International Humanitarian Law Series

The Legal Regime of the International Criminal Court

Essays in Honour of Professor Igor Blishchenko

Edited by
José Doria, Hans-Peter Gasser and M. Cherif Bassiouni

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The Legal Regime of the International Criminal Court

International Humanitarian Law Series

VOLUME 19

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The Legal Regime of the International Criminal Court

Essays in Honour of Professor Igor Blishchenko

In Memoriam

Professor Igor Pavlovich Blishchenko

(1930 – 2000)

Edited by

José Doria

Hans-Peter Gasser

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Professor Igor Pavlovich Blishchenko
(1930–2000)

Preface

The impact of the writings and activities of Professor Blishchenko on the development of international criminal law is widely recognised and this volume is a well-deserved demonstration of respect from an impressive line-up of international legal scholars. The collection of essays signals a cooperative interaction between academics and practitioners. As the first Prosecutor of the International Criminal Court, I believe the engagement of academic communities with the operational problems of the Court will be invaluable, particularly by introducing new theoretical frameworks to explain and confront the complicated challenges that the implementation of the Rome Statute presents.

In just 60 years, the world has witnessed the transformation of an experiment into a global institution. Nuremberg was a landmark. However, the world was not ready to transform such a landmark into a lasting institution. The Cold War produced massive crimes in Europe, Latin America, and Asia; Africa was still under the rule of colonialism and apartheid. In the end, the world would wait for almost half a century after Nuremberg and would witness two genocides – first in the former Yugoslavia, and then in Rwanda – before the Security Council decided to create the *ad hoc* tribunals for Yugoslavia and Rwanda, thus connecting peace and international justice again. The contribution of the *ad hoc* tribunals is yet to be fully recognized and measured. They developed the law, prosecuted the worst perpetrators, including generals and members of governments, and contributed to restore lasting peace in conflict-torn regions. They paved the way for the decision to establish a permanent criminal court.

For centuries, conflicts were resolved through negotiations without legal constraints. In Rome in 1998, a new and entirely different approach was adopted. Lasting peace requires justice – this was the decision taken in Rome by 120 States. The state parties committed to put an end to impunity for the most serious crimes of concern to the international community and to contribute to the prevention of such crimes. International justice was not a moment in time any longer, nor an *ad hoc* post conflict solution: it became an institution. The Rome Treaty, as a global justice system, will reach not only the perpetrators of the crimes; it will also have impact in more than 100 state parties. They have to pass legislation, adjust the operational rules of their armed forces, conduct their own investigations and support the Court when it decides to act. Decisions of the ICC in one case will reinforce the rule of law around the world. Thus, the Rome Statute created a comprehensive and global criminal jus-

tice system. Continued engagement with academic communities around the world is essential to explain this new concept. This book in honour of Professor Blishchenko makes a seminal contribution to the new legal era.

Luis Moreno-Ocampo
Prosecutor
International Criminal Court

Foreword I

Je suis très sensible à l'honneur que l'on m'a fait en me demandant de préfacer cet ouvrage à la mémoire du Professeur Igor Blischchenko. Je le fais avec d'autant plus d'enthousiasme que le Professeur Blischchenko a consacré de nombreuses études au Droit humanitaire et aux problèmes des réfugiés. Ces analyses prennent une acuité particulière au moment où l'humanité subit une série de violations du Droit humanitaire – au Rwanda, en Irak, au Darfour, au Soudan – au moment où des millions de réfugiés croupissent dans des camps de fortune dans l'indifférence de l'opinion publique internationale.

C'est dire que les études savantes du Professeur Blischchenko sont à même de nous éclairer, aujourd'hui plus qu'hier encore, dans la mesure où elles aideront la nouvelle génération d'internationalistes à trouver les idées, les normes, les arguments qui leur permettront de mieux défendre, à leur tour, les violations flagrantes du Droit humanitaire, les violations des droits de l'Homme perpétrées sous des prétextes salutaires pour les uns, fallacieux pour les autres.

Bien plus, la jeunesse est appelée à vivre une des mutations les plus profondes de la société internationale qui passe du crépuscule de l'aire étatique à l'aube de l'aire planétaire. Le Droit humanitaire devra tenir compte de l'utilisation de nouvelles armes, de l'éclatement de nouveaux conflits armés, et là encore, l'œuvre du Professeur Blischchenko leur servira de substrat pour l'élaboration de ces nouvelles normes destinées à humaniser la globalisation et à gérer les conflits inédits de l'aire planétaire.

Boutros Boutros-Ghali
Président de la Commission nationale
égyptienne des droits de l'Homme
Ancien Secrétaire général des Nations Unies

Foreword II

At the Rome Diplomatic Conference in 1998, representatives of states from all parts of the world made history by creating the first permanent international criminal court with jurisdiction over the most serious crimes of concern to the international community as a whole. While the establishment of the International Criminal Court was a tremendous step forward for the development of international law, the path to Rome was neither short nor easy.

The modern development of international criminal law began after the end of the Second World War with the international military tribunals at Nuremberg and Tokyo. In its first years, the United Nations sought to institutionalize these developments in a permanent international criminal court. However, this initial impetus did not last long. The onset of the Cold War stalled substantial progress towards an international criminal court for approximately forty years. When the Berlin Wall fell in 1989, so too did some of the barriers to international cooperation. It is no coincidence that in the same year the United Nations General Assembly resumed work on the establishment of a permanent international criminal court.

While negotiations on the Statute of the Court were progressing, the United Nations Security Council established the *ad hoc* tribunals for the former Yugoslavia and Rwanda. These tribunals were pioneers, but their punishment and deterrent functions were inherently limited, in particular by virtue of their jurisdiction and the manner in which they were created. There remained a need for a permanent, broadly supported international criminal court to punish serious crimes and to contribute to their deterrence on a global scale. In 1998, in a remarkable example of international cooperation, delegates from across the world came together in Rome and adopted the Statute of the International Criminal Court. The Statute established a treaty-based international criminal court with jurisdiction over individuals for the crimes of genocide, war crimes and crimes against humanity. The new court was vested with a robust and strictly non-political judicial mandate.

The International Criminal Court exists as part of an interdependent system of international law. This interdependence is evident in both the principle of complementarity and the Court's inherent need for cooperation. The Court is complementary to national systems. It is a court of last resort, with primary responsibility for the prosecution of crimes belonging to states. The Court can only act where national jurisdictions are unwilling or unable genuinely to investigate or prosecute. Where the Court does act, it relies on the cooperation of states and, by extension, international organizations. The legal regime of the Court is based on two pillars: a judicial pillar and an enforcement pillar. In national systems the two pillars are intertwined as courts rely automatically on the enforcement powers of the state. With the

International Criminal Court the two pillars have been separated. The Court has no police force of its own. It depends on the cooperation of states in all stages of proceedings with such matters as the arrest and surrender of persons, the enforcement of sentences, and witness and relocation. Having wanted this system of cooperation it will be critical that States Parties ensure the Court has the necessary support.

At the time of this writing, there are 104 States Parties to the Rome Statute. The Prosecutor is investigating four situations. Proceedings have been conducted before the Pre-Trial and Appeals Chambers and the first trial is expected to commence shortly. While the Court is still very much in its early days, few of those who were involved in the process leading to and including Rome could have predicted how rapidly the Court would develop.

As the caseload of the Court continues to grow, so too will the need for continued cooperation. Proper understanding of the Court is essential to facilitating the necessary support for its activities. This collection of essays draws together academic commentary on a wide range of issues, providing a broad overview of the legal regime of the International Criminal Court. It will serve as a useful tool to anyone seeking to better understand the Court, and is a very fitting tribute to Professor Blishchenko.

Philippe Kirsch, Q.C.

From the Editors

On 09 August 2007, the academic world marked 7 years from the passing of Prof. Igor Blishchenko. Colleagues and pupils around the world knew him very well as a leading expert in International Humanitarian Law, Human Rights Law and International Criminal Law. Particularly concerned in ensuring that the dignity and value of every human being are respected in times of peace as in times of war, Professor Blishchenko was in the world one of the precursors of the idea of establishing a permanent international criminal court.

In early discussions about international criminal law as a branch of public international law, one of the most difficult issues was disassociating the criminal responsibility of individuals from that of international responsibility of states. Professor Blishchenko belonged to those experts that supported the thesis of individuals as independent subjects of international law with rights and obligations of their own, particularly as it concerns individual criminal responsibility for war crimes, crimes against humanity and genocide. The discussion around the inclusion of the crime of aggression in the ICC Statute clearly shows the continuing pertinence of the issue of the relationship between individual criminal responsibility and international responsibility of states.

The present essays in honour and memory of Professor Blishchenko represent therefore a merited tribute to a scholar whose activity has contributed to the crystallization of the idea that it was time the international community came together and responded permanently, consistently and effectively against those trashing the most elementary values of that community by engaging in acts causing irreparable harm to humanity.

As it happens with projects of such a magnitude distinguishing noble souls of humanity, scholars and practicing lawyers around the world promptly acceded favourably to this universal recognition. Those who were limited in time to present a paper accepted to contribute otherwise as peer-reviewers. Some performed in both capacities. Others have suggested financial and moral support to the project. The co-editors express their deepest appreciation to all those scholars and practicing lawyers who contributed to the project. Students alike also wanted to participate in the project. A number of them, former interns at the ICTY, have assisted the co-editors in putting together the Memorial Volume. The co-editors would like to thank all of them for their hard work, and in particular Amy Faram from Melbourne, Carla Nunes da Costa from Luanda and Lucy Finchett-Maddock from London.

The co-editors also express their appreciation to former Secretary-General Boutros Boutros-Ghali, ICC President Philippe Kirsch and ICC Prosecutor Luis Moreno-Ocampo for their introductory words which attest to the importance of the

subject and to the contributions of the work's distinguished authors.

Because of its depth and breadth, this work will hopefully be recognized as another valuable contribution to the understanding of the ICC, and more importantly we hope that it will enhance support for the ICC in the legal community worldwide.

José Doria
Hans-Peter Gasser
M. Cherif Bassiouni

Short Biography of Professor Igor P. Blishchenko*

Professor Blishchenko was renowned as a leading expert in international law and particularly the law of armed conflict, not only in his home country Russia but also on all five continents of the world. He was the author of over four hundred works centered on problems of international humanitarian law, which have been published both in Russia and abroad. Particularly interested in the relationship between international humanitarian law and other branches of international law, he lectured and wrote extensively on subjects such as problems of disarmament and international law, human rights law, international criminal law, terrorism and international law, international law and municipal law, and the pacific settlement of international disputes. His writings in these fields made a significant contribution to the understanding and interpretation of international law, and especially international humanitarian law. His works include: *Armed Conflict and International Law (*1971*), Non-International Armed Conflict and International Law (*1973*), The Red Cross and International Humanitarian Law (*1977*), Conventional Weapons and International Law (*1984*), International Humanitarian Law (*1986*), The Idea of an International Criminal Court (*1994*), Additional Protocol II on Non-International Armed Conflict and the Problem of Refugees (*1998*), and Precedents in Public and Private International Law (*1999*).*

Professor Blishchenko devoted more than forty years of his life to fruitful academic activity and research at various Soviet and Russian law schools (inter alia as Professor and Vice-Rector of the School of Diplomacy of the Ministry of Foreign Affairs of the Soviet Union, Professor of the Institute of International Relations of the Ministry of Foreign Affairs of the Soviet Union, and for the last twenty years as Head of the Chair of International Law of the Peoples' Friendship University of Russia in Moscow). He was Visiting Professor of International Law at numerous universities, law schools and research centres in many countries (Switzerland, United Kingdom, France, Germany, Italy, the Netherlands, Poland, USA, Japan, Hungary, Greece, Egypt, Angola, Austria and others).

His academic activities were always closely interlinked with practical work. Professor Blishchenko was an expert consultant of the Parliament of the Soviet Union, the Parliament of the Russian Federation and the Ministry of Foreign Affairs of the USSR and of Russia, as well as member or chairman of various official Soviet and Russian delegations to international conferences and symposiums

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* From the note first published on 30-09-2001 by the *International Review of the Red Cross*, No. 843. p. 885-887. Reproduced with permission from the *International Review of the Red Cross.*

and to sessions and working groups of many international organizations. He was expert consultant of the United Nations on problems of international humanitarian law, disarmament, and the prohibition of and restrictions on the use of certain conventional weapons. He was chairman of the Soviet delegation to the International Congress of Paris on the prevention of genocide, representative of the Soviet Union to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and a member of the Soviet delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law which, working in four sessions from 1974 to 1977, prepared the two Additional Protocols to the 1949 Geneva Conventions on the protection of war victims.

Professor Blishchenko was among the distinguished members of the authoritative Independent Bureau for Humanitarian Issues, together with Mohamed Bedjaoui, Judge of the International Court of Justice, Pierre Graber, former President of the Swiss Confederation, and many other eminent public figures, which prepared numerous research studies, including one on "The implementation of international humanitarian law".

Igor Blishchenko was a wonderful person, a talented diplomat and a brilliant law professor and scholar, beloved by his colleagues and pupils all over the world.

He died in Moscow on 9 August 2000 at the age of 70.

General Introduction

This book was conceived by José Doria, a former student of the late Professor Igor Pavlovich Blishchenko, in order to honor his late teacher's lifetime contribution to international law. As described in the dedication, Blishchenko was a distinguished international law jurist in the days of the USSR and was one of those who, during that regime, advocated a more internationalist perspective. I first met him in Moscow in 1976 when I was working on a book with Professor Savitski, entitled The Criminal Justice System of the USSR (1979).

The dedication and hard work of José Doria made this book possible, and he deserves the greater share of the credit in completing this monumental task which consists of more than 1,000 pages written by 44 contributors from 23 countries.

Unlike other anthologies in which different authors contribute their writings to it, the approach followed by the three co-editors has been to give a systematic direction to these contributions. The book is divided into four parts which start with the establishment of the ICC, basic institutional issues, the court at work and relations between the court and states as well as other international organizations. This latter part, however, includes an eclectic number of contributions on miscellaneous topics which could have been placed in a fifth part, had their number been sufficient to warrant it. Each part consists of a number of sections, the sections being numbered consecutively throughout the book to make it easier for cross-referencing; their total number is 20.

Anyone familiar with international criminal law and the International Criminal Court will no doubt be impressed with the names of the distinguished authors appearing in this anthology. They are among the world's most renowned scholars on the subject. Some authors have contributed several articles reflecting their expertise, and many of these contributions will surely be considered highly useful if not significant in understanding the ICC.

Because I was chairman of the Rome Diplomatic Conference's Drafting Committee in 1998, and prior to that I was Vice-Chair of the General Assembly's Preparatory and Ad Hoc Committees between 1995-1998, I have refrained from writing or speaking on what some may call an insider's view. Even in my three-volume work entitled "The Legislative History of the ICC", published by Transnational Publishers in 2005, I have been very careful in avoiding to present anything to the public that may reflect or claim to reflect an insider's view. I did so essentially for what I consider to be ethical reasons, but also because I fully realize that any *ex-post facto* recollection is essentially subjective and that, human nature being what it is, there will be a tendency to give oneself a greater role or influence than what may otherwise have been the case. This is not a judgment on the writings of those who were

also part of the process and who have written on their experiences, but it is an explanation for why I did not contribute any substantive article to this work. Instead, my role has been to screen and review contributed articles, as was the case for our colleague, Hans-Peter Gasser and the external peer-reviewers. Thus, the reader should be assured that the co-editors assisted by independent peer-reviewers did fulfill a substantive quality control mission. In addition, José Doria undertook the task of editing the book. Understandably, the fact that the authors come from so many different legal systems, made this quite a challenge. So, it is appropriate to acknowledge José Doria's effort. It also deserves to acknowledge Martinus Nijhoff's recognition of this work's merit and decision to publish it. And so a word of appreciation is owed by the co-editors to the Martinus Nijhoff publishing team.

M. Cherif Bassiouni

Part I

The Long Way to the ICC

Section 1

Historical Background to the ICC

Chapter 1

Early Efforts to Establish an International Criminal Court

Jackson Maogoto

I. Introduction

Over a period of many centuries, humanitarian principles regulating armed conflicts evolved gradually in different civilizations. In the course of this historical evolution, certain principles at first emerged which restricted what a combatant could do during the conduct of war. As the laws of chivalry developed during the Middle Ages in Western Europe, so did rules limiting the means and methods of conducting war. Heraldic courts developed a code of chivalry that regulated a knight's conduct in battle and that Christian princes enforced in their courts. It was the beginning of what became known as *jus ad bellum*.[1] In time, the humanitarian principles formed an inter-woven fabric of norms and rules designed to prevent certain forms of physical harm and hardships from befalling non-combatants, as well as certain categories of combatants such as the sick, wounded, shipwrecked and prisoners of war. As the protective scheme of prescriptions and proscriptions increased both qualitatively and quantitatively it's more serious breaches were criminalized. With criminalization of certain means and methods of warfare, customary international law recognized and permitted belligerent states to prosecute enemy soldiers in their custody for breach of the laws and customs of war.[2]

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1 Jackson Maogoto, *War Crimes and Realpolitik: World War I into the 21st Century* (2004) 16.

2 Such trials may be held before a military court, either domestic or constituted jointly by more than one state (in which case, it would have an international aspect). In one of the leading texts on international law the customary right of belligerent states to try war criminals is explained thus:

> The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognized principle of international law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there may, as a condition of the armistice, impose upon the authorities of the defeated State the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in a position to occupy. For in both cases the accused are, in effect in his power. And although normally the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of international law prevents the victorious belligerent imposing upon the defeated State the duty, as one of the provisions of the armistice or Peace Treaty, to surrender

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
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The enforcement of modern international humanitarian law[3] dates back to the Middle Ages, when the first known war crimes trials were held.[4] The first supranational criminal tribunal to bring to justice someone responsible for what would today be characterized as crimes against humanity was convened more than five centuries ago. In 1474, an *ad hoc* criminal tribunal of 28 judges from different states allied to the Roman Empire, tried and convicted Peter Von Hagenbach for murder, rape, perjury and other crimes in violation of 'the laws of God and man' during his occupation of the town of Breisach on behalf of Charles, the Duke of Burgundy, at a time when there were no hostilities.[5] Professor M C Bassiouni cites this as the 'first documented prosecution for initiating an unjust war'[6] and essentially as the first ad hoc international criminal tribunal.[7]

Though additional norms and rules were developed in intervening centuries strengthening basic principles of humanity, it was to take another five centuries before the concept of a supranational criminal tribunal was revisited. Until the 19th century, the residual remains of chivalry, the non-binding theoretical treatises of the publicists, and the slow accretions of customary law restraints derived from state practice comprised the legal framework governing conduct in war. However, the changing nature of warfare spurred by technological advancement and heightened rivalries between newly consolidated nation-states, revealed the impotence of these restraints and compelled their revision.[8] The French Revolutionary and Napoleonic wars heralded the dawn of an epoch of unbridled ferocity and marked the birth of

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for trial persons accused of war crimes.

Herscht Lauterpacht and Lassa Oppenheim, *International Law: A Treatise* (7th ed, 1952) vol 2, 257.

3 Professor Schwarzenberger distinguished six meanings of International Criminal Law: 1) the territorial scope of municipal criminal law; 2) internationally prescribed municipal law (a state's international obligation to criminals) 3) authorized municipal criminal law (internationally authorized exercise of criminal jurisdiction, eg with regards to piracy in the high seas); 4) municipal criminal law common to civilized nations; 5) international cooperation in the administration of municipal criminal justice; and 6) international criminal law in the material sense of the word: Georg Schwarzenberger *The Inductive Approach to International Law* (1965) 5–13. Professor Bassiouni defines this 'material international criminal law' as 'the criminal aspects of international law [which] consist of a body of international prescriptions containing penal characteristics, including criminalization of certain types of conduct irrespective of particular enforcement modalities and mechanisms': M Cherif Bassiouni, *International Criminal Law* (1987) 1.

4 Bassiouni mentions, among others, the trial of Comadin Von Hohestafen, tried in Naples in 1268 and Peter Von Hagenbach, tried before an international tribunal in 1474. M Cherif Bassiouni, *International Criminal Law* (1987) 3–4.

5 For a short account of this trial and references to other accounts, see George Schwarzenberger, *International Law as Applied by Courts and Tribunals* (1968) 462–466.

6 M Cherif Bassiouni, *Crimes against Humanity in International Law* (1992) 197. See also, M Cherif Bassiouni, 'The Time Has Come for an International Criminal Court' (1991) 1 *Indiana International and Comparative Law Review* 1.

7 Several centuries were to elapse before the foundations were laid for incriminating individuals for war crimes considered as grave violations of the law applicable in armed conflicts.

8 Jackson Maogoto, *War Crimes and Realpolitik: World War I into the 21st Century* (2004) 21.

the nation-at-arms, in which entire populations and industrial bases were mobilized in support of the war effort, blurring the combatant/non-combatant distinction and jeopardizing any civilian claims to immunity.[9]

As the modern international system developed in the 19th century and multilateralism found its voice, efforts began to be made to increase the level of voluntary compliance and to hold states responsible to the international community for violations of certain international obligations.[10] Unilateral political or military retaliation and economic sanctions continued to be the main vehicles through which states were censured for offensive conduct. It was the failure of this informal international enforcement mechanism that led Gustave Moynier – one of the founders of the International Committee of the Red Cross – to present a proposal to the International Committee of the Red Cross calling for the establishment by treaty of an international tribunal to enforce laws of war and other humanitarian norms on 3 January 1872.[11] Until Moynier suggested a permanent court, almost all trials for violations of the laws of war were by *ad hoc* tribunals constituted by one of the belligerents – usually the victor – rather than by ordinary courts or by an international criminal court.

Gustave Moynier was not originally in favour of establishing an international criminal court. Like many humanists of the era, Moynier shared the belief that engaging reason through an appeal to emotion by gritty descriptions of individual suffering would shock the public into humanitarian outrage and by extension pressure warring states to adhere to humanitarian norms and rules.[12] Indeed in his 1870 commentary on the *1864 Geneva Convention* concerning the treatment of wounded soldiers,[13] he considered whether an international criminal court should be created to enforce it. However he rejected this approach in favour of relying on the pressure of public opinion, which he thought would be sufficient. He noted that 'a treaty was not a law imposed by a superior authority on its subordinates (but) only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee would lie in the creation of international jurisdiction with the necessary power to compel obedience, but in this respect, the 1864 Geneva

9 Quincy Wright, *A Study in War* (1965) 291–328.

10 Jackson Maogoto, *War Crimes and Realpolitik: World War I into the 21st Century* (2004) 21.

11 The proposal was published in the *Bulletin International des Sociétés de Secours aux Militaries Blessés* (the predecessor of the International Review of the Red Cross), under the title 'Note sur la Création d'une Instituition Judiciaire Internationale Propre à Prevenir et à Reprimer les violations à la Convention de Geneve'. For a text of the draft convention, see Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 59, 72–74.

12 For example, Henry Dunant, *A Memory of Solferino* (translation, first published 1862, 1959 edition) 118, with its overt appeal to 'noble and compassionate hearts and ... chivalrous spirits,' represents a 19th-century Romantic approach to limiting war. Many of the Romantics (including Dunant) did not reject the Enlightenment appeal to reason as such but, rather, attempted to go beyond it to engage the emotions. Cf Hugh Honor, *Romanticism* (1979) 280–2.

13 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, reprinted in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts* (3rd rev ed, 1988) 279.

Convention shares an imperfection that is inherent in all treaties'.[14] Nevertheless he believed that public criticism of violations of the 1864 Geneva Convention would be sufficient, observing that

> because public opinion is ultimately the best guardian of the limits it has itself imposed. The 1864 Geneva Convention in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down ... The prospect of those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments, and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other.[15]

He also hoped that each of the state parties to the *1864 Geneva Convention* would enact legislation imposing serious penalties for violations. He was to be disappointed on both accounts.[16] Several months after Moynier's commentary, the Franco-Prussian War broke out. Fundamentally, the origin of the war lay in a collision of national interests. For the sake of Prussian (German) unification and expansion, Bismarck had taken up the cause of German national self-determination whose fulfilment was possible only at the cost of France. Since 1866, the French had dreaded the consolidation of a powerful state on their northern frontier, at least without compensation sufficient to preserve their own relative weight in the European balance. These were the ingredients of an explosive compound. The catalyst which brought them together was the abrupt announcement by Germany in the summer of 1870 that a Hohenzollern prince was to be king of Spain.[17] Subsequent events created an atmosphere in which reason and compromise were impossible by igniting nationalistic passion in France and sweeping away the particularism and distrust of the two Germanys in a flood of patriotic exaltation.[18]

On 15 July 1870, France keen to scuttle Bismarck's unification ambitions and maintain its preponderant political weight declared war on Germany. By early August, the numerically and militarily superior Prussian forces had penetrated deeply into French territory, and in early September, France's principal army surrendered and Emperor Napoleon III was captured. Paris fell in January 1871 (by which time the armies of the French National Defence were largely destroyed), an armistice was declared in late January, a preliminary peace was signed in February, and the final peace treaty was signed in Frankfurt on 10 May 1871.[19] The press and public opin-

14 *Étude sur la Convention de Geneve pour l'Amelioration du Sort des Militaires Blessés dans les Armées en Campagne* (1870) 300, English translation of the quotations in Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (1963) 282.

15 Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 59.

16 Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 59.

17 Otto Pflanze, *Bismarck and the Development of Germany: The Period of Unification, 1815–1871* (1963) 433.

18 Gordon A Craig, *Germany 1866–1945* (1978).

19 See Michael Howard, *Franco-Prussian War: The German Invasion of France 1870–71* (1962);

ion on both sides of that conflict fanned atrocities. Moynier was forced to recognize that 'a purely moral sanction' was inadequate 'to check unbridled passions'.[20] Moreover, although both sides accused each other of violations, they failed to punish those responsible or even to enact the necessary legislation. It was at this point that Moynier developed his proposal for an international criminal court.

It was not surprising that the model for the new international criminal court was the arbitral tribunal which had been established the year before in Geneva pursuant to the *Treaty of Washington* of 8 May 1871 in order to decide claims by the United States against Britain for damage caused to American shipping by the Confederate raider, *The Alabama*.[21] A major transformation of international relations in this period, the rising tendency to settle international conflicts more frequently than in former times by arbitration, seemed to have influenced Moynier in his conviction of the efficacy of an international criminal court. Ostensibly, the numerous arbitrations were a pointer that the international community was inching towards formal adjudication mechanisms in the implementation of international law and a rejection of war as a judicial procedure of last resort.[22]

In developing his proposal, Moynier examined in turn legislative, judicial and executive powers related to criminal law before concluding that an international institution was necessary to replace national courts. Since the states had been reluctant to pass the criminal legislation which he believed that they were morally obligated, as parties to the *1864 Geneva Convention*,[23] to enact in order to prevent violations, he argued that the creation of an international criminal court was necessary. He did not think that it was appropriate to leave judicial remedies to the belligerents because, no matter how well respected the judges were, they would at any moment be subjected to pressure.[24]

Moynier's proposal for an international criminal court focused on creating a formal enforcement mechanism responsible for coercive compliance. The device of a criminal trial was to be the major way in which the enforcement of limitations and obligations of international humanitarian law could be achieved. But for the international justice system to work, the proposal needed the unequivocal co-operation of states. States had to feel duty bound to discharge their international obligations. Since law by its nature requires compliance, successful establishment of an inter-

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AJP Taylor, *The Struggle for Mastery in Europe 1848–1918* (1954) 206–17; Norman Rich, *Great Power Diplomacy 1814–1914* (1992) 213–23.

20 Gustave Moynier, 'Note sur la Création d'une Instituition Judiciaire Internationale Propre a Prevenir et a Reprimer les violations à la Convention de Geneve' (1872) 11 *Bulletin International des Sociétes de Secours aux Militaires Blessés* 122 (quotations as translated in Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 59, 59).

21 See Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 59.

22 Ian Brownlie, *International Law and the Use of Force by States* (1963) 21.

23 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, reprinted in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts* (3rd rev ed, 1988) 279.

24 Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 59, 60.

national penal process necessarily required that the dictates of the laws of war be both respected and obeyed; in other words it would not work if states did not feel obligated to comply. With states rooted in the traditional notion of state sovereignty which enshrined the state's supremacy and independence,[25] the proposal was doomed to failure.

Moynier's proposal led to a flurry of letters from some of the leading experts in international law of the day, including Francis Lieber, Achille Morin, de Holzendorff, John Westlake and both Antonio Balbin de Unquera and Gregorio Robledo on behalf of the Central Committee of the Red Cross of Spain.[26] Although some of these experts welcomed Moynier's initiative to strengthen implementation of the *1864 Geneva Convention*,[27] most of them argued that the proposal to establish an international criminal court would not be as effective as other methods and all were critical of various aspects of the proposal. This cool reception was owing to the reality that traditionally, enforcement of international law was based on an informal system, concentrating on attempting to ensure the voluntary compliance of states rather than a formal enforcement system. Given the cool reception by the legal experts, no government publicly took up the proposal and thus its death without mourners or honour.[28]

The next significant event for international humanitarian law in this period did not occur until almost three decades after Moynier's proposal. Technological and industrial advances which pointed to a major change in the face of warfare led to the epochal Hague Peace Conference. In 1899, European Powers assembled for the first International Peace Conference of The Hague to discuss comprehensively the codification of the laws of war resulting in the ground breaking Hague Conventions on warfare with the key aim of arms limitation. A second conference was convened eight years later to revise the conventions emanating from the 1899 effort and to further broaden the scope of international humanitarian law.

The Hague Peace Conferences of 1899 and 1907, through a number of rules on the means and methods of warfare, established regular means for the pacific settlement of disputes to allow parties to step back from the brink of war, applicable if and when war broke out.[29] The Hague Conferences and their movement towards pacific

25 Jackson Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome*, (2003) Ch I.

26 For a commentary on these views, see Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 59, 63–4.

27 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, reprinted in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts* (3rd rev ed, 1988) 279.

28 No further significant development in the enforcement of international humanitarian law occurred until the end of World War I, with the peace settlement placing an unprecedented focus on the issue of moral and legal responsibility for the outbreak of the war. The Allies went beyond indemnities, territorial concessions, and other measures customarily demanded at peace conferences, to the issue of individual guilt for crimes committed in breach of international law.

