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## Sixty-five years of international criminal justice

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# Sixty-Five Years of International Criminal Justice: The Facts and Figures

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## Abstract

The international criminal justice system comprises nine international criminal courts and tribunals; six are still operational and three have closed down. On average, they operated for almost nine years apiece and concluded 172 cases in which over 250 judges and 23 chief prosecutors were involved. All in all 745 suspects were indicted, 356 were actually tried and, of these, some 281 defendants were convicted. Currently 34 suspects are on trial and 22 are still at large. The 'average' convicted perpetrator is male, aged 40 and a member of a military or paramilitary organisation from Europe, Asia or Africa who is acting on behalf of his government. These are just some of the facts and figures which we present in this article: an overview of the empirical reality of the international criminal justice system which has currently been functioning for just over 65 years.

## Keywords

International criminal courts and tribunals; international crimes; judges; prosecutors; perpetrators

## 1. Introduction

The judgment delivered by the International Military Tribunal (IMT) in October 1946, marked the birth of an international criminal justice system, a system which is now just over 65 years old.<sup>1</sup> In this article, we focus on the empirical reality of the international criminal justice system and present the facts and figures from these last 65 years.<sup>2</sup> We end with the convictions of Thomas Lubanga on 14 March 2012, the first person ever to be convicted by the International Criminal Court (ICC) in The Hague, and Charles Taylor, who appeared before the Special Court for Sierra

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<sup>\*</sup>) The authors wish to thank Joris van Wijk and Tijs Kooijmans for their help in translating the relevant parts of the case law of the Special Panels of Dili.

<sup>1</sup>) The Treaty of Versailles, which was concluded after the First World War, provided for the prosecution of Kaiser Wilhelm II but he fled to The Netherlands and was granted asylum.

<sup>2</sup>) The data were processed up to May 2012.

Leone (SCSL) on 26 April 2012 and was the first former head of state ever to be convicted by an international criminal tribunal.

As well as presenting an overview of the empirical reality of the international criminal justice system, we fill in a gap in the literature. Scholarly articles have usually focused on legal and doctrinal issues and, thus far, a comprehensive overview of the empirical data of the international criminal justice system has been lacking in academic literature. Not only is there an absence of empirical research into international criminal justice but the few empirical studies that have been completed have usually focused on just one aspect of the tribunals' functioning and covered only one tribunal at a time. In contrast, we describe many aspects of the functioning of the international criminal courts and tribunals, including their establishment, court composition, procedural aspects and sentencing practice. We also focus on the main subjects of the international criminal justice system: the defendants.

The article is descriptive and does not strive to provide explanations but to establish a starting point for further research. We have gathered information predominantly from the statutes, official documents and reports released by the courts and tribunals, the official websites of these tribunals and courts, from case law and the work of other scholars. In some cases we have used additional sources on the internet to corroborate our findings.

In the next section, we briefly introduce the various international and internationalized criminal courts and tribunals that have been established and discuss when and how they were set up. In the third section, the focus is placed on the background of the prosecutors and judges involved and, in the fourth section, the figures on the functioning of the tribunals, such as case composition, length of proceedings and sentencing are outlined. The fifth section shifts the focus to the defendants who have been tried by international criminal courts and tribunals. Who are they? What are their ages, sex and rank? Are they civilians or members of the military? In the sixth section, we briefly refer to the trials conducted by domestic courts and the suspects who were tried for international crimes in these courts who should have been tried.

## **2. International Courts and Tribunals: Types and Establishment**

There are a total of nine international criminal courts and tribunals. The International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE) were established by the Allies after the end of the Second World War. The IMT was established by a treaty<sup>3</sup> and the IMTFE by a special

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<sup>3</sup>) Charter of the International Military Tribunal of 8 August 1945.

proclamation of the Supreme Commander of Japan, General McArthur.<sup>4</sup> The International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established in the early nineties by United Nations Security Council Resolutions.<sup>5</sup> The International Criminal Court (ICC) was set up by a statute which states can become a party to. Agreement on the statute was reached on 17 July 1998 in Rome<sup>6</sup> and, on 1 July 2002, after the sixtieth state had ratified the statute,<sup>7</sup> the ICC became operational. The Special Court for Sierra Leone (SCSL),<sup>8</sup> the Extraordinary Chambers in the Courts of Cambodia (ECCC)<sup>9</sup> and the Special Tribunal for Lebanon (STL)<sup>10</sup> were all established after an agreement between the governments of the country and the United Nations (UN). The internationalized court in East Timor, which is generally referred to as the Special Panels of Dili (SPD), was created as part of the transitional UN administration of UNTAET.<sup>11</sup> As well as these international and internationalized courts, there are also national courts which prosecute international crimes; there are also a few national courts with an international dimension such as the courts in Kosovo and the War Crimes Chamber in Bosnia. These courts, however, will not be included in our analysis as there is too much data to be discussed here.

Of the nine international criminal court and tribunals which are discussed in greater detail, five can be considered international courts (IMT, IMTFE, ICTY, ICTR and ICC), and the other four (SCSL, ECCC, STL, SPD) internationalized, mixed or hybrid courts. International courts have international judges only, while the internationalized, mixed and hybrid courts usually have a mixture of national and international judges (for more detail, see Section 3.2). The ICC is the only permanent court, all other courts are temporary. The IMT, IMTFE and the SPD have all closed down, while the ICTY and ICTR are working on their closing strategies. The SCSL has finalized all its cases with the exception of the Charles Taylor appeal. The ECCC is fully operational: it has concluded one case and a second case, which involves three high-profile perpetrators, is currently on-going. The STL is about to

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<sup>4</sup> Charter of the International Military Tribunal of the Far East of 19 January 1946.

<sup>5</sup> SC Resolution 827 of 15 May 1993 and SC Resolution 955 of 8 November 1994.

<sup>6</sup> UN Doc A/CONF. 183/9.

<sup>7</sup> On 11 April 2002 at a special UN ceremony ten countries deposited their instrument of ratification simultaneously, reaching the threshold of the sixty ratifications needed for the Statute of Rome to enter into force. As of July 2012, 121 states are party to the statute.

<sup>8</sup> Statute of the Special Court for Sierra Leone of 16 January 2002.

<sup>9</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of crimes committed during the period of the Democratic Kampuchea (Extraordinary Chambers in the Courts of Cambodia) of 6 June 2003.

<sup>10</sup> SC Resolution 1757 of 30 May 2007.

<sup>11</sup> UNTAET, which stands for United Nations Transitional Administration in East Timor, was established by UN SC Resolution 1272: the resolution referred to the need to investigate the crimes committed after the referendum. In UNTAET Regulation 2000/11 the idea of a hybrid court was launched for the first time.

start its first trial. The ICC has finished one case and is currently investigating sixteen cases in seven different situations.

All the courts and tribunals have limited temporal and territorial jurisdiction. Four tribunals were established after an armed conflict. The IMT and IMTFE were established after the Second World War and had jurisdiction for the crimes committed during this war, only prosecuting perpetrators who belonged to the Axis. The ICTY and SCSL were established after a civil war and prosecuted perpetrators from more than one party within the conflict. Three courts and tribunals deal with one-sided violence; the ICTR, for example, deals with the genocide committed by Hutu extremists in 1994,<sup>12</sup> the ECCC with the crimes committed by the Khmer Rouge regime during their reign in power (1975-1979) and the SPD with the violence committed by the militias and the Indonesian army in 1999 after the ballot for independence. The STL deals with the fatal attack on Prime Minister Hariri, it thus has a temporal jurisdiction which is very limited and only prosecutes crimes related to the attack on 14 February 2005. The ICC has the broadest mandate as it can potentially prosecute all international crimes committed from 1 July 2002, the date of its establishment. It has to be noted, however, if the state in which the crimes were committed has not ratified the statute or the state from which the perpetrator originates has not ratified it then a Security Council Resolution based on Chapter VII of the UN Charter is required to start proceedings.<sup>13</sup> With the exception of the STL, all tribunals have jurisdiction over war crimes and crimes against humanity. The ICTY, ICTR, ICC, SPD and ECCC also have jurisdiction over genocide.<sup>14</sup> The IMT and IMTFE, in their time, had jurisdiction over crimes against peace, which is similar to the current crime of aggression which the ICC will have jurisdiction over.

The mixed and hybrid courts also have jurisdiction over non-international crimes according to domestic criminal codes: the SCSL has jurisdiction over crimes committed under Sierra Leonean law such as offences relating to the abuse of girls or the wanton destruction of property; the ECCC has jurisdiction over the crimes of homicide, torture and religious persecution according to Cambodian law and the SPD have jurisdiction over murder, sexual offences and torture. All courts and tribunals have jurisdiction over natural persons and there are no

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<sup>12)</sup> The genocide was committed during a period of civil war in which the Rwandan Patriotic Front (RPF) committed crimes too. The ICTR however only prosecuted crimes committed by the Hutus as part of the genocidal campaign. Carla del Ponte, Chief Prosecutor of the ICTR tried to also prosecute members of the RPF but was prevented from doing so. See Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, (Other Press, 2009).

<sup>13)</sup> See Art. 12 jo. 13 of the ICC Statute.

<sup>14)</sup> The IMT and IMTFE did not have jurisdiction over genocide. The concept was not internationally accepted at the time. Lemkin had coined the term in 1944 but it wasn't until 1948 and thus after the IMT finished its work that it was legally established in the Genocide Convention.

systems of immunity (or amnesty) that can be used to protect heads of states and other governmental officials from prosecution.

The Hague is often referred to as the legal capital of the world because the ICTY, the Appeals Chamber of the ICTR, the ICC and the STL all have their seat there. The IMT was also seated in Europe, namely in Nuremberg. Two of these European based courts (IMT and ICTY) dealt with crimes committed in Europe (although the crimes of Nazi Germany stretched beyond the boundaries of Europe). The STL deals with crimes committed in the Middle East, while the ICC can potentially deal with crimes committed anywhere in the world but so far has mainly dealt with crimes committed in Africa. The three courts seated in Asia (IMTFE, ECCC and SPD) deal with crimes committed in Asia, while the two courts seated in Africa (SCSL and ICTR) deal with crimes committed in African countries.<sup>15</sup>

### 3. Prosecutors and Judges

One of the distinguishing features of international and internationalized criminal courts and tribunals is the involvement of international prosecutors and judges.<sup>16</sup> In the section below we focus on these prosecutors and judges and their characteristics.

#### 3.1. Prosecutors

In total there were 23 chief prosecutors involved in the nine international and internationalized criminal courts and tribunals, seven of whom are currently still in office (for more detailed figures, see Table 1). Most tribunals have one chief prosecutor at a time with the exception of IMT which had four chief prosecutors and the ECCC which has two chief prosecutors. Initially the function of chief prosecutor at the ICTY and ICTR were combined but these functions were separated in 2003. The SPD and the ECCC also have investigative judges.

