



INTERNATIONAL  
NUREMBERG  
PRINCIPLES  
ACADEMY

# LEARNING MANUAL

Acceptance of International Criminal Justice



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### **Note**

The opinions expressed herein reflect the views of the authors, consulted experts, relevant literature and some of the current debates on the matters, and do not necessarily represent the views of the International Nuremberg Principles Academy. It is based on training materials and lectures by Prof. Dr. Susanne Buckley-Zistel, Prof. Dr. Chandra Lekha Sriram, Prof. Dr. Christoph Safferling, Dr. Jan Koehler, Dr. des. Friederike Mieth, Dr. Sigall Horovitz, Dr. Godfrey Musila and Dr. Briony Jones, which were gathered and prepared for the workshop “Acceptance of International Criminal Justice” held in Nuremberg during 1–16 September, 2015.

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## List of abbreviations

<b>CBO</b>	Community-based Organisation	<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>ECCC</b>	Extraordinary Chambers in the Courts of Cambodia	<b>IMT</b>	International Military Tribunal
<b>ICC</b>	International Criminal Court	<b>NGO</b>	Non-governmental Organisation
<b>ICJ</b>	International Criminal Justice	<b>NMT</b>	Nuremberg Military Tribunals
<b>ICTR</b>	International Criminal Tribunal for Rwanda	<b>STL</b>	Special Tribunal for Lebanon

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## Foreword

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Interdisciplinary research is one of the main working areas and trademarks of the Nuremberg Academy. In its interdisciplinary research work, the Academy explores issues associated with international criminal law, transitional justice, human rights and peace, working together with academics and practitioners from different backgrounds and disciplines. The Nuremberg Academy's research activities enable it to provide a sound scientific basis for the development of political strategies and for training and human rights education for relevant professional groups and civil society.

Acceptance of international criminal justice is one of the triple imperatives that the Nuremberg Academy seeks to address, together with the principles of universality and legality, in order to contribute to the fight against impunity for international crimes. Focusing on acceptance and understanding how international criminal justice mechanisms are perceived and understood in situation countries is an important research topic because in societies emerging from or still struggling to come to terms with mass atrocities, the political actors, civil society, affected communities, victims and

the entire population need to make sense of international criminal law norms, its institutions, processes, timelines and outcomes in the context of a fragile peace and other competing demands and expectations.

Through discussing and researching the acceptance of international criminal justice, the Nuremberg Academy gives voice to local actors, contemplating that these views could help not only the courts to develop better-tailored outreach programmes, but also tools for international and local practitioners interested in promoting accountability for international crimes and gross human rights violations. All the Academy's learning tools, including this very manual, are not only accessible to the public, but the Academy encourages interested scholars and practitioners, especially in situation countries, to make use of them as part of their research and advocacy efforts.

On behalf of the Nuremberg Academy, I thank the acceptance project team for compiling this manual, as well as those who have allowed us to integrate in it their teaching materials.

We hope that you will find this manual useful and inspiring.

Bernd Borchardt  
Founding Director of the Nuremberg Academy

### The International Nuremberg Principles Academy

*The International Nuremberg Principles Academy (Nuremberg Academy) is a foundation dedicated to the advancement of international criminal law.*

*It is located in Nuremberg, the birthplace of modern international criminal law, and was conceived as a forum for the discussion of contemporary issues in the field. The mission of the Nuremberg Academy is to promote the universality, legality and acceptance of international criminal law.*

*The foundation's main fields of activity include interdisciplinary research, trainings and consultant services specially tailored to target groups, and human rights education.*

*The Nuremberg Academy places a special focus on the cooperation with countries and societies currently facing challenges related to international criminal law.*

*The Nuremberg Academy was founded by the German Foreign Office, the Free State of Bavaria and the City of Nuremberg.*

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## Note to manual users

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This manual is a learning tool resulting from the conduct of the Nuremberg Academy's interdisciplinary research project on the acceptance of international criminal justice (ICJ) in different situation countries.

The idea emerged from the acceptance fellowship, a programme that intertwines learning and applying a particular research approach and tools in the context of exploring and researching acceptance of international criminal justice. The fellowship programme targets emerging scholars from situation countries.

Through the fellowship programme, we reached a wide audience of scholars and practitioners in both transitional justice and international criminal law. By designing and implementing the fellowship programme, we were also aware that the needs and the spectrum of interested parties in understanding and exploring acceptance are much larger. For that reason, this collection of didactic materials that comes as a learning manual is intended for outreach purposes and targets a larger audience of

interested practitioners and multipliers.

This learning manual summarises readings and discussion topics that are explored during the stages of mapping, designing and discussing the methodology and in particular the training programmes on researching the acceptance of international criminal justice. This manual is designed as an introduction to acceptance research for practitioners and institutions that may have an interest in researching similar or related topics, such as the impact or legacy of international interventions, courts or transitional justice mechanisms, collecting and analysing public views, perceptions and attitudes of different actors on processes, and particular or controversial findings of international courts.

Such research may have a wide range of applications outside academia and also serve NGOs or other civil society groups interested in developing sound instruments of trial monitoring programmes, refining accountability and advocacy tools.

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## How this manual could be used?

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The manual could be used as a training manual, as well as a self-learning tool as it provides:

- A background on transitional justice goals and mechanisms, international criminal law, crimes, institutions and proceedings;
- A definition and a methodological ground for researching international criminal justice acceptance, looking at what both international criminal law and transitional justice have to offer in terms of norms, institutions and processes comprising international criminal justice on one side and country context and the groups of actors on the other;
- Recommendations for further reading; and
- A short introduction to research methods, as well as discussions of ethical considerations that may be encountered during such researches project.

It could additionally be used as a guide for trainers and educators, providing:

- A working methodology framework discussed with experienced and knowledgeable experts, academics and practitioners, which has been piloted and implemented in a number of situation countries; and
- Training methodology elements, further reading materials, questions and additional exercises after each module. The manual is conceptualised as an ensemble of parts that could be used together or separately and for different training purposes, either with a focus on transitional justice or international criminal justice.

In addition, the Nuremberg Academy welcomes requests for delivering or replicating the training, offering a tailor made curricula, advice, and guidance to multipliers and consultancy services, and inquiries from interested educational and research institutions in situation countries.



## Why researching the acceptance of international criminal justice?

International criminal justice plays a central part in transitional justice processes. Since the early 1990s, the number of international and internationalised courts has increased rapidly, and made significant progress in responding to and prosecuting perpetrators of mass atrocities. The establishment of the International Criminal Court (ICC) in The Hague in 2002 was received with considerable enthusiasm and high expectations.

At the same time, critical debates have yielded and put international criminal justice mechanisms under scrutiny. These ongoing debates primarily discuss the extent to which the institutions of international criminal justice have the potential to provide justice, prevent the recurrence of crimes and future atrocities, and contribute to building peace and reconciliation in situation countries. Few scholarly works however, have directly addressed the issue of acceptance of international criminal justice by different actors involved in these processes. Although some studies implicitly touch on the acceptance of international criminal justice in debates on peace and justice in post-conflict societies,

local assessments of transitional justice, and in evaluations and impact-related research of particular courts and tribunals, a deeper understanding of how international criminal justice is perceived, valued and appreciated by different actors in situation countries is of great importance.

Given that the initial euphoria and support for the ICC has waned in the face of many cases being rather lengthy and costly and the increasing number of critical evaluations of the different international courts, research into the acceptance of international criminal justice has become all the more relevant (Ambos, 1996; Akhavan 2009; Cryer et al., 2010; and Pham and Vinck, 2010). Delineating the reasons why actors accept or reject international criminal justice in the form of laws, courts or tribunals will shed light on the question as to how to increase the relevance of ICJ for people in situation countries, how to prompt discussions on how it should ideally operate, and suggest ideas and practical measures for reform and innovation.

## The values of researching acceptance

Researching ICJ acceptance is a difficult task and thus for its analysis, it requires certain choices to be made concerning the focus of the research. These are reflected in the structure and content of this learning manual and visible in the weight afforded to particular sections, components and discussion topics, which are based on the view of the research team. However, after briefly discussing the puzzle or rationale behind the choice of acceptance of international criminal justice and why this research topic is relevant, it is worth explaining the approach towards international criminal justice, including its underlying principles, norms, processes and institutions.

To start with, it is useful to look at the multiple dimensions and manifestations of acceptance through and as part of a transitional justice approach (Module 1). That is why the manual sets off with and gives a considerable space to transitional justice forms, history, mechanisms and debates. It positions international criminal norms and institutions in the crossing section between post-conflict transitions and the ideas or concepts about justice in the aftermath of mass atrocities and gross human rights violations.

While it is important to understand international criminal justice, which is explored in Module 2, the emphasis of the learning manual is on to the context and the landscape of actors in the societies where such investigations take place. Even though criminal proceedings are limited to perpetrators and victims, it is important to explore the particular dynamics in each situation and country, which cannot fully be captured by the laws and norms establishing legal institutions.

Module 2 of this manual is dedicated to principles and institutions forming international criminal justice. It looks at the objectives of international criminal law and how these objectives intertwine and sometimes conflict with the overall objectives of transitional justice. It examines the needs, interests and expectations of the society actors involved. Looking at the history and development of international criminal justice since the Nuremberg Trials, this section explores crimes under international law and different models of courts and tribunals coined by the international community to combat impunity and hold accountable those most responsible for these crimes.

Targeting audiences from both legal and social science backgrounds, the authors point to the need of complementing gaps that each of these fields of studies has. This can concern both the understanding and the knowledge of international criminal law and transitional justice and also the existing research tools and skills.

Module 3 focuses on approaches and methods of researching acceptance. While acceptance itself may have a legal dimension to it in addition to the social, political or moral ones, the assessment of acceptance could be done through approaches and methods of social empirical research. Therefore, the study of acceptance will identify the actors, conduct or other forms of expression of attitudes towards international courts or tribunals, and take into account the newness of these norms and practices within the society.

## Transitional Justice

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## Learning objectives

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The goal of this first module is to offer an introduction to the ways societies deal with their post-authoritarian regime or armed conflict through:

- Exploring and understanding the definition of transitional justice, its history, mechanisms, foundations and sources;
- Raising awareness of the ongoing debates in the field of transitional justice, including dilemmas on appropriateness of transitional justice in times of peace or war; at the local and global level and on its effects;
- Locating international criminal justice as part of transitional justice mechanisms and goals;
- Understanding that punitive justice is not the only form of justice and that restorative justice goals are to be considered in post-conflict contexts;
- Understanding that beyond peace and justice societies need to address a larger specter of rights including economic, social and cultural ones.

### Background: Transitional justice

*'Concepts such as justice, the rule of law and transitional justice are essential to understanding the international community's efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflict. They serve both to define our goals and to determine our methods. Yet, there is a*

*multiplicity of definitions and understandings of such concepts, even among our closest partners in the field. At an operational level, there is, for some, a fair amount of overlap with other related concepts, such as security sector reform, judicial sector reform and governance reform'.*

*The rule of law and transitional justice in conflict and post-conflict societies –*

*Report of the Secretary-General, 23 August 2004, S/2004/616*

## Forms of transitions and the relevance of transitional justice

*'As nations move from repression to democracy or from war to peace, the legacy of past abuses can be a heavy burden.'* (Kritz 1995, xix)

There is controversy in the literature concerning the very notion of transition. Early definitions such as that of O'Donnell and Schmitter (1986, 6) define transition as the:

*'...interval between one political regime and another. Transitions are delimited, on the one side, by the launching of the process of dissolution of an authoritarian regime and, on the other, by the installation of some form of democracy, the return to some form of authoritarian rule, or the emergence of a revolutionary alternative'.*

These definitions require previous regimes to consist of a certain form of political organisation, which is however not always the case. Furthermore, transition is also referred to as a period during which society attempts to establish peace after a civil war or violent conflict.

Based on the purpose of the transition and relevance for the transitional justice and international criminal law discussion, the literature on these topics identifies two distinguished types of transitions:

- Transitions from an authoritarian or repressive regime characterised by gross human rights violations (such as torture or forced disappearances) to a rather less authoritarian regime or a more democratic regime; and
- Transitions from armed conflicts, where crimes committed potentially amount to international crimes (i.e. genocide, crimes against humanity and war crimes) and currently find themselves in a transition to peace.

Despite the type of regime or the actors involved, transitions can also differ in whether they progress peacefully or are marked by violence.

**Peaceful transitions** could be imposed by the winning parties in the conflict, or negotiated in forms of pacts or deals between contending actors. Transparency, bargaining and initiation of reforms that increase access of different groups in decision-making could also be linked to a peaceful transition.

**Violent transitions**, depending on the actors involved in the conflict and the level of participation of the population, could have the form of a military coup, outbreaks of violence along ethnic or religious lines, social unrest, or revolution.

Both types of transition share a common denominator which is the uncertainty regarding political, social and economic developments. Transitional societies, other than dealing with mass atrocities and widespread human right violations, face the aftermath of poor or exhausted resources, distressed and divided societies. As developing societies emerge from legacies of conflict and authoritarianism, they are frequently beset by poverty, inequality, weak institutions, broken infrastructure, poor governance, insecurity, and low levels of social capital (de Greiff and Duthie, 2009).

The modes of transition and the way that the conflict was ended are important factors in determining the commitment and type of transitional justice mechanism applied. According to Binningsbo, Elster and Gates (2005) about 70 percent of post conflict trials take place with the victory of one of the sides in the conflict. When the balance of power is clearly on one side, there is no reason for the challengers of the previous regime or the winning power from the conflict to negotiate any kind of amnesties. The success of the transitional justice mechanism also seems to depend on the type of regime established in the post-conflict society. Non-retributive and restorative approaches to transitional justice, such as truth commissions and reparations to the victims, are more closely connected to democratic regimes rather than to non-democratic ones. This hints at the expected role of trials having a deterrent effect in authoritarian regimes. In order to understand the type of transitional justice mechanism chosen by a society it is important to elaborate on the types of justice that exist so as to have a better idea on how transitional justice mechanisms correspond to certain understandings of justice, and why one might be prioritised over the other (Binningsbo, Elster and Gates, 2005).

The debate on the benefits and disadvantages of retributive versus restorative justice is a debate within the realms of the theory of justice. It concerns different understandings of the possibility of achieving not only justice, but also peace. Retributive justice has received the most attention in post-conflict societies (Lie, Binningsbø and Gates, 2007). In both the local and international context, it implies the duty to punish individuals for their crimes. This duty belongs primarily to the state, unless exceptional circumstances call for international mechanisms of prosecution and adjudication.

Retribution is a practice of criminal justice focused and based on the punishment of offenders rather than on rehabilitation. Retributive justice focuses on punishment and legal redress for past wrongs, and its focus lies more on the perpetrator and less on the victim. It determines what laws have been broken and by whom, and what punishment they deserve. Retributive justice claims to establish guilt on behalf of the state, and society remains abstract. The main idea of retributive justice is its deterrent effect, as possible future offenders are discouraged; the failure to punish might invite recurrence (Köneke, 2009). However, two things must be kept in mind. First, it is allegedly impossible to punish all perpetrators, which could create a feeling of unequal treatment. Second, a pure punishment approach might advance the feeling of a socially embedded habit of blame and an atmosphere of 'us versus them' (Mani, 2002). The individualising of guilt in punishment seeks to prevent this collectivising of guilt.

In the early 1990s after the establishment of the first international tribunals by the UN Security Council in the former Yugoslavia (1993) and Rwanda (1994) a number of scholars argued that international courts can aid reconciliation (Clark, 2014)<sup>1</sup>. Some authors underline positive effects of criminal justice in post-conflict contexts such as building trust and legitimating new social order (Elster, 2005); the individualisation

of guilt versus collective claims for forgiveness (Fletcher and Weinstein, 2002); ensuring spoilers are put aside (Elster, 2005); and enabling victims of atrocities to attain closure and to restore healthy relations toward one another (Gloppen, 2005).

By contrast, restorative justice concentrates on the harm done to victims. It is a theory of justice which emphasises repairing the harm caused by criminal behaviour and promoting inclusive processes that can lead to transforming attitudes or perceptions of people, relationships and communities (Harris, 2006). One of the main centrepieces of restorative justice is according to Harris "the meeting". All affected people can consensually decide on how to deal with its aftermath of the offence (Roche 2003, 2). In the realm of restorative justice, a crime or a wrongdoing is defined as a violation by one person of another. It seeks to repair social injury and to make way for forgiveness and setting things right again. This can include the acknowledgement of the crime or a confession of what has been done, an apology by the perpetrator or also the construction of a memorial in remembrance of the crime. This helps the victim to deal with the past and to learn about the truth, for example of what happened to their loved ones. Restorative justice emphasizes the humanity in both offenders and victims. 'It seeks repair of social connections and peace rather than retribution against the offenders' (Minow 1998, 92)<sup>2</sup>. However, besides the focus on victims and human rights violations, retributive justice falls short in face of the restoration of identity, social and political roles, and social relations (Long and Brecke, 2003). Despite their divergent priorities, neither form of justice is ever either found or followed in their entirety, and states and international actors may chose or prioritise certain goals over others. or followed in their entirety, and states and international actors may chose or prioritise certain goals over others.

1 See for example Kritz 1996; Akhavan 1998; Cassese 1998; Crocker 2002; Jallow 2008; Kerr 2007; May 2010; Scharf and Williams 2003

2 Cited in Roche 2003, 27

*'Transitional justice can be defined as the conception of justice associated with periods of political change characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.'*

Ruti Teitel (2003)

*'Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.'*

International Centre for Transitional Justice (2015)

*'The notion of transitional justice comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.'*

UN Secretary General (2004)

*'At its broadest TJ involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict.'*

Roht-Arriaza & Mariezcurrena (2006, 2)

## Defining transitional justice

After engaging in the different types of transitions and justice that can lead to a particular need for transitional justice it is important to lay out the definition of transitional justice.

As a field of academic inquiry and practice, transitional justice has grown significantly over the last two decades. Transitional justice entails a range of judicial and non-judicial measures which address past human rights abuses. It does not indicate a special type of justice but can be described as an approach to achieve retributive and/or restorative justice (see discussion on retributive versus restorative justice above) in times of transition from either an authoritarian or repressive regime to a more democratic society, or from armed conflict to peace. After conflicts, many victims are left with the wish for the perpetrators to be punished, the need to receive restitution for their loss, or to learn about the past and the whereabouts of their loved ones.

Mechanisms such as truth commissions, criminal proceedings, lustration, memorials and memory work can restore the victims' trust in the rule of law and allows them to obtain recognition of their suffering. Massive human rights violations also affect society as a whole and require the state to guarantee non-repetition and to reform institutions. A failure to do so may lead to mistrust between divided parts of society and could lead to a potential recurrence of conflict in the future.

Despite a number of different definitions of transitional justice, they share a number of features (see Kayser-Whande and Schell-Faucon 2008, 14):

- They deal with past human rights violations;
- They suggest and assume that a wide-ranging, often political transformation should take place; and

- They refer to a more peaceful, democratic and just society for the future.

The goals of transitional justice are relatively broad and in most transitions they include not only peace, democracy, and justice (for example in the establishment of the rule of law and human rights), but increasingly also reconciliation. Through transitional justice processes states 'seek to redress the violations of a prior regime' (Fletcher and Weinstein 2002, 573). Furthermore 'transitional justice institutions aim to challenge the legitimacy of prior political practices by confronting denial and transforming the terms of debate on past abuses. Yet, they also seek to establish their own legitimacy by minimizing the challenge that they pose to dominant frameworks for interpreting the past' (Leebaw 2008, 95).

