, Appendix III, and see Security Council resolution 1436 (2002) affirming 'strong support' for the Court, and the Report on the Special Court by Professor A. Cassese, the independent expert commissioned by the UN Secretary-General to review the work of the Special Court, December 2006, www.sc-sl.org/documents/independentexpertreport.pdf. See also R. Cryer, 'A "Special Court" for Sierra Leone', 50 ICLQ, 2001, p. 435; Schabas, *The UN International Criminal Tribunals*; A. Smith, 'Sierra Leone: The Intersection of Law, Policy and Practice', P. Mochochoko and G. Tortora, 'The Management Committee for the Special Court for Sierra Leone', and W. A. Schabas, 'Internationalized Courts and their Relationship with Alternative Accountability Mechanisms' in Romano *et al.*, *Internationalized Criminal Courts*, at pp. 125, 141 and 157 respectively.

[120] Article 1(2) of the Statute of the Special Court for Sierra Leone.

in each Trial Chamber, of whom one is appointed by the Sierra Leonean government and two are appointed by the UN Secretary-General. Five judges sit in the Appeals Chamber, of whom two are appointed by the government and three by the UN Secretary-General.[121] The Appeals Chamber hears appeals from persons convicted by the Trial Chamber or from the Prosecutor on the grounds of procedural error, an error on a question of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber. In so acting, the judges of the Appeals Chamber of the Special Court are to be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they are to be guided by the decisions of the Supreme Court of Sierra Leone.[122]

The Prosecutor, who is appointed by the UN Secretary-General for a three-year term and acts independently as a separate organ of the Special Court, is responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Office of the Prosecutor has the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. The Prosecutor is assisted by a Sierra Leonean Deputy Prosecutor, and by a mixture of Sierra Leonean and international staff.[123] The Registry is responsible for the administration and servicing of the Special Court and is appointed by the UN Secretary-General after consultation with the President of the Special Court.[124]

The jurisdiction of the Special Court mirrors the hybrid nature of its creation and staffing. The Court has jurisdiction with regard to crimes against humanity; violations of article 3 common to the Geneva Conventions and of Additional Protocol II; other serious violations of

[121] Article 12(1). Eight judges were appointed in July 2002: see UN Press Release SG/A/813. There are currently eleven judges and one alternate judge.

[122] Article 20. Under article 21, the convicted person or the Prosecutor may apply to the Appeals Chamber for review where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or Appeals Chamber and which could have been a decisive factor in reaching the decision. The Appeals Chamber may reject the application, reconvene the Trial Chamber or retain jurisdiction over the matter.

[123] Article 15. [124] Article 16.

international humanitarian law[125] and certain crimes under Sierra Leonean law.[126] Article 8 of the Statute provides that the Special Court and the national courts of Sierra Leone have concurrent jurisdiction, but that the Special Court has primacy over the national courts and that at any stage of the procedure it may formally request a national court to defer to its competence. The Annual Report of the Special Court for 2006–7 notes that thirteen persons were indicted, all between March and September 2003. Of these, nine were in custody, one dead, one still at large, while two indictments were withdrawn. Trials of the nine in custody began in 2004 and 2005 in three joint trials. Of particular interest is the Charles Taylor case. He was the former President of Liberia. His claim to immunity was rejected by the Appeals Chamber in May 2004[127] and he is currently standing trial in The Hague at the premises of the ICC.[128] Judgment in the *AFRC* trial was handed down on 20 June 2007 and the three accused convicted of offences. Sentencing took place on 19 July 2007 and the appeal against sentencing was dismissed on 22 February 2008.[129] On 2 August 2007, Trial Chamber I reached a decision in the trial of three persons accused of being leaders of the so-called 'Civil Defence Forces', of whom one died prior to pronouncement of judgment, in which the two remaining accused were convicted.[130] The Special Court adopted a completion strategy under which proceedings were due to be completed in 2007.[131] However, this date was not able to be met.

[125] Articles 2–4 of the Statute.

[126] Article 5 of the Statute. These crimes relate to offences relating to the abuse of girls under the Prevention of Cruelty to Children Act 1926 and offences relating to the wanton destruction of property under the Malicious Damages Act 1861. However, the Special Court has no jurisdiction with regard to any person under the age of fifteen at the time of the alleged commission of the crime. No person may be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court. But a person who has been tried by a national court for the acts referred to in articles 2 to 4 of the Statute may be subsequently tried by the Special Court if either the act for which he or she was tried was characterised as an ordinary crime; or the national court proceedings were not impartial or independent, or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted: see article 9.