29 See the Hague Conventions of 1899 and 1907 on the Pacific Settlement of Disputes. The texts are reproduced in James Brown Scott (ed), *Texts of The Peace Conferences at The Hague, 1899 and 1907* (1908). For reports on the proceedings, see James Brown Scott (ed), *The Reports to The Hague Conferences of 1899 and 1907* (1917).

settlement of disputes marked the beginning of the attempts to limit the right of war both as an instrument of law and as a legally recognized means for the changing of legal rights.[30] The elevation of inter-state and regional relations into international relations in the context of an international legal system was marked by the adoption of the Hague Convention*s* of 1899 and 1907 which sought to codify universal rules and norms regarding warfare binding on state parties and also opened the doors to an era of arms control.[31] Laws regulating the means and methods of warfare drafted at The Hague Conference formed the bedrock of modern laws of war, and are generally considered by international law scholars to be the crowning achievement of the effort to humanize war through law.

2. The Path to the Treaty of Versailles

The first major effort to curb international crimes through international penal process arose after World War I. In 1914, Europe, divided by competing military alliances, was a powder keg waiting to explode. The fuse was lit when a Serbian nationalist assassinated Austrian Archduke Franz Ferdinand on the bridge at Sarajevo. Lacking any institution with authority to maintain peace, the disputing parties had no choice but to call upon their allies and resort to force. Without effective international law, the only alternative was war. By the time the war ended, tens of millions of soldiers and civilians lay dead or wounded. The total cost in human life was estimated at 22 million dead and eight million casualties. In monetary terms, the war cost 202 billion dollars, with property destroyed in the war topping 56 billion dollars.[32] Of the civilian death toll, Turkey was the leading perpetrator, massacring between one and two million Armenians, Greeks and Syrians, accounting for about fifty percent of the total civilian toll of the entire war.[33] All hearts cried out for a more peaceful world. Reconciliation could not even begin without first bringing to justice those individuals whose unconscionable atrocities had violated 'the laws of humanity' and who had been responsible as the authors of the war and 'for supreme offences against international morality and sanctity of treaties.'[34]

The devastation of the war provided a catalyst for the first serious attempt in modern times at international justice. Expectations ran high in 1919. World War I

30 Hersch Lauterpacht (ed), *Oppenheim's International Law: Disputes, War and Neutrality* (1952) vol 2, 179.

31 For a listing and brief commentary on the major conventions in the Hague Law regime, see M Cherif Bassiouni, *International Crimes: Digest/Index of International Instruments 1815–1985* (1986). See also European Law Students' Association, *Handbook on the International Criminal Court* (1997) 41–4.

32 For war costs at a glance, see Charles F Horne, *The Great Events of the War* (1923) vol 2. Table of cost in human life and money reproduced in Harold Elk Straubing (ed), *The Last Magnificent War and Eyewitness Accounts of World War I* (1989) 402–3.

33 For war costs at a glance, see Charles F Horne, *The Great Events of the War* (1923) vol 2. Table of cost in human life and money reproduced in Harold Elk Straubing (ed), *The Last Magnificent War and Eyewitness Accounts of World War I* (1989) 402–3.

34 *Treaty of Peace between the Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles').

had evoked revulsion of war and the logic of realpolitik that rationalized great-power rivalry, arm races, secret alliances, and balance-of-power politics. The experience led the policymakers gathered at the Paris peace talks at the Versailles Palace to re-evaluate assumptions about the rules of statecraft and to search for substitute principles for building a new world order. The policy-makers at Paris desired that their deliberations crystallize in policies rooted in the idealism of liberal international relations theory. The problem was not just to build a peace, but to construct a peaceful international order that would successfully manage all international conflicts of the future.[35] Idealists also advocated bringing State sovereign excesses under the jurisdiction of international law through international penal process and the promotion of international justice.

In a dramatic break with the past, and in a bid to build a normative foundation of human dignity, the chaos and destruction of the war gave rise to a yearning for peace and a popular backlash against impunity for atrocity. The war provoked criticism by many of both the outrageous behaviour by a government towards its own citizens (Turkey) and aggression against other nations (Germany). Both types of atrocity evoked demands for increased respect for humanity and the maintenance of peace. The devastation of the war provided a catalyst for the first serious attempt to crack the Westphalian notion of sovereignty. This dramatic new attitude was encapsulated in the enthusiasm for extending criminal jurisdiction over sovereign States (Germany and Turkey) with the aim of apprehension, trial and punishment of individuals guilty of committing atrocities under the rubric of 'war crimes' and 'crimes against humanity'. The peace treaties of Versailles and Sevres[36] envisaged liability for individuals even if their crimes were committed in the name of their States. However, the emerging commitment to human dignity was to be first derailed and then swept aside by resurgent nationalistic ambitions brewed in the cauldron of sovereignty and distilled by politics.

The Paris Peace Conference was the centre point of post-World War I efforts to not only redefine international relations, but also to resolve Europe's prevalent militarism and imperialism through a series of negotiated treaties. The Paris Peace Conference's activities were extensive attempting to resolve virtually all points of concern at the international level; from redrawing boundaries, granting mandates, crafting reparations bills to dismantling empires through the recognition of nations as independent States.[37] Importantly, the Paris Peace Conference was the forum

35 Kalevi J Holsti, *Peace and War: Armed Conflicts and International Order, 1648–1989* (1991) 175–6, 208–9.

36 *Treaty of Peace between the Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles'); *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, signed at Saint-Germain-en-Laye, 10 September 1919 [1920] ATS 3 (treaty entered into force 19 July 1920; Protocol, Declaration and Special Declaration entered into force 10 September 1919); *and Declarations, Treaties, and Other Documents Relevant Thereto*, signed at Paris, 5 and 8 December 1919 and 16 July 1920, and at Sèvres, 10 August 1920 ('Peace Treaty of Sèvres').

37 For the work of the Paris Peace Conference, see, eg, Harold Nicolson, *Peacemaking* (1933); Ray Stannard Baker, *Woodrow Wilson and World Settlement* (1922); Arthur Walworth, *Wilson and His Peacemakers: American Diplomacy at the Paris Peace Conference 1919* (1986); Arthur Walworth, *America's Moment: 1918* (1918).

within whose framework, the issue of judicial accountability for the atrocities was addressed. The Conference spawned the Allied Commission on the Responsibility of the War and on the Enforcement of Penalties (Allied Commission).

The Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties was charged with an onerous responsibility. It held closed meetings for two months and conducted intensive investigations.[38] This work was supposed to culminate in the charging of named individuals for specific war crimes. Besides German responsibility for the war and its breaches of the laws and customs of war, the commission also sought to charge Turkish officials and other individuals for 'crimes against the laws of humanity'[39] based on the so-called Martens Clause contained in the Preamble of the 1907 *Hague Convention (IV)*.[40] That clause states:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[41]

The Commission examined, among other offences, 'barbarous and illegitimate methods of warfare.' This included the category of 'offences against the laws and customs of war, and the principles of humanity,' which the French representative of the Third Sub-Commission,[42] Larnaude, insisted was 'absolutely' necessary to ensure human rights.[43] The Allied Commission proceeded in its investigation according to

38 James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 68.

39 M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd ed, 1999) 45. See generally Eugene Aroneanu, *Le Crime Contre l'Humanite* (1961); Pieter Drost, *The Crime of State* (1959); Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Year Book of International Law* 178.

40 *Convention Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, 1 Bevans 631, 632, preamble (entered into force 26 January 1910) ('*Hague Convention IV*'). See also Carnegie Endowment for International Peace, *The Proceedings of The Hague Peace Conferences: Translation of Official Texts – The Conference of 1899* (1920) 548. For a commentary on the Martens Clause, see Paolo Benvenuti, 'La Clausola Martens e la Tradizione Classica del Diritto Naturale nella Codificazione del Diritto dei Conflitti Armati', *Scritti Degli Allievi in Memoria di Giuseppe Barile* (1993) 173.

41 *Convention Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, 1 Bevans 631, 632, preamble (entered into force 26 January 1910) ('*Hague Convention IV*').

42 The Allied Commission appointed three Sub-Commissions to consider the questions to be faced. The Third Sub-Commission was concerned with the responsibility for the violation of the Laws and Customs of War. See Carnegie Endownment for International Peace *Report of the Commission on Responsibilities of the Conference of Paris on the Violation of the Laws and Customs of War* (1919) 97–8.

43 Her Majesty's Stationery Office, British Foreign Office Papers (FO), FO 608/246, Proces-Verbal No 6 at 57 (folio 417) (8 March 1919). For a description of the gradual emergence in the Allied countries' political and legal circles of an agreement to punish the Central Powers' civilian and military officials suspected of war- or atrocity-crimes, see J

the terms of the 1907 *Hague Convention (IV)*.[44] This Convention, part of the 1907 Second Hague Peace Conference package, was intended to give 'a fresh development to the humanitarian principles [towards] evolving a lofty conception of the common welfare of humanity.'[45]

It was in this context that Nicolas Politis, a member of the commission and Foreign Minister of Greece, proposed the adoption of a new category of war crimes meant to cover the massacres committed by Turkey against its minority Armenian population by, declaring: 'Technically these acts [the Armenian Massacres] did not come within the provisions of the penal code, but they constituted grave offences against the law of humanity.'[46] The majority of the commission hesitatingly concurred with Politis.[47] A 5 March 1919 report by the commission specified the following violations against civilian populations as falling within the purview of grave offences against the laws of humanity: systematic terror; murders and massacres; dishonouring of women; confiscation of private property; pillage; seizing of goods belonging to communities, educational establishments and charities; arbitrary destruction of public and private goods; deportation and forced labour; execution of civilians under false allegations of war crimes; and violations against civilians as well as military personnel.[48]

The American and Japanese representatives on the Commission however, objected to several key aspects of the Allied Commission's report.[49] The rest of the Commission rejected the American (and Japanese) opposition, and insisted on the insertion of penal responsibility provisions in the eventual peace treaty. Having overruled its chairman Robert Lansing (the United States' Secretary of State), a large majority of the Commission agreed that at the next renewal of the armistice the Germans should be required to deliver certain war criminals and also relevant documents; furthermore, Allied commanders in occupied territory should be ordered to

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Read, *Atrocity Propaganda 1914–19* (1941) 240–84; for details of the Commission deliberations, see J Read, *Atrocity Propaganda 1914–19* (1941) 254–65. The work of the Commission was divided into three areas with three corresponding subcommittees: (1) Criminal Offences respecting (a) violation of peace through aggression and (b) war crimes; (2) Responsibilities of the War involving the offenders covered under (1) (a) above and their criminal liabilities and their possible prosecution; (3) Violations of the laws of war affecting the offenders covered under (1) (b) above and their criminal liabilities and possible prosecution. Lansing headed this last Sub-committee, otherwise called the Commission of Fifteen.

44 *Convention Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, 1 Bevans 631, 632, preamble (entered into force 26 January 1910) ('*Hague Convention IV*').

45 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 24.

46 James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 157.

47 James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 157.

48 Carnegie Endowment for International Peace, *Report of the Commission on Responsibilities of the Conference of Paris on the Violation of the Laws and Customs of War* (1919).

49 Carnegie Endowment For International Peace, *Violations of the Laws and Customs of War: Report of the Majority and Dissenting Reports of the American and Japanese Members of the Commission on Responsibilities at the Conference of Paris* (1919) Pamphlet No 32, reprinted in (Supp 1920) 14 *American Journal of International Law* 122.

secure such wanted persons as lived in regions under their control.

The Commission's final report dated 29 March 1919 concluded that the war had been premeditated by Austro-Hungary and Germany; that they had deliberately violated the neutrality of Belgium and Luxembourg; that they had committed massive violations of the laws and customs of war;[50] and determined that 'rank, however exalted', including heads of state, should not protect the holder of it from personal responsibility.[51] The Commission also recommended the establishment of an international court composed of representatives of victors to try certain categories of offences, but specifically recommended against charging anyone with the offence of making aggressive war.[52]

In addition, the Commission's final report, also spoke of 'the clear dictates of humanity' which were abused 'by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods' including 'the violation of ... the laws of humanity.' The report concluded that 'all persons belonging to enemy countries ... who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.'[53] Prompted by the Belgian jurist Rolin Jaequemeyns, the Commission included, albeit did not sharply highlight, the crimes which Turkey was accused of having perpetrated against her Armenian citizens.[54] It concluded that '[e]very belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of [war crimes] ... if such persons have been taken prisoners or have otherwise fallen into its

50 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference, 29 March 1919', reprinted in (1920) 14 *American Journal of International Law* 95, 113–4.

51 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference, 29 March 1919, reprinted in (1920) 14 *American Journal of International Law* 95, 112–7.

52 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference, 29 March 1919', reprinted in (1920) 14 *American Journal of International Law* 95, 118–0.

53 Carnegie Endowment For International Peace, *Violations of the Laws and Customs of War: Report of the Majority and Dissenting Reports of the American and Japanese Members of the Commission on Responsibilities at the Conference of Paris* (1919) Pamphlet No 32, reprinted in (Supp 1920) 14 *American Journal of International Law* 122. The dissenting American members were Robert Lansing and James Scott, who felt that the words 'and the laws of humanity' were 'improperly added': Carnegie Endowment For International Peace, *Violations of the Laws and Customs of War: Report of the Majority and Dissenting Reports of the American and Japanese Members of the Commission on Responsibilities at the Conference of Paris* (1919) Pamphlet No 32, reprinted in (Supp 1920) 14 *American Journal of International Law* 122. In their Memorandum of Reservations, they maintained that the law and principles of humanity were not 'a standard certain' to be found in legal treatises of authority and in international law practices. They argued that these laws and principles do vary within different periods of a legal system, between different legal systems, and with different circumstances. In other words, they declared that there is no fixed and universal standard of humanity, and that a judicial organ only relies on existing law when administering it.

54 See Her Majesty's Stationery Office, British Foreign Office Papers-FO, FO 608/246, Third Session, 20 February 1919 at 20 (folio 163).

power,'[55] and recommended that any peace treaty provide for an international tribunal to prosecute war criminals.[56] The commission proffered a series of acts deemed war crimes which were subsequently codified into international law.[57] The acts were grouped into four categories: (1) offences committed in prison camps against civilians and soldiers of the Allies; (2) offences committed by officials who issued orders in the German campaign against Allied armies; (3) offences committed by all persons of authority, including the German Kaiser, who failed to stop violations of laws and customs of war despite knowledge of those acts; and (4) any other offences committed by the Central Powers that national courts should not be allowed to adjudicate.[58]

The work of the commission was to feature prominently in the subsequent treaties of peace negotiated by the representatives of the Allies and those of Germany and Turkey. In a dramatic break with past precedence, the peace treaties were to contain penal provisions as opposed to blanket amnesties characteristic of past instruments. Much of the debate among the Allies addressed issues concerning the prosecution of Germany's Kaiser Wilhelm II, German war criminals, and Turkish officials for 'crimes against the laws of humanity.'[59] However, because of serious disagreement among the Allies on the desirability of a war crimes tribunal, the recommendations of the Commission were to be subsequently incorporated only to a limited extent into the peace treaties of Versailles and Sevres.[60]

After much compromise, the Allied representatives finally agreed on the terms of the *Treaty of Peace between the Allied and Associated Powers and Germany* (*Peace Treaty of Versailles*), concluded at Versailles on 28 June 1919.[61] Besides other impor-

55 Carnegie Endowment for International Peace, *Report of the Commission on Responsibilities of the Conference of Paris on the Violation of the Laws and Customs of War* (1919), 121.

56 Carnegie Endowment for International Peace, *Report of the Commission on Responsibilities of the Conference of Paris on the Violation of the Laws and Customs of War* (1919).

57 The acts deemed war crimes are to be found in Carnegie Endowment for International Peace, *Report of the Commission on Responsibilities of the Conference of Paris on the Violation of the Laws and Customs of War* (1919), 114–5.

58 Carnegie Endowment for International Peace, *Report of the Commission on Responsibilities of the Conference of Paris on the Violation of the Laws and Customs of War* (1919). At the end of World War I in 1919, the major international instruments relating to the laws of war were the two Hague Conventions on the Laws and Customs of War on Land of 1899 and 1907: James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 5. Other sources of information on the laws of war included national military manuals and Geneva Conferences beginning in 1864. See James W Garner, 'Punishment of Offenders against the Laws and Customs of War' (1920) 14 *American Journal of International Law* 70 (general discussion of laws and customs of war in various states military regulations at the outbreak of the war in 1914).

59 For information on the Armenian genocide, see generally Vahakn N Dadrian, *The History of the Armenian Genocide* (1995); Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221.

60 James F Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 52–62.

61 *Treaty of Peace between the Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles').

tant matters including reparations, the treaty in Article 227 provided for the creation of an *ad hoc* international criminal tribunal to prosecute Kaiser Wilhelm II for initiating the war.[62] It further provided in Articles 228 and 229 for the prosecution of German military personnel accused of violating the laws and customs of war before Allied Military Tribunals or before the Military Courts of any of the Allies.[63]

3. Beyond the Treaty of Versailles

The limited incorporation of the recommendations of the Allied Commission with regard to penal provisions was to prove fatal because the treaty provisions pertaining to war crimes ultimately proved inadequate in the post-war political context.[64] The attempt to try war criminals failed for a number of reasons, including: the enormity of the undertaking; deficiencies in international law and in the specific provisions of the *Peace Treaty of Versailles*, which proved to be unworkable; the failure of the Allies to present a united front to the Germans and to take strong measures to enforce the treaty; and strong German nationalism. The victors' lack of control over affairs within Germany ultimately defeated the Allied attempt to bring accused war criminals to justice.[65]

Subsequently, the two major provisions of the *Peace Treaty of Versailles*, Articles 227 and 228, were not implemented as geopolitical considerations dominated the

62 *Treaty of Peace between the Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles') art 227.

63 Art 228 states:

> The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
>
> The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.

Art 229 states:

> Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel.

Treaty of Peace between the Allied and Associated Powers and Germany, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles') arts 228 and 229.

64 James F Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 52–62.

65 See generally Elizabeth L Pearl, 'Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victors' Justice?' (1993) 30 *American Criminal Law Review* 1389–90.

post-World War I era. Regarding prosecution of the Kaiser under Article 227, the Allies blamed the Netherlands government for its refusal to extradite him and some saw this as a way to avoid establishing a tribunal pursuant to Article 227. The Allies were not ready to create the precedent of prosecuting a head of state for a new international crime. Indeed, this was evident in the choice of words used by the Allies in drafting Article 227, authored primarily by representatives of Great Britain:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence ... In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality ... The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.[66]

Considering that the text of Article 227 does not refer to a known international crime, but defines the purported crime of aggression in a manner more analogous to a 'political' crime, the Dutch government had a valid legal basis to reject the Allies' attempt to secure the surrender of the Kaiser for trial. Article 227, quite possibly, was intended to fail. It offered a concession to the European masses, who saw the Kaiser as an ogre of war, and to the French and Belgian Governments, who wanted to humiliate Germany for initiating the war. Additionally, the notion of prosecuting the Kaiser troubled many. In particular, the British[67] (and obviously some of the Allies) feared that their Heads of State could be exposed to similar risks, thus subverting one of the cardinal tenets of international law – sovereign immunity.

As for the prosecutions intended by Articles 228 and 229, protracted political tussles resulted in a lengthy delay. By 1921 when the provisions finally got a realistic chance for implementation, the zest of the Allies to set up joint or even separate military tribunals had waned, and new developments in Europe required that Germany not be further humiliated. Though crimes against humanity were not ultimately included in the list of offences drawn up by the commission,[68] largely due to objections by the United States and Japan,[69] nevertheless, by 1920, the Allies had

66 *Treaty of Peace between the Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles'), arts 227–9.

67 James F Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 98–101.

68 Carnegie Endowment For International Peace, *Violations of the Laws and Customs of War: Report of the Majority and Dissenting Reports of the American and Japanese Members of the Commission on Responsibilities at the Conference of Paris* (1919) Pamphlet No 32, reprinted in (Supp 1920) 14 *American Journal of International Law* 122 (The United States, Great Britain, France, Italy and Japan were to appoint three persons each to the tribunal, while the other countries were to appoint one person each to the tribunal).

69 Carnegie Endowment For International Peace, *Violations of the Laws and Customs of War: Report of the Majority and Dissenting Reports of the American and Japanese Members of the*

compiled a list of approximately 20,000 Germans who were to be investigated for war crimes.[70] These crimes included torture, use of human shields, rape, and the torpedoing of hospital ships by German submarines.[71] While there is no question that these terrible crimes were covered by the international law of armed conflict as it then existed, the Allies were apprehensive of trying so many German officials and personnel as this posed a political problem for the Allies. After all, Germany was trying to reconstruct and the extensive trials might jeopardize the stability of the already vulnerable Weimar Republic and expose it to revolutionary Bolshevik influence.[72] 'Many politicians argued against prosecution, preferring instead to look to the future.'[73] However, since many of these crimes were truly heinous, complete freedom from prosecution was also unacceptable. An alternative solution was therefore proposed. Instead of setting up an international tribunal, Germany would conduct the prosecutions. An agreement was thus made, allowing the German government to prosecute a limited number of war criminals before the Supreme Court of Germany (*Reichsgericht*) in Leipzig instead of establishing an Allied Tribunal, as provided for in Article 228.

In response to the Allied request to undertake prosecutions, Germany, which had previously passed a national law to implement provisions of Articles 228 and 229 of the *Peace Treaty of Versailles*, passed new legislation to assume jurisdiction under its national laws in order to prosecute accused offenders before its Supreme Court, sitting at Leipzig as a way of placating public opinion in the Allied countries. Under German law, the Procurator General of the Supreme Court had the right to decide which cases would be brought to trial.[74] By refusing to surrender German nationals to the Allies for trial, the German government virtually repudiated Article 228 of the *Peace Treaty of Versailles*, which stipulated such a surrender. Field Marshal von der Goltz's scornful declaration that '[t]he world must realize that ... no catchpoll shall hand Germans over to the Allies,'[75] was symptomatic of the powerful resistance among Germans to which the Allies eventually succumbed. The outcome of the Leipzig proceedings was dismal by any standard of retributive justice. The original list of 20,000 names was whittled down by the Allies to 896 cases.[76] Of this, 884

Commission on Responsibilities at the Conference of Paris (1919) Pamphlet No 32, reprinted in (Supp 1920) 14 *American Journal of International Law* 122.

70 M Cherif Bassiouni, 'Former Yugoslavia: Investigating Violations of International humanitarian Law and Establishing an International Criminal Tribunal' (1995) 18 *Fordham International Law Journal* 1191, 1194.

71 James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 137–9.

72 James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 113.

73 M Cherif Bassiouni, 'The Time Has Come for an International Criminal Court' (1991) 1 *Indiana International and Comparative Law Review* 1, 57.

74 M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court (1997) 10 *Harvard Human Rights Journal* 11, 19–20.

75 A Pflanzer, *Le Crime de Genocide* (1956) 48.

76 The lists of these suspects were, in part, compiled and transmitted to the Germans by Britain (97), Belgium (334), Poland (57), France (332), Italy (29) and Rumania (41). The

suspects were either acquitted or summarily dismissed. Only twelve trials were held; half resulted in acquittals and half in convictions with light sentences. Allied disappointment at the popular exaltation of the defendants and subversion of justice led the Allies to appoint a Commission of Allied Jurists to examine the effect of the popular response on the proceedings. The Commission unanimously recommended to the Supreme Council that the Leipzig trials be suspended and the remaining defendants be tried before Allied Courts. Its recommendations however failed to yield the desired results.[77]

Nine months after the conclusion of the *Peace Treaty of Versailles*,[78] a treaty of peace was presented to Turkey on 11 May 1920. It was signed on 10 August at Sevres.[79] Based on the recommendations of the 1919 Allied Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, several articles stipulating the trial and punishment of those responsible for the Armenian genocide were incorporated into the *Peace Treaty of Sevres*.[80] Under Article 226, 'the Turkish government recognized the right of trial and punishment by the Allied Powers, 'notwithstanding any proceedings or prosecution before a tribunal in Turkey.'[81] Moreover, Turkey was obligated to surrender 'all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under Turkish authorities.'[82] Under Article 230 of the peace treaty, Turkey was further obligated to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which

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remaining suspects were fugitives.

77 *German War Crimes: Report of The Proceedings*, British Parliamentary Papers, Cmnd (1921) 1450.

78 *Treaty of Peace between the Allied and Associated Powers and Germany*, concluded at Versailles, 28 June 1919 [1920] ATS 1 (entered into force 10 January 1920) ('Peace Treaty of Versailles').

79 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, signed at Saint-Germain-en-Laye, 10 September 1919 [1920] ATS 3 (treaty entered into force 19 July 1920; Protocol, Declaration and Special Declaration entered into force 10 September 1919); *and Declarations, Treaties, and Other Documents Relevant Thereto*, signed at Paris, 5 and 8 December 1919 and 16 July 1920, and at Sèvres, 10 August 1920 ('Peace Treaty of Sèvres').

80 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, signed at Saint-Germain-en-Laye, 10 September 1919 [1920] ATS 3 (treaty entered into force 19 July 1920; Protocol, Declaration and Special Declaration entered into force 10 September 1919); *and Declarations, Treaties, and Other Documents Relevant Thereto*, signed at Paris, 5 and 8 December 1919 and 16 July 1920, and at Sèvres, 10 August 1920 ('Peace Treaty of Sèvres').

81 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, signed at Saint-Germain-en-Laye, 10 September 1919 [1920] ATS 3 (treaty entered into force 19 July 1920; Protocol, Declaration and Special Declaration entered into force 10 September 1919); *and Declarations, Treaties, and Other Documents Relevant Thereto*, signed at Paris, 5 and 8 December 1919 and 16 July 1920, and at Sèvres, 10 August 1920 ('Peace Treaty of Sèvres'). See also James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 180.

82 James F Willis, *Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982) 180–81.

formed part of the Turkish Empire on 1 August 1914. The Allied powers reserved to themselves the right to designate the tribunal which would try the persons so accused, and the Turkish government was obligated to recognize such a tribunal.[83] The *Peace Treaty of Sevres*, therefore, provided for international adjudication of the crimes perpetrated by the Ottoman Empire against the Armenians during World War I.

The Turkish response to the demand by the Allies for the surrender of arrested criminal suspects for trial before an international tribunal or inter-allied tribunal paralleled the German response. Not only did the Foreign Minister of the Istanbul government object to surrendering Turkish nationals to the Allies, but Mustafa Kemal, the head of the antagonistic Ankara government, rejected the very idea of 'recognizing a kind of right of jurisdiction on the part of a foreign government over the acts of a Turkish subject in the interior of Turkey herself.'[84] In the end, the penal provisions enshrined in the *Peace Treaty of Sevres* were to prove to be an empty, hollow threat. With the effort at international penal process dead, the attention now shifted to the Special Turkish Military Tribunal that was investigating war crimes committed against the Armenians.

Ultimately, the resulting courts-martial proved a judicial fiasco, confirming once again that a nation-state can rarely be expected to indict and convict itself.[85] Despite the fact that the Istanbul trials tried dozens of defendants[86] as opposed to the dozen at Leipzig, both outcomes were rather uninspiring. Though the Turkish trials were successful in documenting the crimes that had been committed against the Armenian people, they failed dismally, however, in punishing the war criminals. At the abrupt ending of the Turkish courts-martial, only three minor officials were executed.[87] Significantly though, the fact that even these three officials were found

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83 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, signed at Saint-Germain-en-Laye, 10 September 1919 [1920] ATS 3 (treaty entered into force 19 July 1920; Protocol, Declaration and Special Declaration entered into force 10 September 1919); *and Declarations, Treaties, and Other Documents Relevant Thereto*, signed at Paris, 5 and 8 December 1919 and 16 July 1920, and at Sèvres, 10 August 1920 ('Peace Treaty of Sèvres') art 230.

84 Speech delivered by Mustafa Kemal in Ataturk in 1927 (Istanbul, 1963).

85 The specifics of that fiasco are reflected in the comments made by British and American authorities observing the court-martial proceedings at the time. See Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221, 313, n 368 (citing several British Foreign Office documents as well as document from US National Archives); see also British Foreign Office Papers, FO 371/4173/80105, folio 419 (containing handwritten note in margin stating that 'common to all Turk-judiciary' proceedings is the habit of 'beating about the bush').

86 See Vahakn N Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series' (1997) *Holocaust and Genocide Studies* 32.

87 For a description of the individuals executed, Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221, 355; Vahakn N Dadrian, 'The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal' (1991) 23 *International Journal of Middle East Studies* 549, 566; and Vahakn N Dadrian, 'The Turkish Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series' (1997) 11

guilty and executed, encapsulated the shift in international justice from impunity to retributive justice. Another significant feature of the Turkish domestic process was that the Turkish authorities did invoke norms concerning the laws of humanity and crimes against humanity to justify the prosecution and punishment of the Turkish war criminals.[88]

The greatest milestone by the Turkish Courts-Martial was made in its verdict at the end of the Yozgat trial series. The Tribunal asserted that the perpetrators had violated the principle of 'human sentiments' [*hissiyat-I insaniye*].[89] These invocations, which went beyond Turkish municipal law and possess attributes of international law, may best be explained as attempts to apply a general principle of law that recognises certain crimes against humanity that need not be criminalised by domestic statute in order to be punishable.[90] Although ultimately ineffectual, the prosecution of the Turkish leaders implicated in the Armenian genocide before Turkish Courts Martial, which resulted in a series of indictments, verdicts and sentences, was of extraordinary, though unrecognised, significance. For the first time in history, deliberate mass murder was designated 'a crime under international law,'[91] and adjudicated in accordance with international norms within the ambit of a domestic penal code, thus substituting national laws for the rules of international law.

The Leipzig and Istanbul trials exemplified the sacrifice of justice on the altars of international and domestic politics.[92] The treaties commitment to try and punish offenders if Germany and Turkey failed to do so was never carried out. The political leaders of the major powers of that time were more concerned with ensuring the future peace of Europe than pursuing justice.[93] Indeed, it was a common belief that World War I was 'the war to end all wars,' and that the League of Nations would

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Holocaust And Genocide Studies 28, 52.