Males are overrepresented amongst the prosecutors: 18 out of 23 (78 per cent) prosecutors were male whereas there were just five females (22 per cent). The average age of a prosecutor is 50 years old. The youngest prosecutor was 33 (Longinhos Monteiro at the SPD) and the oldest 66 (Da Silva at the SCSL). Most

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<sup>15</sup> The trial of Charles Taylor by the SCSL was conducted in The Hague at the premises of the ICC for security reasons.

<sup>16</sup> For a discussion of this phenomenon and its implication for judicial policy-making, see Jared Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication', 44 *Columbia Journal of Transnational Law* (2005-2006) 377-452; and Sebastian Jodoïn, 'Understanding the Behaviour of International Courts: An Examination of Decision-making in the ad hoc International Criminal Tribunals', 6 *Journal of International Law and International Relations* 1 (2010) 1-34.

Table 1. Prosecutors

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SPD	ECCC	STL	Total <sup>1</sup>
Number	4	1	4	4	2	4	2	3	2	23
Simultaneously	4	1	1	1	1	1	1	2	1	1.4
Male	4	1	2	2	1	3	2	2	2	18
Female	0	0	2	2	1	1	0	1	0	5
Age <sup>2</sup>	45	58	51	53	51	58	41	41	54	50
Time in office (yrs)	1	2	4	3	9	2	2.5	4.5	5	3 <sup>3</sup>

<sup>1</sup> The figures in this column do not all add up but this is because in counting the total numbers we took into account that three of the four chief prosecutors at the ICTY combined this position with their role of chief prosecutor at the ICTR.

<sup>2</sup> We could not trace all data on year of birth. For four prosecutors the year of birth was missing – on the basis of the information provided when they received their MA we have estimated their year of birth.

<sup>3</sup> The figure was calculated by taking all prosecutors (those who left office and those still in office) into account. The outcome does not change if we only take those who left office into account.

prosecutors have a background as a prosecutor, judge or attorney-general and have stayed in office to date for an average of three years – differences in time in office can be related to the length of time that the tribunal was operational. The longest operating prosecutors were Ocampo (ICC) and Jallow (ICTR) who both have nine years service, closely followed by Del Ponte (ICTY) who was in office for eight years. The prosecutors are predominantly from western countries, namely six from Europe, five from the United States and three from Canada; three came from Africa, one from Latin America and one from Asia.

### 3.2. Judges<sup>17</sup>

In total there were over 250 judges involved in the international criminal trials including alternate judges, reserve judges and *ad litem* judges.<sup>18</sup> Of them

<sup>17)</sup> The data on the judges of all the international courts are fairly complete with the exception of the SPD. We were able to gather all the information we required about the judges of the IMT, IMTFE, ICTY, ICTR and ICC. Of the judges of the SCSL, ECCC and STL we could not find enough data about their ages or years of birth to include in our analysis as these tribunals do not provide this information on their website and we could not retrieve the information in any other manner. The data on the judges of the SPD is incomplete as there are no lists of all the judges. By looking through the judgments and the notifications of the Special Representative of the Secretary General of East Timor we estimated that there were about twenty-eight judges involved of whom fifteen were international judges and thirteen national judges. We could not however discern any further information with sufficient certainty (apart from the overall count) so these judges have therefore been excluded from the analysis.

<sup>18)</sup> The IMT had four substitutes who participated fully in the deliberations. A number of courts used alternate or reserve judges, while the ICTY and ICTR appointed so-called *ad litem* judges who are usually assigned to just one case.

24 judges have served as presidents of the international criminal courts and tribunals; most judges served at the ICTY and fewest at the IMT (for further details, see Table 2). The early war courts (IMT and IMTFE) as well as the two international criminal ad hoc tribunals (ICTY and ICTR) and the ICC have international judges only. The so-called hybrid courts have both national and international judges. In all of the mixed and hybrid courts, with the exception of the ECCC, international judges have a majority.<sup>19</sup> Of the total of 256 judges, 222 (87 per cent) were international judges and 34 (13 per cent) were national judges.

Initially judging war criminals was an entirely male concern and all 19 judges at the IMT and IMTFE were male. Since then 61 female judges have been appointed, making up roughly one out of four judges (27 per cent). The first female international judges were Gabrielle Kirk McDonald and Elizabeth Odio-Benito appointed on 17 November 1993 as judges of the ICTY. Most female judges were appointed to the ICTY (22) but the ICC has the highest average of female judges (47 per cent). This can probably be explained by the fact that according to the Rome Statute (Art. 36(8) ICC Statute) there should be a fair representation of female and male judges. Five women have served as presidents of different tribunals.

The average age of the judges at the time of their appointment is 62 years old<sup>20</sup> and the average leaving age is 67. On average the judges at the IMTFE were the youngest, appointed at 55 years old and the ICTY judges at 63 years old were the oldest. The youngest judge ever to be appointed was Bert Röling, the Dutch judge of the IMTFE, appointed at 40 years old. The oldest serving judges were David Pedro of Argentina and Arpad Prangler of Hungary who were both 82 years and served at the ICTY. Judges at the international criminal courts have usually been of a rather advanced age. This fact might be explained by the requirement that international judges be persons of high moral standing with extensive professional experience in the international or domestic arenas (Cf. Art 36(3) ICC, Art 13 ICTY).

The average time judges served in office is four point eight years. On average judges at the SCSL served the longest terms while the judges at the IMT served for less than a year which was the time span of the only trial held at the IMT (for more detailed information, see Table 2). Twenty judges served more than

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<sup>19</sup> At the ECCC this was one of the major points of discussion. The UN wanted a majority of international judges but Cambodia wanted a majority of national judges. This was one of the most important reasons behind why the negotiations took so long but finally the UN gave in. See Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (Pluto Press: London, 2004). The group of experts who had been appointed by the Secretary General of the UN had advised that the majority of judges should be international but the Cambodian government decided otherwise. See Report of the Group of Experts for Cambodia, established pursuant to the General Assembly Resolution 52/135, 1999 – Report: A/53/850.

<sup>20</sup> The figures are based on the IMT, IMTFE, ICTY, ICTR, ICC data where only few numbers were missing. Since there is a lot of missing data on judges' ages the SCSL, ECCC, STL, and SPD we have not included them in the analysis.



Table 2. Judges

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SPD	ECCC	STL	Total
Number	8	12	81	37	34	18	28	26	12	256
International	8	12	81	37	34	14	15	13	8	222 (87%)
National	0	0	0	0	0	4	13	13	4	34 (13%)
Male	8	12	59	27	18	13	MD	20	10	167 (73%)
Female	0	0	22	10	16	5	MD	6	2	61 (27%)
Youngest	43	40	47	46	50	MD	MD	MD	MD	40
Oldest	66	65	82	77	81	MD	MD	MD	MD	82
Av. age	58	55	63	61	62	MD	MD	MD	MD	62
Av. term	1	1.8	4.8	6.2	4.7	6.8	MD	5.1	2.7	4.8
Longest term	1	1.8	14	17	9	10	MD	5.1	2.7	17
Presidents	1	1	6	6	2	6	MD	1	2	25
Male pres.	1	1	5	4	2	4	MD	1	2	20 (80%)
Female pres.	0	0	1	2	0	2	MD	0	0	5 (20%)

Key: MD = Missing Data

ten years (nine at the ICTY, five at the ICTR and six at the SCSL) 17 of whom are still in office. The longest serving judge is William Sekule of Tanzania who was appointed in 1995 at the ICTR and is currently still in office (thus serving for more than seventeen years). Patrick Robinson from Jamaica is the longest serving judge at the ICTY – he was appointed in 1998 and is still in office.

If we take the home country of the judges into account most judges come from Europe – 86 out of the 228 judges (38 per cent). Africa and Asia also have a large share of international judges (between 21–22 per cent). The smallest percentage of judges comes from Australia (see Table 3 for exact figures). If we look at the table we can see that international criminal justice has become more cosmopolitan during the years. While the IMT was a pure western tribunal the other courts strive for a fair geographical balance, although European judges were still dominant at the ICTY. The ICTR had many European and African judges. The two first African judges to be appointed were Georges Abi-Saab from Egypt and Alphonse Karibi Whyte from Nigeria who were both appointed in 1993 at the ICTY. The first Latin American judge was Elizabeth Odio Benito from Costa Rica appointed in 1993 at the ICTY.

In general judges come from three different backgrounds: first of all academia – renowned scholars who have specialized in international law or international criminal law; secondly judges who have been diplomats who represented their countries or worked for them in international organizations and thirdly judges who come from national criminal law courts who have many years of experience on the bench.<sup>21</sup>

<sup>21</sup>) Cesare P.R. Romano, 'The judges and prosecutors of internationalized criminal courts and tribunals', in Cesare P. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized*

Table 3. Judges, Geographical Spreading

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	ECCC	STL	Total
Europe	6	4	36	14	14	3	5	4	86 (38%)
US & Canada	2	3	6	0	1	2	1	0	15 (7%)
Latin America	0	0	10	1	7	0	0	1	19 (8%)
Africa	0	0	11	14	7	11	3	1	47 (21%)
Asia	0	3	15	6	5	2	15	4	50 (22%)
Aust. & NZ	0	2	3	2	0	0	2	2	11 (5%)

#### 4. International Criminal Courts and Tribunals: Functioning

In this section we have gathered information on the functioning of the international criminal courts and tribunals.

##### 4.1. *Start-up and Trials*

With the exception of the ICTY all the ad-hoc courts started operating after their respective conflict ended and most courts and tribunals started functioning within one or two years of the conflict ending (see for further details, Table 4). The STL began operating three and a half years after the attack on Hariri while the ECCC started operating 27 years after the fall of the Khmer Rouge regime. The reason for this exceptionally long delay was that Vietnam had invaded Cambodia and remained in power while the international community continued to recognize the Khmer Rouge government in exile as the legitimate regime.<sup>22</sup> It lasted until the mid-nineties until the international community finally stopped supporting the Khmer Rouge. The negotiations between the government of Cambodia and the UN on an agreement for the tribunal started soon thereafter but lasted a very long time.

With the exception of the STL and the ICC, all the tribunals managed to issue their first indictments within 18 months of operation. It took the courts from between one to ten years before the first judgment was delivered. Within one year of their establishment, the SPD and the IMT decided their first case whilst it took the IMTFE and the ICTR more than two and a half years, the ICTY three years and the SCSL and ECCC over four and a half years. The ICC had the longest starting period; after becoming operational it was almost ten years before it managed to

*Criminal Courts – Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press, Oxford, 2004), p. 249.

