



# The Evolution of Justice

Beginning in June, former Liberian President Charles Taylor will face trial for violations of international law, including war crimes and crimes against humanity. Taylor is being prosecuted by the United Nations-backed Special Court for Sierra Leone, based in the country's capital, Freetown. His trial will be held in one of the courtrooms of the International Criminal Court (ICC), an independent but related court in the growing system of international justice.

This scenario would have been unthinkable in 1948 when, just a few years after the Nuremberg trials opened, the UN General Assembly first contemplated a Criminal Chamber of the International Court of Justice. Almost 60 years later, Taylor will be one of several former heads of state to be charged with atrocity crimes in recent history.

Even more significant are the beginning cases of the ICC, the first-ever permanent, independent international criminal court able to indict and try sitting heads of state, other high government officials and military leaders ultimately responsible for genocide, war crimes and crimes against humanity.

Today, the emerging system of international courts deals with both civil and criminal cases. The key difference internationally is that civil cases focus primarily on the responsibility and

*The international court system is, in a word, complex. Here's what you need to know to understand how these legal bodies work and why their role is critical to trying the most serious crimes of our time.*

**by Matthew Heaphy**

actions of state actors, while criminal cases focus on individuals. Self-contained and composed of judges from around the globe (judges are selected by key UN bodies or by the countries that have joined a court), international courts make legal and factual findings that affect the rights and responsibilities of individuals and nations. Their decisions are based on international treaties and practice, as well as on court decisions from around the world. And while the competence of a particular court is usually limited to cases related to a particular treaty, type of law or a fixed set of events, each international court decision contributes to the growing body of international law.

This primer explains how these

courts work, their relationship to the United States and how they fit into the United Nations system.

## **International Civil Courts: Mediating between nations**

International courts have been quietly considering and resolving civil cases for more than a century. Their decisions may be contentious or advisory, resolving disputes between nations or interpreting provisions in treaties.

The Permanent Court of Arbitration, which is housed in the Carnegie Foundation's Peace Palace in The Hague, The Netherlands, began its work in 1900 to resolve interstate disputes and other matters. There are 106 contracting states, including the US, to the treaty-based court. Unlike a court in which one party hauls in an unwilling defendant, the parties to a case before this court mutually agree to have their dispute resolved by arbitrators of their choice. Recent cases have involved territorial borders, river pollution and railroad disputes.

On the other side of the Peace Palace sits the International Court of Justice (ICJ). As the UN's principal judicial institution, it is also known as the World Court, a moniker often inaccurately applied to other judicial institutions based in The Hague. Composed of 15

judges, the US and other permanent members of the UN Security Council have traditionally held a seat on the ICJ, which was designed to resolve disputes between UN member states and to issue advisory opinions on legal questions referred by certain international bodies, including the General Assembly. In recent years, the ICJ has examined the legality of Israeli fences within the Palestinian territory, and this past February ruled that the government of Serbia violated the Genocide Convention by failing to prevent genocide in Srebrenica during the war in the former Yugoslavia and by failing to cooperate with a UN war crimes tribunal.

There are many other permanent international civil courts which resolve with little fanfare issues between nations, and at times non-state actors. There are few headlines, for example, about the case regarding swordfish stocks pending before the UN International Tribunal for the Law of the Sea based in Germany, or about the Iran-United States Claims Tribunal which is steadily working away in a residential section of The Hague to resolve claims of frozen assets following the 1979 Iran hostage crisis. But international civil courts have become vital components of the international court system, continuously working to resolve disputes on issues that impact the entire world.

### Temporary Criminal Tribunals: Holding individuals accountable

International criminal courts are not unlike domestic criminal courts that deal with homicides and petty theft. The difference is the gravity of crimes the former deal with as well as the circumstances and reasons for their creation. Political situations and practical considerations have meant that, until recently, alleged international criminals



UN Photo/Martine Perrét

**UN Peacekeepers in the Democratic Republic of Congo provide security at the trial of those accused in the killing of the milobs in Mongwalu in May 2003.**

would only be prosecuted well after the end of a conflict and only in relation to a few of the many conflicts that have plagued the world.

The establishment of a permanent international criminal court—the ICC—has been more dramatic and fitful than permanent civil courts, and its realization is often considered the most significant development in international law in the last 60 years. It all started with Nuremberg when the Allied Powers created the International Military Tribunal to prosecute individuals of the European Axis countries for crimes against peace, war crimes and crimes against humanity. The London Charter, which set the stage for the Nuremberg trials, was signed on August 8, 1945, less than two months after the signing of the UN Charter in San Francisco. Although the tribunal was established by four of the five permanent members of the yet-to-meet Security Council—France, the Soviet Union, United Kingdom and United States—the nascent UN did not play a formal role in the proceedings at Nuremberg. Similar trials were set up in Tokyo to try alleged World War II criminals in the Far East.

In November 1947, the UN General Assembly asked its newly-established International Law Commission to “formulate the principles of international law recognized in the Charter of the

Nürnberg Tribunal and in the judgment of the Tribunal.” The commission issued its report in 1950. However, the Cold War prevented any international consensus on establishing a permanent court. It would be another 43 years until these principles would be invoked in the context of an international court.