88 When a deputy of the Ottoman Parliament submitted a motion on 2 November 1918, to institute hearings in the Ottoman Chamber of Deputies to establish the responsibility of the members of the two wartime Cabinets, for example, he used the term 'the rules of law and humanity' [*kavaidi hukukiye ve insaniye*] to describe the offences. *Harp Kabinelerinin Isticvabi* [Hearings of the Wartime Cabinets] (1933) 5–6; see also Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of International Law* 221, 293–4. On 3 March 1919, when the Sultan responded to the request of the Cabinet to authorise a new law for court-martialling the perpetrators, he also denounced the offences in question as 'crimes against humanity' [*kanuni insaniyete ... karsI ika edilen ceraim*]: Ali Fuad Turkgeldi, *Gorup Isittiklerim* [What I Saw and Heard] (2nd ed, 1951) 194.

89 William Bishop Jr, *International Law: Cases and Materials* (3rd ed, 1971) 41, citing League of Nations, Permanent Court of International Justice, Advisory Committee of Jurists, Proces Verbaux of the Proceedings of the Committee, 16 June – 24 July 1920 (remarks of Baron Descamps, Chairman of the Committee of Jurists of the League of Nations, in discussion of generally accepted principles of international law).

90 Vahakhn N Dadrian, 'The Historical and Legal Interconnections between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice' (1998) 23 *Yale Journal of International Law* 503, 551.

91 R Lemkin, 'Genocide as a Crime under International Law' (1947) 41 *American Journal of International Law* 150.

92 M Cherif Bassiouni, *Crimes against Humanity* (1999) 202.

93 Telford Taylor, *The Anatomy of The Nuremberg Trials: A Personal Memoir* (1992) 15.

usher a new world order that would prevent future wars.[94]

The League of Nations represented an ambitious move to curb sovereign military excesses and guarantee world peace. It was during its chequered existence that two issues of significance which continue to plague the international community crept into the international agenda – terrorism and the limitation on the use of military force. With the formation of the League of Nations, the freedom of states to resort to military force became more and more restricted. The right of self-defence gained in significance displacing the expansive right of self-preservation. It was, however, the matter of terrorism rather than the aggressive use of force that would generate mild but renewed interest in the establishment of an International Criminal Court.

The birth of modern terrorism during the French Revolution represented practices of mass repression employed by the state, before metamorphosing into a revolutionary mechanism in the late 19th to early 20th century.[95] By the 1930s, modern terrorism had undergone a rebirth to re-emerge in its original form.[96] It was now used less to refer to revolutionary movements and violence directed against governments and their leaders, and more to describe the practices of mass repression employed by totalitarian states and their authoritarian leaders against their own citizens.

Despite the rebirth of terror as an intrinsic component of Fascist and Nazi governance, it remained an integral operational component of many shadowy, Radićal organizations in various parts of Europe. In the face of lack of ample military power or political legitimacy various Radićal nationalist organizations used terrorism as a major instrument in their overall strategy. It was through the actions of these groups that terrorism came to the League (and international) agenda amidst a background of the undermining of the collective security regime which the League had as the central pivot to curb aggression and other unwarranted uses of force.

On 9 October 1934, Mussolini, Italy's fascist leader told cheering masses at the

94 Subsequent, to World War I and its atrocities, the Allies, however, missed the opportunity to establish an international system of justice that would have functioned independently of political considerations to ensure uncompromised justice.

95 For a detailed tour de horizon on this see Jackson Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2005) 12-13, 22-23, 26-27

96 For the purposes of this work, the working definition is that adopted by the International Law Association in its 1982 Report:

> *any serious act of violence or threat* thereof by an individual whether acting alone or in association with other persons, organizations, places, transportation or communications systems or against members of the general public *for the purpose of intimidating* such persons, *causing injury to or the death* of such persons, disrupting the activities of such international organisations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States or *to extort concessions from States*.
>
> International Law Association, Draft Single Convention on the Legal Control of International Terrorism as contained in International Law Association, Report of the Fifty-Ninth Conference, art. 1(j), 497–504 (1982). This definition is broadly consistent with most definitions in academic literature, which generally require two elements: actual or threatened violence against civilians or persons not actively taking part in hostilities and the implicit or explicit purpose of the act being to intimidate or compel a population, government or organisation into some course of action.

Piazza del Duomo in Milano amidst a forest of green-white-red flags and Fascist standards, that the failure of Italy's wartime Allies to concede to Italy her rightful place in the sun after World War I was a grave mistake.[97] Importantly, the speech had an edge against Yugoslavia: 'We cannot maintain a passive attitude toward neighbouring countries. Our attitude is either friendly or hostile toward them.' On the same day that the Mussolini made the speech, a double assassination was committed in Marseille: King Alexander I of Yugoslavia and Jean Louis Barthou, the Minister of Foreign Affairs of France, were killed by fanatic Croatian assassins[98] from the *Ustaši*, the terrorist and extreme nationalist Croatian fascist organization.[99]

The most important consequence of the double assassination was that terrorism became an active and emotive concern for the international system. This induced the League of Nations in 1937 to adopt the first convention on terrorism the Convention for the prevention and punishment of terrorism.[100] Simultaneously, a convention for the creation of an international criminal court to enforce the terrorism convention was presented for adoption and ratification. Twenty-four states became signatories to the terrorism Convention, though it is telling that only one state, India, ratified it. The Criminal Court Convention did not receive a single ratification![101]

Naturally in the volatile and charged nationalistic and militaristic atmosphere in Europe at the time, terrorism was not viewed as a separate generic issue that demanded attention in the same way that attempting to preserve the crumbling collective security regime and/or reinforce military alliances was. In any case Europe (and the world) was already heading down the slippery slope of excessive state hegemonic ambition that would lead to World War II in less than three years.

The weak processes of international criminal justice following World War I and the dysfunctional collective regime of the League of Nations not only failed to deter the military leaders who initiated World War I, but enhanced their cynicism. It was to take another round of carnage and destruction in World War II before the international community broke through the bastions of State sovereignty to make individuals responsible before international tribunals for their own violations of international criminal law at the international military tribunals at Nuremberg and Tokyo Tribunals.

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97 Information online at http://www.hungary.com/corvinus/lib/eckh/eckh01.htm (visited 14 June 2005).

98 'These were the first shots of the Second World War' writes Anthony Eden. Sir Anthony Eden, *Facing the Dictators; The Memoirs of Anthony Eden, Earl of Avon* (1962) 119.

99 This party originated from the extremist Croatian Law Party founded by Ante Starčević – also the founder of the idea of a 'Greater Croatia', which claimed a racial and religious exclusiveness of the Croats, and advocated their right to territorial expansion.

100 League of Nations, *Convention for the Prevention and Punishment of Terrorism*, OJ 19 (1938) 23; League of Nations Doc. C.546 (I). M.383 (I) 1937V (1938), which contains an annex calling for the establishment of an international criminal court.

101 For a detailed examination of these two initiatives, see G Marston, 'Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions', (2002) 73 *British Yearbook of International Law* 960-915.

Chapter 2

The Tokyo Trial Revisited

Hisakazu Fujita

I. Introduction

It is more than half of a century since the International Military Tribunal (IMT, or Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTF; hereinafter Tokyo Tribunal or Tokyo Trial), the first *ad hoc* international criminal tribunals were established just after the Second World War. The International Criminal Court (ICC) as the first permanent international criminal court was constituted at the end of the 20th century, with a direct backdrop of these tribunals.
During this time-span the world has experienced many wars or armed conflicts which have promoted the development of international law, in particular international humanitarian law through the Geneva Conventions of 1949 and the Additional Protocols of 1977 as representative instruments. But, the branch of international criminal law or international criminal justice (regarded as a kind of mixed or amalgamated sort of international (humanitarian) law and national (criminal) law) experienced certain setbacks in the period of Cold War that dominated the second part of the 20th century. Since entering into the post-Cold War period beginning in the 1990s (after the bringing down of the Berlin Wall), the organs of the United Nations or other bodies, in particular, the International Law Commission (ILC) began to work for the development of an international criminal law and at last proposed the draft Statute of the ICC.

The Rome Statute's establishment of a permanent international criminal court is in fact taken from the past practical experience of the historical *ad hoc* international military tribunals. Therefore, it is interesting as well as indispensable to revisit the proceedings of the Tokyo Trial as well as the Nuremberg one.

This study is designed to re-examine the Tokyo Trial in comparison with the ICC. While a holistic analysis of all aspects of the Tokyo Trial, however, is not possible in this paper, several characteristic points of the Tokyo Trial (the constitution of the Tokyo Tribunal, jurisdiction, crimes, and enforcement in Japan) will be examined historically in relation to the development of international criminal law.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 23–49.

II. Background and Establishment of the Tokyo Trial

It is important, first of all, to see the development and constitution of the Tokyo Trial, with attention paid to the differences of those of the Nuremberg Trial, as well as those of recent international criminal tribunals.

A. Background

The direct background of the Tokyo Trial which was somewhat different from that of the Nuremberg Trial, can be found in the declarations on Japan of the principal Allied Powers during World War II. The Cairo Declaration (December1, 1943) issued by the three Allies, Britain, China and the US (heads of State President Roosevelt, Generalissimo Chiang Kai-Shek, and Prime Minister Churchill respectively) spelled out that their three countries would be satisfied with nothing less than the unconditional surrender of Japan, and "the purpose of this war is to stop and punish Japanese Aggression." The Potsdam Declaration of July 1945 issued by the same three Allies enunciated that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners,"(Paragraph 10).[1]

In the instrument of Japanese Surrender (September 2, 1945) all matters related to the arrest and treatment of war criminals were specifically stipulated.[2] By signing this instrument of surrender, Japan agreed formally that she would be subject to the Supreme Commander for the Allied Powers in order to punish Japanese war criminals.

In addition, at the same time, the United Nations War Crimes Commission (U.N.W.C.C.) which was established as a direct outcome of American, British and Soviet discussions in London in the summer of 1943 decided to appoint a special committee to make recommendations on the apprehension and trial of the Japanese war criminals. On August 29, 1945, it adopted a series of recommendations concerning "Japanese War Crimes and Atrocities." These recommendations declared that "those Japanese who have been responsible for the plans or policies which resulted in these abominable crimes and atrocities should be surrendered to or apprehended by the United Nations for trial before an international military tribunal.

These individuals and officials should include those in authority in the Government, in the military and police establishments, in the secret societies and

1 The swift succession of events following the Potsdam Declaration is well known: on 6 August 1945, the first atomic bomb was dropped on Hiroshima city and on 9 August the second one on Nagasaki city. On that same day, the Soviet Union entered into war against Japan. On August 10, the Japanese Government advised the United States Government of its readiness to accept the terms of the Potsdam Declaration – subject to a reservation with regard to the Emperor's prerogatives – and on August 14 (15 by Japan time), Japan's final acceptance of the Potsdam terms was communicated to the United States, Great Britain, the Soviet Union and China.

2 This instrument reiterated Japan's acceptance of the declaration's provisions including those regarding the punishment of war criminals. It proclaimed the unconditional surrender to the Allied Powers of the Japanese Imperial Headquarters and of all armed forces under Japanese control, and declared that the authority of the Emperor and the Japanese Government to rule the State would be subject to the Supreme Commander for the Allied Powers.

other criminal associations, and in the financial and economic affairs of Japan who by all civilized standards are probable to be war criminals."[3]

The Moscow Conference of Foreign ministers of the big four, Britain, China, the Soviet Union and the U.S., had already issued a Declaration on November 1, 1943, deciding that the Tribunal would be established in Tokyo. By contrast with the London agreement on war crimes in Europe, it recognized the military supremacy of the United States in the Far East. The U.S. had the responsibility for setting up an international military tribunal to try the most heinous Japanese war criminals, and the American Supreme Allied Commander in the Pacific (SACP) was ordered to select the members of the Tribunal from the ten Allied governments represented on the Far Eastern Committee.

However, the American government could not appoint a major judicial figure to play the role taken by Justice Jackson in the preparation of the Nuremberg trials. It was not until the latter part of October 1945 that the instructions to SACP, General Douglas MacArthur, were finally communicated to America's allies.[4] The Memorandum included in the instructions, notified to the SACP and the eight States – Australia, Britain, Canada, China, France, Netherlands, New Zealand, the Soviet Union, and the United States – requested to organize the Tribunal.

According to the memorandum (paragraph 1), the term "war crimes" as used herein, includes:

> A. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
> B. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill-treatment or deportation to slave labor or for any other purposes of civilian population, of, or in, occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, or elsewhere, improper treatment of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

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3 United Nations War Crimes Commission, *Draft Summary of Recommendations concerning Japanese War Crimes and Atrocities*, (28 August 1945), in *The Tokyo War Crimes Trial* (annotated, compiled and edited by Pritchard, R. John and Zaide, Sonia Magbanua), Vol.1 Index and Guide, Garland Publishing Inc., New York & London, 1987, pp.xi-xiv. The Commission recommends that "those Japanese who have been responsible for the plans or policies which resulted in these abominable crimes and atrocities should be surrendered to or apprehended by the United Nations for trial before an international military tribunal. These individuals and officials should include those in authority in the Government, in the military and police establishments, in the secret societies and other criminal associations, and in the financial and economic affairs of Japan who by all civilized standards are provable to be war criminals. The case against these major criminals is that they have devised, set in motion and carried out the criminal plans and enterprises which incited or resulted in the aggression, cruelties and brutalities which have outraged the civilized world. All of these barbarities are flagrant violations of international law, including the laws and customs of land and naval warfare."

4 Memorandum: *Policy of the United States in regard to the Apprehension and Punishment of War Criminals in the Far East. US Department of State,* in *The Tokyo War Crimes Trial,* Vol.1 Index and Guide, *op.cit*., xiv-xvi.

> C. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war or [per]secutions on political, racial or religious grounds in execution of or in connection with any crime defined herein whether or not in violation of the domestic law of the country where perpetrated.

These were in fact almost exactly corresponding to those of Article 6 (a),(b), and (c) of the Nuremberg Charter.

For the trial of persons charged with offenses of the type described in paragraph 1A, any international court appointed by the Supreme Commander, should be selected by him from persons nominated by the appropriate military commanders of the several nations to be represented by such court. The military command of any nation (including the U.S.) participating in the occupation of areas previously dominated by Japan, may upon the authorization of the SACP, establish special national military courts to deal with war criminals not held or requested by the Supreme Commander for trial by an international court or tribunal of crimes of the types referred to in paragraph 6 above (that is, type A).

From the different types (or classes) A, B and C of war criminals, only war criminals of type A as major war criminals were destined to be tried by the international military tribunal, while those of types B and C were tried by national military courts of the Allied countries (nations).

For the just and prompt trial and punishment of the major Japanese war criminals, as one of the steps for enforcing the terms of the Act of surrender, General Douglas MacArthur in his capacity as SACP, established the IMTFE by means of a special Proclamation on January 19, 1946.[5] The constitution, jurisdiction and functions of the Tribunal were set forth in a Charter of the Far East (hereinafter,"Tokyo Charter") approved and issued by him on the same day (but, amended on 26 April, 1946 by GHQ's General Order No.1.).[6] So, the Tokyo Charter to formally inaugurate the IMTFE was set out in a proclamation issued by the Supreme Commander for the Far East unlike the London (Nuremberg) Charter which had been formulated by treaty.[7]

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5 See Special Proclamation: Establishment of an International Military Tribunal for the Far East, in *The Tokyo War Crimes Trial,* Vol.1, Pre-Trial Documents, Transcript of the Proceedings in Open Session, pp.1-2.

6 See General Headquarters' General Order of the Supreme Commander for the Allied Powers, APO 500, 26 April 1946, in *The Tokyo War Crimes Trial, ibid.*

7 See International Military Tribunal for the Far East, Established at Tokyo, January 19, 1946, *U.S. Department of State Pub.*No.2675. The initial version of the Charter had been drawn up by the US based heavily on the Nuremberg language. It was amended somewhat after other Allied countries had appointed prosecutors by April of 1946. Ultimately the enterprise was joined in by judges and prosecutors from eleven Allied nations which had been involved in the struggle in Asia(-Pacific): Australia, Canada, Great Britain, India, the Netherlands, New Zealand, the Philippines, China, France, the USSR and the US.

B. The Tokyo Charter and the Jurisdiction of the Tribunal

The structure of the Tokyo Tribunal differed from that of the Nuremberg Tribunal which had been established five months earlier, in August 1945, in several ways. Without making a detailed comparison between the Nuremberg Charter and Tokyo Charter, it is of interest to note some differences.

First of all, while the Nuremberg Charter was part of a formal agreement between the American, British, Soviet and French Governments, on the establishment of the International Military Tribunal, the Tokyo Charter was issued by the Supreme Commander under the authority of the Allied Powers.

Further, while the Nuremberg Tribunal consisted of four members and four alternatives – a member and an alternative from each of the signatory powers – the Tokyo Charter provided for "not less than six members and no more than eleven members", there being one member only from each of the eleven countries represented: Australia, Canada, China, France, the Netherlands, New Zealand, the Soviet Union, the United States and Great Britain, to which Japan had capitulated, along with India and the Commonwealth of the Philippines, which had suffered the most from Japanese expansionism. The President of the Tribunal was not elected by its members, but appointed by the Supreme Commander for Allied Powers (Tokyo Charter, Arts.2,3). The Supreme Commander appointed Sir William Webb, the Australian representative, as a President of the Tribunal. The same was true of the Chief Prosecutor (Art.8).

At the top of the International Prosecution Section is the "Chief Prosecutor", whose responsibility was declared by the Charter to be "the investigation and prosecution of charges against war criminals within the jurisdiction of the Tribunal," and the rendering of "such legal assistance to the Supreme Commander as is appropriate." The Charter also provided that any United Nations with which Japan was at war might appoint an Associate Counsel to assist the Chief Counsel. The Supreme Commander appointed, as Chief Councel, Mr. Joseph B. Keenan, formerly head of the Criminal Division of the U.S. Department of Justice and Assistant to the Attorney-General. On the other side, the proper defence of the accused was expressly required by the Charter.

What is the most important, or rather problematic provision of the Tokyo Charter is that of "Jurisdiction over persons and offences" *(ratione personae,* and *ratione materiae*) which is provided in Article 5 as follows:

> The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against Peace, (b) Conventional War Crimes, (c) Crimes against Humanity.

Namely, Article 5 classifies acts "for which there shall be individual responsibility," and declares that the Tribunal shall have jurisdiction over persons who committed them. Under the heading (c), it goes on to provide that "Leaders, organisers, investigators, and accomplices participating in the formulation or execution of a common

plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

In order to limit the trial to "major" war criminals, the Tokyo Charter also provides that its jurisdiction is over persons who commit some or all of the acts (see below), including in every case those listed under (a).

The twenty-eight defendants (apprehended as "class A" war criminals and brought to trial) are, therefore, all charged with the commission of crimes against peace, though not all of them are charged with crimes under the second(b) or third(c) headings.[8]

C. The Indictment

The Indictment against twenty-eight defendants begins with a preamble setting out the gist of the counts. Immediately next to this are enumerated fifty-five counts, each alleging against all or some of the defendants, a different crime or number of crimes. These counts are grouped under three headings of Group One: "Crimes against Peace", Group Two: "Murder", and Group Three: "Conventional War Crimes and Crimes against Humanity."[9]

The Tokyo Charter itself specified the acts for which there should be individual responsibility and classified these under the above three headings. The Indictment might, therefore, have gone no further than to charge the defendants with the commission of these acts as crimes by virtue of the Charter.

In the case of the crimes charged in all three Groups, however, the Indictment reads clearly that the Prosecution bases the responsibility of the defendants upon "International Law", and, in the case of crimes charged in Group Two (Murder and Conspiracy to Murder) reliance is also placed upon the fact that the acts charged are contrary to the domestic laws of all countries, including Japan.[10]

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8 The accused (defendants) included 9 civilians and 19 professional military men: 4 former premiers (Hirota, Koiso, Tojo), 3 former foreign ministers (Matsuoka, Shigemitsu, Togo), 4 former war ministers (Araki, Hata, Itagaki, Minami), 2 former navy ministers (Nagao, Shimada), 6 former generals (Doihara, Kimura, Matsui, Muto, Sato, Umezu), 2 former ambassadors (Oshuma, Shiratori), 3 former economic and financial leaders (Hoshino, Kaya, Suzuki), 1 imperial adviser (Kido), 1 (radical) theorist (Okawa), 1 admiral (Oka), 1 colonel (Hashimoto). On April 29, 1946, the Indictment was presented to the Tribunal by Chief Prosecutor Keenan. This document with appendices is a statement of the crimes with which the accused are charged.

9 Then follow several appendices. *Appendix A* is a summary of the principal matters and events to be relied upon by the Prosecution in support of the counts of Group One. *Appendix B* lists the articles of treaties which the Prosecution contend were violated by Japan (Group One and Two). *Appendix C* sets out the official assurances violated (Group One), and *Appendix D* lists the Conventions and Assurances to be relied upon in proving the breach by Japan of the Law and Customs of War and particulars of those breaches. Finally, *Appendix E* states the various offices held by each defendant between 1928 and 1945, and charges that each defendant "used the power and prestige of the position he held and his personal influence in such a manner that he promoted and carried out the offences set out in each Count of this Indictment in which his name appears."

10 The first five Counts charge all the defendants that they participated as leaders, organisers, instigators or accomplices in the formulation or execution of a common plan or conspiracy. The plan as a whole is comprehensively described in the first Count, while the

The vast field and the extent of the period (January 1928 to September 1945) covered by the Indictment indicated some difficulty in deciding who were the defendants. A number of those who had played principal roles were already dead. The Indictment included, however, the survivors selected among those bearing responsibility at the highest level for the most serious of the alleged crimes.[11] The International Prosecution Section of the SACP decided to try seventy Japanese leaders, the first group of whom, numbering 28 war criminals were all major leaders in military, political and diplomatic spheres.[12]

D. The Judgment and Sentences

The judgment of the Tokyo Tribunal is very lengthy. The majority opinion of the judgment examined the nature of the counts in the Indictment and stated that "the law of the [Tokyo] Charter is decisive and binding on the Tribunal," and the Tribunal had no jurisdiction except that expressly found within the Charter. The Tribunal held that the law of the Charter was conclusive and, therefore, the contentions including such matters as lack of individual criminal responsibility, *ex post facto,* and the lack of any pre-existing concept of aggressive war, must be dismissed.[13]

On the other hand, Justice Pal (India)'s dissenting opinion which is extraordinarily lengthy in comparison to the dissenting opinions of other judges (Bernard, Jaranilla, Roling), criticized the entire trial and its outcome, stating that the Tribunal

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Counts 2 to 5 each cover a different phase of the plan as it is alleged to have developed. Counts 6 to 17 charge the "planning and preparing" of a war of aggression and a war in violation of international law, etc., against the various United Nations separately. Counts 18 to 26 charge the "initiation" and Counts 27 to 36 the "waging" of such a war. Counts 37 to 38 charge certain of defendants with the formulation or execution of a common plan or conspiracy to kill and murder by initiating unlawful hostilities and, therefore, the defendants not acquiring the rights of "lawful belligerents." Counts 39 to 43 contain charges in respect of the surprise attack on December 7 and 8 at Pearl Harbour, Kota Bahru, Hongkong, Shanghai, and in the Philippines. Count 44 charges all the defendants with a common plan or conspiracy to procure or commit full-scale murder of a number of prisoners of war and civilians. Counts 45 to 50 charge certain of the defendants in respect of attacks on Chinese cities and populations. Counts 51 and 52 relate to attacks by Japanese armed forces in 1939 upon the territory and armed forces of Mongolia and the Soviet Union. The remaining Counts (53-55) under the heading of "Conventional War Crimes and Crimes against Humanity," charge certain of the defendants with breaches of the laws of warfare in respect of Japan's treatment of prisoners of war and civilian internees.

11 The prosecution was in fact made in the name of all the Allied states, not, as at Nuremberg, divided among the various states. The principles underlying the selection of the defendants resembled those applied at Nuremberg, at least in so far as there was a representative rather than a comprehensive selection of those against whom membership in the "conspiracy" could be alleged. Such a procedure obviously leant itself to a good deal of maneuvering within the prosecution group. See: *The Tokyo War Crimes Trial,* Vol.1 Index and Guide*, op.cit.,* p.xix.

12 Of the 70 Japanese war leaders apprehended as Class A war criminals, the first group of 28 were brought to trial. Two (Matsuoka and Nagano) of 28 defendants died of natural causes during the trial. One defendant (Okawa) had a mental breakdown in the first day of trial, was sent to a psychiatric ward and was released in 1948, as a freeman.

13 Judgment of the IMTFE, Vol.1, pp.23-24.

was not limited to the law set forth in the Charter and that the Charter might be "ultra vires". He insisted that the Tribunal had a right to see if the law was correctly stated in the Charter.[14]

Of the 28 defendants, two (Matsuoka and Nagao) died of natural causes during the trial, and one (Okawa) was sent to a psychiatric ward. The remaining 25 were all found guilty: 7 (including Commander Tojo of the Kwantung Army, and later prime minister) were sentenced to death by hanging; 16 to life imprisonment, and 2 to lesser terms.

The Judgment[15] chose to ignore all but ten of the original fifty-five counts, that is: count 1, the general conspiracy charge,; counts 27, 29, 31, 32, 33, 35, and 36, which dealt with the "waging" of war against named countries; and counts 54 and 55, those dealing with breaches of the laws and customs of war against the armed forces, prisoners of war, and civilian internees of the complaining powers.

Of the seven accused who were condemned to death and executed, three were found guilty on both counts 54 and 55, one, General Matsui, was found to have been "criminally negligent" in not bringing to an immediate end the atrocities that accompanied the capture of Nanking. Three were found to be so seriously incriminated under count 54 that no finding was made on count 55. General Matsui was the exception to the rule in that the conviction on count 55 accompanied by acquittal on count 54 (as with Hata, Koiso, and Shigemitsu) was regarded as less serious by the judges.

The second most serious count in the eyes of the judges was clearly count 1. Shiratori, a diplomat, was acquitted on all counts. Count 55, nevertheless, still drew a life sentence. The case of Togo, foreign secretary at the time of Pearl Harbor, found guilty on both general conspiracy and four other charges, yet sentenced to twenty years, the second most lenient sentence, deserves to be mentioned.

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14 Dissenting Opinion of Pal, *Judgment,* Vol.VI, pp.50-51, 147-151.

15 Judgment read by the President of the Tribunal, see *The Tokyo War Crimes Trial, op.cit., Trial Transcripts* (hereinafter, cited as *Tokyo Transcript*), pp. 48413-49751; Sentenced Imposed by the Tribunal, *ibid.,* Tokyo Transcript. pp.49854-49858.

The remaining 25 were all found guilty, many of multiple counts, 7 (Doihara (spy, later Air Force commander), Hirota (foreign minister), Itagaki (war minister), Kimura (commander, Burma Expeditionary Force), Matsui (commander, Shanghai Expeditionary Force), Muto (commander, Philippines Expeditionary Force), Tojo (commander, Kwantung Army, later prime minister) were sentenced to death by hanging, 16 to life imprisonment, and 2 to lesser term. 3 of the 16 sentenced to life imprisonment died between 1949 and 1950 in prison. The remaining 13 were paroled between 1954 and 1956, less than 8 years in prison for their crimes, 2 former ambassadors were sentenced to seven and twenty years in prison. One died 2 years later in prison. The other one, Shigemitsu, was paroled in 1950, and was appointed foreign minister in 1954.

The rest which was divided into the second and third groups awaited to be tried in Sugamo prison in Tokyo. The second group of 23 war criminals and the third group of 19 war criminals were notorious, industrial and financial magnates, warmongers engaged in ammunition trade and trafficking in drugs, as well as some less known. Notably among them was Kishi, Nobusuke (Taking charge of industry and commerce of Manchukuo, 1936-40; Minister of Industry and Commerce under Tojo cabinet); and Prime Minister of Japan, 1957-1960). All the un-condemned Class A war criminals were set free by General MacArthur in 1947 and 1948. Most of them immediately returned to the Japanese political arena.

While as above-mentioned, the background, constitution and processes of the Tokyo Trial are very different from those of the ICC, there seem to be several similarities or common points in the provisions of the Tokyo Charter and those of the Rome Statute, in particular regarding the categories and elements of international crimes over which the international criminal tribunal has jurisdiction. Taking into account the proceedings of the Tokyo Trial as well as its Judgments and Sentences, we are going to examine among others, several remarkable aspects of "new" international crimes included in the Tokyo Charter and the Indictment.

III. Crime against Peace and the Problem of Conspiracy

Among the crimes provided for in Article 5 of the Tokyo Charter, "crimes against peace", for which there shall be individual responsibility, is the most disputed of the Tokyo Trial. Prosecutors, defendants or judges of the Tokyo Trial have discussed the nature and elements of this crime at length.

The Nuremberg Charter was the first instrument to establish individual responsibility under international criminal law, for an act of aggression.[16] The wording of its Article 6(a), declaring a crime against peace, was adopted in Article 5(a) of the Tokyo Charter which followed in fact paragraph 1.A of the above-mentioned memorandum "Policy of the United States in regard to the Apprehension and Punishment of War Criminals in the Far East."

A "Crime against peace", as defined in Article 5(a) of the Tokyo Charter is : "the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the forgoing [above]."

In this wording, one cannot find any definition of a war, nor a war of aggression. But the Tokyo Charter did state that a war of aggression was a crime under international law.

Several months prior to the commencement of the Tokyo Trial, the Nuremberg Judgment declared under the heading 'The Common Plan or Conspiracy and Aggressive War' that: The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world."; "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[17]

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16 At the Nuremberg Tribunal of the major war criminals, all 22 defendants were charged with crimes against peace, and 12 were convicted of this crime.

17 IMT, Judgment of 1 October 1946. In *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, p.447; Friedman, Vol.II, p.925. Jackson says in preface of his Report of 1945 to the President of the United States: "The charter is something of a landmark, both as an instrument establishing a procedure for prosecution and trial of such crimes before an international court": "The most significant results of applying these definitions as the law of nations are to outlaw wars of aggression."; "The charter also enacts the principle that individuals rather than states are responsible for criminal violations of international law

Thus, the Nuremberg Tribunal established the essential step from prohibiting aggressive war to criminalizing it by the following argument: because of the grave consequences, waging an aggressive war was the most serious of all crimes. To enforce the prohibition of war, those responsible had to be punished. It declared that, to enforce the prohibition of war, one needed to have in mind that wars were not committed by states themselves, but by people, who needed to be held accountable.[18] The Tribunal thus concluded, from the act that waging an aggressive war deserved and needed punishment, that it was in fact criminal.[19]

Following this Nuremberg precedent, the nature or character of this "new" crime and individual responsibility has been stressed by Chief Counsel Keenan, for the Prosecution at the beginning of the Tokyo Trial proceedings. He read the above-mentioned Indictment regarding the international crime of aggressive war and the individual responsibility of the defendants. In his statement, he stressed that this was not an ordinary trial, "it was part of civilization's attempt to preserve the world and its inhabitants from destruction."