[127] See www.sc-sl.org/Documents/Taylor/SCSL-03-01-I-059.pdf.

[128] See Annual Report 2006–7, p. 5.

[129] See www.sc-sl.org/AFRC.html.

[130] See www.sc-sl.org/documents/CDF/SCSL-04-14-T-785A.pdf. See also S. M. Meisenberg, 'Legality of Amnesties in International Humanitarian Law – The Lomé Decision of the Special Court for Sierra Leone', 86 *International Review of the Red Cross*, 2004, p. 837.

[131] See A/59/816 – S/2005/350.

The Extraordinary Chambers of Cambodia

The Khmer Rouge regime under Pol Pot took power in Cambodia in 1975 following a civil war and proceeded to commit widescale atrocities which are believed to have resulted in the death of well over 1 million people. The regime was ousted by a Vietnamese invasion in 1979. In 1997, the Cambodian government requested the United Nations (UN) to assist in establishing a trial process in order to prosecute the senior leaders of the Khmer Rouge. In 2001, the Cambodian National Assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime. On 13 May 2003, after a long period of negotiation, the UN General Assembly approved a Draft Agreement between the UN and Cambodia providing for Extraordinary Chambers in the courts of Cambodia, with the aim of bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.[132] The Agreement was ratified by Cambodia on 19 October 2004.

Article 2 of the Agreement provided that the Extraordinary Chambers were to have subject-matter jurisdiction consistent with that laid down in the Cambodian Law (of 2001) and that the Agreement was to be implemented via that law. However, it is provided also that the Vienna Convention on the Law of Treaties, 1969 is to apply to the Agreement. Accordingly, the Agreement must be seen as an international treaty, although one closely linked with the relevant domestic law. The Chambers are composed of a Trial Chamber, consisting of three Cambodian judges and two international judges, and a Supreme Court Chamber, serving as both appellate chamber and final instance and consisting of four Cambodian judges and three international judges. The UN Secretary-General was to nominate seven judges and the Cambodian Supreme

[132] See General Assembly resolutions 57/228A and 57/228B and A/57/806. See also R. Williams, 'The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?', 53 ICLQ, 2004, p. 227; G. Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers', 6 *Journal of International Criminal Justice*, 2008, p. 129; C. Etcheson, 'The Politics of Genocide Justice in Cambodia' and E. E. Meijer, 'The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization and Procedure of an Internationalized Tribunal' in Romano *et al.*, *Internationalized Criminal Courts*, at pp. 181 and 207 respectively.

Council of Magistracy, the highest domestic judicial body, was to choose five of these to serve in the Chambers.[133] The Agreement also provided for independent co-investigation judges, one Cambodian and one international, who are responsible for the conduct of investigations,[134] and two independent co-prosecutors, one Cambodian and one international, competent to appear in both Chambers, who are responsible for the conduct of the prosecutions.[135]

The jurisdiction of the Extraordinary Chambers covers the crime of genocide as defined in the Genocide Convention, 1948, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as are defined in Chapter II of the Cambodian Law of 2001.[136] The procedure of the Chambers is to be in accordance with Cambodian law, but where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level. It is also provided that the Extraordinary Chambers are to exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.[137]

A list of five suspects was submitted by the prosecutors on 19 July 2007 to the Chambers with a request that they be indicted and, on 31 July 2007, the first suspect (Khang Khek Ieu, known as 'Duch') was indicted.[138] To

[133] Article 3 of the Agreement. The Secretary-General nominated seven judges in March 2006 and the Supreme Council of Magistracy approved a list of thirty Cambodian and international judges in May that year to be followed by appointment by Royal Decree. The judges were duly sworn in in July 2006 and Internal Rules were adopted in June 2007 and revised in February 2008.

[134] Article 5.

[135] Article 6. In the case of both the co-investigating judges and co-prosecutors, the UN Secretary-General was to make two nominations out of which the Supreme Council of Magistracy was to choose one international investigating judge and one international prosecutor. Any differences between the two co-investigating judges and the two co-prosecutors are to be settled by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General: see article 7.

[136] Article 9. [137] Article 12.

