

# International Criminal Law



## Nuremberg to Now

Steven Kay QC



# Aftermath of World War II



- ❧ International criminal justice came into being with the creation of the Nuremberg and Tokyo Tribunals, after the victory in war of the Allied Powers over the German Third Reich in May 1945.



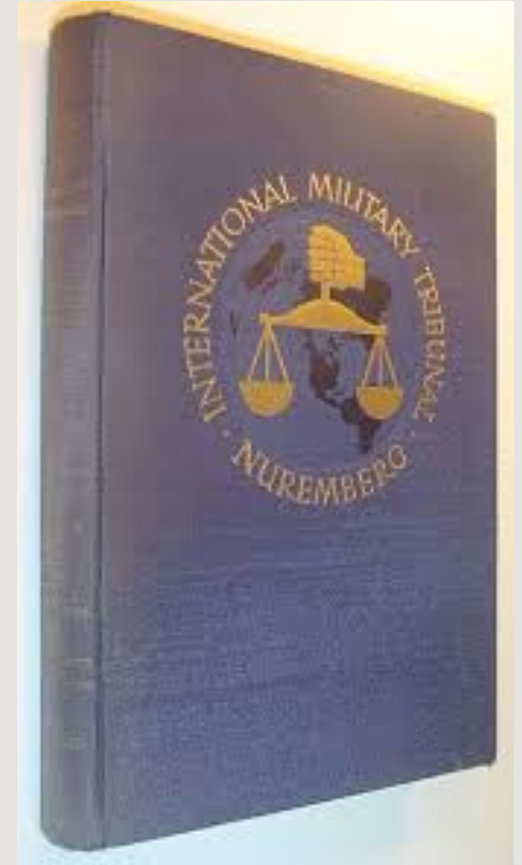
At the London Conference in 1945, the Allied Powers of the United Kingdom, United States, France and Soviet Union resolved to punish the leading Nazi war criminals.



# The Nuremburg Charter



- œ On 8 August 1945, the Charter of International Military Tribunal (‘The Nuremburg Charter’) was issued *“for the just and prompt trial of the Major war criminals of the European Axis”*.
- œ **War crimes** and the newly created **crimes against peace** and **crimes against humanity** were cited as the jurisdiction of the Tribunal.



# Drafting of the Charter



- ❧ Drafted by a mixture of the prosecution and the judiciary that took part in the Major War Crimes trial, including:
  - ❧ Robert Jackson (the US Prosecutor);
  - ❧ Robert Falco (the French reserve Judge); and
  - ❧ Iona Nikitchenko (the Russian Judge).
- ❧ This collaboration would be challenged today as breaching a right to be tried by an independent and impartial court.
- ❧ The additional signatories were:
  - ❧ Professor Aaron Trainin (USSR); and
  - ❧ Lord Jowitt, the Lord Chancellor of England and Wales.



# The Trial of the Major War Criminals



- ∞ The historic trial of the defeated leadership of the German Third Reich commenced on 20 November 1945 at the Palace of Justice in Nuremberg and was named 'The Trial of the Major War Criminals'.





# International Military Tribunal



- ❧ It took place before an International Military Tribunal (IMT), constituted of Judges appointed by the governments of the USA, UK, USSR and France.
- ❧ It was the only joint trial presided over by an international judiciary.



# IMT: Cross Examination of Defendant Hermann Goering





# The Tokyo Charter



- œ On 19 January 1946 the International Military Tribunal for the Far East (IMTFE) was issued with jurisdiction over the same crimes.



# Defendant Shigenori Tōgō, former Japanese foreign minister, on trial at the Toyko Tribunal



# Criminal Responsibility: Nuremburg & Tokyo



- ❧ Both Tribunals established the novel principle of **criminal responsibility regardless of official position** and thereby overturned the previously held legal norms of sovereign immunity.
- ❧ The **defence of acting pursuant to orders of a superior** was also no longer available to free an accused from criminal responsibility.



# HOW DO YOU PROSECUTE UNPRECEDENTED CRIMES?

*“We gave the Nazis what they  
denied their opponents... the  
protection of the law.”*

—Former U.S. Secretary of War, Henry Stimson, January 1947



# Next Stage: The *ad hoc* tribunals



Formed to deal with specific situations of international  
peace and security



∞ ICTY

∞ ICTR



∞ SCSL

∞ ECCC



# The International Criminal Tribunal for the former Yugoslavia (ICTY)

- ✧ The ICTY is a United Nations court dealing with war crimes that took place during the conflicts in the Balkans in the 1990s.
- ✧ Established in 1993, its mandate is to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region.
- ✧ Key cases include:
  - ✧ *Tadić; Gotovina; Mucić; Karadžić; etc.*





# ICTY: Increased Jurisdiction



- ❧ The ICTY added to the legacy of the Nuremburg and Tokyo Charters by prosecuting crimes arising in the conflict under the headings of:
  - ❧ Grave Breaches of the Geneva Conventions;
  - ❧ Violations of the Laws or Customs of War;
  - ❧ Genocide; and
  - ❧ Crimes Against Humanity.

# ICTY:

## *The Prosecutor v. Duško Tadić*



The *Tadić* case has been described as one of the cases which contributed the most to the jurisprudence of the ICTY (e.g. in relation to the development of Joint Criminal Enterprise).

# ICTY:

## *The Prosecutor v. Slobodan Milošević*



President of Serbia from 26 December 1990 and President of the Federal Republic of Yugoslavia (FRY) from 15 July 1997 until 6 October 2000.

Charged with genocide by the ICTY.

# International Criminal Tribunal for Rwanda (ICTR)



- ✧ The Security Council created the ICTR by Resolution 955 of 8 November 1994.
- ✧ Its mandate is to try persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994, in order to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region.