He said that long before the occurrence of the acts charged in the Indictment (covering the period from 1928 to 1945), aggressive warfare had been condemned as illegal. By that agreement (at the First Hague Conference in 1899 and the Second one in 1907) undeclared wars and treacherous attacks were branded as international crimes.[20]

Keenan concluded that portion of his address which dealt with the law by referring to the matter of the individual responsibility of the defendants. For many years, he said, sober-minded and peaceful men and women all over the world had been puzzled in their search for the reason why transgressors in the high places of a nation, who brought about international tragedies, should remain unpunished .... In the Prosecution's submission, Keenan said that "the conspiracy of the defendants to commit the crimes charged was an offence in itself, and for conspiracy individuals are responsible. Secondly, all governments were operated by human agents, and all crimes were committed by human beings." The Tribunal should recognize as law a principle that followed the needs of civilization and was a clear expression of the public conscience.[21]

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and applies to such landmarks the principle of conspiracy by which one who joins in a common plan to commit crime becomes responsible for the acts of any other conspirator in executing the plan. In prohibiting the plea of "act of state" as freeing defendants from legal responsibility, the Charter refuses to recognize the immunity once enjoyed by criminal statesmanship. Finally, the Charter provides that orders of a superior authority shall not free a defendant from responsibility, though they may be considered in mitigation of punishment if justice so requires." *Report of Robert H. Jackson United States Representative to the international Conference on Military Trials,* London, 1945, Ams Press, New York, N.Y., 1971, Preface, pp.VIII-IX.

18 IMT, Judgment*, ibid.*, p.447 (Freedman, p.925.)

19 IMT, Judgment, *Proceedings*, Part 22, p.447, cited in Werle, Gerhard, *Principles of International Criminal Law*, T.M.C. Asser Press, 2005, p.392.

20 Opening Statement by the Prosecution, in *Tokyo Transcript*, pp.381-389.

21 See Harold Evans, "The Trial of Major Japanese War Criminals. The International and Military Tribunal for the Far East," *New Zealand Law Journal*, December 2, 1947, p.324. Keenan, in his book published in 1950 – the work constituting, in effect, the position taken by the United States at the historic Tokyo war crimes trial – expressed the concept of

In the proceedings of the Tokyo Trial, the above arguments on the concept of crimes against peace and in particular, that of the criminalization of aggressive war and its elements, have been criticized from the point of view of the doctrine of *ex-post fact* law or the principle of *Nullum crimen sine leg*e. It was argued by the counsels of the defendants that crimes against peace were applied *ex post facto*, and thus violated principles of justice.[22] It is correct to say that waging war was widely proscribed during the period of inter-world war, but not explicitly criminalized prior to the outbreak of World War II.

It is true, however, that even in that period, there had long been efforts to criminalize aggressive war. While Article 227 of the Versailles Treaty providing for the prosecution of ex-Kaiser Wilhelm II, could not be implemented, the Covenant of the League of Nations prohibiting or limiting war, entered into force. Furthermore, while the Geneva Protocol of 2 October 1924 defining aggressive war as an international crime (Preamble, para.3.) was not ratified by any State, this formulation of aggressive war as an international crime was taken up by several resolutions of the League of Nations.

Thus, as a logical consequence of the prescription of war even before World War II, at least the stage had been set for affirming individual criminal responsibility for aggressive war. So, one may confirm that the *ex post facto* prohibition has not prevented holding state leaders responsible for crimes they committed against international criminal law. But, it is also true that there was no treaty that called for criminal prosecution of the state leaders as individuals responsible for waging aggressive war.

Therefore, the Tokyo Charter as well as the Nuremberg one formed the basis for the criminalization of aggressive war. The crimes provided for in both Charters, and

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aggressive war in saying that "it is rather an activity involving injustice between nations, rising to the level of criminality because of its disastrous effects upon the common good of international society." On criminal justice of aggressive war, Keenan states that "The injustice of a war of aggression is criminal because of its extreme grossness, considered both from the point of view of the will of the aggressor to inflict injury and from the evil effects which ensue."; "Unjust war are plainly crimes and not simply torts or breaches of contracts. The act comprises the willful, intentional, and unreasonable destruction of life, limb, and property, subject matter which has been regarded as criminal by the laws of all civilized peoples. Whether an act is criminal or tortuous depends on its nature and consequences. Keenan says further on criminal character of attacks on Pearl Harbor: "The Pearl Harbor attack breached the Kellog-Briand Pact and the Hague Convention III. In addition, it violated Article XXIII of the Annex to the Hague Convention IV. of October, 1907 (...). But the attack of Pearl Harbor did not alone result in murder and the slaughter of thousands of human beings. It did not eventuate only in the destruction of property. It was an outright act of undermining and destroying the hope of a world for peace. When a nation employs deceit and treachery, using periods of negotiations and the negotiations themselves as a cloak to screen a perfidious attack, then there is a prime example of the crime of all crimes." Keenan, Joseph Berry and Brown, Brendan Francis, *Crimes Against International Law*, Public Affairs Press, Washington, 1950, pp.57-87. See also *Tokyo Transcript*, May 13, 1946, p.419.

22 See also Open Statement of the Defense, in *The Tokyo War Crimes Trial, Vol.7, Transcript of the Proceedings*, pp.17004ff. See also the most critical argument on crime against peace by Carl Schmidt in his expertise opinion to be presented to the Nuremberg Trial in Schmidt, Carl, (Quaritsch, Helmut (ed.)), *Das Internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum Crimen, Nulla Poena Sine Lege"*, Dunker & Humbolt GmbH, 1994.

above all the Tokyo Judgment as well as the Nuremberg one might have been the starting points for the confirmation of the ruling that waging aggressive war is criminal.[23] One may agree in this sense that the Nuremberg and Tokyo Trials embodied the state practice of most States or the Allied Powers as well as *opinio juris* at that period in order to create a rule of customary international law.

Next, it is important, from the point of view of international criminal law, to examine the possible material and mental elements of a crime against peace in the Tokyo Trial, as well as the Nuremberg Trial. On the material elements, Art.5 (a) of the Tokyo Charter and Art.6 (a) of the Nuremberg Charter, criminalized "the planning, preparation, initiation or waging of a (declared or undeclared) war of aggression, or a war in violation of international treaties, agreements or assurances." According to these wordings, crimes against peace could be accomplished through either wars of aggression (declared or non-declared in the Tokyo Charter) or wars that violate international treaties.

The Nuremberg Tribunal discussed the crime of aggressive war thoroughly, but did not consider in depth the subject of waging war in violation of international treaties, because aggressive war had already been proven.[24] One may infer from this that even in the view of the Nuremberg Tribunal, two different offenses- aggressive war and waging war in violation of an international treaty – make up the crime against peace. However, while the offense should not be split in this way between the two, aggressive war is criminalized as a war prohibited under international law.[25]

But, the outlawry of war or illegality of a war under international law is not in itself sufficient to make it an aggressive war. The wars condemned in the Nuremberg Trial or Tokyo Trial aimed to totally or partially annex, subjugate or dominate the territory of the attacked States involved. Characteristic of the situations criminalized as wars of aggression was the attackers' aim to subjugate another State and to use its resources for the benefit of the attacking State.

Thus, as the mental element of the crime against peace, an additional aggressive state of mind is necessary to distinguish a war of aggression from other illegal wars. And, the aggressive aims of a war are generally determined by the government or political leaders deciding to wage the war and can be proven, for example, through their statements or decisions.[26]

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23 In United Nations General Assembly Resolution 95(I) of 11 December 1946, the criminality of waging aggressive war was expressly "affirmed". Later, Article 5(2), sentence 1, of the UN Definition of Aggression (General Assembly Resolution 3314(XXIX) in 1974 and Principle 1(2) of the Friendly Relations Declaration (General Assembly Resolution 2625 (XXV)) in 1970 explicitly defined aggressive war as a crime against international peace. In 1991 and 1996, the ILC submitted drafts, each of which contained the crime of aggression.

24 IMT, Judgment of 1 October 1946, *op.cit.*, Part 22, p.445.

25 Jescheck, Hans-Heinrich, *Die Verantwortlichkeit des Staasorgane nach Volkerstrafrecht* (1952), p.348. He states that the definition of aggressive war is "nothing but a popular expression of a war prohibited under international law." In this vein, Control Council Law No.10 speaks of "war of aggression in violation of international laws and treaties. Thus from a methodological standpoint an "aggressive" war can only be found to exist if the war is contrary to international law."

26 Thus, the Nuremberg Tribunal found that Hitler's *Mein Kampf* already contained an "unmistakable attitude of aggression," which would continue to mark the German Reich

Further, on degree or intensity of the use of armed force for aggressive war, any belligerent use of military force may be not necessarily an aggressive "war". Instead, a use of force must reach a certain degree and intensity in order to qualify as war.[27] Relating to the degree or intensity in question, an express declaration of war is not necessary for war to be present, but the initiation of hostilities of a certain intensity is required.

The Nuremberg Tribunal viewed the German Reich's occupation of Denmark as an aggressive war, in spite of the fact that no state of war existed.[28] The Tokyo Charter expressly provided that a declaration of war was irrelevant, thus abandoning the traditional concept of war. Its Art.5 (a) used the wording "declared or undeclared war of aggression."

While the Nuremberg Charter did not yet contain this wording, the indictment, as well as the judgment of the Tokyo Tribunal considered the invasion and domination, for example, in Manchuria or other regions in China by Japanese armies without any declaration of war, as war of aggression.[29]

The argument to criminalize war of aggression must conduct to that of individual responsibility of state actors launching such a war.

On individual responsibility, Article 5 of the Tokyo Charter conferred jurisdiction upon the Tribunal "to try and punish Far Eastern war criminals, who, as individuals, or members of organizations, are charged with offenses."[30]

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and was judged to constitute preparation of aggressive war. IMT, Judgment, *op.cit*., pp.422 *et seq.* At the Tokyo Trial, the influence of the theory (argument) of Okawa asserting Japan's need for acquiring Manchuria and the book of Kita, Ikki, on "The Gist of the National Reformation Plan" for the accused war leaders was discussed. See *The Tokyo War Crimes Trial, Vol.7, Transcript of the Proceedings,* pp.15560ff.

27 Griffiths,R.L., 2 *International Criminal Law Review*,(2002), 301 at pp.319 *et seq*. To determine the necessary degree of military force, recourse must be had mainly to the Nuremberg judgments. The German attacks on neighboring States that were tried at Nuremberg were generally waged by large armies on broad fronts; they led to total or partial occupation of the victimized State. The offense of aggressive war requires use of a similar degree of military force.

28 IMT, Judgment, *op.cit*., p.437.

29 See Appendix A of the Indictment – Military Aggression in Manchuria (Sec.1); and in the Rest of China (Sec.2); Economic Aggression in China and Greater East Asia (Sec.3); General Preparation for War (Sec.5); Collaboration between Japan, Germany and Italy, Aggression against French Indo-China and Thailand (Sec.7); Aggression against the Soviet Union (Sec.8); Japan, the U.S., the Commonwealth of the Philippines and the British Commonwealth of Nations (Sec.9); and Japan, the Kingdom of The Netherlands and the Republic of Portugal (Sec.10) – in *The Tokyo War Crimes Trial, Vol.1, Pre-Trial Documents*; Opening Statement by the Prosecution Phases III,IV,VI,VIII,IX, XI, XII. *Ibid.*, p.1ff.

30 Considerable judicial and quasi-judicial precedent is available to show that persons have been punished for violation of that division of international criminal law which is known as the laws and customs law. *Tokyo Transcript,* May 16, 1946, p.244.); Keenan, *op.cit*., pp.123-124. It was held in the case of *Ex parte Quirin*, decided by the Supreme Court of the United States in 1942, that individuals might be held punishable for crimes against international law. The Supreme Court also held in the *Yamashita case* that individuals came within the operation of international criminal law. (327 *U.S.1.(1946)* See also *Tokyo Transcript,* June 4, 1946, p.433). Articles 227 – 230 of the Treaty of Versailles, 1919, recognized the responsibility of the individuals for war crimes. In 1921, the German Supreme

And, Article 6, relating to the responsibility of the accused, stated: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to an order of his government, or of a superior, shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment, if the Tribunal determines that justice so requires." This Article seems to confirm that the defenses of the doctrine of act of State as well as that of superior orders were not applicable in this case.[31]

When the doctrine of act of State is applicable, an individual, who acts in the name of his State or Sovereign and with its authority, is liable for wrongs only in the Court of that State.[32] The courts of other States do not have jurisdiction over him. According to this doctrine, those who act as instruments of the State may interpose its sovereignty so as to claim personal immunity from punishing by a foreign State, on the ground that no State has authority over another sovereign State, its head, or its representatives.

But, the doctrine of act of State may not be applied if the acts in question are international law crimes. This position was expressed in the following language by the Nuremberg opinion: 'The principle of international law, which, under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be free from punishment in appropriate proceedings."[33]

As to the principle of superior orders, this doctrine generally refers to the defense of immunity claimed by a person of inferior rank who owes a duty of obedience to a superior giving the order. If it is applicable, the agent may claim immunity for his act on the ground that it was only ministerial and done in pursuance of a command by his lawful superior. But, the principle has no application if the order of the superior was a command to break international criminal law, and the inferior acted with sufficient knowledge of the facts to realize, as a reasonable man, that he was violating the law in question.[34]

It was the opinion of the Nuremberg Tribunal: "That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order

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Court at Leipzig, in the case of hospital ship named *Llandovery Castle,* which involved the shooting of survivors in life-boats, ruled that international criminal law was applicable to individuals. (Glueck, S., "The Nuremberg Trial and the Aggressive War," (Feb) 59 *Harvard Law Revue* (1946) 396, pp.432,433; "Llandovery Castle Case," 16 *AJIL* (1922) 704, p.721.

31 Keenan, *op.cit.*, p.130: This was in accordance with a natural law concept of these two doctrines.

32 Lemkin, R., "The Legal Case Against Hitler," February 14, 1945, *The Nation*, p.206.

33 Nazi Conspiracy and Aggression, IMT Opinion and Judgement, 1947, p.53.

34 *Nuremberg Transcript,* July 26, 1946, pp.14, 451. See also "Llandovery Castle Case," 1921, 16 *AJIL* (1922) 708, p.722. In the case of *Ex parte Quirin*, the potential saboteurs were convicted, although they were acting under the order of governmental superiors. (Lauterpacht, H., "The Law of Nations and the Punishment of War Crimes," *BYIL* (1944) 58, pp.72, 83).

may be urged in mitigation of punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[35] The Prosecution in the Tokyo Trial maintained that the defendants were not entitled to the defenses of act of State or superior orders.

The defense of act of State was not available to them because they were men high in the councils of the Japanese State at the time of the commission of the acts for which they were tried. It is true that they acted pursuant to the orders of their State, in official capacities, but actually they were responsible for those orders.[36] The resulting acts were criminal. And, there was no possibility that the Japanese State on its own initiatives would punish these acts, for the State was controlled by the men who originated the orders.

The Prosecution showed that the accused gave, rather than executed, orders. In so far as they may have executed orders, they did so with full knowledge and realization of the criminal character of their undertakings. It proved beyond reasonable doubt that the defendants had access to facts and evidence, which must have convinced them, reasonable men, that their wars were criminally unjust.[37]

In the context of such individual responsibility, in accordance with the principles of Nuremberg and Tokyo, the crime against peace may be correctly classified as a "leadership crime." It is true that neither Nuremberg nor Tokyo Statutes contained explicit limitations on the class or category of perpetrators. But it can be inferred from the Indictment and Judgment of the Tokyo Trial that only political or military leaders were considered perpetrators of crimes against peace.

As seen above, the class of perpetrators of this crime is thus limited to a relatively small group of military and political leaders.[38] The perpetrator must not necessarily make the actual decision on war and peace, but must take part in activities of major significance in preparing, initiating or waging a war of aggression.[39] The Prosecution in the Tokyo Trial, facing the above-mentioned difficulty of the task in deciding whom to make defendants, sought to select a representative group of defendants. This posed a dual problem.

Defendants were selected from the various organs of the Japanese Government

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35 Nazi Conspiracy, *op.cit*., pp.53, 54.

36 *Tokyo Transcript,* June 4, 1946, pp.467, 468; Keenan's address read at the annual convention of the American Bar Association, Atlantic City, N.J., October 29, 1946.

37 Opening Statement by the Prosecution: Phase XV: 'Individual Responsibility', in *Tokyo Transcript,* pp.15554-16106, 16117-16259.

38 At the *High Command* Trial, the American Military Tribunal states: "war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose, it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level." US Military Tribunal, Nuremberg, Judgment of 28 October 1948 (*von Leeb et al.*, so-called *High Command Trial*) The critical element is the possibility of effective control or leadership, not legal position. Dinstein,Y., *Aggression and Self-Defense*, 3rd ed., (2001), pp.121 et seq.

39 Dinstein, *op.cit.*, pp.122 *et seq.*; Brand,E., *op.cit.,*26 *BYIL* (1949), p.414 at pp.420 *et seq.*

such as the Cabinet, and the Privy Council and the General Staff, which had played vital roles in Japan's program of aggression. The persons chosen as representing a particular organ were the principal leaders and had primary responsibility for the acts committed. The Indictment included the survivors of those bearing responsibility at the highest level for the most serious crimes alleged.

Those selected who were called "war criminals Class A" had held posts during World War II or the Pacific War (between the early 1930s and 1945), as, for example, Prime Minister, Foreign Minister, War Minister, Navy Minister, and Chief of the Army General Staff. But, the Japanese Emperor Hirohito, in the time of war, was not selected there.[40] In addition, no industrialists were selected. In the case of the industrialists, the Executive Committee of the Prosecution was reluctant to proceed unless the case could be made for a crime against peace. No evidence was produced that any industrialist occupied the position of a principal formulary of policy.[41] These arguments must point to the question of a common plan or conspiracy.

In the Tokyo Trial, one of the most difficult and disputed problems was the concept of conspiracy. According to both Charters, the planning, preparation, initiation or waging of a war of aggression is criminal: in addition, conspiracy to wage a war of aggression is criminalized. But, the Tokyo Charter did not define conspiracy derived from Anglo-American law or common law concept. It allowed the Tokyo Tribunal to ascertain the nature of the crime of conspiracy, while conspiracy was very restrictively interpreted by the Nuremberg Tribunal, gaining no independent significance.[42]

As seen above, Article 5 (a) of the Tokyo Charter adopted the wording of the Nuremberg Charter – participation in "a common plan or conspiracy" for the accomplishment of "any of the foregoing", that is, "the planning, preparation, initiation or waging" of a war of aggression or war in violation of international law. The proscribed acts of the offense were essentially oriented toward the development stages of the crime, from "planning", to "preparation", to "initiating", and finally "waging" a war of aggression.

The fact that participation "after" the start of a war of aggression suffices, is expressed by the part of the offense involving the "waging" of an aggressive war.[43] The planning and preparation of a war of aggression are only criminal if they actually result in the initiation of hostilities. A narrowly-limited exception is made for the largely non-violent occupation of a country that occurs in the shadow of massive military superiority. This can be derived from the Nuremberg judgment. The Nuremberg Tribunal described the occupations of Denmark and Luxemburg as aggressive wars, even though these states were subjugated without the use of signifi-

40 On Japanese Emperor Hirohito, see *Tokyo Transcript,* pp.24882-4 (Webb: Remarks on Responsibility for Pacific War Preparations), pp.39001-17 (Prosecution Witness), p.25671 (Konoe Fumimaro,Excerpt [DX 2865] from memories, re. 'The Independence of the Supreme Command and State Affairs').

41 Horwitz, *op.cit.*, p.498.

42 Jeschek, H.H., *Die Verantwortlichkeit des Staatsorgane nach Volkerrecht*, *op.cit.*, p.352.

43 Thus the conviction of Donitz by the Nuremberg Tribunal for crimes against peace was based on his participation in the waging of the war; he was not involved in its planning, preparation or initiation. This conviction has been criticized because Donitz had no opportunity to stop the war. Jeschek, *ibid.*, p.507, pp.353 *et seq*.

cant military force.[44]

In the case of Japan, the accused war leaders, unlike the Nazis, did not constitute a united band of plotters, generally speaking, with a single leader, agreed as to criminal means.[45] Japanese leadership with regard to the conspiracy changed from time to time. But, there were ties which bound the conspirators together into an organic unity of purpose; a common furthering of a criminal policy, jointly created, a joint planning as to the ultimate criminal means and ends, and a definite plan to wage unjust aggressive war, as soon as feasible, on the part of the accused Japanese war leaders, despite their participation in widely separate occupational activities. While they frequently disagreed as to details, they were in agreement as to the general outlines of the conspiracy.[46]

The ultimate purpose of the conspiracy, namely, the seizing of territory at the expense of neighboring nations, did not change, however the immediate aims evolved with the expanding power of the conspirators. Under the international doctrine of conspiracy, according to the argument of Chief Prosecutor Keenan,[47] Japanese war leaders were guilty of a crime just as soon as they entered into agreements, either among themselves or with the leaders of Italy and Germany, to commit any act, *malum in s*e, which violated an international social interest of personality or substance, prior, therefore, to the commission of the act itself. These agreements would have been international crimes even though they did not culminate in the acts intended.

Countering this argument, the Defense argued that there was no positive international law which made criminal the mere agreement to do an unlawful act by lawful means, or to do a lawful act by unlawful means, or to do an unlawful act by unlawful means.[48]

However, according to Keenan, international society may administer justice without positive law, within a sphere restricted by an objective ethical order, recognized by the generality of mankind, just as racial and national society has done for hundreds, in fact, thousands of years. He stated: "the adoption of a limited type of the conspiracy doctrine, by the Court in the trial of Japan's war leaders, was consistent with principles of justice recognized internally by the leading legal orders of the world."[49]

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44 IMT., *ibid.*, *op.cit.*," pp.437 *et seq*. The occupation of Czechoslovakia and Austria were only termed "aggressive action" by the Tribunal and were examined as part of the planning of aggression. *IMT.,ibid.*, p.403.; The Anschluss (of Austria), although it was an aggressive act, is not charged as an aggressive war.

45 Nazi Conspiracy and Aggression, *op.cit.*, p.55; Tokyo Transcript, June 4, 1946, pp.472, 473.

46 *Tokyo Transcript,* June 4, 1946, pp.4114, 4115. See Okuhara,Toshio, "Doctrine of Common Conspiracy in the Tokyo Trial (in Japanese: Tokyo Saiban ni okeru common conspiraci)", SEIKEIRONSO (Kokusikan University), No.5, pp.155-192; No.7, pp.387-413; No.12 pp.181-204.

47 Keenan, *op.cit.*, p.90. See Opening Statement by Chief Prosecutor Keenan in the *Tokyo War Crimes Trial* ,Vol. 1, Transcript, pp.1ff.

48 See Opening Statements by the Defense, in *The Tokyo War Crimes Trial, Vol.7, Transcript*, pp.17004ff.

49 Keenan, *op.cit.,* pp.111-112.Rebuttal by the Prosecution; Reply by the Prosecution to the Defence Summation.

Further, for the commission of a crime against peace by perpetrators of an aggressive war, the mental element besides the material element was required. The planning, preparation, initiation or waging of aggressive war must be committed intentionally. In particular, the perpetrator must be aware of the aggressive aims of the war, but nevertheless continue to work on its planning, initiation or waging.

From the view-point of international criminal law, if the perpetrator acts despite knowledge of the aims of the war, he adopts these aims as his own and acts with *animus aggressionis*.[50] Purpose on the part of the perpetrator is not necessary, and was not required by the Nuremberg Tribunal.[51]

It is noteworthy to see here that, in the Judgment of the Tokyo Trial, while most of the defendants were convicted of one or more counts of waging aggressive war against various of the Allies in time of World War II, all of those sentenced to death by hanging, were convicted of one or both of the major accounts of conventional war crimes in the indictment (Count 54 or Count 55). In short, if giving the death penalty signifies something about the gravity of the offences, it was not waging aggressive war or participating in a common plan or conspiracy that weighed most heavily with the Tribunal. In this respect, the behaviour of the Tokyo Tribunal was similar to that of Nuremberg.

These above-mentioned questions on the concept of a crime against peace and its elements, have remained controversial, even half of a century later, in the preparatory works of the ICC Statute, as well as at the Rome Conference of 1997. While the criminalization of aggression directly affects state sovereignty and requires individual responsibility of war leaders, the definition of the crime of aggression and the requirement for criminal prosecution of individuals before the ICC were extremely controversial at the negotiations on the ICC Statute.

Ultimately, no agreement could be reached as to the requirements of the crime of aggression or the role of the Security Council of the United Nations in prosecuting such crimes. The Rome Statute which includes this crime remained to have no definition of the composite elements of the "crime of aggression." In view of this situation, however, many delegations hoped to prevent the crime of aggression from being completely omitted from the ICC Statute.[52]

The result was a compromise that is laid down in Article 5(1)(d), (2) of the ICC Statute. While this provision gives the ICC jurisdiction to try the crime of aggression, and thus recognizes the crime as such, the International Criminal Court cannot

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50 For the proof of the mental element, the Nuremberg Tribunal relied primarily on the fact that the defendants had acted despite being thoroughly informed of Hitler's plans. See *IMT*, p.425 and pp.489 *et seq.*, pp.491 *et seq.*, pp.495 *et seq.*, p.499, p.507, pp.523 *et seq.*, and p.526. In regard to the defendant Schacht, *IMT*, p.527. See also Cassese, A., *International Criminal Law(*2003), p.115.

51 Dinstein, p.126; Griffiiths, R.L., 2 *International Criminal Law Review* (2002), p.301, at pp.369 *et seq.*; Hogan-Doran J., and van Ginkel, B.T., 43 *Netherlands International Law Review* (1996), p.321 at pp.337 *et seq.*; Cassese, *op.cit.*, (2003), pp.115 *et seq.*, raises doubts; however, on the requirement of intent, see: Glaser S., 99 *RdC* (1960), p.465 at pp.504 *et seq.*

52 For more on negotiations, see Gaya, G., in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court,* Vol.1 (2002), p.427 at pp.430 *et seq.*; von Hebel, H, and Robinson, D., in Lee, R.S. (eds.), *The International Criminal Court, The Making of the Rome Statute* (1999), pp.81 *et seq.*

exercise this authority until the crime of aggression is defined and its relationship to the UN Charter clarified. Under the ICC Rome Statute, the crime of aggression remains to this day as a crime in "abeyance".[53]

IV. Conventional War Crimes and Crimes Against Humanity

The Tokyo Charter classified the remaining two categories of crimes coming under the jurisdiction of the Tribunal as follows:

(b) Conventional War Crimes: namely, violations of the laws or customs of war;

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

The heading "Conventional War Crimes" is defined very simply in avoiding the repetition of the acts of violation enumerated in the Nuremberg Charter. Article 6(b) of the Nuremberg Charter reads as follows: "War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

This category of "war crimes" did not provoke any particular problem except for the concept of "murder" which will be examined below.

On the category of "crimes against humanity", it is defined essentially as in the Nuremberg Charter. However, the Tokyo Charter formulation omitted the words "committed against any civilian population" which appear in the Nuremberg Charter after "murder, extermination, enslavement, deportation and other inhuman acts."[54] Is this a "new" category of international crimes, together with the crime against peace, generated during World War II ?

Historically, the concept of crimes against humanity was not new like that of the war against peace. The wording: "crime against humanity (le crime contre l'humanité)" had been expressed for the first time at the Commisssion established by the 1919 Preliminary Peace Conference for the study of those responsible for the war,

53 For criticism of the approach taken in the ICC Statute, see Schuster, M., 14 *Criminal Law Reform* (2003), p.1 at p.17; Wedgwood, 10 *EJIL* (1999), p.93 at p.105.

54 Justice Roling suggested that these words were struck out of the Tokyo Charters two days, before the trial began, to support the (strange) prosecution argument that killing in an illegal war amounted to a crime against humanity. The Tribunal dodged this approach. In Roling, B. and Cassese, A., *The Tokyo Trial and Beyond: Reflections of a Peacemonger,* Polity Press, Cambridge, 1993, p.56.

held in Paris.[55] From the work of this Commission, it resulted that the concept of crimes against humanity has been included in the text of the agreement. Since then laws of humanity or 'lois de l'humanité' are valued in times of peace as well as those of war, the violation of them must be regarded as a punishable act.

From this, one may affirm that the crime against humanity is distinguished from a war crime only in two aspects: it may be committed even before or during the war and it is not necessarily committed against the civilian population of the same nationality against whom the perpetrator is committing the war crime. While the law of war protects the civilian population against the enemy's acts in time of war, the laws of humanity defend everyone in all times and in all places, despite the acts of their government. It is without any doubt that all crimes against humanity constitute crimes of war, when they have been committed during the war by the occupant against the civilian population of the occupied territories, because all are included among the violations of laws and customs of war.[56]

During World War II, the United Nations War Crimes Commission (established in London on 7 October 1942) was regarded in a sense as the successor of the above-mentioned Commission of 1919, although they are different in several ways. It is true that the Nuremberg Charter made a new fundamental direction in this matter. For the first time, crimes against humanity and war crimes (and crimes against peace) were expressly provided for and defined based on their constitutive elements in the conventional text. Both Charters permitted to affirm that since then, many counts in the list of crimes in the Indictment constituted crimes of war or crimes against humanity.

In the Tokyo Trial, war crimes and crimes against humanity (Count 53 to 55) were not clearly distinguished in the Indictment nor in the Judgment. In the Indictment, "conventional war crimes and crimes against humanity" were classified as group three and "murder" was classified as group two, while in the Nuremberg Charter "murder" was included in the category of "crimes against humanity".

It is rather exact to say that almost all acts of the accused war leaders during the war, such as the ill-treatment of POWs and foreign civilian internees by the Japanese armed forces in the occupied territories, had been classified as crimes of war but not as crimes against humanity.