In May 1993, the Cold War over, the Security Council responded to the crisis in the Balkans by creating the first international criminal tribunal since Nuremberg. Citing the threat to international peace and security and acting under Chapter VII of the UN Charter, the Security Council set up the International Criminal Tribunal for the former Yugoslavia (ICTY), a temporary UN body to prosecute individuals for grave breaches of the Geneva Conventions of 1949, war crimes, genocide and crimes against humanity committed in the former Yugoslavia since 1991.

In November 1994, the Security Council established the International Criminal Tribunal for Rwanda (ICTR). Based in Arusha, Tanzania, the ICTR has many of the same legal and procedural features as the ICTY in The Hague, but is limited to investigating and trying crimes related to the 1994 Rwandan genocide. Until 2003, the two UN-backed *ad hoc* tribunals shared a prosecutor and continue to share an appeals chamber. The temporary tribunals are expected to wrap up their trials by 2008

## Get to Know the Courts

The following timeline depicts the years in which major international courts were established, where they are located, the timeframe of their jurisdiction and the role the US plays in their work.

Civil Courts appear on this page, Criminal Courts appear on the following two pages.

### 1900

#### Permanent Court of Arbitration, The Hague

- 1900-present; a permanent court
- Established by the Conventions for the Pacific Settlement of International Disputes
- The US is a contracting state to the court.

### 1945

#### UN International Court of Justice, The Hague

- 1945-present; a permanent court
- Established by the UN Charter; a successor to the 1919 Permanent Court of International Justice of the League of Nations

- Several judges have been Americans, including a previous president of the court; the US withdrew from compulsory jurisdiction following the 1986 *Nicaragua v. United States* case.

and their appeals by 2010. At that time, the UN will likely dissolve them.

The work of the two tribunals has been admirable, although slow. Then again, the trials are not typical criminal cases. Three-judge panels preside over what can be multi-year cases involving complex issues of command responsibility, essentially determining whether a leader should be held responsible for the actions of subordinates, and determining among differing accounts the political and military events over the course of a conflict. Given the impracticality of selecting an international jury of peers, the judges decide, making written factual findings on all relevant evidence. The verdicts are often several hundred pages long and are carefully scrutinized by appellate judges and analyzed by academics.

To date, the ICTY has concluded cases against 100 defendants, sentenced 48 to serve time and transferred some cases to national courts. The ICTR has completed 24 trials, with 44 more defendants on trial, awaiting trial or awaiting an appeal.

The ICTR has issued a number of landmark and sometime controversial decisions, particularly regarding the crime of genocide. It convicted a former Rwandan prime minister for genocide and was the first international court to find that rape and sexual violence could be considered acts of genocide. The Rwandan tribunal also convicted individual members of the media for their role in the country's genocide, a case now on appeal.

Together, the temporary tribunals have achieved a degree of accountability for the crimes committed in specific conflicts. Their statutes were based on the law as observed by the international community at the time the alleged crimes occurred, but were only applied to the Yugoslav and Rwandan conflicts.



UN Photo/Mark Garten

While the ICTY and ICTR have certainly been effective in prosecuting criminals in their respective countries, international justice has not necessarily been applied evenly. Without consistent application of a fixed set of legal norms, one of the main purposes of international justice—detering future criminal acts—is undermined.

### The International Criminal Court: Providing a permanent presence

Built on the legacy of the Nuremberg Principles and the success of the two UN tribunals described above, the ICC deals with a very narrow set of crimes and is only used in the most extreme circumstances. Only the Security Council, states parties to the court and the court's prosecutor may request the start of an investigation. Only if the prosecutor and a panel of three pre-trial judges find that the national courts are unwilling or unable to prosecute the crimes in question, and only if the crimes are of sufficient gravity, will an investigation go forward.

Unlike international civil courts, which may not have a threshold for the cases that can be heard, the ICC deals with the worst crimes committed by those ultimately responsible. These are clan leaders who order the rape and slaughter of women and children; political chiefs who craft and order plans that aim to erase an entire nationality or

religious group; and military commanders who enlist thousands of children, sometimes under the age of 10, into the military and turn them into armed killing machines.

The *Rome Statute*, the treaty that created the ICC, is based closely on pre-existing treaties and other international agreements on war crimes, genocide and crimes against humanity, and authorizes the investigation and prosecution of these crimes allegedly committed after it entered into force on July 1, 2002. Accordingly, the ICC will not try crimes for which there was no international law at the time, a charge that has been frequently made against the Nuremberg tribunal and the UN wars crimes tribunals.

The ICC can only indict and prosecute individuals who are either nationals of a state party which has joined the court or who allegedly committed a crime in the territory of a state party. With 104 states parties to the court (as of March 2007)—the US not among them—the *Rome Statute* applies in more than half of the countries on the planet.

The court is currently conducting investigations into crimes committed in Uganda, the Democratic Republic of Congo, and Darfur, Sudan, with a fourth expected in the Central African Republic. There are outstanding arrest warrants against five Ugandan rebel leaders. One alleged Congolese warlord,

## 1945

### International Military Tribunal, Nuremberg

- 1945-1946
- Established by the London Charter
- Americans worked as prosecutors and judges.