Scholars and practitioners realised that those objectives were not only difficult to achieve but also not easy to reconcile and achieve them simultaneously (Leebaw, 2008). While truth and justice were gradually seen as compatible and complementary the debate about peace and justice is still dividing the field (Mihai 2016, 25).

More often, decisions of advancing accountability, truth-seeking and the promotion of institutional reforms take place in transitional societies after devastating conflicts or repressive and authoritarian regimes. Thus, to re-establish the rule of law and come to terms with large-scale human rights violations, especially within a context marked by broken institutions, exhausted resources, diminished security, and a distressed and divided population is a difficult and sometimes seemingly impossible process (OHCHR, 2014). In order to understand how these goals have emerged, a brief overview of the history of transitional justice is essential.

## History of transitional justice

The field of transitional justice is relatively new and has received increasing attention only since the end of the Cold War. Some authors trace its origins to the end of the Second World War, and to the Nuremberg and Tokyo trials which are widely understood to have been the first transitional mechanisms, as they were also the first steps toward international criminal law. In the 1970s and 1980s, several South American dictatorships came to an end and the initial inability of the successor regimes to redress past injustices raised the question of the role of the international community in dealing with widespread human rights violations.

Post World War II transitional justice focused mostly on accountability (as in the Nuremberg and Tokyo trials), on non-recurrence (i.e. demobilisation, vetting/lustration) and the building of democracy. The mechanisms were of a legal nature, consisting of international and national trials, state-level reparations, lustrations, and re-education. In her seminal article, Ruti Teitel (2003) describes these developments as 'phase one' of transitional justice.

The time from the late 1980s to the late 1990s could then be described as phase two, or 'Post-Cold War Transitional Justice' (Teitel, 2003). During this second phase of transitional justice, scholars and practitioners from a variety of disciplines discussed more in depth how human rights violations should be dealt with after violent conflicts, such as in the

Western Balkans and in Sub-Saharan Africa. During this time, two ad-hoc tribunals were established, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) in 1994.

Teitel (2003) calls the third phase of transitional justice 'comprehensive transitional justice', lasting from the late 1990s until today. Specifically after the South African Truth and Reconciliation Commission (1996-1998), more complex issues like reconciliation, amnesty, impunity, apologies, and re-traumatisation were widely debated. The concept was increasingly understood in a broader sense, including not only legal but also non-legal mechanisms. The work of truth commissions received much interest (Hayner, 2001), and the so-called local initiatives such as the gacaca courts in Rwanda, which were set up as a more locally rooted response to accountability.

The third phase of transitional justice is characterised by a widening of the scope of transitional justice goals. Beyond democracy and accountability, peace, reconciliation and rehabilitation have become mandates of transitional justice institutions. The disciplines contributing to the transitional justice debate have also widened to include not only law and political science, but also social sciences, psychology, economy, education, history, philosophy and theology.

## Transitional justice mechanisms

It is assumed that a violent past needs to be addressed in one way or another. Former conflicting parties need to be able to live next to each other again and re-establish trust in the government and the rule of law. Transitional justice thus looks into both the past and the future. Transitional justice describes a range of mechanisms for dealing with the past and marking the way for a less violent future. As conflicts are different in their origin and type, the current government, and the resources it can offer to deal with the past, the approach to dealing with past violence differs and is adapted according to the context (Buckley-Zistel, 2007).

A number of distinctive mechanisms, approaches and initiatives widely understood to form the basis for transitional justice efforts are elaborated on below. The list is not exhaustive and the form in which these mechanisms are developed and used may differ according to the context

- **Trials** (international, ad-hoc, hybrid, national or local) imply criminal accountability

for those responsible for human rights violations.

- **Truth** (and reconciliation) commissions are truth-seeking and reconciling bodies tasked with discovering and revealing past wrongdoing by a government or, depending on the circumstances, non-state actors.
- **Reparations** for the victims, including restitution, compensation, rehabilitation and guarantees of non-repetition.
- Reforms of institutions, such as the police, military or the judiciary, including the dismissal of staff.
- **Lustration processes** that examine whether a person holding certain public functions directly or indirectly participated in the commissioning or planning of mass atrocities or collaborated with the repressive apparatus of the former regime.
- **Commemoration** through building memorials and museums.
- **Educational programmes** such as textbooks, plays, etc.

## International, hybrid and national tribunals

International, hybrid and national tribunals dealing with past human rights violations indict individuals for their responsibility concerning the involvement and perpetration of war crimes, crimes against humanity and genocide (Buckley-Zistel, 2007). International and hybrid courts differ from national courts as they are mostly mixed in the sense of the nationality of the judges and the law that is applied. They can be permanent or temporary, for example the International Criminal Court is a permanent one, while the Extraordinary Chambers in the Courts of Cambodia was only established on a temporary basis. Often the mandates of such courts are restricted to a certain time span and geographical reach of their investigations (see Appendix 1).

'Many imperatives, including national reconciliation, vindication of victim suffering, or symbolic breaks with the past, are invoked to justify tribunals' (Akhavan 2009, 628). These objectives are broadly related to non-recurrence and deterrence. Judicial procedures divide a society into perpetrators and victims and by putting on trial those responsible, court procedures may forestall ideas of collective guilt, thus easing the way for a process of reconciliation (Fletcher and Weinstein, 2002). Certainly, not all perpetrators can be put on trial but only those 'who bear the greatest responsibility'<sup>3</sup> for international crimes, leaving a feeling of selective justice, which can have reverse negative impact. At the same time, trials can also deteriorate a post-conflict situation, mostly when they resemble victor's justice.

## Truth commissions

Truth commissions are a non-judicial alternative to tribunals and have been widely used in post-conflict contexts. In the recent past they have also been used as a complementary to tribunals. Truth commissions are temporal establishments that document and uncover past violence and are thus an important tool counteracting all those that try to deny the past. Furthermore, it seeks acknowledgement for victims and uncovers the truth for the left behind relatives on the whereabouts of their loved ones. The particular format of truth commissions is often adjusted to the context in which they are set up<sup>4</sup>.

Truth commissions have been criticised for the attempt to create a uniform and singular truth, which does not sufficiently take into account the individual experience (Buckley-Zistel, 2007). Many truth commissions have

indeed developed a top down approach by looking at the most pressing and most obvious conflicts, while other conflicts remain unaddressed. While the idea behind truth commissions is to reveal the truth about the past, from time to time, this search for truth and its disclosures have also meant a repeated outbreak of violence. Divided societies might feel that dealing with the past might only harden the lines of division (Wiebelhaus-Brahm, 2010).

## Reparations

Reparations acknowledge the victims' suffering and try to repair and compensate for loss. The forms of redress can be material, and symbolic. The latter can be in the form of public acknowledgement of/or an official apology for past violations, indicating state and social commitment to respond to former abuses. The redress can either be made by the individual or by the state, in case of its involvement in the crime. In case of redress by the government, this might create greater trust in the political leadership and is thus an important part of transitional justice. The type of redress depends on the context of the conflict, the scale of the crime, the number of victims, financial resources and the will of the new government.

The public acknowledgement of the victim's loss is often a necessary step to return those affected their dignity and to equal their rights and social standing, which might have served as the target during the conflict (de Greiff, 2006). In countries marked by poverty, material compensation is often vital for survival. The compensation for the loss of family members always raises the question of how much a human life is worth. Financial compensation can never compensate such loss, even if it might on a provisional basis help to compensate for the missing workforce.

## Institutional reform

After an armed conflict or a dictatorship it is essential that societies regain trust in institutions and the political leadership. Lustration is also an important part of a new social order, and is a mechanism of vetting mostly employees of the public sector who have links with the past regime or have demonstrated corrupt or criminal behaviour. A process of lustration is even more important in the judicial sector, as it is important to guarantee an independent and free legal system (Buckley-Zistel, 2007). This equally counts for the security sector, such as the military or militia.

<sup>3</sup> RSCSL Statute, Article 1. Accessed June 14, 2016, <http://www.rscsl.org/Documents/scsl-statute.pdf>; Paper on some policy issues before the Office of the Prosecutor (2003). Accessed August 8, 2016, [https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf); UN Security Council Resolution 1534 (2004), paragraph 4 and 5. Accessed August 1, 2016, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_1534\\_2004\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_1534_2004_en.pdf).

<sup>4</sup> A non-exhaustive list of past and on-going truth commissions can be found in the appendix (see Appendix 2)



## Commemorations and memorials

Like reparations, commemorations acknowledge the victims' suffering but also aim at visualising the past, in order to prevent reoccurrence. Ideally commemorations facilitate an open dialogue about the past and enable the reconstruction of a feeling of national unity and address both individuals and society. Commemoration can refer to events, museums, monuments or ceremonies intended to preserve memory. Examples are the Apartheid Museum in Johannesburg or the Memorial to the Murdered Jews of Europe in Berlin. However, there is not always a shared understanding of the past and thus commemorations may run the risk of instituting a new conflict when they fail to acknowledge all groups in a post-conflict society (Buckley-Zistel, 2014).

## Education programmes

Education programmes can play an important role in promoting socio-economic development and preventing the recurrence of armed violence or repression. Further-more, education reform is particularly relevant in contexts where it was used to divide people or discriminate against certain groups. Further, where conflict resulted in lost educational opportunities for children, it is important to rebuild the educational sector. Education initiatives can include the introduction of new history books, curriculum reform, or non-formal education programs that inspire dealing with the past through forms of art and music (Ramirez-Barat, 2015).

### Right to Justice

*Geneva Conventions 1949, Convention against Torture 1984, ICC Rome Statute*

### Right to Truth

*Universal Declaration of Human Rights 1948, Art 19*

*Geneva Conventions, First Additional Protocol 1977, Articles 32-33*

*Inter-American Court of Human Rights, Velásquez-Rodríguez v. Honduras (1988)*

*UN Human Rights Commission, Expert Report on Principles to Combat Impunity (2005)*

*UN Human Rights Council, Resolutions on the "Right to the Truth" (2008, 2009, 2012)*

*UN General Assembly, Resolution 68/165 on the 'Right to the Truth' (2013)*

### Right to Reparation

*UN General Assembly Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)*

*International Covenant on Civil and Political Rights Article 2 (duty to remedy violations) Judicial decisions against amnesties ICTY, Furundzija, para. 155*

*R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (1998)*

*Inter-American Court of Human Rights, Barrios Altos v. Peru (2001)*

## Transitional justice and rights

It can be argued that the success of transitional justice mechanisms depends on how well they address the following three rights:

- **Truth:** the right to know the circumstances and details of the violation (e.g. how, why, by whom they were committed);

- **Justice:** accountability in the broader sense; and
- **Redress:** reparation restitution, compensation, satisfaction, rehabilitation, guarantees of non-recurrence.

## Legal foundations of transitional justice

The legal foundations of transitional justice lie in national and international legal instruments developed by the United Nations and related bodies, regional or transnational bodies and their jurisprudence. Some of these instruments are legally binding on those countries that have signed and ratified the relevant document or by the principle of customary law which binds all countries to a specific law, regardless of whether they have signed the relevant document. Examples of customary law are the Geneva Conventions and the Convention Against Torture.

Other documents establish principles, and offer standards or guidelines for action and are not legally binding and are referred to as

soft law. They can offer best practice and encourage states to adopt them as part of their domestic legislation, policies and practices. Jurisprudence of international or regional courts such as the Inter-American Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia or the International Criminal Court offer precedent on issues of victim's rights of participation, reparations or limitation of amnesties.

As primary sources, national legal systems including constitutions provide guarantees of rights and remedies referring to international norms as standard and/or as limitations. A list of relevant legal foundations of transitional justice can be found in Appendix 3.

## Current debates in transitional justice

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Transitional justice is a multi-disciplinary field consisting of scholars and practitioners. It has grown significantly over the past 20 years, and today conflict transformation processes rarely take place without incorporating at

least one transitional justice mechanism. With the increasing application of transitional justice in post-conflict and post-dictatorial contexts all over the world, however, a number of challenges have arisen.

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## Transitional justice as victor's justice

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Different groups pursue different goals within the application of transitional justice. Those responsible for setting up the transitional justice mechanisms are also those that have the greatest influence on their establishment and mandate. This can heavily influence the outcome of some of the mechanisms, e.g. when only a certain group has influence on the appointment of those sitting on truth commissions. This might contribute to a one-sided narrative

of the past and can lead to other groups feeling either excluded or unfairly targeted. It can also be used as a pretext to achieve completely different goals to those stated. One such example is a new government that requests lustration processes in order to disable political opponents. The practice of transitional justice is often inherently political and requires a balancing of the power of the different actors involved.

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## Transitional justice in times of peace

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Transitional justice refers to mechanisms that can be used in times of political, social and economic transition. Nonetheless, transitional justice mechanisms are also increasingly used in non-transitional contexts (Hansen, 2014). Examples of this are mechanisms set up long after the initial crimes

have been committed, such as Germany's recent compensation programme for slave and forced labour victims during the Second World War, or Canada's Truth and Reconciliation Commission that recovered the truth about abuses of aboriginal children in Canadian schools.

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## Transitional justice during armed conflict

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Some transitional justice processes begin even before transitions take place, such as in Colombia, where criminal tribunals and negotiations for reparations programmes have taken place for a long time without a peace agreement in place. Such processes are not unproblematic. On the one hand, transitional justice processes have to be designed

and carried out very carefully in order not to disturb ongoing peace processes, as was the case of the indictments by the International Criminal Court against the Lord's Resistance Army, a rebel group in Northern Uganda. On the other hand, transitional justice practitioners have to act cautiously in order not to raise false hopes in intractable situations.

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## Local conflicts and global transitional justice

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With the emerging debate about the different mechanisms of transitional justice, some criticised that it became a kind of 'tool box' that provides the right mechanisms for each transition. Yet the different experiences of such processes in various countries show that too often transitional justice mecha-

nisms remain aloof from local realities and particular socio-cultural contexts. Some authors argue that these processes should be much more anchored in local settings, and acknowledge the specific political, cultural, and historical aspects of the transition (Hilton, 2010; Shaw et al., 2010).

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## Transitional justice and development

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A further debate is on the relationship between transitional justice and development, including socio-economic aspects of conflicts. Critics argue that transitional justice mechanisms focus mostly on political and civil rights and not on economic, social and cultural rights. With this, more structural

causes of violence and conflict, such as corruption or economic marginalisation, remain untouched (Miller, 2008). Rama Mani (2002) has argued for 'distributive' justice which acknowledges such underlying injustices and which entails, amongst other things, the redistribution of resources.

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## Transitional Justice and the question of its effect

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The debate about the choice and appropriateness of transitional mechanisms is influenced by guiding principles rather than by the effects of such choices. Some scholars also question the effect of international justice on national peace and reconciliation and argue that it has been hard to document the effect of international justice on local reconciliation processes (Stensrud, 2009). Bernath and Rubli (2013) observed that during the last ten years the preoccupation with questions of parti-

icipation, outreach, popular opinion, and victim centred approaches have increased. They discuss a missing link between the policy making of transitional justice and the experience of those affected by these institutions in practice and connected claims of missing political will, misunderstood cultural specificities, and bad timing. These contemporary debates speak to questions of agency and power understood in transitional justice scholarship and practice that are not currently well enough.

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## Suggestions for further reading

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## Worksheet I: Goals of transitional justice

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Consider some basic questions related to transitional justice processes:

- How does a society choose to cope with its past?
- How will the mechanisms used affect the future?
- Would a denial of the past lead to a new outbreak of violence in the future?
- How do the different mechanisms fit to the different types of conflict?

While transitional justice describes the way a society deals with its past, many transitional justice goals are also forward looking in that they seek to enable a peaceful, democratic and just future.

Consider a specific country of your interest that has gone through, or is currently facing, a transitional justice process.

- Which mechanisms were established, and with which aims?
- Which aspects of each of these transitional justice mechanisms is backward looking, which are forward looking?
- How does the cultural context and the history of the conflict affect the mechanism chosen?
- What could be the risks of each mechanism?

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## Worksheet II: Transitional justice and socio-economic rights

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*'Violations of economic, social, and cultural rights not only exacerbate or spark social or political tensions resulting in conflict or repression, but conflict or repression often precipitate further violations of these rights. Successful strategic approaches to transitional justice necessitate taking account of the root causes of conflict or repressive rule, and must seek to address the related violations of all rights, including economic, social, and cultural rights (e.g., loss or deprivation of property rights). Peace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and social services, and endemic corruption can be addressed in a legitimate and fair manner by trusted public institutions.'*

Guidance Note on the United Nations Secretary General, UN Approach to Transitional Justice, Principle 9

In order to meaningfully contribute to achieving broader objectives such as the prevention of conflicts and atrocities to occur, reconciliation and peace building, transitional justice should take into account the root causes of conflicts. It should seek to integrate and address a larger spectrum of rights including civil, political, economic, social and cultural ones.

As the link with between human rights is relevant to be addressed in a transitional justice context, the United Nations Secretary-General published his Guidance Note on the United Nations Approach to Transitional Justice. Its principle 9 calls on the United Nations to 'strive to ensure transitional justice processes and mechanisms to take account of the root causes of conflict and repressive rule, and address violations of all rights, including economic, social and cultural rights.' (see and for further reading on the matter: United Nations Office of the High Commissioner for Human Rights, 2014. *Transitional justice and Economic, Social and Cultural Rights*. New York and Geneva).

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## Module 02

### International Criminal Justice

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## Learning objectives

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The goal of this module is to offer an introduction to international criminal justice (ICJ) in the form of principles, laws and institutions.

- It offers a brief overview to the international criminal justice goals such as punishment, deterrence, condemnation and solidarity; and its principles such as individual criminal responsibility and fighting impunity through reducing bars to prosecution by evoking superior orders or acting on behalf of the state;
- In addition, this module elaborates on substantive and procedural aspects of international criminal law (ICL) through exploring the core recognized and prosecutable international crimes which are genocide, crimes against humanity, war crimes and torture. It provides understanding of the structures and actors i.e. judges, prosecutor, suspect(s) and victims.
- Finally, the module offers an overview of the ICL institutions from Nuremberg to The Hague and some of the challenges and dilemmas ICJ is facing today.

#### **Nuremberg Principles:**

*Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.*

*The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.*

*The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does*

*not relieve him from responsibility under international law.*

*The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.*

*Any person charged with a crime under international law has the right to a fair trial on the facts and law.*

*The crimes hereinafter set out are punishable as crimes under international law:*

*a) Crimes against peace*

## Background: International criminal justice

International criminal justice refers to the norms and institutions established for the prosecution of individuals for committing the international crimes of genocide, crimes against humanity, torture and war crimes by national, international courts and tribunals. The international criminal justice system refers to the courts and tribunals, including, where appropriate, relevant national courts engaged in the prosecution of international crimes. Al-

though there is no formal hierarchy amongst international tribunals, it can be argued that the International Criminal Court (ICC) atop an international criminal justice system that includes ad hoc international tribunals, mixed and hybrid courts, and relevant national courts. One could equally include international commissions of inquiry and fact finding commissions that investigate and document the commission of international crimes

## International criminal justice goals

The overarching goals of international criminal justice are related to advancing accountability for heinous human rights violations and the fight against impunity. International criminal justice shares similar standard objectives to national criminal law enforcement, such as retribution for wrongdoing, general deterrence, incapacitation and rehabilitation.