According to Keenan's argument,[57] the distinction between "municipal law murder" and "international law murder" was brought forward in Article 5 of the Tokyo Charter, which declared in fact that an act might be "international law murder", even though it did not violate the domestic law of the country where the killing occurred. "Municipal law murder" disturbs the national interests of a society in the mainte-

55 The work of this Commission was published in 1930. See Rapport presented to "la Conférence des Préliminaires de Paix par la Commission des Responsabilités des Auteurs de la guerre et sanctions," *La Documentation Internationale: La Paix de Versailles III Responsabilités des auteurs de la guerre et sanctions,* Annex 1, Paris, Les Editons Internationales, 1930. Cf. Fujita, Hisakazu, "Le crime contre l'humanité dans les procés de Nuremberg et de Tokyo," *Kobe University Law Review,* No.34 (2000), pp.1-15.

56 See: Paoli, Jules, "Contribution à l'étude des crimes de guerre et des crimes contre l'humanité en droit pénal international," *RGDIP*, Tome XILX, 1941-1945, Vol.II, pp.130-131.

57 Keenan, *op.cit.*, pp.118-119.

nance of peace and order. "International law murder" strikes at the interest which international society has in the preservation of peace and order.

Murder resulting from a violation of the laws and customs of war may not occur before the outbreak of a war, but murder, considered as an offense against the laws of humanity, may be committed even before the outbreak of a war. The same may be said with reference to the acts of extermination, enslavement, deportation, persecution and all other acts of a clearly inhumane nature.

The question arises whether the "mass killing" which takes place in an unjust war, even in regard to the killing of the armed forces of one nation by the armed forces of another nation, is "murder" and a crime against humanity. The Indictment had gone further than to charge the defendants with the commission of these acts as crimes under and by virtue of the Tokyo Charter.

It did not stop at this point. In the case of the crimes charged in all three groups (crimes against peace, murder, and conventional war crimes and crimes against humanity), the Indictment made it clear that the Prosecution also bases the responsibility of the defendants upon "International Law," and, in the case of crimes charged in group two – Murder (and conspiracy to murder) – reliance is also placed upon the fact that the acts charged are contrary to the domestic laws of all countries, including in Japan. In group two, "murder or conspiracy to murder" is charged in sixteen counts (37 to 52).

It is charged, in count 37, that certain accused, conspired unlawfully to kill and murder people of the United States, the Philippines, the British Commonwealth, the Netherlands, and Thailand (Siam), by ordering, causing and permitting Japanese armed forces, during the time of peace, to attack those people, in violation of the Hague Covention III, and in Count 38, in violation of numerous treaties other than the Hague Convention III.

It is charged in the next five counts (39 to 43) that the accused unlawfully killed and murdered the persons indicated in counts 37 and 38 by ordering, causing and permitting, in times of peace, armed attacks by Japanese armed forces, on December 8, 1941, at Pearl Harbour, Kota Baru, Hong Kong, Shanghai and Davao.

The accused were charged under the next count (44) with conspiracy to procure and permit murder of prisoners of war, civilians and crews of torpedoed ships. The charges in the last eight counts (45 to 52) of this group are that certain accused, by ordering, causing and permitting Japanese armed forces unlawfully to attack certain cities in China (count 45 to 50) and territory in Mongolia and of the USSR (Count 51 to 52), unlawfully killed and murdered large numbers of soldiers and civilians.

The Judgment in its "Part B, Chapter VIII: Conventional War Crimes" enumerated abundantly the Japanese acts committed by the violations of the law of war (not only in Japan but in China as well as in the Pacific region) during World War II: including atrocities, the rape of Nanking, murder of captured aviators, massacres, death marches, torture and other inhuman treatment, the humiliation and ill-treatment of prisoners of war, and civilian internees, etc.

In relation to the "crimes against humanity", it is noteworthy that no defendant was prosecuted for this crime. By consequence, the Tokyo Tribunal did not punish anyone under this category of crime, which is one point of remark in comparison with the Nuremberg Judgment.

While, as above-mentioned, the Tokyo Charter defined the concept and ele-

ments of the crime against humanity in an almost similar manner with those of the Nuremberg Charter, it omitted the expression "committed against any civilian population" after "and other inhumane acts" and "religious" (grounds) after "or racial" included in the Nuremberg Charter.

There are two points to be highlighted between the two Charters: the first one is that the expression "committed against any civilian population" (omitted in the Tokyo Charter) signifies the inclusion of the crimes committed, under the Nazi regime, against the civilian population of Germany (German nationals) in the territory or the jurisdiction of Germany. By its omission in the Tokyo Charter, the Indictment limited itself only to the crimes committed against civilian internees of foreign countries in avoiding the crimes committed against the Japanese in the territory or the jurisdiction of Japan during the Pacific War.

The second point is that the Tokyo Charter did not refer to persecutions committed on "religious" grounds. It is perhaps because of the absence, in Japan during the War,[58] of the abundant practice of persecutions comparable to those of Jewish religious communities in Germany; however, persecutions for religious grounds could be generally included in the concept of those committed for political grounds.

That is why the Indictment in the Tokyo Trial did not mention the counts under the heading of crimes against humanity as such, distinguished from conventional war crimes. For the latter, the Indictment, as well as the Judgment of the Tokyo Trial, gave detailed descriptions of murders or killings, violence, imprisonments, deportations, etc., committed against Chinese people and persons living under Japanese occupation. In general, it confounded ill-treatments of prisoners of war, with principally political internees of foreign countries. As a result, in the Judgment, defendant were not solely punished for "crimes against humanity" strictu sensu.

The Prosecution maintained that a criminal State policy of violating the laws of humanity was adopted, after the invasion of China, but more particularly after December 7, 1941,that is, the date of attack of Pearl Harbour, by a closely associated hierarchy of Japan's leaders, including the present defendants.

The defendants did not personally commit crimes against humanity, but they were responsible for the frequent and habitual commission of such crimes insofar as they ordered, permitted or agreed to them, or made no effort to prevent or stop them. There was a clear chain of causation between the defendants and the mass inhumanities which were inflicted upon the people of China and later upon the nationals of those countries with which Japan was at war after Pearl Harbor.[59]

What crimes against humanity did the leaders of Japan, including the defendants, commit in China ? Mass murders, exterminations and enslavements were inflicted by Japanese war leaders upon the Chinese as far back as September, 1931 (the Manchuria Incident).[60] A second chapter of crimes against humanity, on the

58 However, it does not mean that there was not any persecution nor oppression on religious ground in Japan. Several religious sects which resisted against or were not cooperative for Japanese aggressive policy at that period were oppressed.

59 Opening Statement by Keenan, *Tokyo Transcript,* pp.1ff.

60 Keenan, *op.cit.*, pp. 120-121, noting that: "Certainly thousands of Chinese were systematically murdered and exterminated by Japan. Chinese were exterminated by poison gas. There was no formal Japanese policy of deportation in China, but virtual deportation of Chinese resulted from the destruction of their homes and homelands by military occu-

part of these defendants, following Keenan's argument, opened with the waging of war in 1941 against the Allied Powers.

Breaches of the laws of humanity, for which at least some of these accused were responsible, included the widespread killing, beating and torturing and otherwise ill-treating of prisoners of war and civilian internees, nationals of the United States, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Phillipines, Republic of China, Republic of Portugal and the Soviet Union, between December 7, 1941 and September 2, 1945.

Finally, the Prosecution contended that the accused were responsible for the destruction and degradation of human life, both as a causative prelude to, and as an effect of, unjust war, and were therefore guilty of "international law murder." It is considered that criminal killing, extermination and destruction of property were the natural, foreseeable, anticipated and inescapable consequences of the waging of unjust war.

Moreover, neither the Indictment nor the Judgment of the Tokyo Tribunal has not practically mentioned the illegal acts, violences and ill-treatments committed on the habitants or peoples living under colonial domination of Japan, such as the Koreans or Chinese in Taiwan(Formosa).

On the other hand, as afore-mentioned, the Indictment in Tokyo Trial kept the count of "Murder (and Conspiracy to Murder)" in group two (Counts 37-52). The acts charged were regarded contrary to the domestic laws of all countries, including Japan. This count (two counts in the second group, nos. 37 and 38) charged a certain number of defendants with the formulation or execution of a common plan or conspiracy to kill and murder by initiating unlawful hostilities which were breaches of the Hague Convention relating to the commencement of hostilities of 1907 and of several other international agreements. Therefore, the defendants had not acquired the rights of "lawful combatants". Counts 39 to 43 contained charges in respect of the surprise attacks on December 7 and 8 at Pearl Harbour, Kota Bahru, Hongkong, Shanghai, and in the Phillipines.[61]

The Prosecutor insisted on the fact that the defendants and the Japanese armies did not acquire the rights of "lawful belligerents" and as a consequence, their acts of killing the militaries (soldiers) and civilians by the attacks on Pearl Harbour without a declaration of war, were crimes of murder, not lawful belligerent acts.[62]

And, attacks on Chinese cities and populations as well as the territory and armed forces of Mongolia and the Soviet Union by Japanese armed forces in 1938

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pation and the imposition of unreasonable, military, coercive measures. The willful and unreasonable destruction of tillable soil and farmlands in China by Japanese aggression caused starvation. Persecution was resorted to in China to counteract resistance to Japan's war of aggression. The rape of Nanking is universally known".

61 Count 44 charged all the defendants with a common plan or conspiracy to procure or permit the murder on a wholesale scale of prisoners of war and civilians. Counts 45 to 50 charged certain of the defendants in respect of attacks on Chinese cities and populations. Counts 51 and 52 related to attacks by Japanese armed forces in 1938 and 1939 upon the territory and armed forces of Mongolia and the Soviet Union.

62 See the comparison of this concept of "lawful combatant" with the American-oriented concept of "unlawful combatant" used for the prisoners detained at the American naval base in Guantanamo Bay as part of the War on Terror, in Fujita, Hisakazu, "International Humanitarian Law: "War on Terror" in Afghanistan," *ISIL Yearbook of International Humanitarian Law and Refugee Law,* Vol.III (2003), pp.59-82.

and 1939, that is, before the beginning of the Pacific War on December 1941, were not considered belligerent acts, but as "Killing and Murder" contrary to domestic laws (including Japanese law) in times of peace. Therefore, this crime of "Killing and Murder" was classed, in the Indictment, separated from the group of "Conventional War Crimes and Crimes against Humanity" and therefore it seemed to be a new category of crime (in international criminal law, in the sense of national criminal law) recognized in the Indictment.[63]

The remaining counts (Counts 53 to 55) of the Indictment under the heading of "Conventional War Crimes and Crimes against Humanity" charged a certain number of the defendants with breaches of the laws of warfare in respect of Japan's treatment of prisoners of war and civilian internees.

The Tokyo Tribunal confirmed the applicability of the law of war to Japan's activities in the Pacific War, especially the Convention for the Treatment of Prisoners of War of 1929, which Japan did not ratify but assured, just after the opening of hostilities on 7 December 1941, to apply *mutatis mutandis* towards American, British and others' prisoners of war. Consequently, it acknowledged the inhuman or ill-treatment of Allied prisoners of war in violation of the provisions of that Convention by members of the Japanese Army.[64]

These are grosso modo the characteristic aspects of three categories of crimes appearing in the Tokyo Charter and in the counts of the Indictment as well as the Judgment, especially those of the reasoning of the so-called "impunity" of the defendants for the counts concerning crimes against humanity. The Tokyo Tribunal could sufficiently punish the defendants by the counts of the conventional war crimes without taking into account the crimes against humanity. The concept of the crimes against humanity was not adequately adapted to the acts committed by the Japanese political and military leaders before as well as during the Pacific War.

And, the Tokyo Tribunal examined principally the situations and conflicts having occurred in China as well as in the Pacific regions attacked or aggressed by Japan. But, any particular attention was not given to the acts of violations of fundamental human rights in Japan, including the countries under its colonial domination in the Indictment nor in the Judgment.

It goes without saying that the component elements of the acts of a war crime, as well as those of crime against humanity, precisely defined and enumerated in Article 8 as well as in Article 7 of the ICC Rome Statute, are certainly the results of

63 Moreover, the violations of human rights such as the illegal purchase and sale of narcotics and the acts to oppress the Japanese themselves were mentioned in the Indictment or in its annex. However, those violations of civil and political human rights were not considered at that time as crimes against humanity and therefore were not the objects of accusation vis-a-vis the defendants before the Tokyo Tribunal.

64 The Judgment stated: "Under this assurance Japan was bound to comply with the convention save where its provisions could not be literally complied with owing to special conditions known to the parties to exist at the time the assurance was given, in which case Japan was obliged to apply the nearest possible equivalent to literal compliance." (Friedman, *op.cit.*, II, pp.1047. According to the Judgement, the POW Convention is the 'more complete code of the laws of war' contemplated by the Powers signatory to the Hague Convention of 1907. See:Fujita, Hisakazu, "POWs and International law," in Towle, P., Kosuge,M., and Kibata,Y. (eds.), *Japanese Prisoners of War,* Hambleton and London, 2000, pp.87-102 at pp.97-98.

substantial reflections of those of Nuremberg and Tokyo Trials just after the World War II, and of their adaptation for various contemporary situations of international or internal armed conflict in the post-Cold War epoch.

V. Conclusion: Justice of Civilization or Victor's Justice ?

After the Judgment, it seemed that estimations of the works of the Tokyo Trial have been deeply divided. One side, it has been praised as the "justice of civilization", and the other, has been criticized as "victor's justice". The latter view, criticizing the Tokyo Trial from a strict legal point of view, has been wide-spread in Japan.
Those holding the former opinion have criticized rather the insufficiency of the past trials because of the remaining "impunity" of many other war criminals in Japan as well as in Germany.[65] On the implementation of the Judgment, Japanese attitudes towards the treatment of war criminals after the Tokyo Trial seems to have changed before and after the signing of the Peace Treaty with Japan at San Francisco on 8 September 1951.[66]

In the period of the Allied Nations (or in fact American occupation) since Japanese rendition in September 1945, the Japanese government assisted with the enforcement of the sentence of the Allied tribunals prosecuting Japanese war criminals (so-called "Class B and C"), and, under the command of the GHQ, investigated suspects of war crimes all over the country.

The Japanese government also recognized them as criminals in terms of Japanese penal law, as bandits.[67] Under Article 11[68] of the Peace Treaty, Japan "accepts" the

65 Mission interministerielle pour la célébration du 50e anniversaire de la Déclaration universelle des Droits de l'Homme, *Colloque: "Juger les criminels contre l'humanité",* Strasbourg, 20-21, Nov. 1998.

66 A series of documents on the trials of Japanese war criminals of classes B and C in Allied countries which were opened to the public by the Japanese Foreign Ministry in June 1998 gave some indications of the attitude of the Japanese government towards these trials. See the *Asahi Shimbun* and the *Mainich Shimbun* on June 14, 1998.

67 With the exception of the American military courts in Tokyo (at Marunouchi) and Yokohama, almost all the (national) trials of Japanese war criminals of the classes B and C were held in seven victorious Allied countries: the United States, Great Britain, Australia, the Netherlands, France, the Philippines (after its independence of 1947) and China. In total, about 5700 persons were prosecuted in 43 sites. The classes B and C trials in all countries indicated a total number of 2,244 cases, and 5,700 individuals were prosecuted. Among a total number of 321 defendants who came from the colonies there were 146 Koreans and 173 Taiwanese. 49 of them, or 15%, were handed the death sentence. Japan's Ministry of Justice summarised the results of all the trials as follows: 984 defendants received the death penalty (although it was only carried out for 920 people), 475 individuals were handed down sentences of life imprisonment, and 2,944 defendants were given lesser sentences of incarceration. 1,018 people were found not guilty of the charges, while 179 defendants had their indictments overturned or dismissed. In the trials that occurred in each country, atrocities and murder committed against POWs and civilians internees were among the most frequent charges leveled, but similar crimes committed against non-combatants received similar attention in some venues. Kentaro Awaya, "The Tokyo Trials and the BC class Trials," in *Der Umgang mit Kriegs-und Besatzungsunrecht in Japan und in Deutschland, op.cit.,* pp.39-54 at pp.49-53.

68 Article 11 provides: "The power to grant clemency, to reduce sentences and parole with respect to such prisoners may not be exercised except on the decision of the Government

judgments of the IMTFE and of other Allied War Crimes Courts both within and outside Japan, and "will carry out" the sentences imposed thereby upon Japanese nationals imprisoned in Japan. On the other hand, after the Peace Treaty came into force on 28 April 1952, petitions for the commutation of sentences or the release of detained war criminals were received from all parts of the country.

Under these circumstances, the Japanese government changed its attitude believing that "the war criminals in question are not regarded as criminals in the sense of national law." The government thus revised the law relating to the enforcement of punishment and clemency, and tried to lessen the conditions necessary, for example, of providing parole to the detained. The United States, one of the parties to the Peace Treaty, however, protested against these measures, claiming them to be a breach of the Peace Treaty, and, in response to the request of the Japanese Foreign Ministry, replied that not even parole could be permitted, given the treatment of the German war criminals detained in the United States.[69]

After the restoration of independence by the entry into force of the Peace Treaty on 28 April 1952, Japan never tried by herself to prosecute war criminals in Japanese tribunals, a contrast with the attitude of Germany vis-à-vis Nazi war crimes.[70] In addition, the problem of compensation for war victims was never dealt with either before the forum of Tokyo Trial or before the national military courts of the ex-Allied countries prosecuting the Japanese war criminals of B and C classes.

As afore-mentioned, the Tokyo Trial under the Tokyo Charter, as well as the Judgment (sentence), in the same manner as the Nuremberg Trial, only condemned the defendants under international criminal law, and did not treat the redress for the war victims derived from Japanese criminal acts. Traditionally, the problem of war-compensation had been dealt with in the inter-state relations between the victor State and the defeated, and it was normally settled in the peace treaties concluded after hostilities. However, the problem of compensation claims by individual victims has been treated recently in national tribunals in defeated States or third States.

The compensation problem was provided for in the Peace Treaty with Japan (in Chapter V: claims and property-Arts.14 and 19(a)). Article 14 stated: "It is recognized that Japan should pay compensation to the Allied Powers for the damage and suffering caused by it during the war." The Japanese government has always insisted that all compensations, including not only inter-state but also individual victims' ones, were settled by the Peace Treaty, as well as several bilateral treaties, such as the agreement on claims between Japan and the Republic of Korea of 1965.

It has not, therefore, made any compensation to any Japanese or foreign victims of the Pacific War. Recently (in particular, since the 1990s), foreign victims brought lawsuits before Japanese courts. Japanese courts have almost always dismissed the cases by refusing an individual person's right to claim compensation in the lawsuits

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or Governments which imposed the sentence in each instance and on the recommendation of Japan."

69 Despite this, however, the Japanese government quickly took measures to rehabilitate war criminals, including the elimination of a ban against holding office, and reinstating the right to vote and receive pensions.

70 While West Germany prolonged the period of prescription to murder under German penal law and then abolished it, Japan had no intention to prosecute its suspected persons of war crimes under national penal law and procedure.

against the Japanese State by the Japanese victims of war and, in particular, by the foreign victims of the Pacific War. One of the leading cases was the so-called Atomic Bombs case or Shimoda case.

The Tokyo District Court, on 7 December 1963, rendered the decision in which, although recognizing that the dropping of atomic bombs over Hiroshima and Nagasaki in 1945 was illegal under international law, it denied an individual person's right to claim compensation under international law. Decisions in the two recent and internationally-known compensation claim cases by foreigners against Japan, the "Allied Powers POW" case (Tokyo District Court, Nov.26,1998) and the "Dutch POW" case (Tokyo District Court, Nov.30,1998) suggest that the Japanese courts have not changed its previous attitude in denying such individual rights to claim compensation.[71]

The decisions did not contain factual findings as to the wrongdoings to which plaintiffs were subjected, nor rule on their illegality. Only the Dutch POW decision found the existence of cruel and ill-treatment of POWs and civilian detainees by the Japanese military during the Pacific War, by simply stating that the various damages and injuries asserted by the respective plaintiffs were factual. This manner of reasoning in the Dutch POW decision followed the pattern of the decision in the Shimoda case. In one of the most recent cases, the "comfort women case", the Japanese court even asserted the duty of the State to settle this issue via new legislation.[72]

On the disputed issue of reparation or compensation for individual war-victims by the defeated State, there has remained an unresolved problem on the legal relationship between the State responsibility and individual responsibility, in other words, that of State compensation and individual compensation. Reflecting such compensation claims in the national forum, the ICC Rome Statute seems to have broken through this unresolved issue in its Article 75.

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71 Fujita, Hisakazu, Suzuki, Isomi, and Nagano, Kentaro (eds.), *War and the Rights of individuals – Renaissance of Individual Compensation,* Nippon Hyoron-sha,1999, Annex, pp.104-124 (English translation in part).

72 Decision of Yamaguchi district court (Shimonoseki branch), April 27, 1998, *Hanreijoho,* No.1642, p.24 (in Japanese). See: Igarashi, Masahiro, "Post-War Compensation Cases, Japanese Courts and International Law," *The Japanese Annual of International Law,* No.43 (2000), pp.45-82.; Shin Hae Bong, "Compensation for Victims of Wartime Atrocities, Recent Developments in Japan's Case law," *Journal of International Criminal Justice*, Vol.3, No.1 (2005), pp.187-206.

Chapter 3

The Work of National Military Tribunals under Control Council Law 10

Jackson Maogoto

On 20 December 1945, the Allied Control Council promulgated Law No. 10 (*CCL No. 10*), which was to govern all further Nazi prosecutions in domestic courts.[1] The law was the fulfilment of the vow made by the Allied Powers in the course of World War II to return war criminals so they could stand trial before tribunals in the territories in which their crimes had been committed.[2] Many advances in enriching international jurisprudence and fleshing out the substantive content of international criminal law were made by post-World War II domestic tribunals in implementing the Nuremberg legacy. These national trials reaffirmed the triumph of international law over certain aspects of sovereignty. Literally thousands of trials were carried out in domestic tribunals in different countries and regions of the world subsequent to the Nuremberg and Tokyo international trials.

CCL No. 10 was closely modelled on the *Nuremberg Charter*. Like the *Nuremberg Charter*, it abrogated the act of State doctrine[3] and rejected superior orders as a defence.[4] Prosecution was also not barred by any amnesty, immunity or pardon which may have been granted by the Nazi regime.[5] It not only provided for a wide range of penalties for war crimes and crimes against humanity, but, like the *Nuremberg Charter*,

1 *Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity* (20 December 1945), Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946 ('*CCL No. 10*'). See also Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10* (1949), Appendix A (text of the *Nuremberg Charter* on which *CCL No. 10* was based).

2 'Declaration on German Atrocities, 30 October 1943', *Documents on American Foreign Relations* (1945) vol 6, 231, 232.

3 *Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity* (20 December 1945), Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946 ('*CCL No. 10*'), art 2, [4(a)].

4 *Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity* (20 December 1945), Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946 ('*CCL No. 10*'), art 2, [4(b)]. Superior orders may be recognised in mitigation of punishment.

5 *Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity* (20 December 1945), Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946 ('*CCL No. 10*') [5].

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 51–62.

it also criminalised mere membership in certain organisations held criminal by the Nuremberg tribunal without considering individual guilt.[6] Unlike the *Nuremberg Charter*, *CCL No. 10* did not require that crimes against humanity be 'in execution of or in connection with any crime within the jurisdiction of the Tribunal.'[7]

The law aroused almost immediate and vociferous protest by the Germans, with German jurists claiming that parts of *CCL No. 10*, especially the 'crimes against humanity' provisions, constituted *ex-post facto* laws prohibited by international norms, German substantive law and prior Allied laws.[8] Nevertheless, *CCL No. 10* continued to be effective until after the founding of the Federal Republic, when it was finally voided by supervening German law in 1955.[9]

The provisions of *CCL No. 10* provided the basis for many Allied prosecutions of German war criminals. Most accused German war criminals, were prosecuted before courts in the countries in which they committed their catastrophic deeds or by the victorious Allied States on the basis of the physical location of the alleged crimes in territories liberated by the forces of individual Allied States. Various prosecutorial models were utilised. These trials while perpetuating the Nuremberg legacy also made a significant contribution to the corpus of international criminal law and enriched international jurisprudence. The tribunals relied on the universality principle, among other jurisdictional bases, to prosecute war crimes, crimes against humanity, and other offences.

A year after promulgation of *CCL No. 10*, the United Nations General Assembly, by resolution on 11 December 1946, unanimously affirmed the 'principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.'[10] That resolution may be viewed as affirming or codifying the jurisdictional right of all States to prosecute the offences addressed by the Nuremberg International Military Tribunal.

Under the authority of *CCL No. 10* and buoyed by the Nuremberg precedent, many countries, notably in Continental Europe, sought to prosecute war criminals before special criminal courts that applied their existing criminal code but subsequently modified this approach and incorporated the war crimes and crimes against humanity provisions of the Nuremberg principles into their domestic legal code.

Demonstrating the unease with which States viewed the reception of international law into the domestic sphere, Continental European courts attempted, with varying degrees of success, to rely on municipal laws, sanctioning those who contravened existing or newly enacted provisions of the domestic criminal code, which also constituted violations of the humanitarian law of war.[11] Even where war crimes legislation was passed or existing penal codes amended to enable punishment of war

6 They were the SS, SD, Gestapo and the Political Leadership Corps.

7 The *United States v Flick* Case: (1950) 6 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1212–3.

8 Michael Ratz, *Die Justiz Und Die Nazis* (1979) 22.

9 Adalbert Ruckerl, *Ns-Verbrechen Vor Gericht* (1984) 124.

10 GA Res 95, UN GAOR, [188], UN Doc A/64/Add 1 (1946).

11 Mathew Lippman, 'Prosecutions of Nazi War Criminals Before Post-World War II Domestic Tribunals' (2000) 8 *University of Miami International and Comparative Law Review* 1, 11.

crimes and crimes against humanity as defined in the *Nuremberg Charter*, the punishment of these acts remained anchored in domestic doctrine with the sentences usually the maximum established for analogous domestic offences.

The decisions of national tribunals under *CCL No. 10* (especially the twelve decisions by the US Military Tribunals – USMT) applied and extended the Nuremberg principles regarding the development of the corpus of international criminal law.[12] These trials made a substantial contribution in various ways. They addressed the concept of corporate criminal responsibility for violations of international law, they expressly re-affirmed the principle of individual criminal responsibility, brought crimes against humanity from the realm of vague exhortation into the domain of positive international law spawning the idea that grave and massive violations of human rights can become the concern of the international community, not just that of the individual State, affirmed that military officials and civilian leaders no matter how exalted their status, are subject to criminal punishment for violations of international law and lastly established firmly the concept of command responsibility by establishing that those who act behind the scenes and who draft and issue orders are as guilty as those who carry them out.

As Professor Mathew Lippman notes: 'The trials ... demonstrated that international law provides definite standards of conduct which may be applied by courts in a calm, deliberate and consistent fashion. The application of international law thus does not invariably involve an exercise in power politics rather than in reasoned legal analysis.'[13] This section turns to consider the specifics of the significant contribution of these national trials to the fabric of international criminal law.

At Nuremberg, the International Military Tribunal did not try any industrialists for their complicity in violation of international law and the aiding and abetting of international crimes. Subsequently, however, the US military trials constituted under *CCL No 10* tried several German industrialists and corporate executives. Three major trials of corporate leaders were conducted involving the executives of the chemical firm I G Farben, the steel and armament giant Krupp and the Flick conglomerate.[14] These industrial giants had viewed Nazi aggression as an opportunity to expand their economic empires and enrich both the companies and the Nazi regime. They either officially or unofficially aligned their company philosophies and practices with the Nazi regime.

The judgments rendered by courts constituted under *CCL No. 10,* involving industrialists and other commercial actors reveals an underlying implication that

12 For the most complete discussion, see generally William A Zeck, 'Nuremberg: Proceedings Subsequent to Goering Et Al' (1948) 26 *North Carolina Law Review* 350.

13 Mathew Lippman, 'The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany' (1992) 3 *Indiana International and Comparative Law Review* 1, 99–100.

14 *United States v Carl Krauch et al* (1950) 8 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1081 ('*Farben Case*'); *United States v Alfried Krupp* (1950) 9 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1327 ('*Krupp Case*'); *United States v Friedrich Flick* (1950) 6 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1187 ('*Flick Case*').

the corporations for which they worked had committed international war crimes.[15] The trials centred around the complicity of the three leading German firms in the Nazi war effort through supply of munitions and armaments, use of millions of foreign workers as slave labour compelled to toil in appalling conditions,[16] and grant of trusteeships to the companies by the Nazi regime over industries and other factory concerns in occupied territories permitting the German firms to retain profits and provide royalties to the Nazi Government.

In 1947, twenty-three employees of I G Farben – a major German chemical and pharmaceutical manufacturer – were indicted for plunder, slavery, and complicity in aggression and mass murder.[17] The defendants in the *Farben Case* were prosecuted for 'acting through the instrumentality of Farben' in the commission of their crimes.[18] Five of the Farben directors were held criminally liable for the use of slave labour.[19] This was the first time that a court attempted to impose liability on a group of persons who were collectively in charge of a company.[20] As Professor Ramastry notes:

> The USMT based much of its findings on the role of Farben as a corporate entity. The Tribunal did not have jurisdiction over legal persons and therefore could not render a verdict against Farben itself. Nonetheless, the decisions focus quite clearly on the nature of the corporation and its role in perpetrating certain crimes.[21]

Perhaps the most definite expression of the Tribunal's focus on the actions of the corporate entity was the court's reference to legal persons:

> Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.[22]

In *United States v. Flick*, Prosecutor Brigadier General Telford Taylor argued that the symbiotic relationship of industry and the Third Reich was built on the "unholy

15 See Anita Ramasastry, 'Secrets and Lies? Swiss Banks and International Human Rights' (1998) 31 *Vanderbilt Journal of Transnational Law* 325, 423.

16 Opening Statement for the Prosecution, in Flick Case, (1950) 6 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 53–4.

17 See *United States v Carl Krauch et al* (1950) 8 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1081 ('*Farben Case*').

18 See *United States v Carl Krauch et al* (1950) 8 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1081 ('*Farben Case*').

19 *United States v Carl Krauch et al* (1950) 8 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1081, 1205–9 ('*Farben Case*').

20 See Anita Ramasastry, 'Secrets and Lies? Swiss Banks and International Human Rights' (1998) 31 *Vanderbilt Journal of Transnational Law* 325, 423.

21 Anita Ramastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations' (2001) 20 *Berkeley Journal of International Law* 91, 106.