## 1946

### International Military Tribunal for the Far East, Tokyo

- 1946-1948
- Established by the IMTFE Charter
- There was an American prosecutor and American judges; the tribunal was under the authority of Allied Supreme Commander US Army General Douglas MacArthur.

## 1993

### International Criminal Tribunal for the former Yugoslavia, The Hague

- 1993-2010
- Established by the UN Security Council

- Several prosecutors and judges have been Americans, including two of the tribunal's previous presidents.

Thomas Lubanga Dyilo, has been indicted for war crimes related to enlisting child soldiers and awaits trial later this year. In February 2007, the prosecution presented evidence to the court's Pre-Trial Chamber of 51 counts of war crimes and crimes against humanity against Sudanese Minister of State Ahmad Muhammad Harun and Militia/Janjaweed leader Ali Kushayb.

In less than five years of operation, the ICC is not only taking its first steps toward holding international criminals accountable, but also deterring future criminals and offering redress to victims and communities worldwide. And for the first time in the history of international criminal courts, the voices of victims are being heard in proceedings before the ICC through formal legal representation.

### **“Hybrid” Criminal Courts: Collaborating with the United Nations**

The most recent development in international criminal courts has been the establishment of so-called “hybrid” courts which combine domestic and international elements. The UN, wary of creating additional expensive *ad hoc* tribunals, has recently forged agreements to help countries without adequate judicial resources open internationalized courts. These courts are geographically closer to those victims seeking justice, less costly to operate, and are able to investigate and prosecute crimes that occurred before the ICC's mandate began.

The Special Court for Sierra Leone is in its fourth year of trials in the capital city of Freetown, and at press time, the Khmer Rouge tribunal judges were wrestling over the rules of procedure and evidence in Phnom Penh. These are two examples of UN collaboration with national governments. The UN may also set up a tribunal to try those

responsible for the 2005 assassination of Lebanese Prime Minister Rafik Hariri. Some countries, including the US, believe that hybrid courts represent the future of international justice.

### **The United States: Playing a key legal role**

From Nuremberg to Rome, the US has historically been an important contributor to strengthening and expanding international law, and continues to support international courts in their effort to resolve issues important to trade and democracy. In recent years, however, its support has been more selective.

The US has been a member of the Permanent Court of Arbitration since 1900 and had agreed to take part in contentious cases brought by other consenting countries before the International Court of Justice (also known as compulsory jurisdiction). However, the government withdrew its acceptance of the ICJ's compulsory jurisdiction after a case brought by Nicaragua in 1986 alleging violations of its sovereignty by US military activities. In effect, this means that the US can choose whether to be party to a contentious case.

And while the government has been a strong supporter and financial contributor to hybrid courts and both the ICTY and ICTR, and was a key contributor to the negotiations of the *Rome Statute*, the US has actively opposed the ICC over the past five years. Reasoning that it does not have sufficient control over the court's power and that US military personnel could be subject to politicized prosecutions, in May 2002, the Bush administration suspended its signature of the *Rome Statute*, originally signed by President Clinton. Since then, it has discouraged other nations from joining the court. There have been recent indications—including official arrange-

ments for assisting the ICC on the Darfur case—that this opposition may be relaxing, at least in practice.

### **The System: Still Growing and changing**

The universe of international courts has grown as the UN has expanded its agenda. The world body has played a key role in creating and using these judicial institutions to peacefully resolve financial and territorial disputes and, more recently, to hold individual criminals to account. One by one, nations have cooperated to create permanent courts to resolve problems that could not be worked out informally or in national courts.

This evolution reflects the political realities of international cooperation and the willingness of nations to consent to conflict resolution by international arbitrators or judges. The fact that it took 60 years to establish a permanent International Criminal Court reveals the hesitation of some nations to subject individual citizens, and even heads of state, to the jurisdiction of an international court. Charles Taylor – born in 1948, months before the UN first considered establishing a Criminal Chamber at the ICJ – may be among those heads of state not yet comfortable with this idea. As he readies his defense against charges of war crimes and crimes against humanity from his cell in The Hague, Taylor must be ruefully reflecting on how far international law has come in his lifetime. ■

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**WEB LINK:** For more information on the ICC, visit the court's website at [www.icc-cpi.int](http://www.icc-cpi.int). For more information on the US position on the court, visit [www.amicc.org](http://www.amicc.org).

## **1994**

### **International Criminal Tribunal for Rwanda, Tanzania**

- 1995-2010
- Established by the UN Security Council
- An American serves as an appeals judge.

## **1998**

### **International Criminal Court, The Hague**

- 2002-present; a permanent court
- Established by the *Rome Statute*
- The US suspended its signature of the *Rome Statute* in May 2002.

## **2000**

### **Special Court for Sierra Leone, Freetown**

- 2003-present
- Established by a joint UN-Sierra Leonean agreement
- An American served as the first prosecutor.

## **2003**

### **Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge tribunal)**

- 2004-present
- Established by a joint UN-Cambodian agreement
- A reserve judge and a reserve prosecutor are Americans.