According to Aukerman (2002), criminal justice has different goals and belongs to a variety of theoretical frameworks that justify prosecution, including retribution and vengeance, rehabilitation, restorative justice, expressivism or condemnation, and social solidarity. As retributive and restorative forms of justice were discussed in the previous section, some space is dedicated to the other goals here.

### **Deterrence and rehabilitation**

Deterrence is often understood as a prevention of individuals committing crimes because of the possible fear of the consequences of such behaviour. Deterrence does not affect the motivation or capabilities of individuals towards deviant or criminal behaviour, but on the calculation of the costs (sanctions). The literature recognises two forms: individual and social deterrence. The latter comprises the establishment of 'legal and social norms that will help human compassion prevail over cruelty' (Song 2013, 203).

A widely discussed concept in criminal justice often confused with deterrence is rehabilitation. Beyond inhibition from committing crimes, the purpose of rehabilitation is 'curing' the offender and to bring about their reintegration into the community (Aukerman, 2002). Due to a limited range of sentences and the outsourcing of the sentence enforcement to international authorities, the broader aims of rehabilitation and social integration are difficult to achieve (Cryer et al., 2007).

### **Condemnation and social solidarity**

Beyond retaliation, the 'true function' of the punishment is to maintain social cohesion. Thus, the punishment has an expressive and communicative role to reaffirm a common moral and social order, identity and solidarity. In general, the expectations of societies, and the aspirations of the international actors and of court practitioners towards international courts and international criminal justice itself have been much larger than the punishment in making advances 'to achieve objectives related to peace and security such as stopping an ongoing conflict, produce a reliable historical record of the context of international crime, provide a venue for giving voice to international crime's many victims, and to propagate human rights values' (Damaska 2008, 331). In that regard, the objectives of international criminal justice and transitional justice are intertwined.



## International criminal justice principles and norms

*'International law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs'* (Jackson 1945, Opening Statement before the International Military Tribunal).

International criminal justice principles include: fairness, non-discrimination, impartiality, independence, sufficiency of evidence, rights of a fair trial, and presumption of innocence'. International criminal justice shares some of the same principles of national criminal justice such as: the principle of legality (see Nuremberg Principle 1 and Rome Statute

Articles 22 and 23); non-retroactivity (Article 24); ne bis in idem referring to the prohibition of being punished twice for the same crime (Article 20); exclusion of minors from criminal responsibility (Article 25); intent and knowledge on the commission of the crime (Article 30); and also certain grounds for the exclusion from criminal responsibility (Article 31).

The following section will provide more information on sources, crimes and procedure of international criminal law, thus only key principles of international criminal law will be addressed here.

## Principle of individual criminal responsibility

*'The fabric of international law has been radically and irrevocably changed as a result of its contact with atrocity—first in the form of Nazi crimes, and more recently in the shape of atrocities in the Balkans and genocide in Rwanda'* (Douglas 2014, 276).

Since the 15th century, states have been the primary agents of responsibility for crimes on their territory (Roeben, 2012). One of the most basic shifts has been in the development of a basic model of criminality principles intended to puncture the shield of sovereignty (Douglas, 2014). According to Werle (2010) the main obstacles of recognising individual criminal responsibility were two: states and not individuals were the exclusive subjects of international law and the attitudes of states in relation to their sovereignty were rather defensive. Individuals became subjects of international law only after World War II and 'the IMT Charter can be considered as the birth certificate of international criminal law' (Werle and Bung 2010, 1). According to Bassiouni (2013), individual criminal responsibility occurred almost at the same time with international protection of individual and collective human rights. Individual criminal responsibility is a general principle of law, whether under national law or under ICL. The difference is the applicable law (Bassiouni, 2013). Although international crimes are of a collective nature this 'does not absolve us of the need to determine individual responsibility' (Werle 2007, 953).

In the opening speech at the International Military Tribunal, Justice Jackson summarised the essence of individual criminal responsibility employed by international criminal law. The idea that other entities such as states or corporations commit crimes is, in his view, a 'fiction' which could become the basis of 'personal immunity'. 'Crimes are always committed only by persons' and 'only sanctions which reach individuals can peacefully and effectively be enforced' (Damgaard 2008, 100). The principle of personal liability is connected to the assumed purpose of international criminal law in the maintenance of peace. The Nuremberg Principles (1946), Articles 6 of the ICTY/ICTR Statutes and Article 23 of the Rome Statute (1998) refer to 'individual criminal responsibility' for the committing of acts 'under international law' or 'jurisdiction of the court'.

The concept of individual responsibility is not a novelty for domestic criminal laws but 'the application of the law when those committing the conduct acted with the authority of the state has followed a far less a certain path' (Ratner et al. 2009, 3). The novelty of ICL in relation to the principle of individual criminal responsibility is about overcoming the legal and customary barriers that prevent the accountability of certain categories of transgressors such heads of states or those protected by any other form of official authority.

<sup>1</sup> Hague Institute for the Internationalisation of Law. 2011. General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework.

## Fighting impunity – reducing barriers to investigation and prosecution of international crimes

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### Command responsibility

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In the words of Justice Jackson, the rationale behind command responsibility and rejection of the acts of states doctrine is that ‘these twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind’ (Jackson 1945, Opening

The main reason for the development of command responsibility, notably in the international criminal arena, lies in the recognition that crimes are often committed by low-level officials or military personnel because their superiors failed to prevent or repress them (Cassese, 2003). According to Williamson (2008, 309):

*‘superior responsibility has proved to be a particularly vital conduit for prosecutors at the international tribunals to bring to trial heads of government, ministers and other civilian superiors who, in their capacity as civilian superiors, clearly played a substantial role in overseeing and directing violations of IHL, crimes against humanity and genocide, without necessarily setting foot in the arena of combat or where the crimes were committed’.*

The Article 28 of the Rome Statute, in addition to other grounds of criminal responsibility, a ‘commander’ or ‘superior’ is accountable for the crimes committed by the forces under his/her command, control or authority resulting as ‘his or her failure to exercise control’ over his/her effectives or subordinates.

### Superiors’ orders

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The plea of obedience to superior orders is certainly one of the most widely debated and controversial defences in international criminal law (Gaeta, 1999). The rule that a superior order is not a defence for being held accountable is a well-established principle since the IMT and Tokyo Tribunals Charters and was reinforced in the ICC Statute. While executing orders, individuals are in a condition of possibility making ‘moral choices’ (Nuremberg Principles).

According to Gaeta (1999, 189), Article 33 of the Rome Statute ‘has ruled out the possibility of the plea of the superiors orders for the most odious and egregious international crimes’. Article 33 indicates that crimes com-

mitted by both military and civilians under superior orders do not relieve the individual of their individual responsibility unless there is ‘a legal obligation’ to obey and the order is either ‘not manifestly unlawful’ or ‘the person didn’t know the order was unlawful’ (See, article 33 of the Rome Statute, paragraph 1, items a, b and c). The Rome Statute (Article 33 paragraph 2) clearly states that ‘orders to commit genocide or crimes against humanity are manifestly unlawful’. Though, the tribunals’ practice has shown that obedience to orders can be considered a mitigating circumstance by the court even when related to the commission of war crimes (ICRC).<sup>2</sup>

Statement before the International Military Tribunal). Superior orders, the responsibility of commanders and the irrelevance of official capacities are interlinked principles of international criminal law intended to reduce impunity and impediments (bars) to investigation and prosecution of international crimes.

This principle of the Rome Statute can be traced back to the Statutes of the ICTR/ ITCY (Article 6 paragraph 3) and IMT Charter. This principle is interconnected with the one of acting under ‘superior or government order’ (Nuremberg Principle 4).

It is generally established in the jurisprudence of international tribunals that the first key element to determine command responsibility is ‘superior/subordinate relationship’ de jure or de facto. Two other elements are the superior’s knowledge of the actions or intention of the subordinate(s) to commit a criminal act, and the failure of the superior to take the necessary and reasonable measures to prevent or punish the commission of such acts (Williamson, 2008). According to Guenael Mettraux (2009) Command or superior responsibility is often misunderstood. It neither an objective form of liability nor is it a form of complicity. Superiors are held responsible for the omission to act that means despite awareness of the crimes of subordinates, they fail to fulfil the duty to prevent and punish these crimes.

<sup>2</sup> ICRC, Rule 155. Defence of Superior Orders. Accessed August 11, 2016. [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule155](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule155).

## Immunities

Official capacity as head of state or government official does not relieve the person committing an international crime from their responsibility under international law. This important Nuremberg Principle becomes especially relevant as not to shield heads of state or other responsible officials from their accountability.

While international courts have limited capacity to prosecute all perpetrators of international crimes, especially those enjoying high level of official position, the attempts of the 'attempts in domestic courts to prosecute high-level foreign state officials for international crimes have generally ended in failure' (Foakes 2011, 1). According to Akande (2010) there are two forms of immunities, those attached to the status and those attached to the acts or functions.

- 'Personal immunity' or 'immunity *ratione personae*' are accorded to those state officials who represent the state at the international level and are considered necessary in the international relations between the states and for the maintenance of a system of peaceful cooperation and co-existence. These immunities are valid as long as the official remains in office.
- Beside personal immunity, state officials enjoy 'functional immunity' or 'immunity *ratione materiae*'. This type of immunity attaches to the official act rather than the status of the official, and it may be relied on by all who have acted on behalf of the state with respect to their official acts.

State officials are, generally speaking, immune from the jurisdiction of other states in relation to acts performed in their official capacity.

Until the end of World War II the question of the immunity of the heads of state was decided in favour of impunity. This changed with the IMT Charter (1945) and the proclamation by the UN of the Nuremberg Principles (1946). 'Even though the substantive immunity of heads of state which overturned by the IMT Charter, temporal immunity survives today and has been confirmed by the International Court of Justice's 2002 decision in *Congo vs. Belgium*' (Bassiouni 2013, 90-91). The questions of immunities of heads of state became imminent not only in relation to the development of the doctrine of the universal jurisdiction for international crime but also in relation to the cooperation of state parties with the ICC enforcing arrest warrants such as the one issued on March 4, 2009 against Sudanese President Omar al-Bashir for masterminding a campaign of crimes against humanity and war crimes in the Darfur region. To date, some states have refused to execute the warrant.

The question of immunities for heads of state is also relevant in relation to peace processes where de facto immunities become part of ceasefire or peace negotiations, such as in the Dayton Accord (1995) to end the war in the former Yugoslavia, or the Lome Peace Agreement (1999) which ended the war between Liberia and Sierra Leone. The Peace vs. justice dilemma is discussed at the end of this section.

## Duty to punish – principle of complementarity

National courts bear the primary responsibility for trying international crimes under one or more of five bases of jurisdiction recognised in international law: territoriality, nationality, the protective principle, passive personality, and universality (Boas et al., 2011). According to the first Nuremberg Principle, any person committing an international crime is 'liable to punishment' under international law even when 'the internal law does not impose a penalty' (Principle 2).

International criminal law conventions such as the 1949 Geneva Conventions and Additional Protocol I of 1977, the Genocide Convention, the Torture and Apartheid Conventions and the Rome Statute, express a clear and unambiguous obligation to prosecute the crimes contained therein. In certain cases, such as in the Rome Statute, the obligation to prosecute assumes a mandatory character

(Ntoubandi, 2007). Bassiouni (1999, 227) insists that 'prosecution [of international crimes] is a moral, ethical, legal, and pragmatic duty that no amount of passing time should erase'. In his view, international crimes are those 'international criminal law normative proscriptions whose violation is likely to affect the peace and security' and are contrary to the 'fundamental humanitarian values' (Bassiouni 2003, 24).

The first models of international or ad-hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were constructed as an exception of the state primacy principle to prosecute crimes within their jurisdiction. These tribunals have 'primacy over national courts' or 'national courts of all states' (Article 9, item 2, ICTY Statute and Article 8 of ICTR Statute).

The very fact that the ad hoc tribunals were given concurrent jurisdiction with national courts demonstrates that, despite the Security Council's conclusion that such crimes constituted a threat to international peace and security, they never intended to try every international crimes committed in the former Yugoslavia or Rwanda, and would have to share the burden in some way with national courts (Boas et al., 2011).

'The juridical concept of complementarity is based on the unarticulated premise of the existence of concurrent jurisdictional competence' (Bassiouni 2013, 20), such as the relationship between national and international jurisdictions that, in the view of Bassiouni, are co-equal authoritative legal processes. The Rome Statute's fundamental principle of complementarity is designed to leave the primary responsibility for prosecuting international crimes to national courts (Wouters, 2005). Thus, according to Article 17 of the Rome Statute, the ICC cannot admit cases already

investigated or under investigation or prosecution by a state, although, it can admit a case on referral of a situation by a state party (Article 14) or by the Prosecutor proprio motu (Article 15) when the state concerned is genuinely unable or unwilling to investigate or prosecute the crime (Article 17). It is up to the court to establish 'unwillingness' or 'inability'.

- In the case of 'unwillingness' the court shall consider the principles of the due processes and the quality of the national proceedings such as shielding the person concerned from responsibility, unjustified delays and lack of independent or impartial proceedings (Rome Statute, Article 17 paragraph 2).
- In the case of 'inability', the court evaluates the capacities of the national judicial system to undertake its proceedings and considers taking the case when there is a 'total or substantial collapse or unavailability' of a judicial system (Rome Statute, Article 17, paragraph 3).

*'(...) the most serious crimes of concern to the international community as a whole must not go unpunished (...)'*

*Preamble to the Rome Statute of the International Criminal Court (1998)*

*'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'*

*Preamble to the Universal Declaration of Human Rights (1948)*

*'The establishment of the International Criminal Court was a gift of hope to future*

*generations, and a giant step forward in the march towards universal human rights and the rule of law.'*

*Former UN Secretary-General Kofi Annan at the ceremony held at Campidoglio to celebrate the adoption of the Rome Statute of the International Criminal Court (July 1998)*

*'The investigation and prosecution of international crimes—including genocide, crimes against humanity and war crimes—is a fundamental component of transitional justice.'*

*International Centre for Transitional Justice (2016)*

## Foundations of international criminal law (sources)

International criminal law is part of the wider branch of international law. International law 'has the general function to fulfil, namely to safeguard international peace, security and justice in relations between States' (Tomuschat 1999, 23). Article 1 of the United Nations Charter, an important document of modern international law, states that its main purpose is to be a centre for harmonising the actions of nations in the attainment of common ends, such as the maintenance of international peace and security, friendly relations amongst nations and international cooperation. International law is also the voice of those that have formerly been powerless and excluded and which can reinforce their needs through law.

While international law governs the rights and responsibilities between states, international criminal law is addressed to individuals having violated prohibitions imposed by a state. The sources of international criminal law are those of international law. International criminal law is the branch of public international law that concerns itself with the prosecution of international crimes by international or national criminal courts and tribunals of a permanent, ad-hoc or hybrid nature. It is both substantive and procedural. Its substantive part defines the acts that are considered as criminalised while the procedural part regulates the procedure of international courts. Although international criminal law has relied on

national criminal law in its development, international judges still make reference to important principles of national law, and international courts rely to some extent on national criminal justice systems in their work (with which they sit in relationships of primacy, concurrency or complementarity), the definition of international criminal law excludes national law and courts.

The sources of international law are usually referred to as those mentioned in Article 38 of the Statute of the International Court of Justice. The foundation of the Statute was already laid down in 1922 (Evans, 2010). The laws to be applied, according to Article 38, are as follows, and can likewise be taken as a hierarchical order of their application:

- a. **International conventions**, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. **International custom**, as evidence of a general practice accepted as law;
- c. **The general principles of law** recognised by civilised nations; and

d. **Judicial decisions** and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International Conventions (treaties, agreements, etc.) are binding on their signatories. International custom refers to customary law that is based in the 'way things have always been done, becoming the way things must be done' (Thirlway 2010, 101). Customary law is formed from two elements: 1) an established, widespread, and consistent practice on the part of States; and 2) a psychological element known as the *opinio juris sive necessitas* which refers to a belief that an act is obligatory and required by law (International Court of Justice, North Sea Continental Shelf case, 20 February 1969). The general principles of law which are laid down in national legal systems can serve as a reference point when treaty and custom cannot settle the dispute. The last sources of law, namely judicial decisions, are not material sources of law as most teachings and decisions are based in law and are a further interpretation of the existing sources.

## Substantive international criminal law: The crimes

As of today, five core international crimes are recognised under international criminal law: genocide, war crimes, crimes against humanity, torture, and the crime of aggression. International crimes are understood as 'the most serious crimes of concern to the international community as a whole'. The Rome Statute recognises that such crimes 'threaten the peace, security and well-being of the world' (Rome Statute, Preamble, para. 3).

The judgment of the Nuremberg International Military Tribunal gives a classic statement of international crimes:

*'Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced (...) individuals have international duties which transcend the national obligations*

*of obedience imposed by the individual state'.<sup>4</sup>*

The Nuremberg Principles, drawn up by the International Law Commission of the United Nations to codify the legal principles underlying the Nuremberg Trials of Nazi party members following World War II, lay the basis for setting out the individual responsibility for international crimes. The Nuremberg Principles tackle the responsibility for crimes against peace, war crimes, and crimes against humanity. These served as the basis for the development of today's crimes under international criminal law, namely genocide, war crimes and crimes against humanity. Since the Nuremberg Trials, various international, national, ad-hoc or hybrid courts had jurisdiction on those three crimes including the International Criminal Court under the Rome Statute.

<sup>3</sup> Rome Statute, 2002, Preamble, para 3.

<sup>4</sup> Nuremberg IMT: Judgment and Sentences (1947) 41 AJIL 172 at 221.

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## Genocide

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Genocide is often regarded as the crime of all crimes. The term genocide was first used by Raphael Lemkin in the 1940s. His work was mainly influenced by the Holocaust and the events of World War II. He viewed the genocide as a multi-faceted attack on group existence including political, social, cultural, economic, biological, physical, religious and moral genocide (Neressesian, 2002). Today the legal definition of genocide is narrower and excludes cultural aspects.

While the term genocide was not used during the International Military Tribunal in Nuremberg it was set out in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide which also confirmed genocide as a crime under international law. Today the prevention and punishment of genocide is considered customary law, so that its prevention and punishment is an obligation on all states whether or not they are signatories to the Convention.<sup>5</sup>

The Convention on Genocide is the basis for all further definitions of the crime of genocide. The most elaborated and widely used definition can be found in the Rome Statute of the Inter-

national Criminal Court. According to Article 6, 'genocide' refers to any of the following acts committed with 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group' including:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group; or
- Forcibly transferring children of the group to another group.

Genocide is exceptional to other crimes as it requires a mental element (*mens rea*) and a physical element (*actus reus*). The mental element refers to the special intent requirement meaning that the perpetrator must have the intent to destroy, in whole or in part, a group. The number of acts (physical element) committed following this mental element is not important. Due to its mental element the crime of genocide is difficult to prove.

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## Crimes against Humanity

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Crimes against humanity were first prosecuted in 1946 by the International Military Tribunal in Nuremberg. Article 7 of the Rome Statute, which provides a list of 10 prohibited acts and an 11th residual category, constitutes a distillation of the law on crimes against humanity that for the most part forms part of customary international law.