<sup>22</sup> See extensively on this issue Fawthrop and Jarvis, *supra* note 19.

Table 4. Operational Times of Courts

	IMT	IMTFE	ICTY	ICTR
Crimes	1939-1945	1939-1945	1991-1999	1994
Court operational	18-10-1945	29-4-1946	17-11-1993	27-11-1995
1st indictment	20-10-1945	29-4-1946	4-11-1994	22-11-1995
1st trial started	20-11-1945	3-05-1946	7-5-1996	9-1-1997
1st Judgment	1-10-1946	12-11-1948	29-11-1996	2-9-1998
Time Lapse	11.5 m	2 y 6.5 m	3 y	2 y 10 m
Years operational	1 y	2.5 y	19 y	17 y
	ICC	SCSL	SPD	ECCC
Crimes	2002-	1996	1999	1975-1979
Court operational	1-7-2002	1-7-2002	6-6-2000	18-01-2006
1st indictment	8-7-2005	7-3-2003	15-11-2000	19-9-2007
1st trial started	26-1-2009	3-6-2004	18-1-2001	30-3-2009
1st Judgment	14-3-2012	20-6-2007	25-1-2001	26-7-2010
Time Lapse	10 y	4 y 11 m	6.5 m	4.5 y
Years operational	10 y	10 y	5 y	6.5 y

Key: y = years, m = months.

convict its first accused (Lubanga). The explanation for these differences may stem from the fact that the rules and procedures at the earlier tribunals (IMT and IMTFE) were less burdensome than those of the later courts and tribunals (ICTY, ICTR and ICC) and some tribunals were able to start off with relatively straightforward cases (SPD, ICTY) whereas others were not (ICC). To try international criminal cases is, by definition, a difficult task because so many people and organizations are involved and the countries in which the crimes were committed are often war-torn. Much depends on the availability of evidence and the willingness of the respective states to cooperate with the tribunals.

All in all 172 cases were tried involving 356 suspects and 17 cases are still ongoing (see for further details, Table 5). Most of the cases were tried by the SPD which tried 60 cases involving 88 suspects, closely followed by the ICTY and ICTR which conducted 54 and 50 cases respectively. On average, a case in front of an international criminal court or tribunal involves one point nine suspects. The largest cases by far were conducted at the IMT and IMTFE where one trial was held of the accused conjointly (22 and 28 respectively).

#### 4.2. Length of Proceedings

The time lapse between the indictment and the start of trial was very brief at the IMTFE; the indictments were read out on 29 April 1946 and the trials started just

Table 5. Cases

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SDL	ECCC	Total
Suspects	22	28	118	74	11	10	88	5	356
Cases concluded	1	1	54	50	1	4	60	1	172
On-going <sup>1</sup>	0	0	9 <sup>2</sup>	1	6 <sup>3</sup>	1	0	1	17
Average	22	28	1.9	1.5	2	2	1.5	2.5	1.9

<sup>1</sup> Only on-going trial cases are included.

<sup>2</sup> One in the pre-trial phase and eight on-going cases.

<sup>3</sup> Two cases are actually on-going, three cases involving six suspects in total are scheduled to begin in 2013 and one case is still in its pre-trial phase.

four days later. For the other courts, the average time lapse between issuing an indictment and the start of the trial was two years. It was shortest at the SPD (one year) and longest at the ICTY (three point six years) and ICTR (four point five years). This might be due to the lack of enforcement powers and political support at the beginning (securing cooperation) of the functioning of these tribunals. Internationalized courts may have more domestic support and engagement as their respective countries feel more ownership of the on-going proceedings.

On average the time length between the indictment (I) and the trial judgment (TJ) at the international criminal courts and tribunals is four point nine years (for further details, see Table 6). The average length of the trial is two point nine years (time lapse between start of the trial and judgment). The shortest trial was conducted at the SPD and lasted seven days whereas the longest trial was conducted at the ICTR and lasted ten years.<sup>23</sup> On average the fastest working tribunal is the SPD with an average length of trial close to four months, followed by IMT, ECCC and ICTY who all, on average, conclude the trial proceedings within two years. It took the IMTFE and ECCC two and a half years. It is remarkable that the IMT and IMTFE were amongst the fastest tribunals as they tried all defendants (22 and 28) in just one case.

The longest trials on average are conducted at the ICTR and the SCSL which take over three years for a trial, as the ICC did in its first trial. These differences could be explained by the type of cases tried. The SPD usually focused on single incidents, the cases were not very complicated and the defendants often plead guilty. At the ICTR there were many high-ranking figures and the cases covered genocidal campaign, often organized by these defendants, including multiple incidents of killings and mistreatment of victims. Similarly, the trials at the SCSL

<sup>23</sup> This was the so-called Butare case against Pauline Nyiramasuhuko and five others. *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T. The trial commenced on 12 June 2001 and the judgment was rendered on 24 June 2011.

Table 6. Length of Proceedings (I-ST-TJ)

Proceedings	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SDL	ECCC	Av.
Length of first full proceedings (I-TJ)	11 m	2.5 y	2.3 y	2.6 y	6.1 y	4.3 y	2 m	2 y	1.7 y
Shortest full proceedings (I-TJ)	11 m	2.5 y	7 m	4 m	6.1 y	3.6 y	2 m	2 y	2 m
Longest full proceedings (I-TJ)	11 m	2.5 y	12 y	15 y	6.1 y	9.2 y	4.3 y	2 y	15 y
Av. length of full proceedings (I-TJ)	11 m	2.5 y	5.6 y	7.6 y	6.1 y	5.3 y	1.5 y	2 y	4.9 y
Av. time lapse before start trial (I-ST)	1 m	4 d	3.6 y	4.5 y	2.3 y	1.7 y	1.1 y	2.4 y	2 y
Shortest trial (ST-TJ)	10 m	2.5 y	6 m	2 m	3.2 y	2.3 y	7 d	1.3 y	7 d
Longest trial (ST-TJ)	10 m	2.5 y	3.9 y	10 y	3.2 y	4.9 y	2.1 y	1.3 y	10 y
Average length of trial (ST-TJ)	10 m	2.5 y	1.9 y	3.9 y	3.2 y	3.6 y	4 m	1.3 y	2.9 y
Guilty pleas	0	0	21 /118	9/74	0	0	27 /88	0	57/356
Percentage of guilty pleas	0	0	18%	12%	0	0	31%	0	16%

Key: I = indictment, ST = start trial, TJ = trial judgment, y = years, m = months, d = days.

had a multiplicity of high-ranking defendants and deal with multiple crimes. Evidentiary issues of linking these defendants to the crimes committed consumed a lot of trial time. The fact that there were both international and domestic judges with different backgrounds and experiences on the bench might have played a role at both the ECCC and SCSL. Of influence on the length of the trials is also the practice of pleading guilty which generally shorten the proceedings,<sup>24</sup> whereas no one pleaded guilty at the IMT, IMTFE, SCSL, ECCC and ICC, 27 defendants (31 per cent) pleaded guilty before the SPD, 21 defendants (18 per cent) pleaded guilty at the ICTY and nine defendants (12 per cent) pleaded guilty in front of the ICTR.

<sup>24</sup>) It has been argued that, at the ICTY in particular, the practice of plea agreements was implemented because of concerns about time constraints and lengthy proceedings before the Tribunal. Cf. Nancy A. Combs, *Guilty Pleas in International Criminal Law, Constructing a Restorative Justice Approach* (Stanford University Press, 2007).

Table 7. Indictees

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SPD	ECCC	STL	Total
People indicted	24	28	161	90	28	13	392	5	4	745
Withdrawn due to death	1	0	10	1	2	2	0	0	0	16
Others withdrawn	1	0	20	2	4	0	304	0	0	331
Referrals	0	0	13	7	0	0	0	0	0	20
Still at large	0	0	0	6	11	1	0	0	4	22

#### 4.3. *Indictments and Convictions*

In total, 745 people were indicted by the international criminal courts and tribunals; most of these by the SPD and the fewest by the ECCC and STL (for further details, see Table 7). Almost half of all the indictments, namely 347 were withdrawn before they went to trial; 16 withdrawals were due to the death of the suspects: 13 indictees died before their arrest and three others after their arrest but before the trial started. The ICTY and ICTR referred 20 cases to national jurisdiction and withdrew those cases for that very reason. By far the most indictments were withdrawn by the SPD (304) because the accused could not be found and the tribunal was about to close down. The other 27 cases were withdrawn for reasons other than those already mentioned above, such as judicial economy, lack of evidence or because the accused was not fit enough to stand trial. At the ICC, four cases were terminated because the pre-trial chamber did not confirm the charges. A total of 22 indictees are still at large (although some of them may have already died), most of them were indicted by the ICC. The ICTY and ECCC are the only two tribunals which are still functioning and no longer have anyone at large.<sup>25</sup>

Out of the 745 people indicted, only 356 (47 per cent) actually went on trial. Of these, 281 were convicted and 29 acquitted, the indictments of 12 defendants were withdrawn during the trial (ten of them because the person on trial had died) and proceedings against 34 individuals are still on-going, such as cases against some prominent defendants, e.g. the one against Gbagbo, former president of Ivory Coast at the ICC, and Karadzic and Mladic at the ICTY (for further details, see Table 8). The overall conviction rate (i.e. the percentage of those convicted after a trial has been started against them) is 87 per cent, while nine per cent ended in an acquittal and four per cent were withdrawn. All the courts have a conviction rate

<sup>25</sup> Last year on 26 May 2011 and 20 July 2011, respectively, Ratko Mladic and Goran Hadzic were the two last fugitives of the ICTY to be arrested.

Table 8. Suspects Tried and Outcome of Trial

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SPD	ECCC	Total
Suspects tried	22	28	118	74	11	10	88	5	356
Trial still ongoing	0	0	18	2	10	0	0	4	34
Suspects died (suicide)	0	2	6 (1)	1	0	1	0	0	10 (1)
Withdrawals	0	1	0	0	0	0	1	0	2
Acquitted	3	0	13	10	0	0	3	0	29
Convicted	19	25	81	61	1	9	84	1	281
Convictions rate	86%	89%	81%	85%	100%	90%	95%	100%	87%
Acquittals rate	14%	0%	13%	14%	0%	0%	3%	0%	9%
Withdrawal rate	0%	11%	6%	1%	0%	10%	2%	0%	4%

of above 80 per cent. The ICC and the ECCC stand out with a 100 per cent conviction rate so far, but this is due to the fact that they have only concluded one case each and in both cases (*Lubanga* and *Duch*) the respective courts found the defendant guilty. The SPD has a conviction rate of 95 per cent and the SCSL has a conviction rate of 90 per cent due to the fact that one person died during the trial and consequently could not be convicted. So far, four courts have had no acquittals. This is not surprising for the ICC and ECCC which have only concluded one case but is telling in the case of the IMTFE and the SCSL. The IMT, ICTY and ICTR all have an acquittal rate of 13–14 per cent.