- ✧ Key cases include:

- ✧ *Akayesu; Bagosora; Nahimana; etc.*



# ICTR:

## *The Prosecutor v. Alfred Musema*



- œ First trial to allege command responsibility for genocide against a civilian.



# Special Court for Sierra Leone (SCSL)



- ∞ The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations.
- ∞ It is mandated to try those who bear 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.
- ∞ Key cases include:
  - ∞ *Charles Taylor*; *Brima et al*; *Sesay et al*; etc.





# Extraordinary Chambers in the Courts of Cambodia (ECCC)



- ✧ In 1997, the Cambodian government requested the United Nations to assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge.
- ✧ This ECCC was created by the government and the UN but operates independently of them. It is a Cambodian court with international participation that applies international standards.
- ✧ Key cases include:
  - ✧ *Case 001 (Duch); Case 002 (Nuon Chea et al); etc.*



# International Criminal Court (ICC)

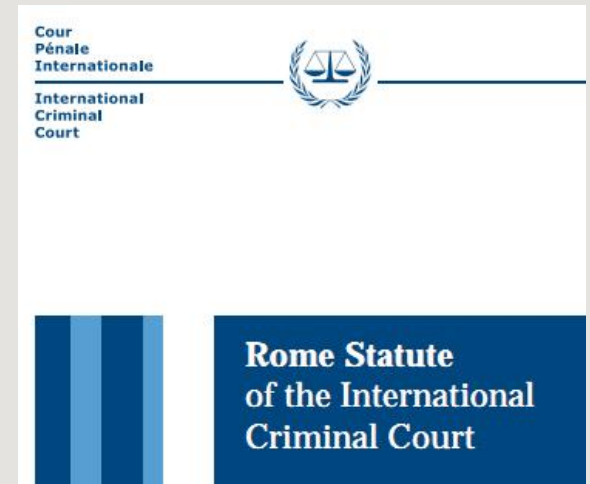


# Introduction to the ICC



- ∞ The ICC is a permanent, independent, international court
- ∞ Established to investigate, prosecute and try persons accused of the most serious crimes of international concern
- ∞ Seat of the Court is in The Hague, the Netherlands

# Rome Statute



- ❧ Treaty based court
- ❧ Established by the Rome Statute
- ❧ Entered into force on 1 July 2002
- ❧ 121 States Parties (effective as of 1 July 2012)
  - ❧ Notably absent - the United States

# ICC Mandate



- ❧ To try individuals rather than States
- ❧ To hold such persons accountable for most serious crimes of international concern, including:
  - ❧ Genocide;
  - ❧ Crimes against humanity;
  - ❧ War crimes; and
  - ❧ Aggression.

# ICC Jurisdiction



- ❧ The ICC does not have universal jurisdiction.
- ❧ It may only exercise jurisdiction if:
  - ❧ The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
  - ❧ The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
  - ❧ The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.
- ❧ Jurisdiction is further limited to events taking place since 1 July 2002.



# ICC: Current Situations / Cases



## ☞ Situations:

- ☞ Sudan (for the situation in Darfur)
- ☞ Democratic Republic of Congo
- ☞ Uganda
- ☞ Central African Republic
- ☞ Kenya
- ☞ Libya
- ☞ Côte d'Ivoire
- ☞ Mali



# ICC:

## *The Prosecutor v. Uhuru Kenyatta*



The Kenyan President is the first incumbent Head of State to be tried internationally.  
He faces charges of crimes against humanity at the ICC.



# ICC: Situations Under Preliminary Investigation



- ☞ Afghanistan
- ☞ Colombia
- ☞ Comoros
- ☞ Republic of Korea
- ☞ Georgia
- ☞ Guinea
- ☞ Honduras
- ☞ Nigeria
- ☞ **Iraq** (preliminary investigation re-opened on 13 May 2014)
- ☞ **Ukraine** (preliminary investigation opened on 25 April 2014)

# ICC Trigger Mechanisms



- ❧ State referral;
- ❧ Security Council referral; and



- ❧ Prosecutor's Initiative (*Proprio Motu*)
  - ❧ The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

# Principle of Complementarity



- ❧ The ICC is a court of last resort.
- ❧ It does not replace national criminal justice systems; rather, it complements them.
- ❧ States retain primary responsibility for trying the perpetrators of the most serious of crimes.
- ❧ The ICC can investigate and, where warranted, prosecute and try individuals *only* if the State concerned does not, cannot or is unwilling genuinely to do so.

# ICC Funding



The Court receives contributions from States Parties as well as voluntary contributions from:

- ❧ Governments;
- ❧ International organisations;
- ❧ Individuals;
- ❧ Corporations; and
- ❧ Other entities.





# Challenges of Implementation



- ❧ The ICC does not have its own police force.
- ❧ It relies on State cooperation, which is essential to the arrest and surrender of suspects.
- ❧ According to the Rome Statute, States Parties shall cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

# Criticisms of the ICC



- ❧ Focus on Africa
- ❧ Allegations of politically motivated prosecutions (and US influence)
- ❧ Reluctance to prosecute sexual crimes

# ICC Topical Issues



- ❧ **Syria**: Russia and China's veto of the draft UN Resolution calling for the crisis to be referred to the ICC.
- ❧ **UK**: Now under preliminary investigation by the ICC Prosecution, it having received new information alleging the responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.
- ❧ **Nigeria**: Recent kidnap of girls by Boko Haram. The Situation in Nigeria is already under preliminary investigation by the ICC for crimes against humanity allegedly committed by Boko Haram.



Thank you!

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