[138] Case file No. 001/18-07-2007-ECCC/OCIJ. See also Annual Report 2007, p. 11.

date, five suspects are before the Chambers[139] and two appeal proceedings have taken place.[140]

Kosovo Regulation 64 panels[141]

Following the conflict between the Federal Republic of Yugoslavia (as it then was, today Serbia) and NATO in 1999, the Security Council adopted resolution 1244, which *inter alia* called for the establishment of an 'international civil presence' in Kosovo. The international civil presence was granted responsibilities, including promoting 'the establishment, pending a final settlement, of substantial autonomy and self-government'; performing basic civilian administrative functions; organising the development of provisional institutions for democratic and autonomous self-government pending a political settlement; and protecting and promoting human rights.[142] The competence of the international civil presence carried out by the UN Interim Administration Mission in Kosovo (UNMIK) was extensive. Section 1.1 of the first regulation issued by UNMIK in 1999 stated that: 'All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary General',[143] while section 1.2 provided that the Special Representative could appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person in accordance with the applicable law.[144]

Following a series of disturbances in 2000, UNMIK Regulation 2000/6 was adopted, providing for the appointment of international judges and prosecutors,[145] and UNMIK Regulation 2000/64 was adopted, providing for UNMIK to create panels (known as Regulation 64 panels) of three judges, including at least two international judges, at the request

[139] Annual Report 2007, pp. 9 ff [140] Annual Report 2007, pp. 13–14.

[141] See e.g. J. Cerone and C. Baldwin, 'Explaining and Evaluating the UNMIK Court System' and J. C. Cady and N. Booth, 'Internationalized Courts in Kosovo: An UNMIK Perspective' in Romano *et al.*, *Internationalized Criminal Courts*, at pp. 41 and 59 respectively. See also S. de Bertodano, 'Current Developments in Internationalized Courts', 1 *Journal of International Criminal Justice*, 2003, pp. 226, 239 ff., and *Finding the Balance: The Scales of Justice in Kosovo*, International Crisis Group, 2002.

[142] Paragraphs 10 and 11. [143] UNMIK/REG/1991/1, S/1999/987, p. 14.

[144] As amended in UNMIK/REG/2000/54.

[145] Initially in Mitrovica and then in all domestic courts and the Supreme Court: see UNMIK Regulation 2000/34. Note that attempts to establish a Kosovo War and Ethnic Crimes Court were abandoned in September 2000: see Cady and Booth, 'Internationalized Courts in Kosovo', p. 60.

of the accused, defence counsel or prosecutor. Such international judges functioned as regular court judges in Kosovo with powers derived from domestic legislation, but their involvement in a case was under either their own control or at the behest of the UN Secretary-General's Special Representative in Kosovo. The applicable law was stated to be regulations promulgated by the Special Representative and subsidiary instruments issued thereunder and the law in force in Kosovo on 22 March 1989.[146] However, problems surfaced, particularly with regard to the high rate of national judge convictions overturned by retrials by international judges and lack of systematic publication of case decisions and brevity of such decisions.[147] Kosovo declared independence in early 2008.[148]

East Timor Special Panels for Serious Crimes[149]

Following a period of violence in East Timor instigated by pro-Indonesian militia after the ending of the long Indonesian occupation, the Security Council established the UN Transitional Administration in East Timor (UNTAET) with a wide-ranging mandate to administer the territory.[150] By Regulation No. 1 adopted on 27 November 1999, all legislative and executive authority with respect to East Timor, including the administration of the judiciary, was vested in UNTAET and exercised by the Transitional Administrator. This administrator was given the competence further to appoint any person to perform functions in the civil administration in the territory, including the judiciary, or remove such person and to issue regulations and directives. UNTAET created a new courts

[146] See UNMIK/REG/1999/24 and UNMIK/REG/2000/59. Section 1.3 provided that all persons exercising public functions were to observe internationally recognised human rights standards as reflected in particular in the Universal Declaration of Human Rights, the International Covenants on Human Rights, the European Convention on Human Rights, the Racial Discrimination Convention, the Women's Discrimination Convention, the Torture Convention and the Rights of the Child Convention.

[147] See e.g. de Bertodano, 'Current Developments in Internationalized Courts', pp. 239 ff.

[148] See above, chapter 5, p. 201.