In comparison to ordinary criminal courts, the conviction rates at the international tribunals are rather high and this provides reason for some, Schabas for one,<sup>26</sup> to doubt the fairness of the procedure. An explanation for the high conviction rate, however, is possibly that the international criminal justice system is very selective and has successfully picked those individuals against whom enough evidence was available. If, on the other hand, we look at the number of people who were in some way involved, in comparison to the number of people tried, the conviction rate is very low, much lower than in relation to ordinary crimes.<sup>27</sup>

<sup>26</sup> See William A. Schabas, 'Independence and impartiality of the international judiciary: some lessons learned and some ignored', in E. Hughes, William A. Schabas & R. Thakur (eds.), *Atrocities and International Accountability*, (United Nations University Press, Tokyo, 2007), pp. 182–207.

<sup>27</sup> Mullins estimated that 'fewer than one percent of the perpetrators of international crimes have been brought to justice', Christopher W. Mullins, 'Conflict victimization and post-conflict justice 1945–2008', in M. Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice: a World Study on Conflicts, Victimization, and Post-Conflict Justice*, (Intersentia, Antwerp, 2010), pp. 67–108.

The international criminal courts and tribunals usually have jurisdiction over the three core international crimes: genocide, crimes against humanity and war crimes (for exceptions, see above Section 2). The majority of all the convicted perpetrators at the international courts were convicted for crimes against humanity (71 per cent) and a large number were convicted for war crimes (41.3 per cent).<sup>28</sup> Fifty-nine (21 per cent) individuals were found guilty of genocide, most of them at the ICTR. Genocide as a criminal concept was not fully developed when the prosecutions at the IMT began, so the Holocaust was qualified as a crime against humanity rather than genocide. In East Timor the first 12 cases were qualified as murder cases rather than crimes against humanity.<sup>29</sup> At the IMT and IMTFE most perpetrators were prosecuted for crimes against peace (aggression) which is an offence which has not been prosecuted since.

#### 4.4. Sentencing

Of the 356 suspects tried, 281 were convicted and received a prison sentence. Of the 281 convicted perpetrators, 19 (7 per cent) were sentenced to death, 45 (16 per cent) received a life sentence while the vast majority (77 per cent) received a determinate sentence. The shortest determinate sentence<sup>30</sup> was handed down by the SPD and was 11 months and the longest, at 52 years, was handed down by the SCSL. The average determinate sentence was 15.3 years. If we compare the different courts and tribunals (for more details, see Table 9) the sentencing practice seems rather varied and sentences at different courts are quite divergent. The differences among individual courts, however, can be explained by sentencing options, case compositions and prosecutorial strategy.

An important difference between the IMT and IMTFE, on the one hand, and the rest of the courts, on the other, is that these courts were the only ones that could sentence suspects to the death penalty. The IMT sentenced 12 out of 19 convicted perpetrators to death (which is 63 per cent of the perpetrators convicted by the IMT) while the IMTFE sentenced seven (28 per cent) convicted perpetrators to death. Seventeen people were actually executed: ten at Nuremberg on 16 October

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<sup>28</sup>) At the IMTFE, no distinction was made in the indictment between war crimes and crimes against humanity and both were grouped under Group III counts 53–55. The literature seem to agree, however, that the crimes grouped under these counts should be considered war crimes rather than crimes against humanity and are usually referred to as the former, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University, Harvard, 2009), p. 103. These crimes have also been considered as such in our data.

<sup>29</sup>) According to Suzannah Linton, 'East Timor Special Panels', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009), p. 307 this was 'because there were no resources on which to develop crimes against humanity cases'.

<sup>30</sup>) Shorter sentences have been given by the courts for misconduct during the process itself, such as contempt of court and giving false testimony, but these have been excluded here.



Table 9. Sentences

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SPD	ECCC	Total
Convicted	19	25	81	61	1	9	84	1	281
Death Sentences	12	7	N/A	N/A	N/A	N/A	N/A	N/A	19
Life imprisonment (still in appeal)	3(0)	16(0)	4(3)	21 (7)	0	N/A	N/A	1	45 (10)
Prison term not life (still in appeal)	4	2	77(14)	40(8)	1	9(1)	84 (0)	0	217 (23)
Minimum sentence	10	7	2	6	14	15	11 m	Life	11 m
Maximum determinate sentence	20	20	40	45	14	52	33.3	N/A	52
Maximum sentence	Death	Death	Life	Life	14	52	33.3	Life	Death
Average determinate sentence length	16.25	15.7	15.9	22.6	14	38.6	8.8	N/A	15.3

Key: N/A = Not Applicable, m = month.

1946, and seven in Tokyo on 23 December 1948. Goering committed suicide the day before he was to be executed and Bormann was never arrested, but convicted in absentia.<sup>31</sup> No other international criminal court or tribunal since has had the option of handing down a death penalty. Because of the development of international human rights standards, the death penalty had been abolished by the majority of states and was, therefore, also excluded as a penalty for international criminal courts and tribunals.

The maximum possible sentence that could be handed out at the post-cold war international tribunals was therefore life imprisonment (art. 24 ICTY and 23 ICTR).<sup>32</sup> A life sentence was given to 45 out of 281 (16 per cent) sentenced perpetrators, ten of which are still under appeal at the ICTY and ICTR.<sup>33</sup> Most

<sup>31</sup> It is now assumed that Bormann had already committed suicide before the trial started. He was officially declared dead in 1954. Later, in 1973, his body was exhumed and identified.

<sup>32</sup> This, by the way, created a strange situation in Rwanda where the most senior perpetrators could receive life imprisonment but less important perpetrators who were prosecuted at the local courts in Rwanda could face the death penalty. According to Schabas, twenty-two individuals were executed in Rwanda in April 1998. However, in 2007, under international pressure, Rwanda abolished the death penalty. William A. Schabas, 'Post Genocide Justice in Rwanda', in Philip Clark and Zachary D. Kaufman (eds.), *After Genocide. Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, (Hurst Publishers Ltd: London, 2008).

<sup>33</sup> Interestingly, a total number of eight life sentences were converted to determinate sentences on appeal. Stakic saw his life sentence converted by the ICTY, while seven defendants saw their life sentences overturned at the ICTR. These sentences were converted to determinate sentences ranging from fifteen to forty-five years. In three other cases, one at the ICTY and two at the ICTR, determinate sentences were converted to life sentences on appeal. These

sentences of life imprisonment were handed down at the ICTR. It has sentenced 34 per cent of all the convicted individuals (21 suspects) to life in prison. This high percentage of life sentences can be explained by the fact that 52 out of 61 sentenced perpetrators were convicted for genocide, generally considered to be the most heinous of all crimes, and many high-ranking perpetrators stood trial at the ICTR and were all convicted of multiple killings. At the ICTY so far, only four perpetrators have been sentenced to life while three of them are still awaiting the outcome of their appeals.

The IMTFE handed down 16 sentences of life imprisonment but all the perpetrators who were convicted were paroled after serving less than ten years.<sup>34</sup> The last was Kenryo Sato who was paroled in Japan in 1956.<sup>35</sup> At the IMT, three people (Hess, Funck and Raeder) were sentenced to life; Hess committed suicide in prison in 1987, the other two were released due to ill health in the mid and late 1950s. Duch, the only person convicted so far at the ECCC, also received a life sentence. Initially a 35 year sentence had been imposed but this was changed into life imprisonment after a successful appeal by the prosecutor. Duch, was the first of four indictees to be sentenced and was a middle-ranking perpetrator, whereas the other three are all high-ranking state officials and organizers. Even though little can be concluded after just one conviction, this could possibly indicate that the ECCC may ultimately sentence all suspects to life imprisonment (since high-ranking officials are usually punished more severely). Notably, however, some tribunals, such as the SCSL, lack jurisdiction for the imposition of life sentences.

The great majority of convicted perpetrators, some 217 (77 per cent), received determinate sentences; the longest being the 52 year sentence handed down by the SCSL to Isay Sesay of the AFRC/RUF (Armed Forces Revolutionary Council/Revolutionary United Front of Sierra Leone). Sesay was the highest-ranking officer after Sankoh and Bockarie, the two leaders of the RUF who died. Alex Brima, the leader of the AFRC, and Charles Taylor, the former president of Liberia, both received a 50 year sentence at the SCSL. The longest determinate sentence handed down at the ICTR was 45 years and at the ICTY 40 years. Three perpetrators at the SPD were sentenced to 33 years and four months; they were all convicted in the

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involved Galic, whose twenty-year sentence was converted to a life sentence at the ICTY and Gacumbitsi and Seromba, whose thirty-year and fifteen-year sentences respectively were converted into life sentences by the ICTR.

<sup>34</sup> See R. John Pritchard, 'International Military Tribunal for Far East and the Allied National War Crimes Trials in Asia', in M. Cherif Bassiouni (ed.), *International Criminal Law*, (Transnational Publishers: Ardsley, 1999), p. 142.

<sup>35</sup> The fact that of all convicted perpetrators, Kenryo Sato was the last to be paroled is remarkable as he is generally considered to be the person least responsible. <http://www.enotes.com/tokyo-trial-reference/tokyo-trial>.

same trial which dealt with the militia group called Team Alfa. All the sentences were, however, reduced to 25 years by a presidential decree.

The highest average determinate sentences of 38 years were handed down at the SCSL and the ICTR has an average determinate sentence of 22.6 years, while the average sentences at the IMT, IMTFE and ICTY are all about 15 to 16 years. The reasons for this variance may be related to the fact that the SCSL could not hand down any life sentences and thus relied on long determinate sentences for those most culpable. The ICTR prosecuted predominantly high-ranking individuals for committing genocidal killings. As this type of crime can be considered one of the most serious, it may not be surprising that as well as the high number of life sentences handed down, many ICTR suspects received long prison sentences. At the IMT and IMTFE, the determinate sentences are relatively low but this can be explained by the fact that the majority were sentenced to death or life imprisonment with only six receiving a determinate sentence. The lowest average sentences are handed down by the SPD, a court which convicted mainly low-ranking perpetrators for usually one single incident. In some cases, the crimes were not even qualified as international crimes but as ordinary crimes. The perpetrators facing this court received an average sentence of just under nine years. The ICC has recently handed out a sentence of fourteen years to Thomas Lubanga for his participation in the war crime of conscripting and enlisting child soldiers.