22 See *United States v Carl Krauch et al* (1950) 8 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1132–3 ('*Farben Case*').

trinity" of National Socialism, militarism, and economic imperialism. He summed it up thus:

> [The Captains of German] industry drank deep of this witches' brew ... [T]hey took to lining their pockets at the expense of wealthy Jews in Germany and the occupied territories. After the victories of the Wehrmacht in France and Russia, they were on hand to seize and exploit the choicer industrial properties. They enslaved and deported the peoples of the occupied countries to keep the German war machine running, and treated them like animals ....[23]

The *Flick Case* also explicitly proclaimed that international criminal law bound both civilians and the military:

> It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in propria persona. The application of international law to individuals is no novelty .... There is no justification for a limitation of responsibility to public officials.[24]

In the same year that the *Flick Case* was decided, the *Krupp Case* reaffirmed the concept of corporate liability espoused earlier in the trial of executives of the I G Farben Conglomerate. In *United States v. Krupp*, Alfred Krupp and eleven executives of his giant armaments firm – which had been one of the main engines which drove the German war machine – were indicted for Crimes against Peace, spoliation and plunder, and the deployment of slave labour.[25] During trial, the Tribunal characterized the Krupp firm's treatment of Polish and Russian workers as 'inhumane,'[26] and its maintenance of several penal camps as a violation of Article 52 of the *Hague Convention IV*.[27]

The Tribunal, in its judgment, described the actions of defendants as '[h]aving exploited, as principals or as accessories, in consequence of a deliberate design and

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23 *United States v Friedrich Flick* (1950) 6 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 33 ('*Flick Case*').

24 *United States v Friedrich Flick* (1950) 6 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 33 ('*Flick Case*').

25 *United States v Alfried Krupp* (1950) 9 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 7–36 ('*Krupp Case*').

26 *United States v Alfried Krupp* (1950) 9 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1405 ('*Krupp Case*').

27 Article 52 requires that services may be demanded from the inhabitants of occupied countries so long as such obligations are intended to meet the 'needs of the army of occupation,' are in 'proportion to the resources of the country,' and do not 'involve the inhabitants in the obligation to take part in military operations against their own country': *United States v Alfried Krupp* (1950) 9 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1432 ('*Krupp Case*').

policy, territories occupied by German armed forces in a ruthless way, far beyond the needs of the army of occupation and in disregard of the needs of the local economy.'[28] Eleven of the twelve defendants were convicted and sentenced.[29]

In the Far East, the issue of corporate liability was addressed in Kinkaseki Mine trial held before the British War Crimes Court in Hong Kong.[30] The nine defendants were all civilian employees of the Nippon Mining Company who were accused of mistreating POWs forced to labour in mines in Formosa owned by the company. The British military court's central focus was whether care for the prisoners (and subsequent mistreatment) was the responsibility of the mining company or of the army. During the trials, the defendants and witnesses from the Japanese Army successfully argued that when the POWs were working in the mine, the company, not the Army was responsible for their welfare.[31]

Summing up the matter of corporate responsibility as espoused by *CCL No. 10* and related national trials, Professor Anita Ramastry notes:

> The trials of Nazi era industrialists for using forced labour during the Holocaust and the prosecution of Japanese mining company officials provide support for the capacity of courts to adjudicate criminal and civil cases in which corporate officials are accused of committing human rights abuses.[32]

Regarding individual criminal responsibility, the Nuremberg Tribunal had observed that '[c]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[33] In the prominent *Einsatzgruppen Case*,[34] the *CCL No. 10* trial went further in sweeping away the protective mantle of the State holding that individuals who had committed criminal acts under international law cannot

28 *United States v Alfried Krupp* (1950) 9 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1338 ('*Krupp Case*').

29 *United States v Alfried Krupp* (1950) 9 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1449–51 ('*Krupp Case*').

30 See 'Excavating Japan's Past', *ABC News*, 23 February 2000, <http://abcnews.go.com/sections/world/DailyNews/slavelabor000223.html> (last visited 10 September 2004). For further accounts of the experiences of British POWs at the Kinkaseki Mine, see 'POWs Fight Japan in USA Courts', *BBC News*, 23 February 2000,<http://0-news.bbc.co.uk.library.newcastle.edu.au:80/hi/english/uk/newsid_652000/652633.htm> (last visited 12 November 2003).See 'Excavating Japan's Past', *ABC News*, 23 February 2000.

31 See 'Copper Mine Trial', *South China Morning Post*, 13 May 1947, 4.

32 Anita Ramastry, 'Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations' (2001) 20 *Berkeley Journal of International Law* 91, 104.

33 *Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946* (London: HMSO), Cmd 6964, 41–2; quoted in Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970) 78.

34 See *United States v Otto Ohlendorf* (1950) 6 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* 412 ('*Einsatzgruppen Case*'). The defendants were charged with the destruction of over one million individuals. According to the Court, they were in 'the field actively superintending, controlling, directing, and taking an active part in the bloody harvest.'

shelter themselves behind their official positions in order to be free from punishment in appropriate proceedings.

The national tribunal after a reasoned judgment rejected as fallacious the proposition that international obligations apply only to the 'abstract entities called States'[35] noting that nations can only act through 'human beings' and each combatant is charged with an obligation to respect international law.[36] According to the tribunal, this was not a trial of the vanquished by the victors:

> In war there is no legal entity such as a 'defeated individual' just as there is no concept of a 'victorious individual.' The defendants are in court not as members of a defeated nation but because they are charged with crime. They are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation.[37]

The tenor of the *Einsatzgruppen* Judgment was reflected in the *High Command Case*, one of the leading military cases.[38] In rejecting the defendants' argument that only Hitler was responsible for launching a war of aggression, the tribunal emphasised that Hitler depended on others to formulate, prepare, plan and wage his wars of aggression. The tribunal further held that though the purpose of international law is to control and direct the conduct of nations, since nations act through individuals, the actions of nations can only be affected by the imposition of liability upon those individuals who shape and carry out State policies.

As vividly expressed by the tribunal, it would be an 'utter disregard of reality and but legal shadow-boxing to say that only the State, the inanimate entity, can have guilt, and that no guilt can be attributed to its animate agents who devise and execute its policies.'[39] The tribunal in the case further observed that international law 'may ... limit the obligations which individuals owe to their States, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of State.'[40]

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35 See *United States v Otto Ohlendorf* (1950) 6 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* 460 ('*Einsatzgruppen Case*').

36 See *United States v Otto Ohlendorf* (1950) 6 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* ('*Einsatzgruppen Case*').

37 See *United States v Otto Ohlendorf* (1950) 6 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* 462 ('*Einsatzgruppen Case*').

38 *United States v Wilhelm von Leeb* (1953) 11 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* 462 ('*High Command Case*').

39 *United States v Wilhelm von Leeb* (1953) 11 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* 508 ('*High Command Case*').

40 *United States v Wilhelm von Leeb* (1953) 11 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* 489 ('*High Command Case*'). The Tribunal went on to point out that the prerogatives of members of the military also are restricted by international law. For example, a military commander in an occupied area 'under international law and accepted usages of civilised nations ... [has] certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area': *United States v Wilhelm von Leeb* (1953) 11 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* 544 ('*High Command Case*').

Crimes against humanity as a distinct group of crimes under international law was tackled in the *Justice Case*.[41] The case involved various German jurists who were charged with the commission of war crimes, crimes against humanity, and with conspiring to commit such offences through the instrumentalities of the German Ministry of Justice and courts. The Tribunal recognized that the war nexus operated to distinguish crimes against humanity from ordinary crimes:

> [C]rimes against humanity as defined in [*CCL No. 10*] must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by a governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offences of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.[42]

The war nexus issue addressed in the *Justice Case* had also been directly at issue in the *Flick Case*, four years earlier, in which the tribunal expressly rejected an argument that the omission of the limiting language in *CCL No. 10* manifested an intent to broaden the scope of crimes against humanity to transcend linkage with war.[43] The prosecution in the *Justice Case,* however, argued vigorously that the plain language of *CCL No. 10* provided jurisdiction over crimes against humanity independent of their connection to war crimes or crimes against the peace.[44]

Although the war nexus requirement was not an express element of the offence of crimes against humanity in *CCL No. 10*, the national tribunal considered itself bound by the Nuremberg International Military Tribunal's precedent and treated the war nexus requirement as an essential element of the offence to be proven by the prosecution. As Beth Van Shaack notes: 'This staying power of the war nexus requirement reveals a profound ambivalence among international lawyers of that era about the propriety of international law reaching inhumane acts that occurred entirely within the boundaries of a sovereign state.'[45]

Though the Nuremberg International Military Tribunal evidently relied on universal jurisdiction,[46] reliance on the universality principle was not always obvious.

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41 *United States v. Alstoetter: Indictment* (1951) 3 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 15.

42 1 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10* (1951) 982.

43 *United States v Friedrich Flick* (1950) 6 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 1212 ('*Flick Case*'): 'It is argued that the omission of this phrase ["in execution of or in connection with"] from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of this Tribunal to include such crimes [occurring before 1 September 1939]'.

44 See Opening Statement for the Prosecution, (1951) 1 *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10* 80, 85.

45 Beth Van Schaack, 'The Definition Of Crimes Against Humanity: Resolving The Incoherence' (1999) 37 *Columbia Journal of Transnational Law* 787, 818.

46 International Military Tribunal (Nuremberg), Judgment and Sentences (1947) 41

The proceedings of the zonal tribunals and the various other post-World War II tribunals constituted by States contain more explicit references to the universality principle. A prominent example is *Re List* (popularly known as the *Hostages Case*)[47] decided by the United States court in Nuremberg.

The tribunal convicted most of the defendants for war crimes and crimes against humanity under *CCL No. 10*.[48] In discussing the basis of legislative, adjudicatory, and enforcement jurisdiction to punish such offences, the zonal tribunal indicated that the defendants had committed international crimes.[49] The tribunal explained that 'an international crime is ... an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.'[50]

The observation in the *List Case* was further reinforced by other cases from zonal and military tribunals including the *Almelo Trial*, the *Zyklon B Case*, the *Hadamar Trial* and *Eisentrager Case* which provide some of the post-World War II cases' most explicit references to the universality principle.[51] The doctrine was emphasised in the *Justice Case* in which the tribunal observed that the extension of international law to encompass acts which traditionally had fallen within States' domestic jurisdiction was premised on the enormity of these offences being such that they were considered to be directed against and pose a threat to humanity rather than against any particular country.[52]

The post-World War II domestic trials reliance and reaffirmation of universal jurisdiction was reflected in some of the post-World War II treaties adopted around this period. These treaties prominently include the four Geneva Conventions of

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American Journal of International Law 172, 216. The entire proceedings of the Nuremberg Tribunal may be found in a 25 volume compilation by the Nuremberg Tribunal, *The Trial of German Major War Criminals* (1946–1951).

47 The transcripts and decisions of these cases are contained in US Government Printing Office, *Trials of War Criminals Before the Nuernberg Military Tribunal under Control Council Law No. 10* (14 Vols, 1949–1953), see volume 11 (1953) at 757.

48 The transcripts and decisions of these cases are contained in US Government Printing Office, *Trials of War Criminals Before the Nuernberg Military Tribunal under Control Council Law No. 10* (14 Vols, 1949–1953), see volume 11 (1953) at 765–76. List is known as the *Hostage Case* because civilians were taken hostage and then killed.

49 The transcripts and decisions of these cases are contained in US Government Printing Office, *Trials of War Criminals Before the Nuernberg Military Tribunal under Control Council Law No. 10* (14 Vols, 1949–1953), see volume 11 (1953) at 1241.

50 The transcripts and decisions of these cases are contained in US Government Printing Office, *Trials of War Criminals Before the Nuernberg Military Tribunal under Control Council Law No. 10* (14 Vols, 1949–1953), see volume 11 (1953) at 1241.

51 United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals* (1945) vol 5, 35 (British Military Court--Almelo); United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals* (1946) vol 1, 93 (British Military Court--Hamburg); United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals* (1945) vol 1, 46 (US Military Commission--Wiesbaden); United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals* (1947) vol 8 (US Military Commission--Shanghai).

52 Jackson Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) 129.

1949,[53] which protect certain classes of persons during an armed conflict between parties'[54] and the *Convention on the Prevention and Punishment of the Crime of Genocide*[55] which outlaws the crime of genocide.[56] Although the Geneva Conventions as such do not refer explicitly to war crimes or crimes against humanity, the grave breaches that the conventions condemn partly overlap with the definitions of war crimes and crimes against humanity in the *Nuremberg Charter* and *CCL No. 10*. The Geneva Conventions arguably may be viewed as having codified (or perhaps crystallised) the Nuremberg Tribunal's and zonal tribunals' subjection of war crimes to the universality principle.[57]

With regard to command responsibility, neither the *Nuremberg Charter* nor the Judgment of the International Military Tribunal for the Trial of German Major War Criminals explicitly addressed the responsibility of military commanders or other

53 The four 1949 Geneva Conventions are: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 ('*Geneva Convention II*'); *Geneva Convention Relative to the Treatment of Civilians in War*, opened for signature 12 August 1949, 75 UNTS 135 ('*Geneva Convention III*'); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 287 ('*Geneva Convention IV*'). See generally Gutteridge, 'The Geneva Conventions of 1949' (1949) 26 *British Year Book of International Law* 294 (discussing the articles common to the four Conventions); Yingling and Ginnane, 'The Geneva Conventions of 1949' (1952) 46 *American Journal of International Law* 393 (examining 'salient provisions' of the Conventions particularly relevant to the development of the international law of war).

54 The Geneva Conventions all provide that '[e]ach [party] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed ... grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 art 49 ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85, art 50 ('*Geneva Convention II*'); *Geneva Convention Relative to the Treatment of Civilians in War*, opened for signature 12 August 1949, 75 UNTS 135, art 129 ('*Geneva Convention III*'); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 287, art 146 ('*Geneva Convention IV*'). For the United States courts in which grave breaches could be prosecuted, see US Department of The Army, *Field Manual No 27–10*, *The Law of Land Warfare* (1956) 180–1.

55 *Convention on the Prevention and Punishment of the Crime of Genocide,* adopted 9 December 1948 in UN GA Res 260(III)A, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

56 *Convention on the Prevention and Punishment of the Crime of Genocide,* adopted 9 December 1948 in UN GA Res 260(III)A, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*'). The Genocide Convention was proposed and adopted under United Nations auspices in 1948, three years after the Nuremberg Judgment adopted the basic thrust of the crimes against humanity count at Nuremberg and made it applicable in peacetime as well as wartime.

57 Kenneth C Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review* 785, 819, n 229. Of course, the definitions of 'grave breaches' in the Conventions do not correspond completely with the offences prosecuted by the war crimes tribunals.

leaders for a failure to act, probably because the degree of participation by leaders in the offences for which they were convicted made consideration of this issue unnecessary in the face of strong evidence of their direct liability.

The most significant command responsibility cases to come from Nuremberg illustrating this judicial stance, however, came from the trials conducted under the auspices of *CCL No. 10*[58] as opposed to the international military tribunals. In the leading German cases such as the *High Command Case*[59] and the *Hostages Case*,[60] it was usually clear that offences had been committed and that orders had been given at the highest level. Consequently, the decisions revolve around the degree of responsibility to be assigned to commanders for implementing these orders.

While prosecution of Nazi leaders for superior responsibility hinged on direct liability, in the Far East, prosecution of Japanese leaders revolved around imputed liability based on the superior's actual or constructive knowledge of crimes by subordinates or gross negligence that contributed to their commission. To the press, the public and legal scholars then and now, the *Yamashita* trial was the first significant Japanese war crime trial outside the Tokyo International Military Tribunal. Major Mark D Pollard, commenting on the trial of this senior Japanese career soldier charged with 123 counts of atrocities over tens of thousands of Filipino deaths, notes:

> The prosecution had little or no evidence that General Yamashita ordered the killings. Instead, the prosecution's theory was that General Yamashita was criminally responsible for the war crimes under a theory of "command responsibility." The theory supposed General Yamashita's guilt because he knew the killings were taking place, yet did nothing to either prevent them or to discipline those responsible.[61]

The *Yamashita Case* is probably the best-known military command responsibility case. It is thought to stand for the proposition that a military commander is liable for the acts of his troops on the basis of strict liability. Major William H. Parks, however, has criticised this viewpoint:

> The value of the study of the Yamashita trial lies not in its often misstated facts nor in the legal doctrine of strict liability it purportedly espoused (but did not), but in the legal conclusions it actually reached. Yamashita recognised the existence of an affirmative duty on the part of a commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of

58 *Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity* (20 December 1945), Official Gazette of the Control Council for Germany, No 3, Berlin, 31 January 1946 ('*CCL No. 10*'), 50–5.

59 United Nations War Crimes Commission, 'The German High Command Trial' (1949) 12 *Law Reports of Trials of War Criminals* 34. Fourteen high-ranking officers of the German army were tried for war crimes and crimes against humanity.

60 United Nations War Crimes Commission, 'The German High Command Trial' (1949) 12 *Law Reports of Trials of War Criminals* 34. Fourteen high-ranking officers of the German army were tried for war crimes and crimes against humanity.

61 Major Mark D Pollard, 'Book Review: Judgement at Tokyo: The Japanese War Crimes Trials' (2002) 171 *Military Law Review* 220, 221.

> the laws of war, in particular exercising control over his subordinates; it established that the commander who disregards this duty has committed a violation of the law of war; and it affirmed the summum jus of subjecting an offending commander to trial by a properly constituted tribunal of a State other than his own.[62]

While both international military tribunals and subsequent national trials by the victorious allies explicitly articulated command responsibility with respect to military commanders, and civilian superiors who had directly participated in military operations, it was unclear whether one should conclude that political and bureaucratic leaders have exactly the same responsibilities as do military leaders for the acts of their subordinates.

The only post-World War II trial which appears to have considered the responsibility of political and bureaucratic leaders for failure to act was the International Military Tribunal at Tokyo. The Tokyo Tribunal articulated and imposed direct international legal responsibilities on political and bureaucratic leaders as well as military leaders.[63]

62 Major William H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1.

63 International Military Tribunal for the Far East, *Japanese War Crimes Trials, 1946–1948* (1948) 48, 443–5.

Chapter 4

The Experience of the *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda

Jackson Maogoto

The end of the Cold War, which paralyzed the United Nations from its inception, was a cause for celebration and hope. In the early 1990s, while Western leaders were still congratulating themselves over the end of communism and the fall of the Soviet empire, the security structure that helped bring about those events began to come apart. Less than two years after the fall of the Berlin Wall, the structure of international law seemed to be crumbling.

Following the historic Security Council Summit Meeting of January 1992, the then Secretary-General of the United Nations, Boutros Boutros-Ghali, spoke of a growing conviction 'among nations large and small, that an opportunity has been regained to achieve the great objectives of the *UN Charter* – a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, "social progress and better standards of life in larger freedom".'[1] Even as this optimistic mission statement was being made, the Balkans had erupted into a theatre of war and Rwanda's genocidal conflagration was in the making. It took a war in Europe-Croatia in 1991-to stir public interest. The war in Bosnia-Herzegovina (1992) and the Rwandan genocide (1994) amplified the alarm bell, though it had been sounded a good deal earlier.[2]

Unlike the indifference by the international community which had met the humanitarian crises of the politically volatile Cold War era, in the post-Cold War era, the ideological barrier between the 'East' and 'West' had crumbled. The UN Security Council was in a position to achieve 'Great Power Unanimity' on operations authorised under Chapter VII of the Charter (to maintain or restore international peace and security). This new spirit of cooperation was crucial in enabling the UN to carve out a much broader role by acting as a watchdog over international

1 *Report of the Secretary General on the Work of the Organization*, UN GAOR, 47th sess, UN Doc A/47/277, S/24111 (1992).

2 In January 1991, with the overthrow of Somalia's President Siad Barre, fighting between various Somali factions and clans resulted in widespread death and destruction, causing a dire need for emergency humanitarian assistance. See generally *The Situation in Somalia: Report of the Secretary-General*, UN SCOR, 47th sess, [7], [9], [11] and [13], UN Doc S/23829/Add 1 (1992); *The Situation in Somalia: Report of the Secretary-General*, UN SCOR, 47th sess, [4], UN Doc S/23693 (1992); *The Situation in Somalia: Report of the Secretary-General*, UN SCOR, 47th sess, [13], UN Doc S/23829 (1992.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 63-74.

disputes, a peacemaker and peacekeeper. Though slow to react, the Security Council issued a series of resolutions with regard to the conflicts in the 1990s, and deployed peacekeepers.[3]

In response to the deteriorating human rights situation in the former Yugoslavia, the UN Commission on Human Rights was called into its first ever special session, during which it adopted resolution 1992/S-1/1 on 14 August 1992, requesting the Chairman of the Commission to appoint a special rapporteur 'to investigate first hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina'.[4] The first report of Special Rapporteur Mazowiecki to the Commission on Human Rights concerned, *inter alia*, the policy of ethnic cleansing and other serious human rights violations committed in the territory of the former Yugoslavia. The report stated that '[t]he need to prosecute those responsible for mass and flagrant human rights violations and for breaches of international humanitarian law and to deter future violators requires the systematic collection of documentation on such crimes and of personal data concerning those responsible.'[5]

The Special Rapporteur then recommended that '[a] commission should be created to assess and further investigate specific cases in which prosecution may be warranted. This information should include data already collected by various entities within the United Nations system, by other inter-governmental organizations and by non-governmental organizations.'[6]

Subsequently, a number of reports called for criminal investigation of war crimes and serious violations of humanitarian law as well as the timely collection of information and evidence to support such investigations.[7] The Security Council keen on

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3 Former Yugoslavia (1992), Somalia (1992), Cambodia (1992), Croatia (1995, 1996, 1998) and East Timor (1999). For information on the relevant Security Council resolutions and profiles of the peacekeeping missions, see the UN website at the following URL: <http//: www.un.org/documents/sc/res>.

4 See *Report on the Situation of Human Rights in the Territory of the former Yugoslavia* submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S–1/1 of 14 August 1992, E/CN 4/1992/S–1/9, 28 August 1992.

5 *Report on the Situation of Human Rights in the Territory of the former Yugoslavia* submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S–1/1 of 14 August 1992, E/CN 4/1992/S–1/9, 28 August 1992, [69].

6 *Report on the Situation of Human Rights in the Territory of the former Yugoslavia* submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S–1/1 of 14 August 1992, E/CN 4/1992/S–1/9, 28 August 1992, [70].

7 See, eg, E/CN 4/1992/S-1/10 of 27 October 1992 at [18] as well as Annex II (Statement by Dr Clyde Snow). See also *Report of the Special Rapporteur* (transmitted by the Secretary-General to the Security Council and General Assembly) A/47/666; S/24809 of 17 November 1992, [140], where Mr Mazowiecki stated: 'There is growing evidence that war crimes have been committed. Further investigation is needed to determine the extent of such acts and the identity of those responsible, with a view to their prosecution by an international tribunal, if appropriate'. See further the later reports of the Special Rapporteur for more details on the human rights situation in the former Yugoslavia: E/CN 4/1993/50 of 10 February 1993; E/CN 4/1994/3 of 5 May 1993; E/CN 4/1994/4 of

deflecting international criticism, on 13 August 1992, adopted Resolution 771, requiring member states to submit reports on violations of humanitarian law perpetrated in the territory of the former Yugoslavia. Finally in response to sustained internal and external criticism, action by the UN came in the form of a 'war crimes commission,' established to better assimilate the massive information and evidence of alleged war crimes being turned over to the UN. On 6 October 1992.[8]

The Secretary-General duly constituted a five-member independent and impartial Commission of Experts to determine whether there were grave breaches of the 1949 Geneva Conventions.[9] The Commission interpreted its mandate as requiring the collection of all possibly relevant information and evidence concerning violations of international humanitarian law that it could secure given its resources and capabilities. The Commission collected information from various sources, carried out a number of investigations, and submitted three reports to the Secretary-General on serious violations of international humanitarian law in the territory of former Yugoslavia, referring to widespread patterns of wilful killing, ethnic cleansing, mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests.[10]

With international pressure mounting over the gross and systematic violations of human rights, captured vividly in various reports, print and electronic media, on 22 February 1993, the Security Council unanimously adopted Resolution 808, which underlined the Council's intention to create an international tribunal to prosecute individuals responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991 and requested the Secretary-General to report on all aspects of the matter and to make specific proposals on the resolution's implementation.[11]

Finally, in an unprecedented decision, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY) was established by the United Nations Security Council in May 1993[12]

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19 May 1993; E/CN 4/1994/6 of 26 August 1993; E/CN 4/1994/8 of 6 September 1993; E/CN 4/1994/47 of 17 November 1993; E/CN 4/1994/110 of 21 February 1994; E/CN 4/1995/4 of 10 June 1994; E/CN 4/1995/10 of 4 August 1994; A/49/641-S/1994/1252 of 4 November 1994; E/CN 4/1995/54 of 13 December 1995; E/CN 4/1995/57 of 9 January 1995; E/CN 4/1996/3 of 21 April 1995; E/CN 4/1996/6 of 5 July 1995. On 27 July 1995, Mr Mazowiecki informed the Commission of his decision to resign his mandate. The responsibilities of the Special Rapporteur on the former Yugoslavia were taken up by Ms Elisabeth Rehn of Finland as of September 1995.

8 See SC Res 780, UN SCOR, sess, 3119th mtg, UN Doc S/Res/780(1992) adopted on 6 October 1992. Reprinted in 31 ILM (1992) 1476.

9 See *Report of the Secretary-General on the Establishment of the Commission of Experts Pursuant to Paragraph 2 of Security Council Resolution 780*, UN Doc S/24657 (1992).

10 See UN Doc S/25274 of 9 February 1993.

11 See SC Res 808, UN SCOR, 48th sess, 3175th mtg, UN Doc S/Res/803 (1993) ('SC Res 808').

12 See SC Res 808, UN SCOR, 48th sess, 3175th mtg, [2], UN Doc S/RES/808 (1993) ('SC Res 808') (requesting a report on how such a Tribunal might be established); see also *Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in*

by the Security Council as an enforcement measure pursuant to Chapter VII of the *UN Charter*.[13] Its creation was essentially prompted by three considerations. First, by 1993, it had become obvious that the parties to the Yugoslav conflict were unwilling, and in the case of Bosnia and Herzegovina unable, to bring to justice persons responsible for the egregious crimes that were taking place. Second, by establishing the Tribunal, the Security Council hoped to deflect criticism for its reluctance to take more decisive action to stop the bloodshed in the former Yugoslavia. Third, the Tribunal was intended to meet the crucial goal of deterrence with the possibility of arrest, prosecution and punishment signalling an intention to curb impunity and discourage criminality. In both political and legal terms the Council's action was groundbreaking. With the Cold War over, it became possible for its members to reach political agreement on a measure that would have been unthinkable in the era of 'East-West' ideological struggle.[14]

Not without controversy, the international community, with the Security Council at its helm, decided that the establishment of an international tribunal empowered to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 was a worthy precedent to set, worthy even to the extent of subjugating the sovereignty of the States involved.[15] Considerations of state sovereignty, dampened enthusiasm for the ICTY. In the first instance, the legal basis of the Tribunal as an enforcement measure by the Security Council under its Chapter VII mandate did not sit well with states. The view of many states was that a multilateral treaty would have been the best system as no state ought to be bound to legal obligations to which it has not expressly consented. Secondly, at the very least, states argued for an establishment under the auspices of the General Assembly, the more representative body.

This would, however, have given States leeway in discussing some kind of least common denominator in terms of legal obligations envisaged under the international penal process and would almost certainly have resulted in a weak institution. In the end, the horrors of the Balkan conflict and the international outrage they gen-

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the Territory of the Former Yugoslavia, SC Res 827, UN SCOR, 48th sess, 3217th mtg, [2], UN Doc S/RES/827 (1993) ('SC Res 827') (creating the Tribunal).

13 Chapter VII allows the United Nations to use military force and act in areas otherwise reserved to the domestic jurisdiction of states. United Nations operations in Iraq, Somalia, and Haiti were all authorised under Chapter VII: see SC Res 678, UN SCOR, 45th sess, Res & Dec, [27], UN Doc S/INF/46 (1990); SC Res 794, UN SCOR, 47th sess, Res & Dec, [63], UN Doc S/INF/48 (1992); SC Res 841, UN SCOR, 48th sess, Res & Dec, [119], UN Doc S/INF/49 (1993).

14 Jelena Pejić, 'Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes against Humanity; The Tribunal and the ICC: Do Precedents Matter?' (1997) 60 *Albany Law Review* 841.

15 A similar decision was made that invoked Chapter VII of the UN Charter to establish the International Tribunal for Rwanda, although some of the circumstances differ. For example, Rwanda initially requested that a judicial tribunal be established to prosecute persons responsible for the violence that broke out. See Virginia Morris and Michael P Scharf (eds), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary Analysis* (1995) vol 1 (citing the Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, UN Doc S/1994/1115 (1993)).

erated prevailed with no State (except the Yugoslav Republics)[16] being bold enough to object strenuously and thus actively attempt to block the quest for international justice by seeking to subordinate the noble idea to the vagaries of realpolitik.[17]

The specific provisions of the *ICTY Statute* reflect the influence of the *Nuremberg Charter*, drafts of the International Criminal Court statute, and proposals of various countries,[18] all of which were considered in drafting the *ICTY Statute*. The Tribunal has subject matter jurisdiction over four categories of crimes: (1) grave breaches of the 1949 Geneva Conventions; (2) other violations of the laws and customs of war; (3) genocide; and (4) crimes against humanity.[19] The principle of individual criminal

16 The Yugoslav republics at the forefront of the objection were the Federal Republic of Yugoslavia (Serbia and Montenegro), Croatia and later the Republic Srpska.

17 This section presents a seemingly linear progression of conflict, investigatory commission and establishment of an international criminal tribunal. The author however wishes to acknowledge that the establishment of the two *ad hoc* international criminal tribunals was undertaken against a background of complex realpolitik considerations and often hypocritical positions by the 'Big Five' as well as other states. Charged with the maintenance of international peace and security, the United Nations fell short of fulfilling this mandate when it virtually ignored the Yugoslav crisis as well as the genocidal conflagration in Rwanda until they had spiralled out of control. Inspite of being symbols of failure of the international community, these two *ad hoc* international tribunals nonetheless constitute an important advancement in taming sovereign excesses. For a discussion of the politics of the two processes, see, eg, M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) *Harvard Human Rights Journal* 11, 39–47; M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia* (1996) 202–236; Jackson Nyamuya Maogoto, 'International Justice Under the Shadow of Realpolitik: Revisiting the Establishment of the Ad Hoc International Criminal Tribunals' (2001) 5(2) *Flinders Journal of Law Reform* 161; Jackson Nyamuya Maogoto, 'International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory' (2001) 13(2) *Bond Law Review* 190.