Crimes against humanity entail the commissioning of certain prohibited acts in the context of a widespread or systematic attack, against any civilian population that is identifiable or defined by a number of characteristics including ethnic, political, geographic, social, cultural or even economic activity, pursuant to a policy originated by a state or an organisation that fulfils certain criteria. The individual charged must have knowledge that his/her conduct was part of the broader attack on the civilian population targeted. Thus, the crime against humanity requires an act to be committed as part of a wider attack of which the actor is aware.

The Rome Statute does not define the meaning of widespread nor of systematic. However, widespread is mostly understood as referring to a multiplicity of persons and systematic referring to a higher degree of organisation and planning (Bassiouni, 2011). Furthermore, there must be a nexus between the act of the individual and the wider attack (ICTY, Tadic judgment, Case No. IT-94-1, 15 July 1999).

The prohibited acts in Article 7 of the Rome

Statute are: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The concept of crimes against humanity has been developed since the end of World War II from being closely linked to the war crimes to an autonomous category that reflects the nature of modern conflicts and crimes against the civilian population 'whether committed in time of war or in time of peace' (Greppi 1999, 543). Even though there have been many examples of prosecutions, since Nuremberg different national and international tribunals have used slightly different definitions of this crime, which unlike genocide or war crimes has not been codified in an international treaty.

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<sup>5</sup> International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951.

The law of armed conflict also referred to as *ius in bello* or international humanitarian law refers to the part of international law that regulates the conduct of hostilities. Therefore, it provides protection to combatants and non-combatants. International humanitarian law applies during times of armed conflict or occupation. Humanitarian law is based on the principles of distinction and proportionality. This means that combatants and non-combatants and civilian and military objects must at all times be treated differently and that attacks must be proportionate to the military advantage achieved. This also means that certain weapons are prohibited as they may cause unnecessary suffering.

War crimes are essentially serious violations of international humanitarian law, which regulates the conduct of armed conflict including the means and methods of warfare and protects those involved and affected by the conflict. The armed conflict could be international (between states, or a war of self-determination waged by those occupied or fighting racist or colonial regimes) or non-international in character (civil war).

Genocide and crimes against humanity do not require being committed in times of armed conflict.

The law regulating armed conflict was first laid down in the Hague Convention of 1864 and 1907. This was followed by the Geneva Conventions of 1949 and supplemented by Additional Protocols. The Hague Conventions are the most extensive documents on the restraints on the conduct of hostilities and the methods and means of warfare. The Geneva Conventions focus on the protections of the wounded and sick, the shipwrecked, prisoners of war and the protection of civilians. Its additional protocols elaborate on the different protection granted during international or non-international armed conflict.

However, not all violations of international humanitarian law constitute war crimes as not all crimes relate to the responsibility of the individual but to state responsibility. The Rome Statute of the International Criminal Court provides the most complete list of war crimes.

**Article 8 of the Rome Statute reads as follows:**

*For the purpose of this Statute, 'war crimes' means:*

*(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:*

*(i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*

*(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;*

*(vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.*

*(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.*

*(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:*

*(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.*

*(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.*

The crime of aggression is a crime under the Rome Statute of the International Criminal Court. The definitions and the conditions for the exercise of jurisdiction over this crime were adopted by consensus at the 2010 Kampala Review Conference by the States Parties to the Court. The ICC may exercise jurisdiction over the crime of aggression, subject to a decision to be taken after January 1, 2017, by a two-thirds majority of states party and subject to the ratification of the amendment concerning this crime by at least 30 states party.

The Kampala amendments will enter into force for those state parties that have accepted them one year after the deposit of their instrument of ratification or acceptance. For the ICC to actually exercise jurisdiction over the crime of aggression two other conditions need to be fulfilled: firstly, the alleged crime must have occurred more than one year after thirty states have ratified or accepted the amendments. Secondly, after 1 January 2017 a decision must be taken by a two-thirds majority of the Assembly of State Parties granting the ICC approval to exercise jurisdiction over the crime of aggression. At the time of writing, 26 states had ratified the Kampala amendments, and another 29 were actively working on the ratification of the amendments.

With the creation of the United Nations in 1946, the use of force in the conduct of international relations was banned (see Articles 2.4 and 2.7 UN Charter). In only two instances is the use of force permitted by the UN Charter: enforcement action ordered by the United Nations Security Council under Chapter VII in the maintenance of international peace and security; and as self-defence under Chapter 51 (and customary international law). Aggression is the use of force outside these two instances.

The right to a humanitarian intervention to protect individuals from gross human rights violations, including by their own government, remains debated.

In terms of Article 8 bis of the Rome Statute, Aggression is the use of force against the territorial integrity and independence of a state, by committing certain acts (acts of aggression), which include a military attack by land forces, bombing, or a blockade of the ports of the state. The crime is a leadership crime and targets senior political and military leaders who have control over the military.

Article 8 bis (1) provides that for the purpose of the Rome Statute, the crime of aggression 'refers to the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'

There are no examples of international or even national prosecutions of the crime of aggression or crimes against peace since the Nuremberg (12 defendants) and Tokyo Trials (18 defendants). 'Despite the progress at Kampala, considerable uncertainties and ambiguities exist concerning the process for activating the jurisdiction, the manner in which the jurisdiction operates once it is activated, its institutional effects on the Security Council and the ICC itself, and its long-term implications for the jus ad bellum' (Murphy 2012, 2). Other authors like Anderson (2010) have expressed their concern about the nature of contemporary aggressive wars and the role of non-state actors.

**According to Article 8 of the Rome Statute the crime of aggression is the following:**

- a) *The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;*
- b) *Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State*
- c) *The blockade of the ports or coasts of a State by the armed forces of another state*
- d) *An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State*

*e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;*

*f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*

*g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.*



## Torture

Torture can be prosecuted in three separate ways within international criminal law: as a separate crime, as a crime against humanity, or as a war crime. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires all states to prosecute and criminalise the act of torture, and as such it has reached the status of customary law. The International Criminal Tribunal for the former Yugoslavia Appeals Chamber has declared that 'the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for

torture outside of the framework of the Torture Convention'.<sup>6</sup> The subject matter jurisdiction of the Extraordinary African Chambers in Senegal, an internationalised court created by Senegal in collaboration with the African Union to try former Chadian dictator Hissene Habre, includes the crime of torture. Treating torture as an independent offense is useful when the contextual requirements of the other crimes, namely as part of war crimes or crimes against humanity, cannot be made. This could be the case outside an armed conflict context or when the widespread or systematic elements of crimes against humanity are missing.

## Procedural international criminal law

Procedural rules govern the work of the tribunal at every stage of the proceedings: preliminary examination (ICC); pre-trial (investigations, indictment, confirmation of charges where provided for, issuance of arrest warrants or summons to appear), trials, including sentencing; appeals; and reparations (where provided for). Since the history of international criminal law is, in fact, a history of tribunals created by separate treaties or statutes,

there is no unified body of procedural law in international criminal and no international criminal procedure. One has to look at the statutes establishing particular courts or tribunal and rules of procedure and evidence specific to that court or tribunal. For the ICC, for instance, the Rome Statute and the Rules of Procedure and Evidence are the two sources of procedural law.

## Actors and terminology in international criminal justice

The international criminal bodies use more or less analogues procedures, despite diverse terminology (Boas et al., 2011). International criminal justice within the wider framework of international law is concerned with the responsibility of individuals. By contrast, the Inter-

national Court of Justice is concerned with state responsibility. Individual criminal responsibility is the term used in international criminal law when the suspect is a legal person under investigation.

## Terminology of international criminal law

- **Accused:** applies to someone against whom charges have been confirmed.
- **Indictment:** the document charging the accused with one or more crimes.
- **Verdict:** the judges' decision on a case.
- **Order or decision:** intermediary decisions or communication from the judge on different matters.
- **Judgment:** the judges' reasoning of the verdict.
- **The parties** in the proceedings are equally prosecution and the defence. Criminal procedure recognises the parties equality of arms.
- According to the stage of the proceedings, the chambers are referred to as pre-trial, trial or appeal chamber. Usually one judge can preside only in one stage of the proceeding.

## Structure of the chambers

International criminal tribunals usually follow a similar structure.

- The Statutes of the ICTY, ICTR and the Special Court for Sierra Leone established a two-tiered hierarchy in which the Appeal Chamber is in charge of the interlocutory appeals prior to final judgments, and the appeals of verdicts and requests for revision.
- The Rome Statute of the ICC develops a three-tiered structure composed of pre-trial,

trial and appeal chambers. The latter enjoys hierarchical superiority.

- The right to appeal or revise trial decisions is a recent development of international justice. No right to appeal was provided for at the International Military Tribunals at Nuremberg or Tokyo.

(On the above and for further reading see Boas et al., 2011).

<sup>6</sup> Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23/1, Judgment, para. 148 (Appeals Chamber, June 12, 2002).

### Judge

The role of judges is related to the nature of the proceedings which are either adversarial or inquisitorial. The judges at the ICTY and ICTR have a more passive role, with exception to some provisions allowing them to summon witnesses *ex officio* or order parties to present additional evidence. According to Cryer et al. (2007), over time judges have become more active in controlling the proceedings as a whole, rather than simply the trial. The role of the ICC judges is from the outset more an inter-ventionist, reflecting additional inquisitorial elements in the criminal procedures.

### Prosecutor

International Prosecutors enjoy a high degree of independence. The degree of judicial supervision is greater in the ICC than in the ICTY or the ICTR. Each prosecutor decides on the commencement of the investigation, the conduct of the investigation, and any prosecution of a crime. Their powers are limited to geographical or temporal jurisdiction of the tribunal or court. The obligation to prove the guilt of the accused rests with the prosecutor. The role of the prosecutor in most of the criminal justice systems is to represent the interests of the public, state or justice. The ICC prosecutor besides prosecuting and punishing perpetrators of crimes has a more 'active truth-seeking duty' (Cryer et al., 2007).

### Suspect

The suspect is a legal person concerning whom the prosecutor possesses information to hold them accountable in relation to the

commission of a crime. The suspect turns into an 'accused' once the charges have been confirmed. The accused is presumed innocent until found guilty by a court. For that purpose, the statutes of the tribunals and the ICC provide for the safeguard of the fundamental rights of the accused during the proceedings, including the right to be tried without any delay, the right of a defence council, and translation.

### Victim

Victims are not only those individuals who have suffered qualifying personal harm directly or indirectly, but also representatives of particular entities that have suffered qualifying property damage (Boas et al., 2011). According to the Rome Statute Rule of Procedure 85 (a) the status of the victim is determined by the pre-trial chamber according to four criteria: the victim must be a natural person; they must have suffered harm; the crime ensuing the harm must fall under the jurisdiction of the court; and a causal link between the crime and the harm suffered must be established. The role of the victims has significantly changed with the ICC, in which the victims are granted the right to participate and pursue their own interests in the proceedings. The Rome Statute of the ICC and Extraordinary Chambers in the Courts of Cambodia provide reparations for the victims as part of the criminal proceedings. In the earlier tribunals, restitution and compensation of the victims was not part of the criminal proceedings.

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## International criminal justice institutions – from the Nuremberg and Tokyo trials to ad hoc tribunals and the ICC

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The International Military Tribunals in Nuremberg and Tokyo were the forerunners of today's international criminal courts and tribunals and were established after the end of World War II to try German and Japanese leaders for waging a war of aggression and for war crimes and crimes against humanity committed during that war. Following the trials and the adoption of the Nuremberg Principles by the United Nations General Assembly in 1946, efforts to develop a code of international crimes, and to establish a permanent international criminal court stalled, in part due to the Cold War divide.

Fifty years later, the United Nations Security Council established two ad hoc international criminal tribunals – the ICTY and the ICTR – in response to atrocities committed during the breakup of the former Yugoslavia and the Rwandan Genocide. The atrocities com-

mitted in both conflicts, and the consensus that the work of the two tribunals generated, precipitated efforts towards the creation of a permanent international criminal court, culminating in the adoption of the Rome Statute of the ICC in 1998. The International Criminal Court<sup>7</sup> commenced operations on July 30, 2002 and has so far investigated 23 cases in 10 situations, namely Uganda, Democratic Republic of the Congo, Central African Republic I & II, Kenya, Libya, Ivory Coast, Mali and Georgia. The Office of the Prosecutor is currently conducting preliminary examinations in Afghanistan, Colombia, Guinea, Iraq, Nigeria, Palestine and Ukraine (see Appendix 4 for further information on cases before the ICC).

After the two ad hoc tribunals, there was a shift in favour of a different model of tribunals from ad hoc international tribunals to

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<sup>7</sup> References on ICC situation and cases drawn from ICC official website: <https://www.icc-cpi.int/Pages/Home.aspx> and <https://www.icc-cpi.int/pages/situations.aspx>

hybrid/mixed or internationalised tribunals. The shift was due in part to concerns about the costs of tribunals, ownership and legitimacy. The participation of actors and the inclusion of local judges (and law) are aimed at promoting ownership of the tribunal and its work. The Special Court for Sierra Leone established by agreement between the government of Sierra Leone and the United Nations was the first generation. The most recent will be the proposed Special Criminal Court in Central African Republic, which is likely to begin operations sometime in 2016. Between the two, several other courts and tribunals of the same mould, but with varying elements including subject matter jurisdiction have been established to prosecute international crimes. These include the Extraordinary Chambers in the Courts of Cambodia, Special Panels for Serious Crime in Timor Leste and the Extraordinary African

Criminal Chambers in Senegal, which exercises universal jurisdiction.

International criminal courts and tribunals can be divided into four fundamental genera (Mackenzie, Romano, Shany and Sands, 2009):

- Permanent International Criminal Courts (ICC)
- Ad Hoc International Criminal Tribunals (ICTY, ICTR)
- International Military Tribunals (Nuremberg and Far East Tribunal)
- Hybrid criminal tribunals also known as mixed or internationalised tribunals (Serious Crimes Panels in East Timor, Panels in Kosovo, War Crimes Chamber in Bosnia and Herzegovina, Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon)

In the sections below, you can find some representative examples.

## International military tribunals

### Nuremberg and Tokyo trials

The Nuremberg and Tokyo trials were a series of military tribunals convened by the Allied forces after World War II, which were most notable for the prosecution of prominent members of the political, military, and economic leadership of Nazi Germany. The first and best known of these trials was the trial of the major war criminals before the International Military Tribunal (IMT), held between 20 November 1945 and 1 October

1946. On October 1, 1946, the International Military Tribunal handed down its verdicts in the trials of 24 Nazi leaders (see Appendix 3 for a list of all IMT cases). The second set of trials was conducted under Control Council Law No. 10 at the United States Nuremberg Military Tribunals (NMT), which took place from 9 December 1946 to 13 April 1949 (Heller, 2011) (see Appendix 4 for a list of all NMT cases).

## International tribunals

### The International Criminal Tribunal for the former Yugoslavia

The International Tribunal for former Yugoslavia was the first international tribunal established since Nuremberg and Tokyo. It was set up by the Security Council under Chapter VII of the United Nations Charter that provides for action with respect to threats or breaches of the peace and acts of aggression. This tribunal was considered an ad-hoc measure by the Security Council, aiming to contribute to the 'restoration and maintenance of peace' and that the serious violations of international humanitarian law occurring in the territory of the former Yugoslavia are 'halted and effectively redressed' (UN Security Council Resolution, S/RES/827 (1993)). In Resolution 827 (1993), the tribunal was created in response to reports of

mass killings, massive, organised and systematic detention and rape of women, and ethnic cleansing in the territory of former Yugoslavia. The ICTY was established in the middle of an ongoing conflict, prosecuting crimes committed between 1991 and 2001 against or by members of different ethnic groups composing the dissolving Yugoslavia and its succeeding entities.

According to its official website<sup>8</sup>, the ICTY has charged over 160 people including heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts.

<sup>8</sup> Available at <http://www.icty.org>. Accessed July 12, 2016.

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## The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established under Resolution 955 (1994) of the United Nations Security Council. This resolution mandated the ICTR 'for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994' (UN Security Council Resolution, S/RES/955 (1994)). According to the

legacy website of the International Criminal Tribunal for Rwanda, since opening in 1995, it has indicted 93 individuals, whom it considered responsible for serious violations of international humanitarian law, including high-ranking military and government officials, politicians, businessmen, and religious, militia, and media leaders. The Tribunal has delivered 'ground-breaking judgments concerning genocide' in addition to its role in creating jurisprudence (Møse 2005, 290), and defining genocide and rape as a means of perpetrating genocide (see ICTR residual mechanism: <http://unictr.unmict.org/>).

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## Hybrid criminal tribunals

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## The Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was set up in 2006 to bring to trial the senior leaders and those most responsible for the crimes committed during the Khmer Rouge regime. This court is part of Cambodian judicial system and functions as a special or ad-hoc court based on an agreement between United Nations and the Cambodian Government in 2003. The trial chambers are composed of Cambodian and international judges. The creation of the ECCC took longer – from

1997 to 2007 – than was the experience for any other international or hybrid criminal tribunal in the post-Cold War era (Scheffer, 2008) and it has a limited temporal jurisdiction over crimes committed about 40 years ago in the Democratic Republic of Kampuchea (1975-1979). The ECCC Internal Rules provide for participation of the victims in the criminal proceedings. ECCC is trying four cases, one of them already concluded. (see ECCC website: <http://www.eccc.gov.kh/en>)

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## Permanent International Criminal Court

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The International Criminal Court (ICC) is a permanent court, the jurisdiction and functioning of which is governed by the Rome Statute, which is a treaty adopted at the Rome Diplomatic Conference on July 1998 and entered into force on July 1, 2002. According to the ICC Assembly of the State Parties website, 124 countries are State Parties to the Rome Statute:<sup>9</sup>

- 34 are African states;
- 19 are Asia-Pacific states;
- 18 are in Eastern Europe;
- 28 are in Latin American and the Caribbean; and
- 25 are in Western European and other states.

Its jurisdiction encompasses four categories of international crimes namely genocide, crimes against humanity, war crimes and the crime of aggression. As the Rome Statute does not provide a definition of the crime of aggression, the court will exercise its jurisdiction once a provision is adopted according to Articles 121 and 123 of the Statute (Article 5 paragraph 2).

The ICC is a court of last resort and is not a substitute or intended to take over jurisdiction from national courts. States continue to have the primary duty to investigate, prosecute and adjudicate all crimes occurring within their jurisdiction. The relationship between ICC and national courts is based on the principle of complementary as stipulated in the paragraph 10 of the Preamble of the Rome Statute. ICC exercises its jurisdiction only over the most serious crimes and after an assessment of the state's unwillingness or inability to conduct investigation or prosecution (see Article 17 for admissibility issues). The ICC has jurisdiction over crimes committed in the territory or by the nationals of a state party (*ratione personae* and *loci*) but only after the entering into force of the Rome Statute on July 1, 2002 or after ratification of the specific country (*ratione temporis*).