#### 4.5. Appeals

Overall, on 175 occasions, the outcome of a case was appealed (either by a defendant or prosecutor or both). The IMT and IMTFE did not allow appeals. If we take this into account, then 66 per cent of all the cases which could be appealed were appealed (for further details see Table 10). All the judgments handed down by the SCSL were appealed. At the ECCC and ICC the only cases finished on trial so far (*Duch* and *Lubanga*) were appealed. Over 80 per cent of the outcomes were appealed at the ICTY and ICTR, whereas by far the lowest appeal rates are at the

Table 10. Appeals and Sentences after Appeal

	ICTY	ICTR	ICC	SCSL	SPD	ECCC	Total
Concluded trials	94	71	1	9	88	1	264
Appeals (pending)	75 (17)	58 (17)	1(1)	9(1)	31	1	175 (36)
Percentage	80%	82%	100%	100%	35%	100%	66%
Lower after appeal	22	13	0	0	15	0	50 (36%)
Higher after appeal	5	3	0	3	6	1	18 (13%)
No change on app.	31	25	0	5	10	0	71 (51%)

SPD, with only 35 per cent of the cases being appealed. In total 36 appeals are still pending, 17 each at the ICTR and ICTY, and one each at the SCSL and ICC. In 50 cases (36 per cent), the sentence was lowered by the Appeals Chamber and in 18 cases the Appeals Chamber actually increased the trial sentence (12.9 per cent). This practice is controversial because of human rights standards and many judges at the ICTY and ICTR filed dissenting opinions in this respect (referring to the ‘prohibition of reformation *in peius*’ which means a person should not be placed in a worse position as a result of filing an appeal).

#### 4.6. *Closing Down*

The IMT, IMTFE and SPD have closed down while all the other courts are still operational. To date, the courts operating the longest are the ICTY and ICTR which have been operating for 19 and 17 years respectively, but both are now working on their closing strategies. The ICC and SCSL have been operational for more than ten years, while the IMT and IMTFE have been operating for one and two and a half years respectively. On average, the international criminal courts and tribunals were operational for eight point eight years. The ICC is the only permanent court.

### 5. Profile of Convicted Perpetrators

The nine international criminal courts and tribunals convicted all together 281 individuals. Most people, some 84, were convicted by the SPD; this is 30 per cent of all convicted perpetrators. The ICTY convicted 81 (29 per cent) and the ICTR 61 (22 per cent). The IMTFE convicted 25 people (9 per cent) and the IMT 19 (7 per cent), while SCSL convicted nine people (3 per cent) and the ICC and ECCC one person each (less than 1 per cent). In this section we look at the extent to which we can find any general characteristics about the kinds of individuals who are convicted by the international criminal justice system and the differences between the typical profile of the perpetrators convicted by each tribunal, as prosecutors can exercise quite a large amount of discretion in choosing defendants, depending on the type of conflict, the cases investigated and the available evidence.

#### 5.1. *Rank*

We distinguished four ranks: high, middle, low and those without any authority at all. Top political or military authorities who make decisions at policy level were considered to be high-ranking. Middle-ranking individuals were those at the intermediate level of power and authority who implemented and executed policies

determined by the top level authorities such as regional political leaders, higher ranking military commanders, heads of executive units within the state bureaucratic apparatus. The low-ranking perpetrators are those with very limited authority over others, such as camp commanders, shift leaders, local army commanders and local politicians. Foot soldiers, very low level bureaucrats and civilians were ranked as having no authority at all. If we combine all the figures (see Table 11) and look at the percentages of convicted perpetrators, then all four different ranks are more or less equally represented. The various tribunals however show remarkable and revealing differences.

The Nuremberg and Tokyo tribunals strove to prosecute only those with the greatest responsibility in the main international trial, trying the minor perpetrators in the follow-up trials without this being explicitly stated in the statute (see Section 6). With the possible exception of Julius Streicher, who owned the influential and racist newspaper *Der Stürmer*, all the others convicted at the IMT and IMTFE held high positions within the state hierarchy or were high-ranking military leaders who could be considered as the highest level organizers of international crimes committed during WWII. The ICC has only convicted one person to date, namely Thomas Lubanga who was the leader of the rebel movement UPC and considered to be an influential rebel leader in the Congo. Although he did not have a position within the state, he can nevertheless be considered high-ranking as he carried a large amount of authority and was a key member of his rebel group. These three tribunals almost exclusively convicted high-ranking perpetrators.

The United Nations Security Council (UNSC) initially did not specify who the ICTY and ICTR were to prosecute. Art. 1 ICTY and Art. 1 ICTR refer in general terms to those responsible for serious violations and thus leave it to the discretion of the

Table 11. Rank of Convicted Perpetrator

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SPD	ECCC	Total
Convicted	19	25	81	61	1	9	84	1	281
(Percentage)	(7%)	(9%)	(29%)	(22%)	(0.4%)	(3%)	(30%)	(0.4%)	
High rank	18	25	9	17	1	8	0	0	78
(Percentage)	(94.7%)	(100%)	(11.1%)	(27.8%)	(100%)	(88.9%)	(0%)	(0%)	(28%)
Middle rank	1	0	23	31	0	1	1	1	58
(Percentage)	(5.3%)	(0%)	(28.4%)	(50.8%)	(0%)	(11.1%)	(1%)	(100%)	(21%)
Low Rank	0	0	37	11	0	0	29	0	77
(Percentage)	(0%)	(0%)	(45.7%)	(18%)	(0%)	(0%)	(35%)	(0%)	(27%)
No authority	0	0	12	2	0	0	54	0	68
(Percentage)	(0%)	(0%)	(14.8%)	(3.3%)	(0%)	(0%)	(64%)	(0%)	(24%)
Military	9	16	67	14	1	9	83	1	200
(Percentage)	(47%)	(64%)	(83%)	(23%)	(100%)	(100%)	(99%)	(100%)	(71%)
Civilians	10	9	14	47	0	0	1	0	81
(Percentage)	(53%)	(36%)	(17%)	(77%)	(0%)	(0%)	(1%)	(0%)	(29%)

prosecutor to decide which perpetrators he or she would focus on. From the start, the aim was to focus on those most responsible, but circumstances could make the work very difficult. This was especially the case for Goldstone, the first prosecutor of the ICTY, who with very little support had to construct the entire institution while the war in Yugoslavia was still on-going.<sup>36</sup> Goldstone consequently decided to make a start with low-ranking perpetrators who could easily be apprehended such as Tadic and Erdemovic and then subsequently build up cases against the high-ranking perpetrators. In 2002 the ICTY prosecutor made it clear that he would focus his efforts exclusively on high-ranking perpetrators and in 2003 and 2004 the tribunals were given clear instructions by the UNSC to focus on those most responsible.<sup>37</sup> So far the ICTY has convicted nine high-ranking perpetrators, 23 middle-ranking perpetrators, 37 low-ranking perpetrators and 12 perpetrators who had no authority at all. Thus over 60 per cent of the people convicted at the ICTY had little to no authority.

The ICTY was the first international criminal tribunal to indict a sitting head of state when it indicted Slobodan Milosevic on 24 May 1999. Milosevic lost the elections, was arrested and transferred to the tribunal on 29 June 2001. His trial began on 12 February 2002, the first time that a former head of state had been put in the dock. His trial was a long and difficult one, as Milosevic demonstrated little respect for the court and used the court as an arena for promoting his political views. His trial ultimately did not lead to a conviction as Milosevic died in his cell on 11 March 2006. A number of important and high-ranking suspects such as Mladic and Karadzic are currently still on trial. That no one is at large anymore is a huge achievement of the ICTY, this is, however, in some part because of the number of cases (13) that have been referred to national jurisdictions.

Figures at the ICTR show a rather different picture: of the 61 perpetrators who have been convicted 17 (27 per cent) could be qualified as high-ranking, 31 (51 per cent) as middle-ranking, 11 as low-ranking (18 per cent) and two (3 per cent) as having no authority at all. Most high-ranking perpetrators have indeed been tried and it is not a surprise that such a large percentage of middle-ranking perpetrators were prosecuted as, in reality, this group is much bigger in comparison to the limited number of the top state and military officials. Low-ranking perpetrators were only prosecuted in exceptional cases.

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<sup>36</sup> See Frederiek de Vlamming, *De aanklager – Het Joegoslavië-Tribunaal en de Selectie van Verdachten*, (Boom Juridische uitgevers, 2010).

<sup>37</sup> See SC Resolutions 1534 (2004) of 26 March 2004 and UN SC Res 1503 (2003) on 28 August 2003 but see also statement of the president of the SC in S/PRST/2002/678. This was initiated after President Claude Jorda wrote a letter to the Secretary General in relation to this issue. See S/2002/678 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No2/434/47/IMG/No243447.pdf?OpenElement>) and also to UN SC Res 1329(2000) November 2000.

The SCSL was the first court at an international level which had a statute specifically referring to those ‘who bear the greatest responsibility’ (art. 1).<sup>38</sup> It indicted 13 suspects and convicted nine perpetrators, all of whom can be considered high-ranking leaders (with the possible exception of one individual, Kanu). The most well-known defendant was Charles Taylor, former head of state of Liberia and the first former head of state to be convicted as a war criminal for aiding and abetting war crimes. In the same way as the SCSL, the ECCC strove to focus on senior leaders and those most responsible (art. 1 Agreement); of its five indictees, four were, indeed, amongst the most senior leaders. So far Kaing Guek Eav, better known as Duch, has been the only person convicted by the ECCC. He was the director of the infamous Tuol Sleng (S-21) prison which was, in fact, a torture and extermination centre. Duch’s main job entailed the supervision and running of this prison at which probably as many as 12,000 people were tortured and executed including (allegedly) many Khmer Rouge cadre members.<sup>39</sup> Apparently only 14 prisoners survived. Duch cannot be qualified as a one of the highest ranking leaders as he did not have any political or decision making power. Duch was, however, head of the most important prison for political prisoners and so, nevertheless, held a crucial position in the state administration.

The SPD tried predominantly low-ranking perpetrators who were the hands-on perpetrators, the ones who used force and violence killing the pro-independence supporters: 99 per cent of those convicted can be qualified as either low-ranking or without any authority at all. They were virtually all East Timorese militia members acting on the orders of the Indonesian army.<sup>40</sup> Many of the highest-ranking leaders were Indonesian military leaders such as General Wiranto whom Indonesia refused to extradite to East Timor for trial. The SPD was consequently forced to withdraw all these indictments and, in the end, only prosecuted perpetrators who had very little to no authority.<sup>41</sup> However, if we ignore the figures of the SPD which

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<sup>38</sup>) There was some discussion as to the difference between greatest responsibility and most responsible but the clear aim of the UN was to have those in leadership positions to be prosecuted. See Report of the Secretary General on the establishment of a Special Court for Sierra Leone. See also Renate Winter, ‘The Special Court for Sierra Leone’, in Roberto Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate, 2010), p. 106.