[149] See e.g. S. de Bertodano, 'East Timor: Trials and Tribulations' in Romano *et al.*, *Internationalized Criminal Courts*, p. 79; S. Linton, 'Prosecuting Atrocities at the District Court of Dili', 2 *Melbourne Journal of International Law*, 2001, p. 414, and S. Linton and C. Reiger, 'The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admission of Guilt, Duress and Superior Orders', 4 *Yearbook of International Humanitarian Law*, 2001, p. 1. See also the report produced by the Judicial System Monitoring Programme in April 2007, www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES %20DIGEST%20(Megan)%20250407.pdf.

[150] Resolution 1272 (1999). See also resolution 1264 (1999) and S/1999/24.

system,[151] including the establishment of special panels to deal with serious crimes within the District Court of Dili and in the Court of Appeal.[152] These serious crimes were defined as genocide, war crimes, crimes against humanity, murder, sexual offences and torture,[153] for which there was individual criminal responsibility.[154] The applicable law was the law of East Timor as promulgated by sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and, where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict.

The Panels in the District Court of Dili were to be composed of two international judges and one East Timorese judge, as were the Panels in the Court of Appeal in Dili. In cases of special importance or gravity, a panel of five judges composed of three international and two East Timorese judges could be established.[155] However, the system had barely started before 2003 and in the *Armando Dos Santos* case, the Court of Appeal held, in a decision much criticised,[156] that since the Indonesian occupation was illegal, Indonesian law was never validly in force so that domestic law was Portuguese law and, further, Regulation 2000/15 could not be applied retroactively so that only Portuguese law could be applied to crimes committed before 6 June 2000.[157] On 20 May 2002, the UN handed over its authority to the new institutions of East Timor and UNTAET was replaced by the UN Mission of Support in East Timor (UNMISET), although UNTAET regulations continued in force. In May 2005, UNMISET came to an end and the Serious Crimes Unit closed. Partly no doubt as a consequence, the Special Panels suspended operations indefinitely. By this time, fifty-five trials, most involving relatively low-level defendants, had taken place, eighty-four individuals had been convicted and three acquitted.[158]

[151] UNTAET Regulations 2000/11 and 2000/14.

[152] Regulation 2000/15. [153] Defined in sections 4–10 of Regulation 2000/15.

[154] Section 14. [155] Section 22.

[156] See de Bertodano, 'East Timor', pp. 90 ff., and de Bertodano, 'Current Developments in Internationalized Courts: East Timor – Justice Denied', 2 *Journal of International Criminal Justice*, 2004, p. 910.

[157] Case No. 16/201: see www.jsmp.minihub.org/Judgements/courtofappeal/Ct_of_App-dos_Santos_English22703.pdf.

[158] See the digest of cases before the Special Panels, produced in 2007, www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf.

The Bosnia War Crimes Chamber[159]

In January 2003, the Office of the High Representative in Bosnia[160] and the International Criminal Tribunal for the Former Yugoslavia issued a set of joint conclusions recommending the creation of a specialised chamber within the State Court of Bosnia and Herzegovina to try war crimes cases.[161] This was supported by the UN Security Council.[162] The Chamber came into being in 2005 with jurisdiction concerning cases referred to it by the ICTY pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence with regard to lower- to mid-level accused persons. As such, this procedure forms part of the completion strategy of the ICTY.[163] In addition, the Chamber has jurisdiction with regard to cases submitted to it by the Office of the Prosecutor of the ICTY where investigations have not been completed, and the first case was referred to the Chamber on 1 September 2005.[164] Further, the Chamber also has jurisdiction over what have been termed 'Rules of the Road' cases. The 'Rules of the Road' procedure was first established in response to the widespread fear of arbitrary arrest and detention immediately after the conflict in Bosnia. Originally, the Bosnian authorities were obliged to submit every war crimes case proposed for prosecution in Bosnia to the Office of the Prosecutor of the ICTY to determine whether the evidence was sufficient by international standards before proceeding to arrest. This review function was subsequently assumed by the Special Department for War Crimes within the Office of the Prosecutor of the State Court of Bosnia in October 2004. Where the case has not yet led to a confirmed indictment and where the prosecutor determines that the case is 'highly sensitive', it will be passed to the Chamber, otherwise it will be tried before the relevant cantonal or district court. If, however, the indictment has been confirmed, the case will remain with the relevant cantonal or district court.