18 France, Italy, and Sweden (on behalf of the CSCE) made proposals. Formal suggestions (in contrast with the unpublished informal submissions of other states) were made by Brazil (UN Doc A/47/922-S/25540 (1993)); Canada (UN Doc S/25594 (1993)); Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey, on behalf of the members of the Organisation of the Islamic Conference (OIC) and as members of the OIC Contact Group on Bosnia-Herzegovina (UN Doc A/47/920-S25512 (1993)); Mexico (UN Doc S/25417 (1993)); Netherlands (UN Doc S/25716 (1993)); Russian Federation (UN Doc S/25537 (1993)); Slovenia (UN Doc S/25652 (1993)); and the United States (UN Doc S/25575 (1993)). See Virginia Morris and Michael P Scharf (eds), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary Analysis* (1995) vol 1, 32 n 120.

19 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), arts 2–5. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 1993. The ICTY Statute is contained as an Annex to the Report. For a detailed commentary on the ICTY's subject matter jurisdiction, see John R W D Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998) 7–60; Virginia Morris and Michael P Scharf (eds), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary Analysis* (1995) vol 1, 61–88; Sean D Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1999) 93 *American Journal of International Law* 57, 65-71.

responsibility for the commission of these crimes is the cornerstone of the Tribunal's jurisprudence.[20] The Tribunal's jurisdiction over the above-mentioned crimes is not exclusive, as national courts may also try indicted war criminals.[21] Nevertheless, the Tribunal retains primacy over national courts and may step into the national judicial proceedings at any time to take over the trial.[22]

The general form of primacy set out in the *ICTY Statute* and Rules of Procedure and Evidence compromises the criminal jurisdiction of all States in order to establish that of the International Tribunal. Article 9 of the *ICTY Statute* grants the International Tribunal jurisdiction both concurrent with, and superior to, that of the national courts of the former Yugoslav States. It provides:

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1 January 1991.
> 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.[23]

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20 See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), art 7 (setting forth the scope for who can be held criminally liable). See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 1993. The ICTY Statute is contained as an Annex to the Report. For a detailed discussion of art 7 in the ICTY jurisprudence, see John R W D Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998) 62–72; Virginia Morris and Michael P Scharf (eds), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary Analysis* (1995) vol 1, 91–115 (discussing who is liable, what defences are available, and when immunity may be granted); Sean D Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1999) 93 *American Journal of International Law* 57, 71–2.

21 See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), arts 9–10. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 1993. The ICTY Statute is contained as an Annex to the Report.

22 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), art 9. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 199. The ICTY Statute is contained as an Annex to the Report. See *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991,* UN GAOR, 49th sess, [11]–[14], UN Docs A/49/342, S/1994/1007 (14 November 1994), available at <http://www.un.org/icty/rapportan/first-94.htm> (visited 24 March 2003).

23 See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), preamble and art 1 (Competence of the International Tribunal), art 9 (Concurrent Jurisdiction). See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 1993. The ICTY Statute is contained as an Annex to the Report.

Under Article 9 of the *ICTY Statute*, the International Tribunal and national courts have concurrent jurisdiction over serious violations of international humanitarian law within the Tribunal's competence subject to the Tribunal's primacy.[24] According to the Statute, primacy means that 'at any stage of the procedure,' the International Tribunal may formally request national courts to defer to its competence.[25] Thus, even though a State has both custody of a person accused of war crimes and concurrent jurisdiction to try him/her, that State is required to yield its jurisdiction once the Tribunal makes a formal 'request' for deferral.[26] This deferral process raises a number of delicate political issues,[27] and there has been disagreement from the start on fundamental aspects of its operation.[28] The Statute's use of the term 'request' may be interpreted as meaning that deferral is not legally required,[29] but the judges of the Tribunal have endorsed a much stronger view of primacy and deferral.[30]

Primacy of the Tribunal is further enshrined through its Rules of Procedure and Evidence. Rules 8 through 13 expound upon the primacy of the Tribunal over national courts and set out the process by which it may assert that primacy. When proceedings that appear to concern crimes within the jurisdiction of the International Tribunal begin in any State, the Prosecutor may request information from that State

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24 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), art 9(1). See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 1993. The ICTY Statute is contained as an Annex to the Report.

25 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), art 9(1). See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 1993. The ICTY Statute is contained as an Annex to the Report.

26 Deferral is the Prosecutor's formal request made to a Trial Chamber that a state defer to the Tribunal's jurisdiction and pass the results of its inquiries in the matter considered to the Office of the Prosecutor. If such a request is issued, the Office of the Prosecutor incorporates the investigations from the national authorities into its own investigation, and the persons under investigation become subject to prosecution solely before the Tribunal.

27 M Cherif Bassiouni has observed that '[o]f all the provisions of the Statute, those concerning deferral are likely to have the most political significance. They also have the greatest potential for protracted legal and political manoeuvres': M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia* (1996) 319.

28 See Provisional Verbatim Record of the 3217th mtg, UN Doc S/PV 3217 (1993) (Statements from the Provisional Verbatim Record).

29 See Philippe Weckel, 'L'Institution d'un Tribunal Internationale pour la Repression des Crimes de Droit Humanitaire en Yougoslavie' (1993) 39 *Annuaire Français de Droit Internationale* 232, 258–9, quoted in M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the former Yugoslavia* (1996) 313–4 (suggesting that the obligation to comply with requests and orders of ICTY under art 29 of its Statute does not apply to requests for deferral).

30 '[W]hen an international tribunal such as the present one is created, it must be endowed with primacy over national courts.' Appeals Decision on Jurisdiction, below n 191 at 58; see also Virginia Morris and Michael P Scharf (eds), *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary Analysis* (1995) vol 1, 131 (concluding that compliance with request for deferral is an obligation under art 29 of *ICTY Statute*).

regarding its national criminal proceedings.[31] Rule 9 sets out three grounds that the Prosecutor may invoke in asking that the Trial Chamber issue a formal request for deferral. Thus, the Prosecutor may initiate the deferral process if the act being investigated by the national court or the subject of the proceeding is characterised as an ordinary crime, if the national proceedings are a sham, or if what is at issue in the national proceedings is closely related (factually or legally) to investigations or prosecutions before the Tribunal.[32] The third ground for requesting deferral under Rule 9 does not require that there be any deficiency in the national prosecution, nor does it restate or reflect any specific language included in the Statute.

Rather, Rule 9(iii) allows the Prosecutor to request deferral solely because the national proceedings overlap in some way with an investigation or prosecution of the International Tribunal. Thus, the Tribunal can assert its primacy in virtually any situation, not merely when it will remedy specific problems with an ongoing national proceeding. This distinguishes the primacy of the *ad hoc* Tribunal from the lesser 'complementary jurisdiction' that is incorporated into the *Rome Statute of the International Criminal Court*.[33]

Further reflecting on the primacy of the ICTY is the power and authority conferred on the Prosecutor. The Prosecutor is appointed by the Security Council on nomination by the Secretary-General[34] and has the power to 'initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations ...'[35] '[T]he Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the

31 *ICTY Rules of Procedure and Evidence*, UN Doc IT/32/REV.20 (as amended 12 April 2001), available at <http://www.un.org/icty/basic/rpe/IT32_rev20con.htm> (visited 30 May 2004). Rule 8, unlike Rule 9, specifically provides that compliance with these requests is to be legally binding under art 29 of the Statute.

> *Rule 8 Request for Information*:
>
> Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with art 29 of the Statute.

32 *ICTY Rules of Procedure and Evidence*, UN Doc IT/32/REV.20 (as amended 12 April 2001), available at <http://www.un.org/icty/basic/rpe/IT32_rev20con.htm> (visited 30 May 2004), Rule 9.

33 Art 1, *Rome Statute of the International Criminal Court*, (*Rome Statute*), UN Doc A/CONF 183/9) reprinted in 37 ILM 999 ('*Rome Statute*'), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

34 See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), art 16, cl 1 (The Prosecutor).

35 *ICTY Rules of Procedure and Evidence*, UN Doc IT/32/REV.20 (as amended 12 April 2001), available at <http://www.un.org/icty/basic/rpe/IT32_rev20con.htm> (visited 30 May 2004), Rule 54, art 18, cl 1 (Investigation and Preparation of the Indictment).

State authorities concerned.'[36]

The powers of the Prosecutor are borne out by the Rules of Procedure and Evidence. The Prosecutor may 'request the State to forward to him all relevant information [with regard to criminal proceedings instituted in the courts of any State], and that State shall transmit to him such information forthwith ...'[37] and he/she may 'request ... that [a national court wherein investigations or criminal proceedings have been instituted] defer to the competence of the Tribunal.'[38] The Prosecutor has broad powers of investigation under Rules 39 and 40.

About a year after the establishment of the ICTY, in 1994, the international community became a spectator to an archetypal genocide, the attempted extermination of an entire people. The genocide of 1994 was anything but a surprise for the international community. It was the culmination of many years of cynical indifference and wilful blindness to the plight of the Rwandan people.[39]

The slaughter in Rwanda required extensive administrative and logistical planning, evidenced by the chillingly calculated and thorough way in which it was carried out, and by the fact that most of the victims-between 500,000 and 1 million mainly Tutsi persons as well as politically moderate Hutu leaders and their families were killed over the relatively short period from 6 April through the first three weeks of May 1994.[40] This death toll amounted to roughly ten percent of the Rwandan national population.[41] Notwithstanding the 'low-tech' nature of the massacres, (Victims were butchered with machetes (panga), sticks, tools, and large clubs studded with nails (masu))[42] '[t]he dead of Rwanda accumulated at nearly three times the rate of Jewish

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36 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted 25 May 1993 by Security Council Resolution 827) ('*ICTY Statute*'), art 18, cl 2 (Investigation and Preparation of the Indictment). See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc S/25704, 3 May 1993. The ICTY Statute is contained as an Annex to the Report.

37 *ICTY Rules of Procedure and Evidence*, UN Doc IT/32/REV.20 (as amended 12 April 2001), available at <http://www.un.org/icty/basic/rpe/IT32_rev20con.htm> (visited 30 May 2004), Rule 47 (Request for Information).

38 *ICTY Rules of Procedure and Evidence*, UN Doc IT/32/REV.20 (as amended 12 April 2001), available at <http://www.un.org/icty/basic/rpe/IT32_rev20con.htm> (visited 30 May 2004), Rule 39 (Conduct of Investigations).

39 In the words of the Rwandan representative to the Security Council:

> Since 1959 Rwanda has repeatedly experienced collective massacres, which, as early as 1964, were described by Pope Paul VI and two Nobel Prize winners-Bertrand Russell and Jean-Paul Sartre-as the most atrocious acts of genocide this century after that of the Jews during the Second World War. But whenever such tragedies occurred the world kept silent and acted as though it did not understand that there was a grave problem of the violation of human rights.

UN SCOR, 49th sess, 3453rd mtg, [13]–[14], UN Doc S/PV.3453 (1994).

40 See *Report of the Situation of Human Rights in Rwanda Submitted by Mr R Degni-Sequi, Special Rapporteur of the Commission on Human Rights*, UN ESCOR Commission on Human Rights, 51st sess, Provisional Agenda Item 12, [24], UN Doc E/CN 4/1995/7 (1994).

41 See Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (1998) 4.

42 See Madeline H Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' (1997) 7 *Duke Journal of Comparative and International Law* 349, 350.

dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.'[43] In this sense, the genocide was well organized, coordinated, and administered; it was anything but spontaneous and random.[44] During the genocide, murder and mayhem was effectively the law of the land.

With the existence of the International Criminal Tribunal for the Former Yugoslavia, it would have appeared patently discriminatory for the Security Council not to have considered creation of a similar institution for Rwanda. Despite the fact that many of the Security Council's Members did not consider Rwanda to be as closely tied to their national interests as the former Yugoslavia, the Security Council nevertheless had to respond in a like manner.[45] Parallel to these efforts within the UN system, the government of Rwanda that came to power by toppling the genocidal regime[46] made a request to the UN Security Council for assistance to bring those responsible for the genocide to justice.[47]

The ICTR grew out of the response of the UN system to the Rwandan tragedy. The UN Commission on Human Rights met in a special session in May of 1994.[48] The Commission named a Special Rapporteur to investigate the situation and instructed the High Commissioner for Human Rights to establish a field presence in Rwanda.[49] Days following the Special Rapporteur's report outlining the human rights problems, and in response to the massive violations of human rights and humanitarian law in Rwanda, the Security Council adopted Resolution 935 on 1 July 1994. This resolution recalled that 'all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice' and requested the Secretary-General

> ... to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyze information submitted pursuant to the present resolution, together

43 Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (1998) 4: 'That's three hundred and thirty- three and a third murders an hour–or five and a half lives terminated every minute'. Of course, to these numbers have to be added the 'uncounted legions who were maimed but did not die of their wounds, and the systematic and serial rape of Tutsi women, in order to fully grasp the numbers of aggressive participants and victims in the genocide: ibid 133.

44 Most of the individuals responsible for carrying out violations of human rights and humanitarian law fled the country amongst the over 2 million that sought refuge in the neighbouring countries of Burundi, Zaire and Tanzania, for fear of possible Tutsi reprisals and revenge attacks. Numerous criminal suspects fled to francophone West African countries, as well as to Kenya, and as far away as Belgium, Canada, France, Switzerland and the United States.

45 See *Preliminary Report* (4 October 1994), part VIII(A), UN Doc S/1994/1125.

46 The Rwandan Patriotic Front took power in July 1994. For an overview, see Gerard Prunier, 'The Great Lakes Crisis' (1997) 96 *Current History* 193.

47 Letter Dated 28 September 1994 from the Permanent Representative of Rwanda Addressed to the President of the Security Council, UN SCOR, 49th sess, [4], UN Doc S/1994/1115 (1994).

48 UN ESCOR, Hum Rts Comm, 3rd special sess, UN Doc E/CN 4/S–3/1–4 (1994).

49 See also Rene Degni-Segui, *Report on the Situation of Human Rights in Rwanda*, UN ESCOR, 51st sess, UN Doc E/CN 4/1995/7 (1994).

> with such further information as the Commission of Experts might obtain, through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur on Rwanda, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.[50]

Resolution 935 requested the Secretary-General to report to the Security Council within four months of the Commission's establishment. The Commission of Experts observed that both sides to the armed conflict in Rwanda during the period 6 April 1994 to 15 July 1994 were responsible ' ... for serious breaches of international humanitarian law, in particular of obligations set forth in article 3 common to the four Geneva Conventions of 12 August 1949 and in Protocol II additional to the *Geneva Conventions* and relating to the protection of victims of non-international armed conflicts, of 8 June 1977.' With the support of the work already done by the Special Rapporteur and of the High Commissioner's Human Rights Field Operation in Rwanda, the Commission of Expert took note of violations committed both by elements associated with the former Government of Rwanda as well as by members of the Rwandese Patriotic Front, it concluded that

> ... there exists overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way. Abundant evidence shows that these mass exterminations perpetrated by Hutu elements against the Tutsi group as such, during the period mentioned above, constitute genocide within the meaning of article 11 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948. To this point, the Commission has not uncovered any evidence to indicate that Tutsi elements perpetrated acts committed with intent to destroy the Hutu ethnic group as such during the said period, within the meaning of the Genocide Convention of 1948.

The Commission therefore recommended international prosecution of the persons responsible for these crimes under international law and that ' ... the Security Council amend the Statute of the International Criminal Tribunal for the former Yugoslavia to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on 6 April 1994.'

On 8 November 1994, the day that the Yugoslav Tribunal issued its first indictment, a second international criminal tribunal was established by the United Nations Security Council. With the Tutsi slaughter over and the world left reeling from its conscience on its passive role, the Security Council decided by Resolution 955 to establish the 'International Criminal Tribunal For The Prosecution of Persons Responsible For Genocide and Other Serious Violations of International

50 SC Res 935, UN SCOR, 49th Sess, 3400th mtg, UN Doc S/Res/935 (1994). The complete name of the Commission is 'Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Examine and Analyse the Grave Violations of International Humanitarian Law in Rwanda, Including Possible Acts of Genocide'.

Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible For Genocide and Other Such Violations Committed in The Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994'[51] to bring the guilty to book by putting them on trial for gross violations of international humanitarian law and genocide.

Resolution 955 reiterates the Council's 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda', determines 'that this situation continues to constitute a threat to international peace and security' and resolves 'to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them'. Resolution 955 underlines the Security Council's conviction that prosecution of individuals responsible for serious violations of international humanitarian law are intended to contribute to the process of national reconciliation and the restoration and maintenance of peace. Created in the wake of ethnically motivated mass killings, the Rwanda Tribunal is charged with prosecuting Rwandans for genocide and other serious violations of international humanitarian law. Like the Yugoslav Tribunal, it is called upon to address humanitarian concerns in an era increasingly marked by the proliferation of brutal ethnic conflicts.

Although the Rwanda Tribunal was established as a separate institution, its establishment 'at a time when the ICTY was already in existence dictated a similar legal approach (and) mandated that certain organizational and institutional links be established in order to ensure a unity of legal approach as well as economy and efficiency of resources.'[52] Accordingly, Article 15 of the *ICTR Statute* provides that the Yugoslavia and Rwanda Tribunals have a common Prosecutor, although assisted by an additional Deputy Prosecutor for the ICTR. Likewise, Article 12(2) provides that the five members of the Appeals Chamber of the ICTY 'shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.'[53] The Tribunals are further organized similarly, but separately. Each Tribunal has its own Registry and its own two Trial Chambers (composed of three judges each). Pursuant to Article 28 of the ICTR *Statute* which mirrors Article 29 of the *ICTY Statute*, states are obliged to cooperate with and to grant assistance due to the international tribunals.[54] These provisions entail the core of the obligation to accept and carry out the UN Security Council decisions to establish the *ad hoc* international criminal tribunals.

51 SC Res 955 of 8 November 1994.

52 *Comprehensive Report of the Secretary- General on Practical Arrangements for the Effective Functioning of The ICTR*, [9], UN Doc 5/1995/134, 13 February 1995.

53 It should also be noted that pursuant to art 14 of its statute, the ICTR adopted the Yugoslav Tribunal's *Rules of Procedure and Evidence* (ICTR/2/L.2, 5 July 1996, adopting IT/32/Rev 9).

54 Pursuant to the first paragraphs of these articles, states are under obligation to 'cooperate with the International Criminal Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.' Pursuant to the second paragraphs of these articles, 'states shall comply without undue delay with any request for assistance or an order issued by a Tribunal Chamber, including but not limited to: (a) the identification and location of persons; (b) the taking of testimony; (c) the service of documents; (d) the arrest and detention of persons; and (e) the surrender or the transfer of the accused to the International Tribunal'.

Section 2

The Progressive Development of International Humanitarian Law and International Criminal Law by the *Ad Hoc* Tribunals

Chapter 5

Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals

William Schabas

I. Introduction

From the earliest days of the international criminal tribunals, customary international law has played an extraordinary and unprecedented role. It is relied upon to delimit the scope of the crimes themselves, building upon the often laconic provisions drawn from aging treaties. Judges also use customary international law to address challenges to retroactivity, answering claims that a prosecution violates the principle of *nullum crimen sine lege* by arguing that the law could be found in custom even if it had not been written down. The tribunals apply an interpretative presumption that the statutes are intended to codify customary international law at the time of their adoption. There is even some authority for the proposition that customary international law provides an independent source, existing alongside the statutes, the rules of procedure and evidence and the other positive legal instruments. Finally, judges call upon customary international law in order to resolve procedural and evidentiary issues, particularly when they find gaps in the applicable texts.

The International Military Tribunal at Nuremberg invoked customary international law to justify the exercise of its jurisdiction:

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.[1]

More recently, Judge Geoffrey Robertson of the Appeals Chamber of the Special Court for Sierra Leone (SCSL) has explained:

> International law is not found in statutes passed by parliament and its rules do not date from any official gazettes. It is a set of principles binding on states, pulling itself up by its own bootstraps mainly through an accretion of state practice. The point

1 *France* et al. v. *Göring* et al., (1946) 22 IMT 203, 13 ILR 203, 41 *American Journal of International Law* 1947, 172, p. 219.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 77–101.

> at which a rule becomes part of customary international law depends upon creative interplay between a number of factors.[2]

For these reasons, customary law provides international criminal tribunals with an immensely flexible technique that they can use to mould and develop the law. This accounts for much of the dynamism and effectiveness of the institutions.

The authoritative statement on customary international law appears in article 38(1) of the Statute of the International Court of Justice, which is annexed to the Charter of the United Nations. It declares that 'international custom' is one of the sources of law that the Court may apply, together with international conventions, general principles of law and, on a subsidiary basis, 'judicial decisions and the teachings of the most highly qualified publicists of the various nations'. According to article 38(1)(b), international custom is established by 'evidence of a general practice accepted as law'. Judgments and advisory opinions of the International Court of Justice, as well as the works of academic writers, usually formulate this as a requirement of two elements, 'State practice' and '*opinio juris*'.[3] Thus, it is a two-pronged analysis, involving both the practice of States and manifestations of their belief that they are acting in accordance with a binding legal norm. There are many references in the case law of the United Nations international criminal tribunals to the effect that 'to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*'.[4]

By comparison, article 21 of the Rome Statute, the comparable provision that enumerates the sources of law that are applicable to the International Criminal Court, makes no mention of customary international law. It may take a nod in this direction with its reference to 'the principles and rules of international law, including the established principles of the international law of armed conflict'.[5] Nevertheless, the initial rulings from the International Criminal Court attach little if any significance to customary international law.[6] Here the contrast could not be more dramatic with the abundant references to customary law in the first judgments of the International Criminal Tribunal for the former Yugoslavia.[7]

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2 *Prosecutor* v. *Norman* (Case No. SCSL-04-1-4-AR72(E)), Dissenting Opinion of Justice Robertson, 31 May 2004, para. 18.

3 *Continental Shelf Case (Libyan Arab Jamahiriya* v. *Malta)*, [1985] ICJ Reports 29-30, para. 27; Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law, Vol. I, Rules*, Cambridge: Cambridge University Press, 2005, p. xxxii.

4 *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-AR72), Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12; *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 49 (reference omitted). Also: *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-AR72), Separate and Partially Dissenting Opinion of Judge David Hunt, 16 July 2003, para. 3.

5 *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, art. 21(1)(b).

6 There is, to date, only one reference, and it is in a citation from academic literature rather than an authoritative pronouncement of the Court. See: *Situation in Uganda* (Case No. ICC-02/04-01/05), Update of Proposed Treatment of All Relevant Documents of the Record and Application for Entry of Reasons for Sealing into Public Record, 14 November 2005, para. 8, fn. 3.

7 *e.g.*, *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Decision on the Defence Motion on

The UN international criminal tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) – have no explicit authorization in their statutes for the general application of customary international law. There is one important exception: the reference in article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia to the 'laws or customs of war'. This provision has been interpreted as the incorporation within the Tribunal's jurisdiction of all crimes recognized as 'serious violations of international humanitarian law' to the extent that they are part of customary international law.[8] The corresponding war crimes provision in the statutes of the other two tribunals speaks of 'serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977'. On its face a reference to treaty law rather than custom, in reality neither common article 3 nor Additional Protocol II provide any guidance as to what constitute 'serious violations' incurring individual criminal liability, with the result that the courts have had to turn to customary international law here as well, applying essentially the same methodology as the ICTY does with respect to 'laws or customs of war'.[9]

Despite the silence of their statutes, the tribunals have acted as if these contain a provision inviting them to apply, as residual law, the recognised sources of public international law, especially customary international law. In the Blaškić Subpoena Decision, the ICTY Appeals Chamber said 'the rules of customary international law may become relevant where the Statute is silent on a particular point', giving as an example the 'act of State' doctrine.[10] The ICTR Appeals Chamber has said that '[t]he International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned'.[11] This intriguing comment might have passed unnoticed, or been dismissed as an odd and isolated formulation. Yet years later, in 2005, the Appeals Chamber returned to the same point, citing its statement in Barayagwiza as authority for the proposition that 'the sources of law for this Tribunal' consist of its Statute, the Rules of Procedure and Evidence and customary international law.[12] There are some similar pronouncements in rulings of the International Criminal Tribunal for Rwanda.[13] In other words, the tribunals consider customary international law to be an autonomous reservoir of

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Jurisdiction, 10 August 1995, paras. 19, 44, 51, 52, 60, 61, 63, 65, 67, 69, 72, 76, 79, 82, 83.

8 *Posecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

9 Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/935 (1994), annez, art. 4; Statute of the Special Court for Sierra Leone, art. 3.

10 *Prosecutor* v. *Blaškić* (Case No. IT-95-14-AR108*bis*), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 64.

11 *Prosecutor* v. *Barayagwiza* (Case No. ICTR-97-19-AR72), Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 40.

12 *Kajelijeli* v. *Prosecutor* (Case No. ICTR-98-44A-A), Judgment, 23 May 2005, para. 209.

13 *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 341. Also: *Prosecutor* v. *Kamuhanda* (Case No. ICTR-95-54A-T), Judgment,. 22 January 2004, para. 695.

applicable law, even though their statutes provide no explicit authorisation to this effect.

II. Identifying the Norms: State Practice and *Opinio juris*

The relationship between the two sources of customary international law – State practice and *opinio juris* – is not particularly clear, and there would appear to be different views as to which of them is the more important. State practice may be drawn from such sources as national legislation, military manuals and treaties. In its recent study of customary international law, the International Committee of the Red Cross presents two voluminous tomes identifying elements of State practice from which it has derived rules it considers to constitute customary international law. The *opinio juris* is often derived from judgments or, perhaps, official pronouncements. In the appeal judgment in Tadić, the Appeals Chamber spoke of 'judicial and state practice'[14] rather than *opinio juris* and State practice, suggesting that it equates *opinio juris* with judicial pronouncements, or case law. It is relevant to point out, however, that article 38(1) of the Statute of the International Court of Justice views 'judicial decisions' as a 'subsidiary means for the determination of rules of law', quite separate from international custom.

The process itself seems tautological, and often the search for customary norms – whether described as *opinio juris* or as State practice – leads back to one of the other primary sources, international conventions. Widely-ratified treaties have been held to constitute evidence of customary international law by bodies like the International Court of Justice[15] and the Inter-American Commission on Human Rights.[16] In Delalić, an ICTY Trial Chamber explained one aspect of the problem:

> The evidence of the existence of such customary law – State practice and *opinio juris* – may, in some situations, be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of States. The evidence of State practice outside of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant.[17]

Often, therefore, the tribunals have associated customary international law with cod-

14 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999. Also: *Prosecutor* v. *Blaškić* (Case No. IT-95-14-A), Judgment, 29 July 2004, para. 97; *Prosecutor* v. *Aleksovski* (Case No. IT-95-14/1-A), Judgment, 24 March 2000, para. 133; *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 18; *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-A), Judgment, 17 December 2004, para. 309; *Prosecutor* v. *Naletilić* et al. (Case No. IT-98-34-T), Judgment, 31 March 2003, para. 183..

15 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States)*, [1986] ICJ Reports 14, §§218, 255, 292(9).

16 *Domingues* v. *United States* (Case 12.28522), Report No. 62/02, Merits, 12 October 2002, paras. 66-67.

17 *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 302.

ified texts, such as common article 3 of the 1949 Geneva Conventions.[18] The ICTR Appeals Chamber has referred to the International Covenant on Civil and Political Rights as well as the relevant regional human rights treaties as 'persuasive authority and evidence of international custom'.[19] To support its assertion that the right to a fair trial was part of customary international law, the ICTR Appeals Chamber observed that it was embodied in several international instruments, including common article 3 of the Geneva Conventions.[20] Similarly, judges have concluded that the doctrine of command responsibility set out in article 7(3) of the ICTY Statute, and in common article 6(3) of the ICTR and SCSL statutes, is consistent with custom by referring to articles 86 and 87 of Protocol Additional I.[21] Recognising that enslavement was a war crime, an ICTY Trial Chamber in Krnojelac said this was confirmed by its inclusion in Protocol Additional II.[22] In Erdemović, the ICTY Appeals Chamber referred to the Nuremberg Charter as evidence that a crime of conspiracy was part of customary international law, noting that the Charter 'subsequently obtained recognition as custom'.[23] In Tadić, it observed that article VI(c) of the Nuremberg Charter did not make discriminatory intent an element of all forms of crimes against humanity, concluding that this was therefore not a requirement under customary international law.[24] Elsewhere, it bolstered its conclusion that duress was not a defence at customary international law by noting that 'it is not contained in any international treaty or instrument subsequently recognised to have passed into custom'.[25] The tribunals have also derived norms of customary law from various 'soft law' instruments, such as the Draft Code of Crimes prepared by the International Law Commission.[26]

But treaties do not always codify customary international law, even in the spheres of international humanitarian law and international criminal law. They are the fruit of diplomatic compromise, and may sometimes exceed and often fall short of customary law. For example, the Rome Statute of the International Criminal Court

18 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98; *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 68; *Prosecutor* v. *Blaškić* (Case No. IT-95-14-T), Judgment, 3 March 2000, para. 166; *Prosecutor* v. *Naletilić* et al. (Case No. IT-98-34-T), Judgment, 31 March 2003, para. 228.

19 *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-A), Judgment, 23 May 2005, para. 209.

20 *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-A), Judgment (Reasons), 1 June 2001, para. 51.

21 *Prosecutor* v. *Blaškić* (Case No. IT-95-14-T), Judgment, 3 March 2000, para. 327.

22 *Prosecutor* v. *Krnojelac* (Case No. IT-97-25-T), Judgment, 15 March 2002, para. 353.

23 *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 51.

24 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 289.

25 *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 51.

26 *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 227; *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-PT), Decision on Joint Defence Motion to Dismiss for Lack of Jurisdiction Portions of the Amended Indictment Alleging 'Failure to Punish' Liability, 2 March 1999; *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 61; *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 537; *Prosecutor* v. *Milošević* (Case No. IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, para. 30.

appears to deviate from custom in a number of areas, including its inadequate codification of prohibited weapons[27] and its failure to incorporate the prohibition on conspiracy to commit genocide, set out in article III of the 1948 Genocide Convention.