<sup>39</sup>) For more on the role of S-21, see Ben Kiernan, *The Pol Pot Regime – Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (Yale University Press, New Haven, 1996); David Chandler, *Voices from S-21 – Terror and History in Pol Pot’s Secret Prison* (University of California Press, Berkeley 1999); Alex L. Hinton, *Why did they Kill? Cambodia in the Shadow of Genocide*, (University of California Press, Berkeley, 2005) and on Duch’s role see Nic Dunlop, *The Lost Executioner: the Story of Comrade Duch and the Khmer Rouge*, (Bloomsbury, London, 2009).

<sup>40</sup>) See Sylvia de Bertodano, ‘East Timor: Trials and Tribulations’, in Romano et al., *supra* note 21, p. 94 who notes that: ‘overwhelming evidence [existed] from other sources that the violence was instigated and controlled by the Indonesian military.’

<sup>41</sup>) *Ibid.*, p. 81.

prosecuted mainly low-ranking perpetrators and was the court which received the most criticism, then 40 per cent of all those convicted were high-ranking, 29 per cent were middle-ranking, 24 per cent low-ranking and only 7 per cent were civilians or foot soldiers who had no authority at all.

Most convicted perpetrators (71 per cent) were members of the military while just over one quarter were civilians (29 per cent). In comparison to the other tribunals, most civilians were prosecuted by the ICTR, the IMT and the IMTFE. This comes as no surprise as the crimes were instigated by the state and many of the convicted perpetrators were politicians who were drafting and implementing state policies.

### 5.2. *For or against their Government*

Almost all the convicted perpetrators acted on behalf of their governments. The crimes prosecuted by the IMT and the IMTFE were committed on behalf of the government as were the genocides committed in Rwanda and Cambodia. In East Timor, the crimes were committed by the militias under the orders of the Indonesian military (TNI) who at the time were still in power in East Timor.<sup>42</sup> The crimes committed in former Yugoslavia were committed during a civil war by various groups and militias. Due to the existence of difficult power relations during the conflict, and the fact that many groups and *de facto* governments were involved, categorizing crimes in the former Yugoslavia along these lines is a highly complicated matter. In Sierra Leone members of the three main parties within the conflict were convicted: the Civil Defence Forces (CDF) which represented the government and the RUF and the AFRC which were both rebel groups which successfully committed a coup on 25 May 1997 but were overthrown in February 1998 by the Economic Community of West African States (ECOMOG). Two of the convicted perpetrators were from CDF, while six others were from RUF and AFRC. Interestingly enough, the perpetrators of the CDF were initially given fairly low sentences of six and eight years as they were, according to the judges, fighting for a just cause (to defend the democratically elected government). In appeal these arguments were quashed and the suspects received much higher sentences, namely 15 and 20 years. The ninth perpetrator convicted was Charles Taylor, President of Liberia who supported the RUF.

The ICTY and SCSL were the only two courts to prosecute perpetrators from two different opposing sides. The IMT and IMTFE only prosecuted crimes committed by the Axis power and none of those committed by the Allies. There is no

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<sup>42</sup> East Timor had declared its independence in 1975 when the Portuguese left but they were invaded by Indonesia soon after. The violence erupted after the ballot in 1999 when the East Timorese population voted for independence rather than autonomy. East Timor finally became independent in 2002.



doubt that Nazi Germany and Japan were aggressors and that they committed much more serious crimes, but some acts of war such as the bombings of the German cities of Hamburg and Dresden and the atomic bombs dropped on Hiroshima and Nagasaki, arguably, may also have deserved investigation. Carla Del Ponte, prosecutor of the ICTY and ICTR attempted to prosecute Tutsis from the Rwandese Patriotic Front (RPF) as well but was prevented from doing so. The Rwanda government was very much opposed to this initiative threatening to withdraw all cooperation with the ICTR.<sup>43</sup> It must be noted that the prosecution of international crimes is, to a certain extent, a political decision. There are often so many people involved that prosecuting all the perpetrators is simply impossible and justice, as a consequence thereof, is by definition selective. A prosecutorial strategy is often determined by pragmatic considerations (such as at the beginning of the ICTY) and is arguably influenced by political factors as well (such as the failed attempt to prosecute RPF crimes at the ICTR which is described above).

### 5.3. Sex

The most outstanding characteristic of the convicted perpetrators is that more than 99 per cent of them are male (for further details, see Table 12). To date only two women have been convicted by international criminal courts and tribunals. The first was Biljana Plavsic, a leading Bosnian Serb political figure who, as part of a plea agreement, was sentenced to eleven years for persecution by the ICTY and Pauline Nyiramasuhuko, a Rwandan politician, who was recently given a life sentence for incitement to genocide by the ICTR thus becoming the first ever woman

Table 12. Convicted Perpetrators' Sex and Age

	IMT	IMTFE	ICTY	ICTR	ICC	SCSL	SPD	ECCC	Total
Male	19	25	80	60	1	9	84	1	279
(percentage)	(100%)	(100%)	(99%)	(98%)	(100%)	(100%)	(100%)	(100%)	(99%)
Female	0	0	1	1	0	0	0	0	2
(percentage)	(0%)	(0%)	(1%)	(2%)	(0%)	(0%)	(0%)	(0%)	(1%)
Youngest (crimes)	32	46	19	24	41	25	14	32	14
Youngest (TJ)	39	53	25	36	51	35	17	67	17
Oldest (crimes)	66	74	61	70	41	48	51	32	74
Oldest (TJ)	73	81	72	78	51	64	55	67	81
Av. Age (crimes)	48	57	39	43	41	36	32	32	40
Av. age (TJ)	55	64	49	55	48	48	37	66	49

Key: TJ = Trial Judgement.

<sup>43</sup> See Del Ponte, *supra* note 12.

in history to be convicted by an international tribunal for genocide. At the ECCC a third woman, Ieng Thirith, a Cambodian politician under the Khmer Rouge regime and the wife of Ieng Sary, one of the other defendants, and sister-in-law of Pol Pot, was until recently one of the defendants in an on-going trial. However, she successfully plead for her release on the grounds of being mentally unfit to stand trial and was consequently freed on 13 September 2012.

The predominance of males is not remarkable as women are under-represented in governments and within the militarized organizations such as the army, police and secret services in particular and these are the main organizations which are responsible for these crimes. Women have played a role in international crime but it has been a less prominent one compared to men. When they have been involved – as for instance in the Rwandan case<sup>44</sup> – many of them were hands-on perpetrators, accomplices or accessories rather than leaders.

#### 5.4. Age

The average age of the convicted perpetrators was just under 40 years old (39.84) at the time of the crimes (for further details, see Table 12). The youngest perpetrators are those convicted at the SPD who, on average, are 32 years old, closely followed by the SCSL where the perpetrators have an average age of 36. The average age of the perpetrators at ICTY and ICTR is around 40 years, whereas the perpetrators convicted at the IMT had an average age of 48 at the time of their crimes. With an average age of 57 at the time their crimes were committed, the perpetrators convicted at the IMTFE are by far the oldest perpetrators. The oldest person convicted by an international criminal court or tribunal is Hiranuma Kiichiro who was 74 when he committed the crimes and 81 when he was sentenced. Kiichiro was prime minister of Japan in 1939, a minister from 1940 to 1941 but then withdrew from government. Nevertheless, he was sentenced to life by the IMTFE but paroled in 1952; he died shortly after his release. The second oldest to be tried was Elizaphan Ntakirutimana who was convicted by the ICTR and was 70 years old at the time of the crimes. He was the first of the clergy to be convicted for genocide. Ntakirutimana was sentenced to ten years imprisonment for his participation in genocide while judges emphasized his advanced age and state of health as important mitigating factors. Ntakirutimana was released after he served his sentence and died shortly thereafter.

The youngest person ever convicted was 14 years old at the time of the crimes and aged 17 when he was in the dock. He was convicted for murder and

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<sup>44</sup> See African Rights, *Rwanda: Not so Innocent; when Women Become Killers*, (African Rights, London, 1995).

sentenced to one year imprisonment by the SPD. His name and date of birth were deleted from the files in order to protect his identity.<sup>45</sup> So far he is the only minor convicted by an internationalized criminal court or tribunal. The dilemma of prosecuting minors was discussed most prominently at the SCSL; many child soldiers were involved in the conflict as members of the infamous ‘small boys units’ which committed atrocious crimes. The SCSL had jurisdiction over persons of 15 years of age and above (Art. 7 SCSL) and could thus prosecute suspects between 15 and 18. The Secretary General and the Security Council of the UN clearly stated that it would be better if the Truth and Reconciliation Commission (that was also established in Sierra Leone after the conflict) could deal with juveniles.<sup>46</sup> The prosecutor David Crane noted furthermore that he would not prosecute minors: ‘although the children of Sierra Leone may be amongst those who have committed the worst crimes, they are to be regarded first and foremost as victims and not as the ones who bear the greatest responsibility’.<sup>47</sup> Two convicted perpetrators, however, alleged that they had been abducted and their careers thus possibly started as child soldiers.<sup>48</sup> Art. 26 ICC Statute excludes persons who were under 18 years of age when their crimes were committed from the jurisdiction of the ICC. Amongst the indictees at the ICC is Dominic Ongwen who was abducted as a ten year old child but advanced to the rank of brigade commander and who is now indicted for war crimes, crimes against humanity and specifically the recruitment of child soldiers. Although Ongwen, without doubt, has committed atrocious crimes one may wonder whether he is not simultaneously a victim and a perpetrator.<sup>49</sup>

### 5.5. *Geographical Background*

Amongst the perpetrators who have been convicted, there are no Americans, Australians or anyone from Latin America. All the convicted perpetrators came from Asia, Africa and Europe. This is not surprising as the crimes prosecuted by

<sup>45</sup> *The Prosecutor v. X*, Case No. 04/2002, 2 December 2002. See also Linton, *supra* note 29, p. 307.

<sup>46</sup> Letter from the President of the Security Council addressed to the Secretary-General (31 January 2001) UN Doc S/2001/95. See also William A. Schabas, ‘Internationalized courts and their relationship with alternative accountability mechanisms: the case of Sierra Leone’, in: Romano et al., *supra* note 21, p. 163.

<sup>47</sup> See report UN SG S/2000/915 of 4 October 2000. See also Luc Côté, ‘Special Court for Sierra Leone’, in Cassese, *supra* note 29, p. 516.

<sup>48</sup> See, for instance, the defence of Issay and Kallon who state that they joined the forced because they were forcefully abducted. See also Schabas, *supra* note 46, p. 140 who notes: ‘the older military leaders of both the RUF and the pro-government militias had begun their careers as child soldiers.’