The Chamber has both trial and appeals chambers and there are currently five judicial panels, each comprising two international judges and one local judge, the latter of whom is the presiding judge of the

[159] See Cryer *et al.*, *Introduction to International Criminal Law*, pp. 159 ff.; Bohlander, 'Referring an Indictment from the ICTY and the ICTR to Another Court', p. 219; *Looking for Justice – The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, 2006, and *Narrowing the Impunity Gap – Trials Before Bosnia's War Crimes Chamber*, Human Rights Watch, 2007.

[160] As to the High Representative, see above, chapter 5, p. 231.

[161] See www.un.org/icty/pressreal/2003/p723-e.htm.

[162] See resolution 1503 (2003).

[163] See above, p. 407.

[164] *Prosecutor* v. *Radovan Stanković*, ICTY, Case No. IT-96-23/2-AR11 bis.1, Decision on Rule 11 *bis* Referral (Appeals Chamber), 1 September 2005, para. 30.

panel. The Office of the Prosecutor of the State Court includes a Special Department for War Crimes and there are five international prosecutors and one international acting prosecutor, as well as eight local prosecutors, including the deputy prosecutor.[165] The Registry manages the process of appointing and engaging international judges and prosecutors. The international judges are appointed by the High Representative after a joint recommendation of the President of the State Court and the President of the High Judicial and Prosecutorial Council, while the international prosecutors are appointed by the High Representative following a joint recommendation from the Bosnian Chief Prosecutor, the President of the High Judicial and Prosecutorial Council and the Registry.[166]

As of October 2006, the Chamber had confirmed a total of eighteen indictments involving thirty-two defendants. In addition to cases initiated locally, the Chamber had received five Rule 11 *bis* referrals, involving nine accused, from the ICTY.[167] The applicable law is that of Bosnia, including criminal and criminal procedure codes introduced by the High Representative in 2003.

The Special Tribunal for Lebanon[168]

Following the assassination of Rafiq Hariri, the former Prime Minister of Lebanon, in February 2005, the Security Council established an International Independent Investigation Commission to aid the Lebanese authorities in their investigation. As a result of its report and the request of the Lebanese government to establish 'a tribunal of an international character' to try those persons accused of the assassination,[169] the Security Council adopted resolution 1664 (2006) calling upon the UN Secretary-General to negotiate an agreement with the government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice. The Secretary-General's report[170] was accepted by the Council in resolution 1757 (2007). Acting

[165] See Human Rights Watch, *Looking for Justice*, pp. 4 ff.

[166] The appointments by the High Representative are made under the powers vested in him by article 5, annex 10, of the Dayton Peace Accord.

[167] See Human Rights Watch, *Narrowing the Impunity Gap*, p. 5.

[168] See e.g. Cryer *et al.*, *Introduction to International Criminal Law*, p. 155; B. Fassbender, 'Reflections on the International Legality of the Special Tribunal for Lebanon', C. Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon', and N. N. Jurdi, 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon', 5 *Journal of International Criminal Justice*, 2007, pp. 1091, 1107 and 1125 respectively.

[169] See Security Council resolutions 1595 (2005), 1636 (2005) and 1644 (2005). See also S/2005/783 and S/2006/375.

[170] S/2006/893 and S/2007/150. See resolutions 1686 (2006) and 1748 (2007) calling for the work of the Commission to continue.

under Chapter VII of the Charter, the Council established the Special Tribunal for Lebanon by virtue of an agreement with the government of Lebanon, annexed to the resolution. The Statute of the Tribunal is attached to the agreement.

The Tribunal has jurisdiction not only with regard to those responsible for the assassination of Rafiq Hariri but also with regard to those responsible for other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the parties and with the consent of the Security Council, that are seen as connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005.[171] The Tribunal is to be composed of the Chambers, the Prosecutor, the Registry and the Defence Office. The Chambers, to be composed of between eleven and fourteen independent judges, are to consist of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber. A single international judge is to serve as Pre-Trial Judge, while three judges are to serve in the Trial Chamber, being one Lebanese judge and two international judges. Five judges are to serve in the Appeals Chamber, of whom two are to be Lebanese and three international judges.[172] The Prosecutor and the Registrar are to be appointed by the UN Secretary-General after consultation with the Lebanese government, while the Head of the Defence Office is to be appointed by the Secretary-General after consultation with the President of the Tribunal.[173] The applicable law is Lebanese criminal law and the Tribunal is to have concurrent jurisdiction with Lebanese courts and have primacy over them.[174]

The Iraqi High Tribunal[175]

The Governing Council of Iraq was authorised by the Coalition Provisional Authority on 10 December 2003 to establish the Iraqi Special

[171] Article 1 of the Statute. [172] Articles 7 and 8 of the Statute.