For more information about the ICC: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

<sup>9</sup> Accessed 12.08.2016. [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)

## International criminal justice challenges

International criminal justice faces a number of challenges at the macro-level that have to do with the lack of consensus of the different approaches international community opt in dealing with atrocities in general and particular cases or situations. Some of these obstacles have to do with the understanding by the states of the duty to prosecute, and also different approaches on tools and their legitimacy. According to Bassiouni (2013), the future of international criminal justice depends on the five following approaches:

- **Non-enforcement** by *de facto* or *de jure* amnesties and by general disregard by states of the duties to prosecute or extradite;
- Continued occasional enforcement, which is more in the nature of anarchic enforcement, depriving international criminal justice of an element of legitimacy, and failing to provide for consistency and predictability which are necessary elements of deterrence;
- **Unidirectional enforcement** through the United Nations Security Council by means of economic and military sanctions (including the delegation of unilateral use of force to a member seeking to enforce a Security Council resolution), and also by the Council's establishment of sub-organs such as the ICTY (even though the enforcement of their respective orders and judgments which are not complied with by a state depend on further action by the Security Council). But this approach has the characteristics as the second approach in that it is inconsistent, and thus lacks the legitimacy of even-handed and consistent application;
- **Incentivised enforcement**, through a variety of compliance inducement factors; and
- **Collective enforcement** through the ICC, notwithstanding its asymmetrical enforcement model.

As the only permanent court in place, the ICC faces a number of dilemmas due to its nature as an international treaty-based organisation with a broad membership and a wide mandate (Schiff, 2008):

- **Civil vs. common law dilemma:** international tribunals and especially ICC Statute and Rules combine common law and civil law tradition that may cause clashes between judges and prosecutors, which are trained in either of the two traditions.
- **Judicial vs. political dilemmas:** international courts are set to prosecute crimes that have occurred in contexts of international and non-international conflicts in which the political context drives people to extreme behaviour. Given the charged environment courts operate in; their judicial decisions can be politically interpreted.
- **Peace vs. justice dilemma:** as courts exercise their jurisdiction over crimes specified in their Statutes, their operations including investigations and trials may take place while conflicts or situations in which the crimes occur may be still ongoing or the society may still be under a fragile peace. This may lead to further conflict or a dilemma between the interest to achieve peace and justice at the same time.
- **Structural vs. administrative dilemma:** a complex organisational architecture and administrative structure to ensure power division, judicial neutrality and independence is not always the best design to ensure efficiency and coordination.
- **Retributive vs. restorative justice dilemma:** there is strong pressure on the court to embrace a broad mandate of both retributive and restorative justice, but the more broadly this mandate is pursued, the more difficult it is to fulfil.

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## Worksheet I: Peace versus justice

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The Peace vs. Justice debate is a longstanding one tracing back to Augustine and just war theory. It became increasingly salient with Latin American transitions from authoritarianism and more so with transitions from civil war in the 1990s in Africa and the former Yugoslavia (see Sriram and Pillay, 2009). In terms of demands, justice prioritises accountability for crimes, truth, admission of guilt, and addressing and redressing victim's needs. On the other side those demanding peace look at stability, implementation of peace agreements, contention of security forces, and retaliation.

Questions to be considered in this debate, and which should be kept in mind for the following exercise, are the following:

- How can processes of justice such as commissions of inquiry, trials, vetting and lustration, amnesty, restorative justice may be contentious or interfere with peace and stability?
- How can peace processes such as ceasefires, peace mediation, peace agreements and peace building activities (rule of law reforms, human rights promotion, security services reform, disarmament, demobilisation and reintegration of ex-combatants) interfere with justice efforts?
- How might justice priorities (protection of human rights, accountability for past abuses, victims' needs, reforms and preventive actions of future violations) conflict in a given situation with norms of peace (termination of conflict or political violence, stabilisation of situation and addressing demands of combatants to prevent return to conflict)?
- How do different identities and professional positions shape attitudes to contestation over peace and justice?
- Looking at the actors' interests – how do their interests compete?

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## Questions and exercises

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### Exercise 1

1. Can we balance justice and peace? This refers to managing processes, goals, norms, actors, and interests which many say are irreconcilable.
2. If we can balance, how do we do it, and how do we convince participants with history, narratives, interests and grievances that this is necessary or possible?

Split into two groups. One group discusses the arguments for favouring 'peace over justice', while the other group discusses arguments advocating 'justice over peace'. After 30-40 minutes, present your arguments to the other group in the format of a debate and respond to each other's arguments from your respective position, advocating either peace or justice.

These are some more questions to consider while answering the above questions of the exercise: Should peace come before justice or vice versa? Is one more of a precondition for the other? What are the challenges and what are the benefits from pursuing one over the other? Which stakeholders need to be considered? What would an approach look like that is implementing the two at same time? How can peace and justice instruments cross-fertilise each other? Give some examples of mechanisms and policies typically implemented to bring about peace and serve justice. Can you give examples where 'peace over justice' or 'justice over peace' have succeeded or failed, and why?

### Exercise 2:

Please brainstorm two country situations in four groups. For each country, one group will develop strategies of an international mediator focused more on justice, while another will develop strategies focused on peace. You can also discuss your own country.

Tip for trainers: Prepare information sheets for each of the countries, e.g.

Colombia timelines: <http://www.bbc.com/news/world-latin-america-19390164>

Ukraine crises: <http://www.bbc.com/news/world-middle-east-26248275>

Groups will brainstorm for 45 minutes and develop strategies depending on their country/position.

## Worksheet II: Actors in transitional justice

Depending on when and under which circumstances transitional justice is debated or implemented; a range of stakeholders may be involved. Skaar and Wiebelhaus-Brahm (2013, 133) outline a typology of actors, grouped at the domestic and international level. The purpose of this worksheet is to understand why some actors promote or obstruct transitional justice in particular contexts; why others do not get involved; and, among those who engage, how they advance their preferences.

Domestic sphere		International sphere
National stakeholders	Local stakeholders	Transnational stakeholders
<ul style="list-style-type: none"> <li>• Ancien regime</li> <li>• Post-war government</li> <li>• Judiciary</li> <li>• Military</li> <li>• Police and other security personnel</li> <li>• Government bureaucracies</li> <li>• Opposition groups</li> <li>• Political parties</li> <li>• Socio-economic elites connected to the old or the new order</li> <li>• National human rights groups</li> <li>• Other civil society organisations</li> <li>• Victims' organisations</li> <li>• Churches</li> <li>• Public</li> </ul>	<ul style="list-style-type: none"> <li>• Community-level traditional sources of authority and organisation</li> <li>• Community organisations</li> <li>• Indigenous groups</li> <li>• Ordinary citizens</li> </ul>	<ul style="list-style-type: none"> <li>• States (involved in peace talks and/or as foreign donors or countries with other interests, e.g. allies and adversaries of the government)</li> <li>• Intergovernmental organisations (e.g. United Nations, World Bank)</li> <li>• International courts (e.g. ICC)</li> <li>• Transnational activist networks/civil society</li> <li>• Epistemic communities/technical experts (e.g. International Centre for Transitional Justice)</li> </ul>

## Questions for group discussion

1. Who are the actors? What are their interests? What strategies can they use within transitional justice mechanisms? Which tools do they have? How might they interact?
2. How might local actors (or any other group) either engage them or reject transitional justice mechanisms?

## Drivers and spoilers of justice

Chandra Sriram (2013) redefines the concept of 'spoilers' of justice as elaborated by Stephen John Stedman (1997) in relation to peace processes. She argues that the identities, incentives, and strategies of the spoilers are equally important with those of the drivers of justice. A clearer identification of the identities and goals and strategies of spoilers might also enable a better understanding of entry points to address their concerns and enable drivers of justice to make greater inroads. It may seem clear that most spoilers of justice in conflict-affected countries will be responsible (individually or severally, directly or indirectly) for serious offenses. However, some actors without any evident responsibility for serious crimes may object to, or undermine accountability processes on a range of other grounds, such as national sovereignty and concerns about the imposition of externally driven models of justice, or beliefs that justice measures will disrupt reconciliation and peace-building, or the belief that those in a shared identity group are being unfairly targeted.

According to Chandra Sriram, those who resist accountability processes are not all violent, intransigent war criminals who object to all justice, and some may be persuaded to accept mechanisms they initially opposed. Even international actors and domestic actors who advocated accountability may become reluctant accepters of justice processes if they fear they might create obstacles to other goals.

### Group task:

Identify a spoiler in either your own country or a different cases study, e.g. the military. Then discuss all aspects listed below within the transitional justice process and regarding the spoiler. This exercise can help to identify how much harm and influence a particular actor can have and how to then best work with them.

- Responsibility
- Vulnerability
- Relative power
- Goals and incentives
- Status/prestige

## Module 03 Researching the Acceptance of International Criminal Justice

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## Learning objectives

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- The goal of this module is to offer an overview of the research challenges in relation to international criminal justice acceptance as a concept of a complex, multi-layered and multi-dimensional nature;
- In addition, it offers a methodological approach and an analytical framework to understand how international criminal justice is accepted by the relevant actors in a situation country;
- The last part of this module focuses on research methods and ethical challenges.

Focusing on acceptance is a challenging concept and a compelling perspective from which to examine international criminal justice. The scope of the term itself is fairly broad and may suggest a certain level of fluidity and vagueness. First and foremost, however, it points to the fact that research into acceptance is of a complex, multi-layered and multi-dimensional nature that requires the consideration of a multitude of factors that are each specific to the respective situation country and its actors therein. In other words, it takes a wide and analytical approach that aims at comprehending a myriad of aspects that play into what constitutes acceptance of international criminal justice. In this regard, acceptance also relates to a number of other overlapping concepts and notions such as compliance, tolerance, legitimacy, non-resistance, agreement, support, acknowledgement, recognition and consent. In sum, acceptance refers to actors' appreciation, favourable reception and approval of international criminal justice norms, procedures and institutions – and conversely, their lack thereof. However, acceptance is not a binary matter of yes or no: acceptance is a complex process rather than a static condition which is subject to a temporal dimension and may therefore change over time, for instance depending on the developments in legal proceedings or with regard to specific aspects of a court, tribunal or legal provision being accepted while others are viewed more critically. It is also important to differentiate what is being accepted and what is not, and what the reasons behind this are. Acceptance differs according to the positions of the actors being analysed. They respond to international criminal justice mechanisms from a particular socio-political, economic, historical and cultural context and may be driven by different priorities and agendas. For this reason, focusing on acceptance will reveal a variety of actors' approaches to and diverse levels of acceptance of international criminal justice.

What arises from this general assessment are questions dealing with issues such as how identifiable and manifest acceptance is and how we can ascertain if, why and when certain actors accept. Jones et al. (2013, 15) concluded, when studying resistance to transitional justice, that for an act to be deemed resistance it has to be 'a purposeful act intended by the actor to work against, prevent or disrupt the intended or implemented formal transitional justice process'.

When transferring this theorem onto acceptance, does it mean that acceptance can or even must be conceptualised as an intentional act? And would merely tolerating international criminal justice then also fall under the category of acceptance? Does the non-acceptance of international criminal justice mechanisms, in reverse conclusion, constitute outright rejection? Or does it inform us about the presence of local, alternative and divergent approaches to and understandings of how justice could be served and how peace could be consolidated in a situation country? Some of these questions suggest that the concept of acceptance incorporates both active and passive qualities; ranging from tacitly sanctioning and permitting international criminal justice operating in a situation country to affirmative approval, trust and belief in its mechanisms.

Generally speaking, acceptance of international criminal justice relates to rules, principles, norms and the institutions themselves but also to issues that are situated outside the control of courts and tribunals. Especially where local populations have different understandings of what justice means, the acceptance of an international court may require the presence of other policies and additional transitional justice mechanisms to address and rectify past wrongs.

Before turning to a research methodology for examining acceptance, the following points, deduced from scholarly works dealing with negative reactions (Brownlie, 2008; Nouwen, Wouter & Werner, 2011; DeGuzman, 2012), to ICJ, present selective country-specific, but nonetheless generally valid factors that can be considered as hindering acceptance, making some international criminal justice processes less likely to succeed than others:

- **'Imposed' international justice.** When international justice is perceived as an outside intervention, or when affected populations question whether ICJ is the right kind of justice for them, preferring that crimes should be dealt with on a domestic, rather than an international level. Moreover, ICJ is less accepted when its mechanisms either do not meet people's immediate need for peace or when it threatens a fragile state of peace in a situation country.

- **Social, geographic, psychological ‘distance’ of ICJ.** Affected populations perceive international courts and tribunals as being less relevant to their lives when they are geographically distant and prefer trials to take place in their home country. The often strong internationalised composition and highly formalised state-like nature of hybrid courts may prompt a felt aloofness that is social and psychological, rather than geographical.
- **Retributive vs. restorative justice.** Local understandings of what constitutes justice may considerably differ from ICJ mechanisms, for instance, when an affected population prioritises reconciliation over punishment. In their view, punitive justice alone does not address the structural causes of conflict.
- **Low trust in and negative experiences with justice systems.** People’s previous bad experiences with judicial systems affect their perception of ICJ negatively, especially where people are confronted with inadequate, biased and corrupt domestic justice systems. To increase acceptance, ICJ should operate alongside other mechanisms to facilitate sustainable social transformation and peace.
- **Selectivity:** ICJ tribunals and courts tend to only indict those bearing the most responsibility for crimes while granting amnesties and national trials to other, low-level perpetrators. Non-exhaustive geographical and temporal, and incomplete investigations pertaining to parties and structural dimensions involved, may not grasp the full scope of crimes and charge one group disproportionately over others, or only try them for selected crimes. This is likely to foster resentment among victim groups and indictees for inherent biases.
- **Lack of impact.** The perceived and actual failure to contribute to peace and serve justice (e.g. by failing to surrender indictees) severely affects acceptance of ICJ.
- **Politicisation.** A court which is perceived to be influenced by political bias, delayed due to lack of political will, subjected to political bargaining or abused by political leaders for their own ends, risks alienating victim and civil society groups and undermines acceptance.
- **Communication and outreach.** Public awareness and a good knowledge of ICJ within the situation country can be vital to lend legitimacy to its mechanisms, ensure co-operation and increase acceptance among affected populations. Victim participation during trial may further increase positive attitudes towards the court’s work. An adequate timing of communication and outreach activities, including information about the court’s potential and limits, and regular updates, may positively influence acceptance of ICJ.

In sum it can be said that acceptance of ICJ resonates with how the actions of its institutions are perceived in terms of affectivity and legitimacy, but acceptance is further mediated by ways that are situated outside the control of courts and tribunals and that depend on and are shaped by wider socio-political dimensions and personal experiences of actors. Where local understandings do not necessarily conform to what justice entails in ICJ proceedings, the establishment of additional supporting transitional justice mechanisms (truth commissions, reparations programmes, memorials and other initiatives) addressing past crimes may in turn help facilitate acceptance of international courts. Some indicators that make acceptance of ICJ more likely are when it is not perceived as an imposed entity, and when it is considered to operate in an unbiased and unpoliticised way. Studies from various situation countries suggest that an early and informative communication of the court’s mandate and actions could increase acceptance among affected populations. In cases where affected populations have recognised international courts as legitimate actors, or even requested ICJ proceedings themselves, a greater level of acceptance seems more likely.



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## Researching acceptance: methodological approaches

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## Assessing the acceptance of international criminal justice in situation coun- tries – a methodology

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As part of an interdisciplinary research project, the Nuremberg Academy has developed a methodology to critically assess the multiple dimensions of acceptance of international criminal justice in different situation countries. After a mapping of relevant literature on recent and current situation countries, the project has devised a

With international criminal justice forming a large part of transitional justice after mass atrocities, understanding if and how it is accepted by different actors in particular situation countries is of major significance. How do they respond to the mechanisms? What are their attitudes towards them?

The objective of this methodology is to provide an analytical framework for assessing the acceptance of international criminal justice in situation countries. It focuses on examining forms of international criminal justice, such as exercised by courts, tribunals or legal provisions, and actors who accept or do not accept these. The development of this research methodology is part of a larger project at the International Nuremberg Principles Academy which examines the dimensions of acceptance of international criminal justice.<sup>1</sup> It is targeted at academic researchers in the field, rather than practitioners who are interested in impact assessments or evaluations. As a consequence, it takes rather a broad and analytical approach, seeking to understand various aspects that influence that acceptance of international criminal justice.

International criminal justice refers to the norms underlying the prosecution of individuals for committing the international crimes of genocide, crimes against humanity and war crimes by international courts and tribunals. It has its roots in the International Military Tribunal in Nuremberg, Germany, which prosecuted Nazi crimes in 1945–6. After a long period of inactivity, mainly due to the Cold War bi-polar world structure, it was only after the violence in the former Yugoslavia and Rwanda in the mid-1990s that international tribunals re-emerged. Since then, a number of international and hybrid tribunals have been institutionalised and the International Criminal Court in The Hague established. Despite the rapid expansion of international criminal justice, it has been subjected to criticism, raising the question of how international criminal justice is perceived and appreciated – in our

research design for the analysis of pertinent levels and factors that can have an impact on actors' acceptance (and non-acceptance) of institutions, mechanisms and outcomes of international criminal justice processes. The methodological approach described in this section may be a useful guide for similar research projects.

terminology accepted – by certain actors in situation countries in which international courts are operating.

Acceptance covers a number of aspects. So far, few studies have examined the issue of acceptance of international criminal justice directly. However, acceptance is implied in much of the available literature debating peace and justice in post-conflict situations, local critiques of transitional justice, and in evaluations of specific courts or tribunals. It moves beyond the mere reception of international criminal justice, such as the passive acknowledgement of its processes, to a more active reception or approval by various groups. We thus define acceptance as the agreement, either expressly or by conduct, to the principles of international criminal justice in one or more of its forms (laws, institutions, or processes). This includes a range of active features from recognising to giving consent and expressing outright approval and belief.

The focus of this research is on actor groups, which vary from local populations affected by crimes and the ensuing tribunals to justice departments that change their legal regulations to incorporate provisions of international criminal justice. Acceptance can refer to both the outcome of a process and the process itself.

Acceptance is not a single act, but rather a complex process, the direction of which may change over time. Acceptance of international criminal justice might depend on current or past developments in legal proceedings, often leading to some aspects of a court, tribunal or legal provision being approved of, whilst others are seen more critically. Acceptance might also vary with the positions of the actors analysed, since they are always situated in a particular socio-political, historical and/or cultural context, determining attitudes towards a mechanism. There will thus rarely emerge one story of acceptance, but often a diversity of views.

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<sup>1</sup> For more information see: <http://www.nurembergacademy.org/projects/detail/acceptance-of-international-criminal-justice-12/>.