<sup>49</sup> For general information on this topic, see E. Baines, ‘Complex Political Prisoners: Reflections on Dominic Ongwen’, 47 *Journal of Modern African Studies* 2 (2009) p. 163; and Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, Oxford, 2012), p. 90.

international criminal courts and tribunals were all committed in Europe, Asia and Africa. The largest proportion of convicted perpetrators is from Asia which has 110 out of 281 (39 per cent). Most of these are East Timorese (82) and Japanese (25) as well as two Indonesians and one Cambodian. The second largest group is from Europe with 101 perpetrators (36 per cent), most of them German and Yugoslavian, while 70 convicted perpetrators (25 per cent) come from Africa, most of them from Rwanda and Sierra Leone. So far crimes committed by Americans, Australians or within Latin America have not been investigated by international criminal courts and tribunals. The ICC has however started preliminary investigations in Columbia and Honduras.

#### 5.6. *Education, Marital State, Children and Criminal Records*

We have also tried to gather information on the level of education, marital state, children and criminal records of the convicted perpetrators but many data are missing as judgments do not systematically record personal details of the defendants. We have, therefore, provided an overview based on the existing data; this may not necessarily be representative of the whole population of defendants ever tried by the international criminal justice system.

First of all, it becomes clear that perpetrators from all levels of education have been convicted for committing international crimes. Of the 124 convicted perpetrators whose educational backgrounds we could trace 53 (43 per cent) have studied at university (many of them law) while 54 (44 per cent) had professional training.<sup>50</sup> This often entailed getting a degree after having successfully completed a military academy. The official data on the level of education of the perpetrators convicted at the SPD are missing but it is stated in a number of cases that many suspects were 'illiterate farmers'.<sup>51</sup>

The data seem to show that the high-ranking perpetrators, in particular, had a rather high level of education whereas the low-ranking perpetrators had little or no education. A lot of the educational data on the perpetrators at the ICTY are missing but, of the 42 perpetrators whose education we could trace, 17 went to university and 19 had professional training, whereas only six had primary or secondary school. At the ICTR we were able to trace the educational level of 34 perpetrators: 17 went to university and 15 had professional training. We also tried to trace information on the convicted perpetrators marital state and whether they had children. Although data was missing on a 119 (42 per cent) of the

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<sup>50</sup>) Professional training means specialized education aimed at acquiring specific skills/knowledge after finishing secondary level education *e.g.* military academy, police training, training for auto-mechanic, electrician etc.

<sup>51</sup>) De Bertodano, *supra* note 40, p. 81.

perpetrators, 154 of the 162 perpetrators (95 per cent) were married and 150 individuals (95 per cent) did have children. Very few perpetrators seem to have had a criminal record prior to their involvement in international crimes. We found only nine cases in which the convicted perpetrator already had a criminal record and some of these were related to political crimes such as a failed coup attempt.

## 6. Others Prosecuted and Those Who Were not Prosecuted

Focusing solely on people convicted by international criminal courts and tribunals, however, does not tell the entire story of the atrocities committed within each conflict. A number of perpetrators are tried by national courts, dealt with by the Truth and Reconciliation Commission or not brought to justice at all. In the Subsection 6.1 we discuss the people prosecuted in relation to the abovementioned conflicts and in Subsection 6.2 we examine the suspects and perpetrators who should have been prosecuted in relation to these conflicts but were not.

### 6.1. *Other Prosecutions*

As well as the trial of the main war criminals in Nuremberg, 12 trials were conducted by the Allies under the authority of the Control Council Law No. 10, amongst which were the prominent *Einsatzgruppen* case and the case against the Nazi doctors. A total number of 185 alleged perpetrators were indicted, of whom a 142 were convicted and 35 acquitted, while eight cases were withdrawn (three indictees committed suicide, one died, one case was withdrawn because it was considered a mistrial and three cases were terminated because of the ill health of the suspect).<sup>52</sup> Twenty-five convicted perpetrators were sentenced to the death penalty and 20 to life imprisonment. The maximum determinate sentence was 25 year and the shortest one and a half years. Many more people were prosecuted in countries occupied by the Nazis during the Second World War besides these national military tribunals. The UNWCCC documented 89 war crimes trials,<sup>53</sup> some of which attracted a lot of worldwide media attention such as the trial of Eichmann in Jerusalem in 1961, Klaus Barbie, nicknamed the Butcher of Lyon tried in France in 1987 and John Demjanjuk in Germany in 2011.<sup>54</sup> In Japan too

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<sup>52</sup> See Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, Oxford, 2011).

<sup>53</sup> Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts – Ansätze einer Dogmatisierung* (Duncker & Humblot, Berlin, 2002), p. 140.

<sup>54</sup> For trials against crimes committed during the Holocaust, see Stephan Landsman, *Crimes of the Holocaust – the Law confronts Hard Cases*, (University of Philadelphia Press, Philadelphia, 2005).

there were many domestic trials<sup>55</sup> as well as those held at the IMTFE. Chen notes that:

Of the 5,700 accused of Class B and Class C crimes, 984 were condemned to death (some were later pardoned), 475 were given life imprisonment sentences, 2,944 were given finite imprisonment sentences, 1,018 were acquitted and 279 were not brought to trial or not sentenced. Between 1945 and 1951, over 2,200 trials were held outside of Japan against 5,600 Japanese nationals and Japanese collaborators accused of various crimes. More than 4,400 were convicted and about 1,000 were sentenced to death.<sup>56</sup>

Most of those prosecuted by other courts were the middle and low-ranking perpetrators which may explain the difference in sentencing. Sometimes, however, high-ranking perpetrators were prosecuted such as General Yamashita, who was tried by an American military tribunal in the Philippines, found guilty on 7 December 1945 and sentenced to death. He was executed on 23 February 1946.

The ICTY and ICTR have referred a number of cases to national courts and will continue to do this as part of their completion strategy. The Bosnian War Crimes section, for example, has prosecuted 74 accused<sup>57</sup> and many others have stood trial at the courts in Kosovo and the Serbia war crimes tribunal. In the overcrowded prisons of Rwanda, at one point, almost a 120.000 suspects were awaiting trial. More than 10.000 have been tried for genocide by national criminal courts in Rwanda and a number of the convicted perpetrators received the death penalty and were executed.<sup>58</sup> The death penalty was officially abolished in 2007 but no executions had been carried out since 1998. Doubts were raised as to whether these trials were fair. In order to solve the problem of overcrowded prisons the Rwandan government set up the *Gacaca* system which began operating in March 2005 and wound down in June 2012. The total number of cases tried was over 1.958.634. Of those indicted, some 84 per cent were found guilty while 277.066 (14 per cent) were acquitted.<sup>59</sup> The people who committed international crimes during the war in Sierra Leone were given amnesty and, apart from the ones who were prosecuted by the SCSL, no other people were prosecuted. In Cambodia there was just one trial held against Pol Pot and Ieng Sary who were both convicted in

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<sup>55</sup> Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2010), p. 120 and Neil Boister, 'The Tokyo Trial', in William A. Schabas & Nadia Bernaz, (eds.), *Routledge Handbook of International Criminal Law* (Routledge, London, 2011), p. 21.

<sup>56</sup> See the info on the website: [http://ww2db.com/battle\\_spec.php?battle\\_id=221](http://ww2db.com/battle_spec.php?battle_id=221). Class A suspects were the most important ones while Class B and Class C suspects were the less important.

<sup>57</sup> Fidelma Donlan, 'Hybrid courts', in Schabas & Bernaz, *supra* note 55, p. 99.

<sup>58</sup> See website: <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>

<sup>59</sup> Summary of the Report Presented at the closing of Gacaca Courts Activities, National Service of Gacaca Courts, Kigali, Republic of Rwanda, June 2012, pp. 34-35.

absentia for genocide in 1979 so many years before the ECCC started operating.<sup>60</sup> Sary was pardoned in 1996 when he defected from the Khmer Rouge and now has to stand trial before the ECCC which did not acknowledge either the first trial or his pardon. Apart from the mentioned trial and the suspects tried by the ECCC no one was prosecuted.

Indonesia promised the UN that it would prosecute the Indonesians responsible for the violence in East Timor<sup>61</sup> and a body of inquiry, the Indonesian National Commission of Human Rights (KPPHAM) was established which issued a report into the human rights violations in East Timor. After the publication of the report, the Human Rights Court was established which had the authority to inquire into cases of gross human rights violations perpetrated by Indonesians in East Timor. In March 2002 an ad hoc panel in Jakarta indicted 18 military and police officers, militia members and civilian officials.<sup>62</sup> Of this 18, some 12 were acquitted and six were found guilty receiving sentences from three to ten years. This panel also convicted the former East Governor of East Timor, sentencing him to three years and the commander of Aitarak militia who received a ten year sentence of imprisonment. Both were ethnic East Timorese.<sup>63</sup>

## 6.2. *Who Were not Prosecuted but Should Have Been?*

One of the obvious and inevitable questions which arise when discussing the people who were prosecuted, tried and convicted is: who, given their status and involvement in international crimes was not prosecuted but should have stood trial in front of an international court? At the IMT in Nuremberg the most prominent absentees were Hitler, Goebbels and Himmler; all Nazi leaders of the highest-rank who committed suicide at the end of the war and thus prevented the Allies from apprehending them. At the IMTFE Emperor Hirohito was the most prominent absentee in the dock simply because he was not indicted. This was remarkable as the Australians had called him 'the war criminal number one'.<sup>64</sup> Cryer noted that 'his immunity was necessary for Japan's post-war stability'.<sup>65</sup> Other members of the Emperor's family were also absolved from prosecution. Amongst

<sup>60</sup> Judgment of the people's revolutionary court of Phnom Penh of 19 august 1979. See also Subhash Kashyap, 'The Framework of the Prosecutions in Cambodia', in Kai Ambos and Mohammed C. Othman (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, (Max Planck Institute, Freiburg i. Br. 2003) p. 189; and Craig Etcheson, 'The politics of genocide justice in Cambodia', in Romano et al., *supra* note 21, p. 214.

<sup>61</sup> See De Bertodano, *supra* note 40, p. 79 and 94.

<sup>62</sup> *Ibid*, p. 84.

<sup>63</sup> Mohammed Othman, 'The frame work of prosecution and the court system in East Timor', in: Ambos and Othman, *supra* note 60, p.106.

<sup>64</sup> Boister, *supra* note 55, p. 18.