[173] Articles 11, 12 and 13 of the Statute. The Registrar was appointed on 11 March 2008: see www.un.org/apps/news/story.asp?NewsID=25925&Cr=Leban&Cr1.

[174] Articles 2 and 4 of the Statute.

[175] See e.g. Scharf, 'The Iraqi High Tribunal', Cryer *et al.*, *Introduction to International Criminal Law*, p. 160; I. Bantekas, 'The Iraqi Special Tribunal for Crimes against Humanity', 54 ICLQ, 2004, p. 237; M. C. Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal', 38 *Cornell International Law Journal*, 2005, p. 327; M. Sissons and A. S. Bassin, 'Was the *Dujail* Trial Fair?', 5 *Journal of International Criminal Justice*, 2007, p. 272; G. Mettraux, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal', 5 *Journal of International Criminal Justice*, 2007, p. 287; S. de Bertodano, 'Were There More Acceptable Alternatives to the Iraqi High Tribunal?', 5 *Journal of International Criminal Justice*, 2007, p. 294.

Tribunal to hear crimes alleged against the former regime of Saddam Hussein.[176] A revised Statute was enacted in 2005 and the tribunal renamed the Iraqi High Tribunal. The Tribunal has jurisdiction over genocide, crimes against humanity and war crimes, the definitions of which are based upon the provisions of the Rome Statute and newly incorporated into Iraqi law, committed between 16 July 1968 and 1 May 2003[177] by Iraqi nationals or residents.[178] Persons accused of committing crimes within the jurisdiction of the Tribunal bear individual criminal responsibility.[179] The Tribunal has concurrent jurisdiction with national courts but primacy over them. Article 6(b) of the Statute provides that the President of the Tribunal shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber. The role of the non-Iraqi nationals is stated to be to provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards. In appointing such non-Iraqi experts, the President of the Tribunal is entitled to request assistance from the international community, including the United Nations. However, the judges and prosecutors of the Tribunal are all Iraqi nationals. Criticisms have been made of the Tribunal, including the fact that it can impose the death penalty, as for example with regard to Saddam Hussein upon his conviction in the *Dujail* case.[180]

The Serbian War Crimes Chamber

On 1 July 2003, the Serbian National Assembly adopted a law establishing a specialised War Crimes Chamber within the Belgrade District Court to prosecute and investigate crimes against humanity and serious violations of international humanitarian law as defined in Serbian law. A War Crimes Prosecutor's Office was established in Belgrade. The Chamber consists of two panels of three judges each selected from the Belgrade District Court

[176] Order No. 48.

[177] The dates reflect the commencement of the Ba'ath party control of Iraq and the end of the Saddam Hussein regime.

[178] Articles 1 and 11–14 of the Statute of the Tribunal. [179] Article 15.

[180] See e.g. N. Bhuta, 'Fatal Errors: The Trial and Appeal Judgments in the *Dujail* Case', 6 *Journal of International Criminal Justice*, 2008, p. 39; M. P. Scharf and M. A. Newton, 'The Iraq High Tribunal's *Dujail* Trial Opinion', *ASIL Insight*, 18 December 2006, www.asil.org/insights/2006/12/insights061218.html, and Human Rights Watch report on the *Dujail* trial, http://hrw.org/english/docs/2007/06/22/iraq16230.htm.

or seconded from other courts, and two investigative judges. It is, however, essentially a national court.[181]

International crimes

A brief survey of some of the main features of international crimes for which individual criminal responsibility now exists will follow, noting that issues concerning the jurisdiction of purely domestic courts for those international crimes that have been incorporated into domestic legislation are covered in chapter 12, while state responsibility for such offences is covered in chapter 14.

Genocide[182]

Article 4 of the Statute of the ICTY, by way of example, provides that:

> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group

and that the following acts shall be punishable:

> (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.[183]

[181] The War Crimes Chamber's first trial, the *Ovcara* case, began on 9 March 2004. As of 2006, three trials had been completed and three others were ongoing: see *Unfinished Business – Serbia's War Crimes Chamber*, Human Rights Watch, 2007, pp. 1 ff. See also M. Ellis, 'Coming to Terms with its Past: Serbia's New Court for the Prosecution of War Crimes', 22 *Berkeley Journal of International Law*, 2004, p. 165. The ICTY has referred some cases to this Chamber: see e.g. *Vladimir Kovačevič*, ICTY Referral Bench, 2006.