This methodology consists of four components. They should not be considered as individual blocks in isolation to from each other, but always in light of whether and how international criminal justice is accepted:

- Analysis of international criminal justice
- Analysis of the various actor groups in the particular situation country
- Analysis of the country context
- Analysis of the acceptance of international criminal justice

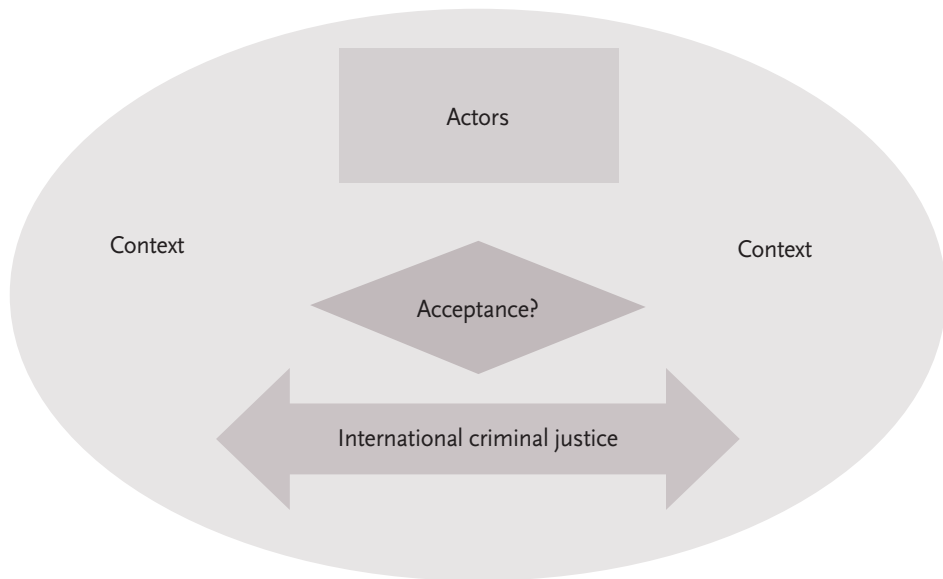


Figure 1 - Acceptance of international criminal justice, Prof. Dr. Susanne Buckley-Zistel

## International criminal justice

International criminal justice in the form of tribunals, courts or the respective laws should be analysed. This involves a depiction of the form of the institution – whether it is a hybrid court, an ad hoc tribunal, or the International

Criminal Court – and an assessment of the level of international engagement. Central are also the apparent limits of the investigations. It also requires an analysis of the forms and scope of crimes that were perpetrated.

### International Criminal Justice:

#### What is accepted/not accepted?

*Which crimes are investigated? (e.g. crimes against humanity, war crimes, etc.)*

*In the particular situation context, what does international criminal justice entail?*

*Can international criminal justice be best described as certain norms or ideas, as concrete institutions, as certain legal provisions, or as a process?*

*What is the history of international criminal justice in the situation country?*

*If acceptance concerns a specific institution, at which stage is the process? (E.g. investigation phases, ongoing trials, verdicts, etc.)*

*How comprehensive is the scope of the investigation? Are there limits (e.g. geographical, temporal) in the investigations?*

*Who are the individuals indicted? Are they high-level or lower-level perpetrators, is the selection representative or not?*

*Was international criminal justice imposed from the outside or called for from members of the society?*

*What is the level of engagement of international criminal justice actors in the situation country (e.g. shared responsibility with domestic actors, external jurisdiction through the ICC, etc.)?*

*Are there any outreach activities by the courts?*

## Actors

### Actors: Who accepts/does not accept?

*Which actors are relevant in terms of acceptance? (e.g. victims, lawyers, civil society, general public, politicians, veterans, donors, international NGOs, etc.)*

*What is the level of knowledge of actors regarding international criminal justice? How informed is their view?*

The second step comprises of a mapping of the actors' landscape in the situation country and, where relevant, beyond. An actor is an individual or collective initiator of action, and each society consists of many actors representing a multitude of positions and views on international criminal justice. When assessing acceptance it is thus important to position the actors within the social and political structure and to understand their perceptions and actions against the backdrop of their past and present experiences, their past and present role in society, and their objectives and strategies that derive from this positioning. Actors may include but are not limited to: victims, perpetrators, veterans, human rights or legal NGOs/CBOs, faith based groups, political leaders and elites, (former) entrepreneurs of violence, court staff and legal practitioners, and the general public.

When analysing actors it is important to understand their access to information, and the kind of information they have access to. This may vary significantly with their place of residence (urban, rural, capital), level of education, access to resources and the media, degree of relevance of international criminal justice for their personal and public life, and so on. Their role in current society must also be understood. Some actors may take the form of organised entities such as victims groups; others may not be easily identified as a group. Nevertheless, the position they speak from is key in understanding why they say what they say.

Another key factor is the relevance of international criminal justice in the situation country more generally. This, again, may vary between the different interest groups. Their position may reach from ignorance to an outright rejection of punitive justice in the particular context.

### Context

*Which other historical, social, economic and/or political factors may influence acceptance? What is the level of engagement of international criminal justice actors in the situation country (e.g. shared responsibility with domestic actors, external jurisdiction through the ICC, etc.)? How does the history of human rights violations in the situation country influence acceptance*

*of international criminal justice? Were certain parties of the current socio-political landscape involved in previous atrocities? What forms of violence took place and/or continue to take place? Did previous atrocities concern all of the population or only specific groups? How does the current situation (economic, cultural, political, etc.) influence acceptance?*

## Context

Countries which have experienced mass atrocities differ regarding their political, social, cultural and economic constitution, and any assessment of acceptance by different actors needs to be contextualised. The third step is thus to analyse how the experience and legacy of the violence, the history of the situation country and the present structure of the society is relevant to studying acceptance, which may, again, vary for each actor. This analysis should therefore consist of a range of perspectives to avoid simplification and one-sided views.

The purpose of analysing the context in which international criminal justice is situated is to explore how it influences (non-)acceptance by particular actors. It is thus not merely a description of the history of the conflict, but

is tailored towards the wider question of acceptance. The views of different actors and/or the population may differ regarding why and how violence occurred and against whom, and have an effect on their acceptance or non-acceptance. There may be ongoing societal or violent conflicts that are not related to the situation under review before international criminal courts or tribunals. The society of the situation country may be ethnically, religiously or ideologically divided and prone to politicisation and manipulation. Finally, it is important to be aware that there is no objective context in which we can situate acceptance, but that the context may be perceived and understood differently according to each actor.

### Acceptance

*Which aspects of international criminal justice – a tribunal, its outcomes, legislation, or more general ideas or concepts of international criminal justice – are relevant for the actors' acceptance?  
What do different actors accept, what do they see critically?*

*Do the respective actors accept by conduct or by expression?  
What are reasons for acceptance / non-acceptance?  
Has acceptance changed over time?  
If yes, how and why?  
What consequences does acceptance / non-acceptance have for the respective actors?*

## Acceptance

Acceptance is a dynamic process and not a matter of yes or no, and it may have many nuances. Acceptance may be partial, and it may be conditional. In addition, while some aspects of courts or tribunals might be accepted, other might be viewed more critically.

The analysis of acceptance involves the development of an understanding of how acceptance is manifest in the particular country context. One way to assess the perception of interviewees is to let them define what they understand by the term acceptance, the absence thereof, and the many shades between these far ends of the spectrum. Alternatively, the interviewees can be asked broader questions without any mention of acceptance, and the researcher can assess the data collected to determine if and how the answers given can be situated on the wide spectrum of acceptance nuances. These viewpoints can be analysed to fit the proposed acceptance definition which emphasises the active manifestations of acceptance.

To further investigate acceptance, it is suggested to analyse the conduct of the different

actors as well. Here, observations, the study of documents and more indirect actions, can provide important leads to the nature of acceptance or non-acceptance in a situation country. For example, in addition to analysing how a particular political actor assesses international criminal justice, how often they do so and whether this is coherent across different audiences or situations can also be assessed. It is also important to understand the timeline of international criminal justice and to situate the analysis of acceptance within these processes. They may reach from the conception of a court or tribunal, to the first investigation, indictments, hearings, to the verdicts and revisions. Each stage may prompt a different response from actors. For instance, acceptance may be high in the initial stages, but drop after the first verdict. Since it is often not possible to conduct a longitudinal study to assess acceptance over time, the stage which the process has reached at the time of the study is important. It is also useful to ask interviewees whether they think that their attitude towards the court has changed over time.

## Data collection methods and research ethics

The objective of this document is to provide a method for analysing the acceptance of international criminal justice by various actors in situation countries. Its focus is on research design, as a first pointer towards conducting a research project. An important part of such an analysis is how the data is collected within the situation country, and what ethical concerns need to be taken into consideration. Contributions should include a short section on data collection and ethics, which should describe:

- Which group/actors was researched;
- How access was gained;
- How many research participants were approached;
- Which methods were used to gather data;
- How an ethical process of data collection was ensured; and
- Any other relevant information regarding the research methods used, such as challenges encountered, or noteworthy aspects of the data collection process.

## Research methods and ethics

Research involves choices. Some of them are conscious and made on purpose, but others come during the course of the research which is subject to adjustments in each of its stages. The scope of the research itself and the topic of acceptance of international criminal justice, and the context in which it takes place come from a variety of understandings and backgrounds of researchers that could be enriching or a source of limitation.

Empirical research is a research based on experience. It relies on knowledge gained through

recording and analysing evidence that is used to answer questions that puzzle the researcher and guide their enquiry. The data or evidence can be analysed quantitatively, qualitatively or through a combination of both.

The research process generally has three parts: planning, execution and reporting. This section provides a brief reflection of the first part. Knowledge of research methods is important in order to make good decisions. These choices were relevant and applicable



to the planning of the study of acceptance of international criminal justice. This section is not intended as an exhaustive description of research methods, which may be needed by individuals less familiar with social science

research methods. Rather, it is hoped that the following discussion will provide some entry points and inspiration for the study of acceptance of international criminal justice or other similar studies.

<b>Subject</b>	<ul style="list-style-type: none"> <li>• What am I interested in and why a particular topic is interesting?</li> </ul>
<b>Questions</b>	<ul style="list-style-type: none"> <li>• What questions are guiding my research?</li> <li>• What questions do I want to answer?</li> </ul>
<b>Hypothesis</b>	<ul style="list-style-type: none"> <li>• Do I have any preliminary explanations or some potential answers to the questions?</li> </ul>
<b>Strategy</b>	<ul style="list-style-type: none"> <li>• How do I answer my questions?</li> <li>• Time, geography, units of analysis, resources available etc.</li> </ul>
<b>Data &amp; Methods</b>	<ul style="list-style-type: none"> <li>• What data do I need and how do I get them?</li> <li>• What methods are best fit to get them?</li> </ul>
<b>Analysis</b>	<ul style="list-style-type: none"> <li>• How do I process the data?</li> <li>• Building a case narrative?</li> </ul>

Figure 2 – Research planning; Dr. Jan Koehler

Some questions of practicality should also guide the process of finding a research subject:

- What access does the researcher have in the situation country?
- What role will the researcher have vis-a-vis potential research participants?
- Which actors can be approached?
- Could a reasonable number of actors of a particular group be explored?
- Are there security issues?
- Could access to these actors be difficult, and how? E.g. politically, geographically, and considering the security of both researcher and research participant.

## Research design

According to Blaikie (2010, 5), research design is ‘an integrated statement of and justification for the technical decisions involved in planning a research project’. It incorporates decisions that need to be made and also provides justifications for such decisions. Decisions need to be made at the beginning, or soon after some exploratory work has been completed, are stated, justified, related and evaluated.

The purpose of the research design is:

- To make decisions clear to the researcher but also to the audience;
- To explain the rationale behind these decisions;
- To ensure consistency and avoid confusion; and
- To allow critical evaluation at every stage of the research.

The discussion of the research design includes five key concepts: research questions, purposes, strategies, paradigms and methods (Blaikie, 2010). According to Blaikie (2010) a research design includes:

- The selection of the research problem and the researcher’s motives and goals for investigating it;
- The research question(s) that will address the problem and the purposes associated with them;

- The choice of research strategy (logic of inquiry) to investigate each research question and justifications for synthesis choices;
- Elaboration of the ontological and epistemological assumptions on which the research will be founded;
- The research paradigm or paradigms within which the research will be conducted;
- The concepts and theory and how they relate to the research process;
- A statement of the hypothesis or hypotheses to elaborate on the mechanisms to be investigated;
- A discussion of data sources, types and forms;
- A discussion of methods for selecting data from sources thesis;
- An outline of the methods of data collection, reduction and analysis to be used; and
- A discussion of the problems that might be encountered and the limitations of the design in its ability to answer the research questions.

An adequate and realistic research design is the basis of any successful research project. Having a concrete and feasible research topic and a clear question is particularly important because every research project seeks to Enhancing the researcher’s and scholarly community’s understanding of the topic.

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## Purpose of research

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Research invariably has a purpose, and sometimes more than one. This reflects our interest in the past, present or future. The purpose of the research also reflects the kind of questions that are asked. The link between research questions and the purpose is very important and is an indicator of a well-designed research. Research design varies by field and by the question being investigated. The questions must also be clearly spelled and answerable.

When the purpose of the research is to make sense of events of current developments, the researcher seeks to describe, explain and understand them in light of the information

gathered. Sometimes the purpose may not be to understand a situation or define a problem, but to understand the answers that the research provides on one particular environment, group or community, which may be the same in another. The temptation to generalise is as great as the temptation to looking at the future with the purpose of influencing policies, predicting changes or prescribing successful interventions. The purpose of an acceptance study is not to generalise or look at the future of international criminal justice. It is focused on the present and on the past as part of the context in which international criminal justice norms, institutions and actors operate.

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## Purpose and questions

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- Description: what is going on? (What, when, where, who)?
- Explanation: why did it happen?
- Understanding: how is it experienced?
- Interpretation: what does it mean?
- Prediction: what is to be expected?
- Prescription: how ought it be?
- Change: how can it influence policy or change in the society?
- Critique: would it be the same in another environment? What are the long-term or hidden effects?

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## Research topic and research questions

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According to Bryman (2007), a research problem is a statement about an area of concern, a condition to be improved on, a difficulty to be eliminated, or a troubling question that exists in scholarly literature – in theory, or in practice – that points to the need for meaningful understanding and deliberate investigation. In some social science disciplines, the research problem is typically posed in the form of one or more questions (Bryman, 2007). A research problem does not state how to do something, offer a vague or broad proposition, or present a value question. Usually the research problem or topic is related to the purpose of the study and its benefits.

In the context of research on acceptance of international criminal justice, the following questions could be helpful:

- Why is it interesting or important to study acceptance of international criminal justice in this situation country?
- Why is it interesting or important to study acceptance of particular actors?

Before going to the next step and defining the research plan and research needs, the following questions should be considered:

- What is my overall strategy for doing this research?
- Will this design permit me to answer the research question?
- What exactly do I want to find out?
- What is a researchable problem?
- What are the obstacles in terms of knowledge, data availability, time, or resources?
- Do the benefits outweigh the costs?

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## Research planning – data needs

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Once a research design is devised, it has to be operationalised. This means that the kind of data that is necessary to answer the research question must be determined. This in turn informs which kind of data

collection methods must be used. Three examples will be described below of how research fellows at the Nuremberg Academy approached their research.

### Interviews

There are many different methods to collect data, such as textual analysis, analysis of legal proceedings, or discourse analysis, which are described in detail in similar publications (see Swisspeace & OTJC, 2013). Here, we will briefly describe different forms of interviews, as the research project at the Nuremberg Academy focused on interviews with actors in the situation countries.

**Structured interviews** are verbal questionnaires containing predetermined questions that allow for little variation or follow-up questions. They are commonly employed in quantitative research because it is a quick method to generate a large, standardised sample in which all participants have been subjected to the same conditions and the same set of questions. Structured interviews are more often employed in the context of surveys and clarifying specific issues, but they tend to lack in-depth findings.

**Unstructured interviews** operate without pre-formulated questions or with very open-ended questions that do not suggest any assumed theories or ideas. The interview takes its course on the basis of the answers provided. Given the lack of a predetermined framework, taking part in or guiding through the interview may be challenging. Unstructured interviews are lengthy conversations that are employed in biographical research, when little is known of the research object at hand or when in-depth findings and subjective interpretations are sought.

**Semi-structured interviews or guideline interviews** employ key questions that provide for a loose framework of topics and issues to be discussed. The interview method provides some structure but leaves enough flexibility for new themes to come up that may not have been considered by the researcher. There is no fixed order to the questions and there is room for follow-up questions and the possibility to explore new topics and perspectives. Semi-structured interviews are applied where some prior knowledge of the research topic exists, or when the comparison or verification of information is sought.

**Focus group interviews** are problem-centred group discussions, guided and monitored by a researcher, on a particular topic for research purposes. They allow for a more natural and relational conversation setting, which sheds light on informants' patterns of interaction and how they construct their understandings, beliefs, attitudes and perceptions on certain

issues and in relation to others. Group members are brought together based on common interests or characteristics. Interviews with conflicting groups can also generate valuable pro- and contra-views on a focused issue.

**Expert interviews** are specific forms of semi-structured interviews in which the interviewees are of particular interest due to their privileged access to information and their capacity, experience and knowledge of a certain field of activity. Experts are commonly scientists or practitioners, but occasionally specialist status also refers to, for example, chronically ill people who are experts for their illness. When researching acceptance, experts could be people who take part in decision-making processes, such as policy makers, lawyers of international criminal law, or academics.

**Ethnographic interviews** are interview that take place within ethnographic research. Ethnography is a form of qualitative research that combines participant observation and numerous in-depth interviews, and which is carried out over a longer period of time. The aim is to understand people's viewpoints, which involves the immersion into the social practices of the culture and people being studied. Ethnographic fieldwork often includes a range of data collection methods, and observation, participant observation, informal conversations, and other methods to complete the knowledge gained in interviews. Ethnographic interviews are often characterised by more familiarity and a deeper knowledge, as ideally the researcher and research participant have already established a relationship through previous interactions. In transitional justice research, ethnography has been used to shed light on different cultural understandings of truth, memory and justice in situation countries.

**Interview setting and the selection of interviewees.** The selection of interview partners should be informed by a number of criteria, for instance: function, expert knowledge, ethnicity, social strata, and membership of a specific group or organisation. Researchers should map out which interview techniques are most suitable, what would be good entry points to approach informants, and how they can possibly overcome initial reservations interviewees may have. Researchers should be aware of inherent biases which may influence the course and outcomes of the interview. These include: involuntarily leading the interviewee;

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the selectivity of information; unbalanced or partial selection of informants; underlying agendas interviewees may pursue; the artificial set-up of the interview situation; irreconcilable cultural incompatibilities; experts that are pressed for time; and distorted or erroneous findings through hired-hand effects.

Researchers should thoroughly prepare for interviews by formulating some guideline questions. First, interviews commonly cover some biographical and background information on the interviewee and then move on to the specific knowledge the interviewee can provide. Unproblematic questions should open the conversation, while sensitive questions should only be asked later in the

process. Researchers should try to build up good rapport with interviewees by creating a pleasant and trusting atmosphere in which the interviewer shows interests, does not judge the interlocutor's statements, and remains flexible towards the course that the interview takes. Tools to lead through the interview range from open and closed questioning techniques, to asking clarifying, probing, verifying and perhaps suggestive questions. Whenever possible, notes should be taken during, or at least immediately after the interview, as part of the follow-up and data analysis. These should include observations, additional information after the formal ending of the interview, and unanswered questions.

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## Research ethics

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*'Fieldwork is [...] replete with problems of creating respectful relationships with research participants, obtaining valid data from them, assuring privacy and confidentiality, interpreting data correctly, and disseminating data responsibly' (Sieber 1982, 2).*

Scientists are expected to conform to a certain scientific standard and adhere to a professional code of conduct defined and shared by the scientific community on what constitutes ethical and unethical scientific practice. For instance, scientists should on no account plagiarise, tamper with, or in any way falsify their data collection, data analysis and interpretations in a way that advances their private agenda, misrepresents scientific findings, or violates scientific principles and norms. Some of the expected principles of ethical behaviour within the scientific community are, for example, the voluntary participation of informants, including informed consent, anonymity, confidentiality and guarantees that their participation will

not entail any negative ramifications. It also involves disclosure to participants of who will conduct the study, for what purpose, and who will benefit from the results, and provide a transparent account of how data has been collected and analysed.