<sup>65</sup> *Ibid*, p. 22 and see also Cryer et al. 2010, *supra* note 55, p. 119..

them was Prince Asaka who played an important role in the Rape of Nanking, which occurred in 1937 in China when 300.000 Chinese civilians were brutally tortured, raped and murdered.<sup>66</sup> Many others who had originally been arrested and described as the most important, so-called Class A suspects were never prosecuted. Among these was Nobusuke Kishi who became prime minister of Japan in 1957.<sup>67</sup> Individuals who did bacteriological research and supported bio warfare, leaders of industrial conglomerates and the ones responsible for the ‘comfort women’ system escaped the attention of the IMTFE.<sup>68</sup>

As already noted from the original list of the ICTY, no one is at large anymore and, with the exception of the ten people who died before their arrest or before they could be convicted, one can assume that the individuals most responsible for the crimes have all been tried. Amongst those who died before they could be arrested was Arkan, the infamous leader of the Arkan Tigers, who was murdered in Belgrade in January 2000.<sup>69</sup> Six suspects died in prison after their transfer to the Tribunal.<sup>70</sup> Amongst them one of the key figures in the conflict - Slobodan Milosevic, former president of Serbia and the Federal Republic of Yugoslavia, who was found dead in his cell on 11 March 2006, four years after his trial had begun. All the other important figures appear to have been tried or are still on trial. The ICTR was less successful in that regard and six indictees are still at large, amongst them some of the ring leaders, according to Cryer.<sup>71</sup> One of the major failures of the ICTR, as already mentioned, was that it did not prosecute the offences committed by the RPF.<sup>72</sup>

The Lome Peace Agreement, which was signed by the various warring parties in Sierra Leone, provided a full amnesty for combatants on all sides and envisaged the setting up of a Truth and Reconciliation Commission (TRC); legislation to do this was adopted on 22 February 2000.<sup>73</sup> Although the SCSL did not find itself bound by the amnesty, it could however only try individuals who carried the most responsibility. The SCSL had a list of 13 indictees but three of these suspects died two before their arrest and one during the trial proceedings. Koroma, who became

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<sup>66</sup> See Iris Chang, *The Rape of Nanking*, (Penguin Books, London, 1997).

<sup>67</sup> Boister, *supra* note 55, p. 22.

<sup>68</sup> *Ibid*, p. 22.

<sup>69</sup> For more information on Arkan, see Christopher S. Stewart, *Hunting the Tiger – the Fast Life and Violent Death of the Balkans most Dangerous Man*, (Thomas Dunne Books: New York 2007).

<sup>70</sup> For their names, see: <http://www.icty.org/action/cases/4>.

<sup>71</sup> Cryer et al., *supra* note 55, p. 140.

<sup>72</sup> See book by Del Ponte, *supra* note 12.

<sup>73</sup> See Truth and Reconciliation Act 2000 s 6(1). See also William A. Schabas, ‘A synergistic relationship: the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’, in: W.A. Schabas and S. Darcy (eds.), *Truth Commissions and Courts: the Tension between Criminal Justice and the Search for Truth*, (Kluwer Academic Publishers, The Hague, 2004), p. 3; and Schabas, *supra* note 46, p. 157.



head of state for a short period of time after the successful coup of the AFRC, is still at large although he may also have died.<sup>74</sup> President Kabbah was not indicted while the leaders of the pro-government CDF forces were.

A number of prominent figures of the genocide in Cambodia escaped justice as did all middle and low-ranking cadres. Pol Pot died in 1998 and so could not be prosecuted. Son Sen and his wife Yan Yat, both high-ranking Khmer Rouge leaders, were murdered by Pol Pot and Ke Pauk, who was also a member of the inner circle of leadership, died in 2002. Ta Mok, one of the senior leaders of the Khmer Rouge, was apprehended but died in prison in 2006.<sup>75</sup> In this respect we should note that two ECCC co-investigating international judges resigned because they felt obstructed in their search to find the truth. They wanted to indict and prosecute more people but were prevented from doing so.<sup>76</sup>

East Timor tried mainly low-ranking perpetrators. High-ranking militia members and commanders of the Indonesian military were indicted but could not be apprehended as Indonesia would not cooperate with the Tribunal.<sup>77</sup> General Wiranto, for instance, was one of those high-ranking officers who was indicted but never apprehended. His indictment led to a political uproar and even president Gusmao 'expressed regret' in relation to the indictment and stressed the important of good relations with Indonesia.<sup>78</sup> Indonesia refused to hand over any of the Indonesian suspects but promised to prosecute them instead. As already noted above, Indonesia indeed prosecuted a few suspects but, as De Bertodano remarks: 'it is generally felt that those tried represented the 'second division; and not the top command'.<sup>79</sup> Wiranto one of the senior leaders responsible for the crimes committed in East Timor, for instance, was not indicted by the Indonesian courts and later even became a prominent figure in Indonesian politics. The commanders who were indicted were charged mainly with criminal negligence.<sup>80</sup> Othman states that the outcome of the trials was disappointing: the court acquitted the former chief of police and five senior military and police officers, a former Dili Military commander and three senior leaders. The court could not establish a structural link but 'this finding is at odds with the indictments for the special panels'.<sup>81</sup> The SPD only had jurisdiction for crimes committed in 1999 after it was

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<sup>74</sup>) If he is captured he has to be tried by a national court, see Winter, *supra* note 38, p. 118.

<sup>75</sup>) Etcheson, *supra* note 60, p. 204.

<sup>76</sup>) *BBC News*, 19 March 2012: <http://www.bbc.co.uk/news/world-asia-17432484>.

<sup>77</sup>) De Bertodano, *supra* note 40, p. 81.

<sup>78</sup>) *Ibid*, pp. 84-85.

<sup>79</sup>) *Ibid*, p. 93. Wiranto was accused of being one of the main perpetrators of the violence, according to an Indonesian Human rights Commission report which was published in January 2000.

<sup>80</sup>) See report of International Crisis Group: Indonesia: implications of the Timor Trials 8 May 2002; and De Bertodano, *supra* note 40, p. 93.

<sup>81</sup>) Othman, *supra* note 63, pp. 105-107.

announced that a ballot would decide whether East Timor would become completely independent or only receive autonomy within Indonesia. The violence and repression of the previous twenty-five years under the reign of Indonesia, which was much worse and cost 200,000 people their lives, was not prosecuted.<sup>82</sup>

## 7. Summary and Conclusion

This article has presented an overview of the empirical reality of the international criminal justice system which is represented by nine international criminal courts and tribunals which, on average, have operated for almost nine years. Together, these courts have concluded 172 cases in which over 250 judges and 23 chief prosecutors were involved. Overall 745 people were indicted and 356 actually tried. This number is less than half of the people indicted but is mainly due to the fact that the SPD had to withdraw 304 indictments because Indonesia refused to hand over the suspects. If we exclude SPD from our calculations, then 353 suspects were indicted, of whom 268 were actually tried, which is 76 per cent. Of all those indicted 16 died, 27 cases were withdrawn for other reasons in addition to 20 cases which were referred to national jurisdictions. There are currently 34 defendants on trial while 22 are still at large, half of these indicted by the ICC.

In total, 281 defendants were convicted, 29 were acquitted and 12 cases were withdrawn after the trial had started. The overall conviction rate of international criminal courts and tribunals is 87 per cent, with only 9 per cent of the defendants were acquitted. The average time-lapse between an indictment and the trial judgement was four point nine years while the trials lasted on average two point nine years. This is long but can be explained by the complexity of the cases and that, despite the horrendous nature of the crimes, the human rights of the defendants still had to be taken into account. A total number of 19 convicted perpetrators were sentenced to death, 45 to life imprisonment and 217 received a determinate prison sentence ranging from 11 months to 52 years. The average determinate prison sentence was 15.3 years and 66 per cent of the cases were appealed.

The convicted perpetrators are almost all male (99 per cent) and mostly members of a military or paramilitary organisation (71 per cent). The vast majority acted on behalf of their government and they were, on average, 40 years old. The age span varies from 14 to 74. All levels of education (from illiterate to academic) were represented amongst the perpetrators and almost all the perpetrators of

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<sup>82)</sup> The CAVR, a truth and reconciliation commission, dealt with this period and produced a report. Beth S. Lyons, 'Getting Untrapped, Struggling for Truths: the Commission for Reception, Truth and Reconciliation (CAVR) in East Timor', in Romano et al., *supra* note 21, p. 100.

whom we could find data seemed to be married and have children. Most perpetrators came from Asia, Africa and Europe, which is not surprising as the crimes prosecuted by the international criminal courts and tribunals were committed in these three continents. Perpetrators from all four different ranks (high – middle – low – no authority at all) were prosecuted and, if we take all courts into consideration, the convicted perpetrators are fairly evenly distributed over the four ranks. If, however, we ignore the figures of the SPD, which prosecuted mainly low-ranking perpetrators and is in general the court which was very much criticized, then 40 per cent of all those convicted were high-ranking, 29 per cent were middle-ranking, 24 per cent low-ranking and only 7 per cent were foot soldiers with no authority at all.

The case law produced by the nine international criminal courts and tribunals forms an extremely rich body of law which can guide national states as well as the ICC in their future prosecutions of international crimes. It is expected that no international criminal courts and tribunals or mixed or hybrid courts will be established in the future and that national states will prosecute international crimes themselves. The ICC can only be, and should only be, the court of last resort. The best response to international crimes is, arguably, prosecution by the national states; the international community should intervene only if these national states are unwilling or unable to prosecute. Furthermore, the establishment of the ICC has led many national states to incorporate legislation related to international crimes into their national system and some states have indeed prosecuted perpetrators of international crimes. The ICC is taking an active stance; it has 16 cases involving seven situations which are currently under investigation and is conducting preliminary examinations in an additional seven cases.

If we look at all these data, it cannot be denied that only an extremely small percentage of all the people involved in international crimes are prosecuted. On the other hand, although many perpetrators go free, others are prosecuted, convicted and punished, amongst them heads of state and high-ranking leaders. In so doing, the international criminal courts and tribunals have sent a clear message to the world. Although the chances of getting caught are still slim, perpetrators of international crimes can no longer rely on impunity. Heads of state who order or commit international crimes should be warned. Among the 28 people indicted by the ICC, there are four (former) heads of state. Although the deterrent effect which is created by international criminal prosecutions on middle and low-ranking perpetrators might be limited, high-ranking perpetrators definitely have more reason to worry than they had 65 years ago. Furthermore, as these high-ranking perpetrators pull all the strings, the deterrent effect of these prosecutions and indictments might be larger than anticipated. The Human Security Report, for instance, suggests that these prosecutions have helped to prevent international crimes; this is also found by Kim and Sikkink who conducted empirical research and concluded

that human rights prosecutions definitely have a deterrent effect.<sup>83</sup> From our data we cannot tell whether this is true, nor can we conclude whether the international criminal justice system has been a success or failure so far. We have simply provided an overview of what has been achieved so far – which may be much more than most people could have anticipated some 65 years ago.

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<sup>83</sup>) Human Security Report 2009/2010, 77; Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries', 54 *International Studies Quarterly* (2010) 939-963.