[182] See e.g. Cryer *et al.*, *Introduction to International Criminal Law*, chapter 10; Werle, *Principles of International Criminal Law*, part 3; and Cassese, *International Criminal Law*, chapter 6. This section should also be read with the relevant section in chapter 6 above: see p. 282.

[183] See also article IV of the Genocide Convention, 1948, article 2 of the Statute of the ICTR and article 6 of the Statute of the ICC.

Genocide has been regarded as an international crime since the Second World War and the Genocide Convention, 1948 was a critical step in that process. The crime of genocide has also been included in the operative provisions of the statutes of most of the courts and tribunals discussed in the previous section. Case-law before the two international criminal tribunals (ICTY and ICTR) has, however, helped clarify many of the relevant principles. For example, perhaps the distinctive feature of the crime is the importance of establishing the specific intent to destroy the group in question in whole or in part, for genocide is more than the act of killing. This was emphasised by the ICTY in the *Jelisić* case, which noted that 'it is in fact the *mens rea* [i.e. the intention as distinct from the actual act] which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law'.[184] This was reaffirmed by the ICTR in the *Akayesu* case,[185] which defined the specific intent necessary as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'. The Trial Chamber underlined the difficulties in establishing the critical intent requirement and held that recourse may be had in the absence of confessions to inferences from facts.[186] In the *Ruggiu* case, the ICTR held that a person who incites others to commit genocide must himself have a specific intent to commit genocide.[187] However, in the *Jelisić* case, the ICTY pointed to the difficulty in practice of proving the genocidal intention of an individual if the crimes committed were not widespread or backed up by an organisation or a system.[188] This may be distinguished from the *Ruggiu* case, where a systematic scheme to destroy the Tutsis was not in doubt.

The element of intention was further discussed by the ICTY in the *Krstić* case, where it was noted that the intent to eradicate a group within a limited geographical area, such as a region of a country or even a municipality, could be characterised as genocide,[189] while 'the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it'. The part of the group sought to be destroyed had to constitute a distinct element.[190] In the decision of the Appeal Chamber in this case, it was emphasised that it was well established that

[184] IT-95-10, para. 66. [185] ICTR-96-4-T, 1998, para. 498.
[186] *Ibid*., para. 523. See also the cases of *Kayishema and Ruzindana*, ICTR-95-1-T, 1999, paras. 87 ff. and *Musema*, ICTR-96-13-T, 2000, paras. 884 ff.
[187] ICTR-97-32-I, 2000, para. 14. [188] IT-95-10, paras. 100–1.
[189] IT-98-33-T, 2001, para. 589. [190] *Ibid*., para. 590.

> where a conviction for genocide relies on the intent to destroy a protected group 'in part', the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.[191]

It was concluded that the intent requirement of genocide under article 4 of the Statute was satisfied where evidence shows that the alleged perpetrator

> intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.[192]

It was also emphasised that each perpetrator must possess the necessary specific intent.[193]

The intention to 'destroy' means the physical or biological destruction of all or part of the group and not, for example, attacks upon the cultural or sociological characteristics of a group in order to remove its separate identity.[194] The sometimes difficult question of the definition of membership of the groups specifically referred to in the relevant instruments has also been analysed. In *Akayesu*,[195] the Trial Chamber of the Rwanda Tribunal leaned towards the objective definition of membership of groups,[196] but this has been mitigated by other cases emphasising the importance of subjective elements as part of the relevant framework.[197]

[191] IT-98-33-A, 2004, para. 8. [192] *Ibid.*, para. 12. [193] *Ibid.*, para. 134.
[194] *Ibid.*, para. 25. [195] ICTR-96-4-T, 1998, paras. 511 ff.
[196] In *Kayishema and Ruzindana*, ICTR-95-1-T, 1999, paras. 522 ff., the Trial Chamber emphasised the importance of the designation contained in identity cards.
[197] See *Rutaganda*, ICTR-96-3-T, 1999, paras. 55 ff. See also *Bagilishima*, ICTR-95-1A-T, 2001, para. 65, where the Trial Chamber concluded that 'if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide'. See also the Report of the UN Commission of Inquiry on Darfur, S/2005/60, paras. 500 ff.