Researchers should also be aware of the wider implications that their research in a particular society may entail. Focusing on one specific group may arouse the displeasure of other groups who feel disregarded or see their personal interests undermined and who might attempt to disrupt research proceedings. Particularly in the case of researching sensitive topics, for instance in post-conflict societies and when working with individuals and groups who have been affected by atrocities as victims and perpetrators, researchers should at all cost avoid the rekindling of socio-political tensions or the re-traumatisation of their interlocutors.

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## Documentation of research

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How the data was collected and analysed and how ethical concerns were taken into consideration must be clearly documented, not least because it improves the quality of any written report or article on the topic. The following aspects should be addressed in any document deriving from the research:

- Which actors and interest groups were researched;

- How the researcher gained access to a specific group;
- How many research participants were contacted;
- Which research methods were used to collect data;
- How an ethical process of data collection was ensured; and
- Other relevant information regarding the research setting and methods, including challenges.

### Three exemplary research projects

The following case studies are selected examples of how to conduct research on the acceptance of international criminal justice. As will become apparent, each case reflects the distinctiveness

of each situation country and the multiple attitudes, various interests and dynamic perceptions that inform the acceptance of various actor groups towards international criminal justice.

#### Case Study Kenya<sup>2</sup>

This project examines the acceptance of the ICC in Kenya and outlines events where ICC trials were politicised by local politicians, who effectively decried it as a neo-colonial intervention and then appropriated justice for their own ends; actions, which ultimately influenced the acceptance of the broader population towards the ICC. Based on literary study, expert interviews with the political elite and civil society members, and participant observation of political rallies, the project devises two dimensions of acceptance: it distinguishes between Kenya's formal and legal compliance with ICC proceedings and politicians' actual behaviours, which have shifted from initial cooperation to categorical rejection. So far, civil society groups have not succeeded in changing these perceptions. In order to retrace politicians' attitude change, the project revisits the events from the post-election violence in 2007-2008 when crimes occurred until the new election year in 2013, after which two of the accused took office as president and vice president. Despite politicians' disapproval of the ICC, Kenya has maintained its willingness to prosecute and the ICC's presence perhaps contributed to a more peaceful election process in 2013. Nonetheless, dynamics of acceptance and dominant discourses of ICJ continue to be strongly linked to, and informed by the interests of political elites.

#### Case Study Kosovo<sup>3</sup>

This exploratory project focuses on the legal acceptance of international criminal justice in Kosovo. Given that Kosovo is not a fully recognised state and is therefore not eligible to ratify the Rome Statute, it has nonetheless integrated international criminal provisions into its domestic body of laws. Based on literature study and expert interviews with political and legal professionals who took part in this domestication process, the project explores if the inclusion of ICJ provisions indicates formal and/or actual acceptance by these actors. It also discusses the intentions of various actors involved in this process: did they consciously accept ICJ and therefore provided for its domestic inclusion? Was there a conscious

decision made to accept international justice? Conversely, does its inclusion necessarily suggest actual acceptance? How does knowledge or unawareness of ICJ influence acceptance by the actors involved? The project concludes that the process of domestication was fragmented and various actors bearing different motives contributed to it. On the whole, however, interviewees stated that ICJ has been accepted, especially with regard to how it has been incorporated and the way that it functions within the national legal system.

#### Case Study Cambodia<sup>4</sup>

In 2010, the Appeals Chamber sentenced Kaing Guek Eav alias 'Duch', a high ranking official of the former Khmer rouge regime, to life imprisonment. Thereby, the Appeals Chamber overruled the Trial Chamber's initial sentence of 35 years imprisonment. The first sentence had led to objections amongst the victims who considered it as too weak. The project focuses on legal, political and moral aspects of acceptance and further considers how reactions of international observers influenced national actors. It starts with the assumption that ECCC outcomes are influenced by the interests of the stakeholders. It primarily seeks to understand how the ECCC arrived at its verdicts through exploring, besides legal arguments, the motivations around the reversal of the ECCC's first verdict and whether consensus or dissent arose between local and international judges. Focusing on the hybrid nature of the ECCC which is built around converging interests, the study addresses two main questions. First, what is the ECCC's mandate besides ensuring accountability and how does the hybrid nature of the court indicate acceptance of international criminal justice? Second, the study focuses on the acceptance of the outcome and the perception by different actors. It explores different perceptions of justice, expectations and reactions, which may indicate the acceptance or resistance of the ECCC. The project examines how different groups, such as civil society organizations, legal professionals or victim groups accept or not accept international criminal justice by analyzing their reactions to the verdict.

2 Lugano, Geoffrey. 2016. 'Changing Faces on Acceptance of International Criminal Intervention in Kenya.' Accessed August 12, 2016. <http://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Kenya.pdf>.

3 Bučaj, Dafina. 2016. 'Acceptance of International Criminal Justice through Fragmented Domestication: The Case of Kosovo.' Accessed August 12, 2016. <http://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Kosovo.pdf>.

4 Soy, Kimsan. 2016. 'Understanding Acceptance of International Justice through Duch's Sentence at the Extraordinary Chambers in the Courts of Cambodia.' Accessed August 12, 2016. <http://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Cambodia.pdf>.

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## Worksheet II: Design a research on acceptance

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Think of a situation country or specific region that currently experiences international criminal justice: in which form could international criminal justice be studied? What institutions and mechanisms are present?

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Narrow down to a particular actor or actor group. Why would it be interesting and necessary to study the acceptance of these actors?

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What kind of research methods would you apply?

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Think of the implications of this research. How is it relevant to scholars, practitioners, civil society groups, or others?

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## Appendix

## Appendix 1: International, hybrid and national tribunals

Institution	Type	Founded	Location	Geographical reach	Time span	Crimes investigated
International Criminal Tribunal for the former Yugoslavia	Temporary	Established by Resolution 827 of the United Nations Security Council on 25 May 1993. Since 1 July 2013, the Mechanism for International Criminal Tribunals started assuming responsibility for the ICTR's residual functions	The Hague, Netherlands	Territory of what is referred to as the former Yugoslavia: the territory that was up to 25 June 1991 known as The Socialist Federal Republic of Yugoslavia (SFRY). Specifically, the six republics that made up the federation – Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the regions of Kosovo and Vojvodina) and Slovenia.	Since January 1991	Grave breaches of the Geneva Conventions of 1949; Violations of the laws or customs of war; Crimes against humanity; Genocide.
International Criminal Tribunal for Rwanda	Temporary	Established by United Nations Security Council Resolution 955 on 8 November 1994. Since 1 July 2012, the Mechanism for International Criminal Tribunals started assuming responsibility for the ICTR's residual functions.	Arusha, Tanzania with offices in Kigali, Rwanda. Its Appeals Chamber is located in The Hague, Netherlands.	Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States.	Between 1 January 1994 and 31 December 1994	Genocide; Crimes against Humanity; Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.
International Criminal Court	Permanent	On 17 July 1998, the Rome Statute of the International Criminal Court was adopted.	The Hague, Netherlands	The ICC can prosecute nationals from state parties to the Rome Statute or crimes committed on the territory of a state party. However, if the country is not a Member to the ICC, the UNSC can refer a case or the country can allow for ad hoc jurisdiction. The Prosecutor can also, under special circumstances, initiate an investigation.	Limited to events taking place since 1 July 2002. In addition, if a state joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that state.	Genocide; Crimes against Humanity; War Crimes (the crime of aggression will not fall within the jurisdiction of the Court until after 1 January 2017 when a decision is to be made by state parties to activate the jurisdiction)
Special Court for Sierra Leone	Temporary	16 January 2002.	Freetown, Sierra Leone with offices in New York and	In the territory of Sierra Leone	Since 30 November 1996	Crimes against humanity; Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II; Other serious violations of international humanitarian law; Offences relating to the abuse of girls under the Prevention of Cruelty to Children; Offences relating to the wanton destruction of property under the Malicious Damage Act.
Special Tribunal for Lebanon	Temporary	Established on 23 January 2007 by United Nations Security Council Resolution 1757.	Leidchendam, Netherlands with an office in Beirut, Lebanon.	Jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafik Hariri and in the death or injury of other persons.	Between 1 October 2004 and 12 December 2005	Acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy.

## Appendix 2: A non-exhaustive list of past and on-going truth commissions

Country	Time span
Argentina	1983–1984
El Salvador	1992–1993
South Africa	1995–1998
Guatemala	1997–1999
East-Timor	2002–2003
Ghana	2002–2004
Liberia	2006–2009
Solomon Islands	2009–ongoing

## Appendix 3: Legal Sources<sup>1</sup>

### UN Security Council Resolutions/Presidential statements

- Sexual violence in armed conflict, Security Council Resolution 1888 (UN Doc: S/RES/1888(2009), Sep. 30, 2009)
- Women, peace and security, Security Council Resolution 1889 (UN Doc: S/RES/1889(2009), Oct. 5, 2009)
- Security Council Presidential Statement on post-conflict peacebuilding (UN Doc, S/PRST/2010/7, Apr. 16, 2010)\*
- Security Council Presidential Statement on Promoting and Strengthening the Rule of Law in the maintenance of international peace and security (UN Doc S/PRST/2010/11, Jun 29, 2010)\*

### UN General Assembly

- General Assembly Resolution adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Doc A/RES/60/147, Mar. 21, 2006)
- Human Rights Commission Resolution adopting the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, (2005/81)
- General Assembly Resolution adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Doc A/RES/40/34, November 29, 1985)

### Human Rights Council

- Human Rights Council resolution on transitional justice and human rights (UN Doc A/HRC/RES/12/11, October 12, 2009)\*
- Human Rights Council resolution on the right to truth (UN Doc A/HRC/9/L.23, September 19, 2008)\*
- Human Rights Council resolution on forensic genetics and human rights (UN Doc A/HRC/RES/15/5, October 6, 2010)\*

### Policy Sources

#### UN Reports and Guidance Notes

- Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice (March 2010)
- Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States:
  - Prosecution Initiatives (2006)
  - Vetting: an operational framework (2006)
  - Truth Commissions (2006)
  - National Consultations on Transitional Justice (2009)
  - Reparations Programmes (2008)
  - Mapping the Justice Sector (2006)
  - Maximizing the Legacy of Hybrid Courts (2008)
  - Amnesties (2009)
  - Monitoring Legal Systems (2006)
- Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance (April 2008)
- Revised Guidelines for UN Representatives on certain aspects of negotiations for conflict resolutions (June 2006)\*
- Report of the Secretary-General on enhancing mediation and its support activities (UN Doc S/2009/189, April 8, 2009)
- Report of the Secretary General on Implementation of the Responsibility to Protect (UN Doc A/63/677, January, 12 2009)
- In larger freedom: towards development, security and human rights for all (UN Doc A/59/2005, March 21, 2005) (paras 137, 138)
- A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change (UN Doc A/59/565, December 2, 2004)

<sup>1</sup> Available at <https://www.ictj.org/transitional-justice-legal-and-policy-references>. Accessed July 11, 2016.



- Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (UN Doc S/2004/616, 23 August 2004)
- Report of the Secretary-General: Securing peace and development: the role of the UN in supporting security sector reform (UN Doc S/2008/39, January 23, 2008)\*
- OHCHR Study on human rights and transitional justice activities undertaken by the human rights components of the United Nations system (UN Doc E/CN.4/2006/93, February 7 2006)\*
- OHCHR Analytical study on human rights and transitional justice (UN Doc, A/HRC/12/18, 6 August 2009)
- OHCHR report on the right to the truth and on forensic genetics and human rights (UN Doc A/HRC/15/26, August 24, 2010)\*
- OHCHR report of the Study on the Right to the Truth (UN Doc, E/CN.4/2006/91, February, 8 2006)\*
- United Nations Integrated Disarmament, Demobilization and Reintegration Standards, Module 6.2 – Transitional Justice and DDR (Department of Peacekeeping Operations, 2009)
- African Union Expert Report on Non-impunity, truth, peace, justice and reconciliation in Africa: Opportunities and Constraints (for the AU Panel of the Wise, September 2010)

#### Organisation of American States

- Resolution Nffl 1/03 on Trial for International Crimes (Oct 24, 2003)
- Resolution AG/RES. 2507 (XXXIX-O/09), Promotion of an Respect for International Humanitarian Law, (June 4, 2009), Thirty-Ninth regular session San Pedro Sula, Honduras, June 2009, page 236
- Principal Guidelines on a Comprehensive Reparations Policy, Adopted by the Interamerican Commission on Human Rights, 19 February 2008 OEA/Ser/L/V/II.131

#### Treaties/other international documents

- Statute of the International Criminal Court (1998), Articles 68 and 75
- The Nuremberg Declaration on Peace and Justice (UN Doc A/62/885, June 19, 2008)
- Universal Declaration of Human Rights, Article 8
- International Covenant on Civil and Political Rights, Article 2
- International Convention on the Elimination of All Forms of Racial Discrimination, Article 6
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14
- Convention on the Rights of the Child, Article 39
- Hague Convention respecting the Laws and Customs of War on Land of October 18, 1907 (Convention IV), Article 3
- Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I) of June 8, 1977, Article 91
- Article 7 of the African Charter on Human and Peoples' Rights
- Articles 8 and 25 of the American Convention on Human Rights
- Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

\* Documents available via UN Document Database, <http://www.un.org/en/documents/index.html>. Accessed August 20, 2016.

## Appendix 4: Cases in the International Criminal Court

Country	Case	Accused	Arrest Warrant	Accused for/Verdict
Democratic Republic of the Congo	ICC-01/04-01/06 The Prosecutor v. Thomas Lubanga Dyilo	Thomas Lubanga Dyilo	10 February 2006	14 years of imprisonment for committing, as co-perpetrator, war crimes consisting of article 8(2)(e) Rome Statute (conscripting and enlisting children under the age of fifteen into the armed forces)
Democratic Republic of the Congo	ICC-01/04-01/07 The Prosecutor v. Germain Katanga	Germain Katanga	2 July 2007	12 years of imprisonment for being found guilty, as an accessory, within the meaning of article 25(3)(d) of the Rome Statute, of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC.
Democratic Republic of the Congo	ICC-01/04-02/06 The Prosecutor v. Bosco Ntaganda	Bosco Ntaganda	22 August 2006	Charges consisting in 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and 5 counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population) against Bosco Ntaganda allegedly committed in 2002–2003 in the Ituri Province, DRC
Democratic Republic of the Congo	ICC-01/04-01/10 The Prosecutor v. Callixte Mbarushimana	Callixte Mbarushimana	28 September 2010	Charges not confirmed for the initial accusation of five counts of crimes against humanity: murder, torture, rape, inhumane acts and persecution; Eight counts of war crimes: attacks against the civilian population, murder, mutilation, torture, rape, inhuman treatment, destruction of property and pillaging.
Democratic Republic of the Congo	ICC-01/04-01/12 The Prosecutor v. Sylvestre Mudacumura	Sylvestre Mudacumura	13 June 2012	Allegedly criminally responsible for committing nine counts of war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus, in the DRC on the basis of his individual criminal responsibility (article 25(3)(b) of the Statute) including: attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity.
Democratic Republic of the Congo	ICC-01/04-02/12 The Prosecutor v. Mathieu Ngudjolo Chui	Mathieu Ngudjolo Chui	6 July 2007	Sentenced for three crimes against humanity: Murder under article 7(1)(a) of the Statute; sexual slavery and rape under article 7(1)(g) of the Statute. Seven war crimes: Using children under the age of 15 to take active part in hostilities under article 8(2)(b)(xxvi) of the Statute; deliberately directing an attack on a civilian population as such or against individual civilians or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i); wilful killing under article 8(2)(a)(i) of the Statute; destruction of property under article 8(2)(b)(xiii) of the Statute; pillaging under article 8(2)(b)(xvi) of the Statute; sexual slavery and rape under article 8(2)(b)(xxii) of the Statute.
Central African Republic	ICC-01/05-01/08 The Prosecutor v. Jean-Pierre Bemba Gombo	Jean-Pierre Bemba Gombo	23 May 2008	Found guilty for being criminally responsible, as military commander, of Two counts of crimes against humanity: murder (article 7(1)(a) of the Statute) and rape (article 7(1)(g) of the Statute); Three counts of war crime: murder (article 8(2)(c)(i) of the Statute); rape (article 8(2)(e)(vi) of the Statute); and pillaging (article 8(2)(e)(v) of the Statute).
Central African Republic	ICC-01/05-01/13 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido	Jean-Pierre Bemba Gombo	20 November 2013	The trial in the case Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido started on 29 September 2015 for offences against the administration of justice allegedly committed in connection with the case of the Prosecutor v. Jean-Pierre Bemba Gombo. The offences, all allegedly committed between the end of 2011 and 14 November 2013 in various locations, include corruptly influencing witnesses by giving them money and instructions to provide false testimony, presenting false evidence and giving false testimony in the courtroom, all perpetrated in various ways including by committing, soliciting, inducing, aiding, abetting or otherwise assisting in their commission.
Central African Republic	ICC-01/05-01/13 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido	Aimé Kilolo Musamba	20 November 2013	See above
Central African Republic	ICC-01/05-01/13 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido	Jean-Jacques Mangenda Kabongo	20 November 2013	See above

Country	Case	Accused	Arrest Warrant	Accused for/Verdict
Central African Republic	ICC-01/05-01/13 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido	Fidèle Babala Wandu	20 November 2013	See above
Central African Republic	ICC-01/05-01/13 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido	Narcisse Arido	20 November 2013	See above
Uganda	ICC-02/04-01/05 The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo	Joseph Kony	8 July 2005	Accused for criminally responsible for thirty-three counts on the basis of his individual criminal responsibility (articles 25(3)(a) and 25(3)(b) of the Statute) including: Twelve counts of crimes against humanity (murder - article 7(1)(a); enslavement - article 7(1)(c); sexual enslavement - article 7(1)(g); rape - article 7(1)(g); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k)); and, Twenty-one counts of war crimes (murder - article 8(2)(c)(i); cruel treatment of civilians - article 8(2)(c)(i); intentionally directing an attack against a civilian population - article 8(2)(e)(i); pillaging - article 8(2)(e)(v); inducing rape - article 8(2)(e)(vi); forced enlistment of children - 8(2)(e)(vii)).
Uganda	ICC-02/04-01/05 The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo	Vincent Otti	8 July 2005	Allegedly criminally responsible for thirty-two counts on the basis of his individual criminal responsibility (article 25(3)(b) of the Statute) including: Eleven counts of crimes against humanity (murder - article 7(1)(a); sexual enslavement - article 7(1)(g); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k)); and, Twenty-one counts of war crimes (inducing rape - article 8(2)(e)(vi); intentionally directing an attack against a civilian population - article 8(2)(e)(i); forced enlistment of children - 8(2)(e)(vii); cruel treatment of civilians - article 8(2)(c)(i); pillaging - article 8(2)(e)(v); murder - article 8(2)(c)(i)).
Uganda	ICC-02/04-01/05 The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo	Okot Odhiambo	8 July 2005	Alleged Deputy Army Commander of the Lord's Resistance Army
Uganda	ICC-02/04-01/05 The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo	Raska Lukwiya	8 July 2005	Alleged Deputy Army Commander of the Lord's Resistance Army
Uganda	ICC-02/04-01/15 The Prosecutor v. Dominic Ongwen	Dominic Ongwen	8 July 2005	Judged for seven counts on the basis of his individual criminal responsibility (article 25(3)(b) of the Statute) allegedly committed on or about 20 May 2004 at the Lukodi IDP Camp in the Gulu District, Uganda: for three counts of crimes against humanity (murder; enslavement; and other inhumane acts) and four counts of war crimes (murder; cruel treatment; attack against the civilian population; and pillaging). On 21 December 2015, the Prosecutor charged Dominic Ongwen with crimes in addition to those set out in the warrant of arrest: a total of seventy counts. The additional charges related to attacks on the Pajule IDP camp, the Odek IDP camp and the Abok IDP camp. The counts brought against the suspect in the context of these attacks include attacks against the civilian population, murder, attempted murder, torture, cruel treatment, other inhumane acts, enslavement, outrages upon personal dignity, pillaging, destruction of property, and persecution. The expanded charges against Dominic Ongwen also include sexual and gender-based crimes committed from 2002 to 2005 in Sinia Brigade - forced marriage, rape, torture, sexual slavery, and enslavement - and the conscription and use of children under the age of 15 to participate actively in hostilities from 2002 to 2005, in Sinia Brigade.
Darfur, Sudan	ICC-02/05-01/07 The Prosecutor v. Ahmad Muhammad Harun („Ahmad Harun“) and Ali Muhammad Ali Abd-Al-Rahman („Ali Kushayb“)	Ahmad Muhammad Harun	27 April 2007	Allegedly criminally responsible for 42 counts on the basis of his individual criminal responsibility under articles 25(3)(b) and 25(3)(d) of the Rome Statute, including: Twenty counts of crimes against humanity: murder (article 7(1)(a)); persecution (article 7(1)(h)); forcible transfer of population (article 7(1)(d)); rape (article 7(1)(g)); inhumane acts (article 7(1)(k)); imprisonment or severe deprivation of liberty (article 7(1)(e)); and torture (article 7(1)(f)); and Twenty-two counts of war crimes: murder (article 8(2)(c)(i)); attacks against the civilian population (article 8(2)(e)(i)); destruction of property (article 8(2)(e)(xii)); rape (article 8(2)(e)(vi)); pillaging (article 8(2)(e)(v)); and outrage upon personal dignity (article 8(2)(c)(ii)).

Country	Case	Accused	Arrest Warrant	Accused for/Verdict
Darfur, Sudan	ICC-02/05-01/07 The Prosecutor v. Ahmad Muhammad Harun („Ahmad Harun“) and Ali Muhammad Ali Abd-Al-Rahman („Ali Kushayb“)	Ali Muhammad Ali Abd-Al-Rahman	27 April 2007	Allegedly criminally responsible for 50 counts on the basis of his individual criminal responsibility under articles 25(3) (a) and 25(3) (d) of the Rome Statute, including: Twenty-two counts of crimes against humanity: murder (article 7(1) (a)); deportation or forcible transfer of population (article 7(1) (d)); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (article 7(1) (e)); torture (article 7(1) (f)); persecution (article 7(1) (h)); and inhumane acts of inflicting serious bodily injury and suffering (article 7(1) (k)). Twenty-eight counts of war crimes: violence to life and person (article 8(2) (c) (i)); outrage upon personal dignity in particular humiliating and degrading treatment (article 8(2) (c) (ii)); intentionally directing an attack against a civilian population (article 8(2) (e) (i)); pillaging (article 8(2) (e) (v)); rape (article 8(2) (e) (vi)); and destroying or seizing the property (article 8(2) (e) (xii)).
Darfur, Sudan	ICC-02/05-01/09 The Prosecutor v. Omar Hassan Ahmad Al Bashir	Omar Hassan Ahmad Al Bashir	14 July 2008	Allegedly criminally responsible for ten counts on the basis of his individual criminal responsibility under Article 25(3) (a) of the Rome Statute as an indirect (co) perpetrator including: Five counts of crimes against humanity: murder – Article 7(1) (a); extermination - Article 7(1) (b); forcible transfer – Article 7(1) (d); torture – Article 7(1) (f); and rape – Article 7(1) (g); two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities -Article 8(2) (e) (i); and pillaging - Article 8(2) (e) (v). Three counts of genocide: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c).
Darfur, Sudan	ICC-02/05-02/09 The Prosecutor v. Bahar Idriss Abu Garda	Bahar Idriss Abu Garda	7 May 2009 (Summons to appear)	Accused for criminally responsible as a co-perpetrator or as an indirect co-perpetrator for three war crimes under article 25(3) (a) of the Rome Statute: Violence to life in the form of murder, whether committed or attempted, within the meaning of article 8(2) (c) (i) of the Statute; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission within the meaning of article 8(2) (e) (iii) of the Statute; and pillaging within the meaning of article 8(2) (e) (v) of the Statute.
Darfur, Sudan	ICC-02/05-03/09 The Prosecutor v. Abdallah Banda Abakaer Nourain	Abdallah Banda Abakaer Nourain	27 August 2009 (Summons to appear)	Allegedly criminally responsible as co-perpetrator for three war crimes under article 25(3) (a) of the Rome Statute: Violence to life, whether committed or attempted, within the meaning of article 8(2) (c) (i) of the Statute; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission within the meaning of article 8(2) (e) (iii) of the Statute; and pillaging within the meaning of article 8(2) (e) (v) of the Statute.
Darfur, Sudan	ICC-02/05-01/12 The Prosecutor v. Abdel Raheem Muhammad Hussein	Abdel Raheem Muhammad Hussein	1 March 2012	Accused of individual criminal responsibility under article 25(3) (a) of the Rome Statute as an indirect (co) perpetrator including: Seven counts of crimes against humanity: persecution (article 7(l) (h)); murder (article 7(1) (a)); forcible transfer (article 7(1) (d)); rape (article 7(1) (g)); inhumane acts (article 7(l) (k)); imprisonment or severe deprivation of liberty (article 7(l) (e)); and torture (article 7(1) (f)). Six counts of war crimes: murder (article 8(2) (c) (i)); attacks against a civilian population (article 8(2) (e) (i)); destruction of property (article 8(2) (e) (xii)); rape (article 8(2) (e) (vi)); pillaging (article 8(2) (e) (v)); and outrage upon personal dignity (article 8(2) (c) (ii)).
Kenya	ICC-01/09-01/11 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang	William Samoei Ruto	8 March 2011 (Summons to appear)	Accused of being criminally responsible as an indirect co-perpetrator pursuant to article 25(3) (a) of the Rome Statute for the crimes against humanity of: murder (article 7(l) (a)); deportation or forcible transfer of population (article 7(l) (d)); and persecution (article 7(l) (h)).
Kenya	ICC-01/09-01/11 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang	Joshua Arap Sang	8 March 2011 (Summons to appear)	Accused of having otherwise contributed (within the meaning of article 25(3) (d) of the Rome Statute) to the commission of the following crimes against humanity: murder (article 7(l) (a)); deportation or forcible transfer of population (article 7(l) (d)); and persecution (article 7(l) (h)).
Kenya	ICC-01/09-02/11 The Prosecutor v. Uhuru Muigai Kenyatta	Uhuru Muigai Kenyatta	8 March 2011 (Summons to appear)	Accused for crimes against humanity, including murder, deportation or forcible transfer of population, rape, persecution and other inhumane acts, in the context of the 2007-2008 post-election violence in Kenya.
Kenya	ICC-01/09-01/13 The Prosecutor v. Walter Osapiri Barasa	Walter Osapiri Barasa	2 August 2013	Accused for being criminally responsible as direct perpetrator for the crime of corruptly influencing or, alternatively, attempting to corruptly influence witnesses by offering to pay them to withdraw as ICC Prosecution witnesses in the context of the Kenyan cases before the ICC.

Country	Case	Accused	Arrest Warrant	Accused for/Verdict
Kenya	ICC-01/09-01/15 The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett	Paul Gicheru	10 March 2015	<p>The warrant of arrest was issued against Paul Gicheru and Philip Kipkoech Bett on 10 March 2015 and unsealed on 10 September 2015. Mr Gicheru and Mr Bett are allegedly responsible for offences against the administration of justice consisting in corruptly influencing witnesses regarding cases from the situation in Kenya</p> <p>In issuing the warrant, Pre-Trial Chamber II found that there are reasonable grounds to believe that Mr Gicheru and Mr Bett are criminally responsible for offences against the administration of justice consisting in corruptly influencing Prosecution witnesses.</p>
Kenya	ICC-01/09-01/15 The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett	Philip Kipkoech Bett	10 March 2015	See above
Libya	ICC-01/11-01/11 The Prosecutor v. Saif Al-Islam Gaddafi	Saif Al-Islam Gaddafi	27 June 2011	<p>Accused for being criminally responsible as indirect co-perpetrator for two counts of crimes against humanity:</p> <ul style="list-style-type: none"> <li>- Murder, within the meaning of article 7(1)(a) of the Statute; and</li> <li>- Persecution, within the meaning of article 7(1)(h) of the Statute.</li> </ul>
Libya	ICC-01/11-01/11 The Prosecutor v. Saif Al-Islam Gaddafi	Muammar Mohammed Abu Minyar Gaddafi	27 June 2011	See above
Libya	ICC-01/11-01/11 The Prosecutor v. Saif Al-Islam Gaddafi	Abdullah Al-Senussi	27 June 2011	See above
Ivory Coast	ICC-02/11-01/12 The Prosecutor v. Simone Gbagbo	Simone Gbagbo	29 February 2012	<p>Accused for individual criminal responsibility, as indirect co-perpetrator, for four counts of crimes against humanity:</p> <p>a) murder, b) rape and other sexual violence, c) persecution and d) other inhuman acts, allegedly committed in the context of post-electoral violence in the territory of Côte d'Ivoire between 16 December 2010 and 12 April 2011</p>
Ivory Coast	ICC-02/11-01/15 The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé	Laurent Gbagbo	23 November 2011	<p>Accused of four counts of crimes against humanity: murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution, allegedly committed in the context of post-electoral violence in Côte d'Ivoire between 16 December 2010 and 12 April 2011</p>
Ivory Coast	ICC-02/11-01/15 The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé	Charles Blé Goudé	21 December 2011	See above
Mali	ICC-01/12-01/15 The Prosecutor v. Ahmad Al Faqi Al Mahdi	Ahmad Al Faqi Al Mahdi	18 September 2015	<p>Accused for being criminally responsible for having committed, individually and jointly with others, facilitated or otherwise contributed to the commission of war crimes alleged by the Prosecutor regarding intentionally directing attacks against the following buildings: 1) the mausoleum Sidi Mahmoud Ben Omar Mohamed Aquit, 2) the mausoleum Sheikh Mohamed Mahmoud Al Arawani, 3) the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabar, 4) the mausoleum Alpha Moya, 5) the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi, 6) the mausoleum Sheikh Muhammad El Micky, 7) the mausoleum Cheick Abdoul Kassim Attouaty, 8) the mausoleum Ahamed Fulane, 9) the mausoleum Bahaber Babadié, and 10) Sidi Yahia mosque.</p>

## Appendix 5: List of cases before the International Military Tribunal

#	Name	Case	Penalty
1	Martin Bormann	Successor to Hess as Nazi Party Secretary.	Death penalty
2	Karl Dönitz	Leader of the Kriegsmarine from 1943. Briefly became President of Germany following Hitler's death. Convicted of carrying out unrestricted submarine warfare in breach of the 1936 Second London Naval Treaty, but was not punished for that charge because the United States committed the same breach.	10 years
3	Hans Frank	Reich Law Leader 1933–45 and Governor-General of the General Government in occupied Poland 1939–45.	Death penalty
4	Wilhelm Frick	Hitler's Minister of the Interior 1933–43 and Reich Protector of Bohemia-Moravia 1943–45. Co-authored the Nuremberg Race Laws.	Death penalty
5	Hans Fritzsche	Popular radio commentator; head of the news division of the Nazi Propaganda Ministry.	Acquitted
6	Walther Funk	Hitler's Minister of Economics; succeeded Schacht as head of the Reichsbank.	Life imprisonment
7	Hermann Göring	Reichsmarschall, Commander of the Luftwaffe 1935–45, Chief of the 4-Year Plan 1936–45, and original head of the Gestapo before turning it over to the SS in April 1934. Originally the second-highest-ranked member of the Nazi Party and Hitler's designated successor, he fell out of favor with Hitler in April 1945. Highest-ranking Nazi official to be tried at Nuremberg.	Death penalty
8	Rudolf Hess	Hitler's Deputy Führer until he flew to Scotland in 1941 in an attempt to broker peace with the United Kingdom	Life imprisonment
9	Alfred Jodl	Wehrmacht Generaloberst, Keitel's subordinate and Chief of the OKW's Operations Division 1938–45. Signed orders for the summary execution of Allied commandos and Soviet commissars.	Death penalty
10	Ernst Kaltenbrunner	Highest-ranking SS leader to be tried at Nuremberg. Chief of RSHA 1943–45, the Nazi organ comprising the intelligence service (SD), Secret State Police (Gestapo) and Criminal Police (Kripo) and having overall command over the Einsatzgruppen.	Death penalty
11	Wilhelm Keitel	Head of Oberkommando der Wehrmacht (OKW) and de facto defence minister 1938–45. Signed numerous orders calling for soldiers and political prisoners to be executed.	Death penalty
12	Gustav Krupp von Bohlen und Halbach	C.E.O. of Friedrich Krupp AG 1912–45. Due to an error, Gustav, instead of his son Alfried (who ran Krupp for his father during most of the war), was selected for indictment. The prosecutors attempted to substitute his son in the indictment, but the judges rejected this due to proximity to trial. However, the charges against him remained on record in the event he should recover (he died in February 1950). Alfried was tried in a separate Nuremberg trial (the Krupp Trial) for the use of slave labour, thereby escaping worse charges and possible execution.	Acquitted
13	Robert Ley	Head of DAF, German Labour Front.	Committed suicide before trial
14	Konstantin von Neurath	Minister of Foreign Affairs 1932–38, succeeded by Ribbentrop. Later, Protector of Bohemia and Moravia 1939–43. On furlough since 1941, he resigned in 1943 because of a dispute with Hitler.	15 years
15	Franz von Papen	Chancellor of Germany in 1932 and Vice-Chancellor under Hitler in 1933–34. Ambassador to Austria 1934–38 and ambassador to Turkey 1939–44. Although acquitted at Nuremberg, von Papen was reclassified as a war criminal in 1947 by a German de-Nazification court, and sentenced to eight years' hard labour.	Acquitted
16	Erich Raeder	Commander In Chief of the Kriegsmarine from 1928 until his retirement in 1943, succeeded by Dönitz.	Life imprisonment
17	Joachim von Ribbentrop	Ambassador-Plenipotentiary 1935–36. Ambassador to the United Kingdom 1936–38. Minister of Foreign Affairs 1938–45.	Death penalty
18	Alfred Rosenberg	Racial theory ideologist. Later, Minister of the Eastern Occupied Territories 1941–45.	Death penalty
19	Fritz Sauckel	Gauleiter of Thuringia 1927–45. Plenipotentiary of the Nazi slave labour programme 1942–45	Death penalty
20	Dr. Hjalmar Schacht	Pre-war president of the Reichsbank 1923–30 & 1933–38 and Economics Minister 1934–37. Admitted to violating the Treaty of Versailles.	Acquitted
21	Baldur von Schirach	Head of the Hitlerjugend from 1933–40, Gauleiter of Vienna 1940–45.	20 years
22	Arthur Seyss-Inquart	Instrumental in the Anschluss and briefly Austrian Chancellor 1938. Deputy to Frank in Poland 1939–40. Later, Reichskommissar of the occupied Netherlands 1940–45.	Death penalty
23	Albert Speer	Minister of Armaments from 1942 until the end of the war. In this capacity, he was ultimately responsible for the use of slave labourers from the occupied territories in armaments production.	20 years
24	Julius Streicher	Gauleiter of Franconia 1922–40, when he was relieved of authority but allowed by Hitler to keep his official title. Publisher of the anti-Semitic weekly newspaper Der Stürmer.	Death penalty

## Appendix 6: List of cases before the United States Nuremberg Military Tribunals

#	Designations	Dates	Defendants
1	Doctors' Trial	9 December 1946 – 20 August 1947	23 Nazi physicians of the Action T4
2	Milch Trial	2 January – 14 April 1947	Field Marshal Erhard Milch of the Luftwaffe
3	Judges' Trial	5 March – 4 December 1947	16 Nazi German "racial purity" jurists
4	Pohl Trial	8 April – 3 November 1947	Oswald Pohl and 17 SS officers
5	Flick Trial	19 April – 22 December 1947	Friedrich Flick and 5 directors of his companies
6	IG Farben Trial	27 August 1947 – 30 July 1948	Directors of IG Farben, maker of Zyklon B
7	Hostages Trial	8 July 1947 – 19 February 1948	12 German generals of the Balkan Campaign
8	RuSHA Trial	20 October 1947 – 10 March 1948	14 racial cleansing and resettlement officials
9	Einsatzgruppen Trial	29 September 1947 – 10 April 1948	24 officers of Einsatzgruppen
10	Krupp Trial	8 December 1947 – 31 July 1948	12 directors of the Krupp Group
11	Ministries Trial	6 January 1948 – 13 April 1949	21 officials of Reich ministries
12	High Command Trial	30 December 1947 – 28 October 1948	14 High Command generals

## Appendix 7: Other trials conducted after the Nuremberg Trials (a non-exhaustive list)

Designations	Dates	Other information
The Auschwitz Trials	24 November 1947–22 December 1947 (Kraków, Poland)	40 former staff of the Auschwitz concentration camps
The Belsen Trial	17 September 1945 and lasted 54 days in court (Lüneburg, Germany)	Josef Kramer and 44 former SS from Bergen-Belsen and Auschwitz
The Belzec Trial	8 August 1963–21 January 1965 (Munich, Germany)	8 former SS members of Belzec extermination camp
The Chelmno trials	1945 (Poland) 1962–1965 (Bonn/ Cologne, Germany)	3 members of the SS-Sonderkommando Kulmhof in Poland and, 13 defendants from Chelmno concentration camp (6 of them acquitted) in Bonn
The Frankfurt Auschwitz Trials	20 December 1963–19 August 1966	22 defendants from Auschwitz-Birkenau camp, charged under German criminal law
The Majdanek trials	27 November 1944–2 December 1944 (first trial in Lublin, Poland) 26 November 1975–30 June 1981 (last trial in Düsseldorf, Germany)	6 defendants (first trial) 63 defendants (second trial) 16 defendants (third trial)
The Mauthausen-Gusen camp trials	29 March–13 May 1946 6–21 August 1947 (Dachau, Germany)	Mauthausen – Gusen concentration camp personnel 61 defendants (first trial) 8 defendants (one acquitted, second trial)
The Ravensbrück Trials	5 December 1946–3 February 1947 (first of 7 trials, Hamburg, Germany)	16 defendants (first trial) 1 defendant (second trial) 5 defendants (2 acquitted, third trial) 5 defendants (fourth trial) 3 defendants (fifth trial) 2 defendants (sixth trial) 6 defendants (1 acquitted, seventh trial)
The Sobibor trial	1965–1966 (Hagen, Germany)	12 defendants (6 of them acquitted)
The Treblinka trials	12 October 1964–3 September 1965 (Düsseldorf, Germany) 13 May–22 December 1970 (second trial)	11 defendants' members of the SS camp personnel Second trial against camp commandant Franz Stangl