Referring to the definition of crimes against humanity in the Nuremberg Charter, the ICTY Appeals Chamber said 'both judicial practice and possibly evidence of consistent State practice, including national legislation, would be necessary to show that customary law has deviated from treaty law by adopting a narrower notion of crimes against humanity'.[28] It did not find this to be the case. Where customary crimes are not codified in treaties, judges have tended to take this as evidence that they are not, in fact, criminal under customary law. In Krnojelac, for example, a Trial Chamber said torture intended to 'humiliate' the victim was not within the Tribunal's subject matter jurisdiction because it is not mentioned in any of the principal international instruments prohibiting torture.[29] On the other hand, the same Trial Chamber accepted that enslavement was a war crime within the scope of article 3 because of the express prohibition of slavery in Protocol Additional II.[30]

Even the statutes themselves provide evidence of custom. In one case, an ICTY Trial Chamber said that the inclusion of superior responsibility liability in article 7(3) of the Statute 'should be read as a reflection of the reasonable and well-supported views of the Security Council and the Secretary-General that this norm formed part of customary international law at the time covered by the mandate of the International Tribunal'.[31] But although there is a presumption that provisions of the Statute are consistent with customary law,[32] the tribunals have occasionally indicated aspects in which they fall short of evolving norms. For example, the requirement in article 5 of the ICTY Statute that crimes against humanity be 'committed in armed conflict' and the requirement in article 4 of the ICTR Statute that crimes against humanity be perpetrated 'on national, political, ethnic, racial or religious grounds' are both inconsistent with contemporary interpretations.[33]

The tribunals have not always been consistent in how they categorise sources. In Furundzija, an ICTY Trial Chamber found evidence of *opinio juris* in the Rome Statute of the International Criminal Court:

> In many areas the [Rome] Statute [of the International Criminal Court] may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that

27 *Rome Statute*, art. 8(2)(b)(xx).

28 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 290. Also: *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 580.

29 *Prosecutor* v. *Krnojelac* (Case No. IT-97-25-T), Judgment, 15 March 2002, para. 108. Also: *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-A), Judgment, 21 July 2000, para. 111.

30 *Ibid.*, para. 353.

31 *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-PT), Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 171:

32 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 296.

33 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141; *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 305.

> existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[34]

These comments were subsequently endorsed by the Appeals Chamber.[35] But in Krnojelac, the ICTY Appeals Chamber seemed to confuse, or perhaps rather to conflate, the two concepts. It referred to 'recent state practice, as reflected in the Rome Statute, which provides that displacements both within a state and across national borders can constitute a crime humanity and a war crime'.[36] The accompanying footnote, however, pointed to the Appeals Chamber's earlier pronouncement, in Tadić, noting that the Rome Statute 'is supported by a great number of States and may be taken to express the legal position i.e. opinio iuris of those States'.[37]

Often State practice and *opinio juris* are invoked together, without any effort at identifying which of the two is applicable. In a dissenting opinion, Judge Hunt described clauses in headquarters agreements between the International Committee of the Red Cross and States as constituting '*opinio juris* and State practice for the purposes of finding a customary rule', as if there was no distinction whatsoever between the two.[38] The majority of the Trial Chamber treated such agreements as evidence of practice to the effect that the organization 'consistently relies on confidentiality to carry out its mandate'.[39]

The apparent confusion in discussions of the two concepts is confirmed by the relatively rare attempts to examine *opinio juris* as a distinct concept. In the seminal Tadić Jurisdictional Decision, the Appeals Chamber responded to the argument of the United States Government, in its amicus curiae brief, claiming that the 'grave breach' provisions of article 2 of the Statute applied to armed conflicts of a non-international as well as of an international character. A majority of the Chamber said the statement was 'unsupported by any authority' although it acknowledged that

> there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States.

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34 *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 227. Also: *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23-T & IT-96-23/1-T), Judgment, 22 February 2001, para. 495, fn. 1210.

35 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 223.

36 *Prosecutor* v. *Krnojelac* (Case No. IT-97-25-A), Judgment, 17 September 2003, para. 221.

37 *Ibid.*, para. 221, fn. 358, citing *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 223.

38 *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Separate Opinion of Judge David Hunt on Prosecutor's Motion, 27 July 1999, para. 23.

39 *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 56.

> Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the 'grave breaches' system might gradually materialize.[40]

Later in the same ruling, the Appeals Chamber cited unanimous Security Council resolutions as evidence of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations.[41] Judges Sidhwa and Abi Saab also referred to *opinio juris* in their individual opinion.[42] In the Erdemović appeal, Judges McDonald and Vohrah wrote:

> Not only is State practice on the question as to whether duress is a defence to murder far from consistent, this practice of States is not, in our view, underpinned by *opinio juris*. Again to the extent that state practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals and national laws, we find quite unacceptable any proposition that States adopt this practice because they 'feel that they are conforming to what amounts to a legal obligation' at an international level.[43]

In the case concerning the evidentiary privilege of the International Committee of the Red Cross (ICRC), a Trial Chamber said: 'The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC as described above, leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the Information'.[44]

There is no discussion of *opinio juris*, as distinct from State Practice, in the case law of the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone. In an interlocutory ruling in Rwamakuba on the application of the concept of joint criminal enterprise to the crime of genocide, the ICTR Appeals Chamber began its analysis with the uncontroversial statement that '[n]orms of customary international law are characterized by the two familiar components of state practice and *opinio juris* ... '[45] The subsequent analysis considered the post-second world war trials and the drafting history of the Convention for the Prevention and

40 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 83.

41 *Ibid.*, para. 133.

42 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 114; *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

43 *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 50; also, para. 55.

44 *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 74.

45 *Rwamakuba* v. *Prosecutor (*Case No. ICTR-98-44-AR72.4), Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 14.

Punishment of the Crime of Genocide.[46] The Appeals Chamber did not examine whether these materials were invoked as evidence of *opinio juris*, or of State practice, or of both, or of either. The only other reference is in a separate opinion of Judge Shahabuddeen in Gakumbitsi, opposing introduction of a theory of co-perpetratorship: 'Since several states adhere to one theory while several other states adhere to the other theory, it is possible that the required state practice and *opinio juris* do not exist so as to make either theory part of customary international law.'[47]

As for the Special Court for Sierra Leone, it has on occasion considered matters that seem obviously to constitute issues of customary international law, yet without using the term or, for that matter, referring to *opinio juris* or State practice. In its amnesty rulings, it spoke of a 'crystallising international norm' prohibiting amnesty for serious violations of international humanitarian law. The Appeals Chamber said:

> The opinion of both amici curiae that it has crystallised may not be entirely correct, but that is no reason why this court in forming its own opoinion should ignore the strength of their argument and the weight of materials they place before the Court. It is accepted that such a norm is developing under international law.[48]

The general lack of precision in distinguishing the elements of customary international law is not inconsistent with attempts by other bodies, such as the International Law Commission or even the International Court of Justice, to identify *opinio juris* as distinct from State practice. According to the customary law study of the International Committee of the Red Cross, 'it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects practice and legal conviction.'[49]

Only a few rather isolated opinions suggest a special and unique role for *opinio juris*. In Kupreškić, an ICTY Trial Chamber examined whether a defence of reprisal might be available. It noted that reprisals against civilians were prohibited by articles 51 and 52 of Additional Protocol I, but admitted that this was not decisive in terms of the existence of a customary norm:

> Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely usus or diuturnitas has taken shape. This is however an area where opinio iuris sive necessitatis may play a much greater role than usus, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian

46 *Ibid.*, paras. 15-28.

47 *Gacumbitsi* v. *Prosecutor* (Case No. ICTR-2001-64-A), Separate Opinion of Judge Shahabuddeen, 7 July 2006, para. 51.

48 *Prosecutor* v. *Kallon* (Case No. SCSL-04-15-AR72(E)) and *Prosecutor* v. *Kamara* (Case No. SCSL-04-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 82.

49 Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law, Vol. I, Rules*, Cambridge: Cambridge University Press, 2005, p. xl.

> law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent . The other element, in the form of opinio necessitatis, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[50]

Certainly, State practice appears to be much more significant in the judicial work of the international criminal tribunals, judging by the frequent references to it in discussions of customary international law in the jurisprudence. The outstanding example is the discussion of individual criminal responsibility for serious violations of international humanitarian law committed during non-international armed conflict, in the Tadić Jurisdictional Decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.[51]

The ICTY Appeals Chamber also cited State practice as evidence that the nexus between crimes against humanity and crimes against peace or war crimes had disappeared since Nuremberg.[52] The examples were selective, of course, because although there are certainly post-1945 manifestations of a concept of crimes against humanity without the nexus, there are others than maintain it, the most recent and dramatic example being article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia itself. One of the examples the Appeals Chamber proposed was article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide. But the drafters of the Genocide Convention allowed that the crime could be committed in time of peace precisely in order to distinguish it from crimes against humanity, as they had been defined at Nuremberg.

Among other important examples of reliance upon State practice is the rejection of the 'effective control' test, which is explained by the Appeals Chamber of the Yugoslavia in the Tadić Appeals Decision. The Appeals Chamber said the 'effective control' test set out by the International Court of Justice in Nicaragua should not be applied because it was at variance with State practice.[53] But the ICTY Appeals Chamber dismissed the argument that the absence of references to command responsibility indicated that State practice did not acknowledge application of the concept in non-international armed conflict. It said:

> The Appeals Chamber affirms the view of the Trial Chamber that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, as the Trial Chamber considered,

50 *Prosecutor* v. *Kupreškić* (Case No. IT-95-16-T), Judgment, 14 January 2000, para. 527.

51 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 100-108, 125, 128.

52 *Ibid.*, para. 145.

53 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999. Also: *Prosecutor* v. *Blaškić* (Case No. IT-95-14-T), Judgment, 3 March 2000, para. 97; *Prosecutor* v. *Aleksovski* (Case No.: IT-95-14/1-A), Judgment, 24 March 2000, para. 133; *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 18; *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-A), Judgment, 17 December 2004, para. 309; *Prosecutor* v. *Naletilić* et al. (Case No. IT-98-34-T), Judgment, 31 March 2003, para. 183..

> Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it. In like manner, the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts. The Appeals Chamber considers that, at the time relevant to this indictment, it was, and that this conclusion is not overthrown by the play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument.[54]

In several cases, the judges have been unable to identify an applicable norm of customary international law. In Naletelić, the Appeals Chamber of the ICTY cited the study on customary international law published by the International Committee of the Red Cross, but said it provided an 'unclear picture':

> State practice in relation to punishment of violations of international humanitarian law provides a rather unclear picture as to the definition of deportation. The recently published ICRC study on the status of customary international humanitarian law shows that even prior to 1993 many countries had penalized forced displacement of civilians in times of armed conflict. Although elements of specific crimes are not provided, some implications may be drawn from the national legislations analyzed in this study. The study lists various national military manuals and legislative acts which use the term "deportation" to describe (criminal) forced displacement within national borders or, conversely the term "transfer" to describe (criminal) displacement across State borders. Other States punish only "deportation".[55]

Similarly, in Kordić & Čerkez, the ICTY Appeals Chamber concluded there was a lack of State practice translating the prohibitions contained in articles 51 and 52 of Additional Protocol I into international crimes, such that unlawful attacks were penalized regardless of the showing of a serious result. According to the Appeals Chamber, 'State practice was not settled as some required the showing of serious injury, death or damage as a result under their national penal legislation, while others did not'.[56] In Hadžihasanović, the majority criticized the two dissenters, Judges Hunt and Shahabuddeen, saying they had been '[u]nable to muster any significant evidence of State practice or *opinio juris*' establishing the application of the concept of superior responsibility for crimes committed before an individual had taken command.[57]

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54 *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-AR72), Decision on Interlocutory Appeal Challenging Jurisdiction with respect to Command Responsibility, 16 July 2003, para. 29. Affirming *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-PT), Decision on Joint Challenge to Jurisdiction, 12 November 2002.

55 *Prosecutor* v. *Naletelić* et al. (Case No. IT-98-34-A), Judgment, 3 May 2006, para. 15 (references omitted).

56 *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-A), Judgment, 17 December 2004, para. 66. Also: *Prosecutor* v. *Strugar* (Case No. IT-01-42), Judgment, 31 January 2005, para. 281, fn. 897.

57 *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-AR72), Decision on Interlocutory

One of the boldest judicial initiatives in the case law of the tribunals is the use of customary international law to introduce the doctrine of 'joint criminal enterprise'. In virtually identical provisions, the Statutes of the ICTY, ICTR and SCSL authorise prosecution of persons 'who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime' within the jurisdiction of the Tribunal.[58] There is no reference in this text to 'common purpose' or 'joint criminal enterprise' participation in crimes, by which, in its most extreme form, a person who joined with others to commit a crime within the jurisdiction of the Tribunal is also guilty for the crimes committed by the others, to the extent these were reasonably foreseeable.[59] By contrast, the Rome Statute of the International Criminal Court authorises this form of liability explicitly.[60]

In the Radićal interpretation of article 7(1) advanced in the Tadić appeal judgment, the ICTY Appeals Chamber said that 'international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design'[61] It is distinct from aiding and abetting, in that there is no requirement that the accomplice actually have knowledge of the intent of the principal perpetrator. In Rwamakuba, the Appeals Chamber of the ICTR concluded that joint criminal enterprise is also applicable to the crime of genocide. It regularly invoked customary international law, referring to its earlier case law that relied upon the post-World War II trials as evidence of recognition in international criminal law of the concept. Although none of the post-World War II cases dealt with genocide as such, the Appeals Chamber explained that in 1945 and 1946 genocide was considered to be a category of crime against humanity.[62]

In Vasiljević, an ICTY Trial Chamber considered the finding of another Trial Chamber, in Blaškić, to the effect that 'violence to life and person' was a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences'. The Vasiljević Trial Chamber said it was unfortunate that the Blaškić Trial Chamber had failed to identify the source of these propositions, 'in particular, relevant instances of state practice'. The Vasiljević Trial Chamber said it had 'been unable to find any conclusive evidence of state practice – prior to 1992 – which would point

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Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 55.

58 ICTY Statute, art. 7(1); ICTR Statute, art. 6(1); SCSL Statute, art. 6(1).

59 The concept was endorsed by the Appeals Chamber in *Tadić*, but was actually summarily developed in an earlier Trial Chamber judgment: *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, paras. 210-216. Similarly, an ICTR Trial Chamber had written, in *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, paras. 203-205, that the members of a criminal group 'would be responsible for the result of any acts done in furtherance of the common design where such furtherance would be probable from those acts'.

60 *Rome Statute*, art. 25(1)(d).

61 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 193.

62 *Rwamabuka* v. *Prosecutor* (Case No. ICTR-98-44-AR72.4), Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, paras. 14-17.

towards the definition of that crime'.[63]

On several occasions it is not State practice but rather its absence that has been invoked as evidence of customary international law. In Aleksovski, for example, the ICTY Appeals Chamber overturned a Trial Chamber finding that under customary international law violations of the laws or customs of war require proof of a discriminatory intent. The Appeals Chamber said there was 'no evidence of State practice which would indicate the development in customary international law of such a restriction on the requisite mens rea of violations of the laws or customs of war'.[64] Similarly, on this basis a Trial Chamber in Vasiljević disagreed with a judgment of a Trial Chamber of the International Criminal Tribunal for Rwanda, which had held that a single killing could qualify as the crime against humanity of extermination if it formed part of a mass killing event.[65] Judges Mcdonald and Vohrah considered that duress was not available as a defence to crimes against humanity because of an absence of State practice:

> Although some of the above mentioned cases may clearly represent the positions of national jurisdictions regarding the availability of duress as a complete defence to the killing of innocent persons, neither they nor the principles on this issue found in decisions of the post-World War Two military tribunals are, in our view, entitled to be given the status of customary international law. For a rule to pass into customary international law, the International Court of Justice has authoritatively restated in the North Sea Continental Shelf cases that there must exist extensive and uniform state practice underpinned by *opinio juris* sive necessitatis. To the extent that the domestic decisions and national laws of States relating to the issue of duress as a defence to murder may be regarded as state practice, it is quite plain that this practice is not at all consistent.[66]

Judge Cassese, on the other hand, reached the more cautious conclusion that an absence of State practice meant that no conclusion could be drawn about the content of customary international law:

> I referred above to the Prosecution's contention that an exception has evolved in customary international law excluding duress as an admissible defence in offences involving the taking of innocent lives. This contention can only find support in one Canadian case (Hölzer et al., mentioned in paragraph 26, supra) as well as the military regulations of the United Kingdom and the United States (paragraph 29, supra). With these elements of practice one should contrast the contrary, copious

63 *Prosecutor* v. *Vasiljević* (Case No. IT-98-32-T), Judgment, 29 November 2002, para. 195. Followed in: *Prosecutor* v. *Ntakirutimana* et al. (Case No. ICTR-96-10 & ICTR-96-17-T), Judgment, 21 February 2003, para. 860.

64 *Prosecutor* v. *Aleksovski* (Case No. IT-95-14/1-A), Judgment, 24 March 2000, para. 23.

65 *Prosecutor* v. *Vasiljević* (Case No. IT-98-32-T), Judgment, 29 November 2002, para. 227, fn. 586, referring to *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 147. Also: *Prosecutor* v. *Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 391, fn. 926.

66 *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 49 (reference omitted).

> case-law I have just surveyed as well as the legislation to the contrary of so many civil-law countries (see note 63, supra). In my opinion, this manifest inconsistency of State practice warrants the dismissal of the Prosecution's contention: no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in case of crimes involving the killing of persons.[67]

Many of the references to customary international law are rather perfunctory, and provide little or not authority in support of a finding that some specific norm is recognized at customary international law. For example, in its first judgment, Prosecutor v. Akayesu, the International Criminal Tribunal for Rwanda referred to customary international law to support its interpretation of article 3(a) of the English version of its Statute.

Trial Chamber I said that 'Customary International Law dictates that it is the act of "Murder" that constitutes a crime against humanity and not "Assassinat"', which is the term in the French version. But the Trial Chamber offered virtually no explanation of the sources of this alleged custom, aside from an unconvincing allusion to the work of the International Law Commission.[68] In a judgment the following year, Trial Chamber II disagreed. It conceded that Trial Chamber I might have been correct about the state of customary international law, but said that the court was bound by the wording of its Statute rather than by customary international law.[69]

The Appeals Chamber of the Special Court for Sierra Leone considered customary international law when the child soldier recruitment provision of the Court's Statute was challenged as being contrary to customary international law. It argued that the prohibition on child recruitment had 'crystallized as customary international law' by 1996, when the temporal jurisdiction of the Court begins, noting that '[a]s regards state practice, the list of states having legislation concerning recruitment or voluntary enlistment clearly shows that almost all states prohibit (and have done so for a long time) the recruitment of children under the age of 15'.[70] The Appeals Chamber also cited provisions of international treaties, including the Convention on the Rights of the Child and Additional Protocol II, in support of the existence of such a customary norm.[71] Turning to the more difficult issue of whether the norm entailed individual criminal responsibility, the Appeals Chamber referred to the incorporation of a crime of recruitment following adoption of the Rome Statute on 17 July 1998, saying this had been done by 'an abundance of states'.[72] The Court cited 'a few examples', specifically legislation in Norway and Ireland incorporating the Geneva Conventions and their Protocols into national legislation and providing

67 *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 40.

68 *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 587. Followed, by the same trial chamber, in *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 214.

69 *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 138.

70 *Prosecutor* v. *Norman* (Case No. SCSL-04-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 18.

71 *Ibid.*, para. 20.

72 *Ibid.*, para. 43.

for prosecution of any 'contravention' of the norms set out in those instruments.[73]

However, it seems a trifle exaggerated to assume that an act or omission incurs international criminal responsibility because a contravention may result in penal liability in the national legislation of a few countries. Elsewhere in the same ruling, the Appeals Chamber said that between 1994 and 1996 'the majority of states' criminalized child recruitment,[74] but in fact it offered no evidence to support this proposition, which is surely a gross exaggeration. In other words, the demonstration of either State practice or *opinio juris* prior to 1998 was exceedingly slim.

There is also some authority for the view that the tribunals are bound by rules of evidence that are part of customary international law, at least to the extent that there is no explicit norm in the Rules of Procedure and Evidence.[75] In the motion concerning evidentiary immunity or privilege for employees of the International Committee of the Red Cross, an ICTY Trial Chamber held that in the absence of a specific privilege granted by the Rules and the Statute, the judicial inquiry should extend to customary international law.[76] It has also been held that according to customary international law, there is no requirement that testimony by corroborated.[77]

Customary international law has been invoked in the area of criminal procedure. Thus, despite the silence of the Rules of Procedure and Evidence on an application by way of habeas corpus, it has been viewed as a customary legal right available to an accused.[78] Judge Robinson said it was a norm of customary international law, based on the presumption of innocence, 'to make pre-trial detention an exception, which is only permissible in special circumstances'.[79] But when Croatia argued that customary international law protected its national security interests from an ICTY subpoena, the Appeals Chamber answered that 'although it is true that the rules of customary international law may become relevant where the Statute is silent on a

73 *Ibid.*, para. 45.

74 *Ibid.*, para. 50.

75 *Ibid.*, para. 539; *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 594; *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, paras. 40-42 (also paras. 74, 76, 80).

76 *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999. Similarly, in *Kajelijeli* (Case No. ICTR-98-44A-A), Judgment, 23 May 2005, para. 209, the ICTY Appeals Chamber identified three sources of law, the Statute, the RPE and customary international law.

77 *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 539. *Prosecutor* v. *Kamuhanda* (Case No. ICTR-95-54A-T), Judgment,. 22 January 2004, para. 38.

78 *Milošević* (Case No. IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, para. 38; *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Separate Opinion of Judge Robinson, 18 October 2000, para. 2; *Prosecutor* v. *Barayagwiza* (Case No. ICTR-97-19-AR72), Decision, 3 November 1999, para. 88. *Contra*: *Prosecutor* v. *Brđanin* (Case No. IT-99-36-PT), Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 8 December 1999.

79 *Prosecutor* v. *Krajišnik* et al. (Case No. IT-00-39 & 40-PT), Decision on Momćilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson.

particular point, such as the "act of State" doctrine, there is no need to resort to these rules where the Statute contains an explicit provision on the matter'. The Appeals Chamber said that in the case of national security information, the Statute 'manifestly derogates from customary international law'.[80]

Peremptory or *jus cogens* norms are rules of customary international law from which no derogation by treaty is permitted. Article 53 of the Vienna Convention on the Law of Treaties declares that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. It continues: 'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[81]

Defendants have repeatedly argued that various provisions of the statutes of the ad hoc tribunals breach *jus cogens* norms, specifically the fair trial rights that are codified by instruments like the International Covenant on Civil and Political Rights. As a rule, judges have given such claims short shrift.[82] Judgments of the tribunals have occasionally referred to specific norms as being *jus cogens*, such as the prohibitions of genocide[83] or torture.[84] In Čelebići, the Appeals Chamber 'note[d] that in human rights law the violation of rights which have reached the level of *jus cogens*, such as torture, may constitute international crimes'.[85] In one judgment, an ICTY Trial Chamber, presided by Judge Antonio Cassese, said 'most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*,

80 *Prosecutor* v. *Blaškić* (Case No. IT-95-14-AR108*bis*), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 64. But see Judge Hunt, in *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Separate Opinion of Judge David Hunt on Prosecutor's Motion, 27 July 1999, para. 20: 'It may be accepted that the Tribunal is bound by customary international law, as is the United Nations itself.'

81 *Vienna Convention on the Law of Treaties*, (1979) 1155 UNTS 331, art. 53.

82 For example: *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 74; *Prosecutor* v. *Krajišnik* (Case No. IT-00-39-PT), Decision on Motion Challenging Jurisdiction – with reasons, 22 September 2000, para. 14.

83 *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 88; *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 60, which claims – erroneously – that the International Court of Justice, in its 1951 advisory opinion on the *Genocide Convention*, 'placed the crime on the level of *jus cogens* because of its extreme gravity'; *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 541; *Prosecutor* v. *Stakić* et al. (Case No. IT-97-24-T), Decision on Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002, para. 20; *Prosecutor* v. *Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 680.

84 *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 225; *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, paras. 155-157; *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 466.

85 *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 172, fn. 225.

i.e. of a non-derogable and overriding character'.[86] These statements seem intended only to emphasis the seriousness of the crimes, and no particular legal consequences appear to be contemplated.

The only occasion where a finding that a norm was *jus cogens* had a practical effect was in a ruling acknowledging a right to appeal a contempt conviction made by the Appeals Chamber itself, despite the silence of the Statute and the Rules of Procedure and Evidence on this point. The Appeals Chamber noted that there was a right to appeal in article 14(5) of the International Covenant on Civil and Political Rights, which it said was 'an imperative norm of international law'.[87]

III. Customary Law as an Interpretative Presumption?

When the ICTY Statute was being drafted, the Secretary-General of the United Nations issued an explanatory report on the draft text that he was submitting to the Security Council. The Secretary-General insisted that the Tribunal would only be able to prosecute offences that were unquestionably recognised at customary international law.[88] According to the majority in the Tadić Jurisdictional Decision, 'the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of nullum crimen sine lege in the event that a party to the conflict did not adhere to a specific treaty'.[89]

No comparable explanatory report was presented by the Secretary-General to accompany the draft statute of the proposed tribunal for Rwanda. Perhaps this seemed unnecessary, given that most of the instrument was essentially identical to that of the ICTY. There were some minor differences in the definitions of the war crimes and crimes against humanity, as well as variations of an essentially technical nature. Nevertheless, a few months later, the Secretary-General produced a report on the ICTY Statute that accounts for some of the choices and provides helpful guidance for purposes of interpretation. According to the report:

> [T]he Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Protocol Additional II, which, as a whole, has not yet been uni-

86 *Prosecutor* v. *Kupreškić* (Case No. IT-95-16-T), Judgment, 14 January 2000, para. 530.

87 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A-AR77), Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001. The expression 'imperative norm' is a bit of a Gallicism. The French term *norme imperative* is used in article 53 of the Vienna Convention on the Law of Treaties. The English equivalent is 'peremptory norm', *i.e.*, a norm of *jus cogens.*

88 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), para. 34.

89 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 143.

> versally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions.[90]

Several years later, when the Secretary-General presented a draft statute for the Special Court for Sierra Leone to the Security Council, he returned to the presumption of conformity with customary international law: 'In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime'.[91]

The Secretary-General's report on the ICTY Statute has resulted in an interpretative presumption by which the Security Council is deemed to have intended to mandate the ICTY with the enforcement of customary international law as it existed when the Tribunal was established (or, perhaps, in 1991, when its temporal jurisdiction begins). In other words, the Council did not mean to enact new law, and the Statute should be construed accordingly. As the ICTY Appeals Chamber explained in Tadić, it was to apply 'the principle whereby, in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law. In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules.'[92]

There are many examples of this in the case law. In Krstić, an ICTY Trial Chamber took note of evolving interpretations of the definition of genocide, but declined to follow them because 'despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group'.[93] Similarly, in interpreting the scope of the term 'rape', which hitherto lacked any definition in international criminal law, the tribunals have applied what they considered to be customary law in order to avoid infringing upon the principle against retroactivity.[94] The ICTY Appeals Chamber dismissed an argument that grave breaches of the Geneva Conventions, set out in article 2 of the Statute, did not reflect rules of customary law, noting the near universal participation of States in the treaty regime.[95] The ICTY has also held that reference to common article 3 of the four Geneva Conventions of 1949 within the context of the offence of violations of the laws or customs of war is not retroactive punishment, although common article 3 is not contemplated by the criminal jus-

90 UN Doc. S/1995/134, paras. 11-12.

91 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone', UN Doc.S/2000/915, para. 12.

92 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 287 (see also para. 296).

93 *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 580; confirmed by *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para.. 25. See also: *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 61.

94 *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 184.

95 *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 112.

tice provisions of the Conventions and is not referred to in the ICTY Statute.[96]

Some judges have viewed the requirement that the statutes be consistent with customary law in force at the time as a substantive requirement, and not just an interpretative presumption. For example, in ruling upon a challenge to an indictment, one Trial Chamber said 'the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed'.[97] Often the tribunals have affirmed that in addition to being a crime in their statutes and the subject of a widely-ratified convention, genocide is also prohibited at customary international law, implying that were this not the case they could not convict.[98]

Similarly, judgments often recall that the concept of command responsibility, set out clearly in the statutes of the tribunals, is also recognized under customary international law.[99] In Akayesu, Trial Chamber I concluded, after a rather lengthy discussion, that the war crimes provision of its Statute was consistent with customary international law.[100] In Aleksovski, the Appeals Chamber said that the principle of legality required 'that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission'.[101]

At the Special Court for Sierra Leone, Judge Robertson, dissenting, was even prepared to 'grant a declaration to the effect that [the accused] must not be prosecuted for an offence of enlistment [...] alleged to have been committed before the end of July 1998',[102] despite the terms of the Statute. An ICTY Trial Chamber, in a case dealing with the Rules of Procedure and Evidence rather than the Statute, held that that Rule 89(C) was limited by customary law.

Accordingly, 'the International Tribunal's Rules may be affected by customary

96 *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, paras. 298, 301, 306.

97 *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-PT), Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 March 1999, para. 20.

98 *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 49495; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 54; *Prosecutor* v. *Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 680; *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 500; *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 541; *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 60; *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-A), Judgment (Reasons), 1 June 2001, para. 88; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 46.

99 *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 195; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 37; *Prosecutor* v. *Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 275.

100 *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 600-613.

101 *Prosecutor* v. *Aleksovski* (Case No. IT-95-14/1-A), Judgment, 24 March 2000, para. 126. Also: *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-PT), Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 March 1999, para. 20.

102 *Prosecutor* v. *Norman* (Case No. SCSL-2000-14-AR72(E)), Dissenting Opinion of Justice Robertson, 31 May 2004, para. 47.

international law, and that there may be instances where the discretionary power to admit any relevant evidence with probative value may not be exercised where the admission of such evidence is prohibited by a rule of customary international law'. The Trial Chamber said that customary international law recognized a privilege for the International Committee of the Red Cross attaching to its employees, who could not testify before the Tribunal without the consent of the organization.[103]

But nothing in the statutes suggests that the judges have any such power, which would give them an authority analogous to that of a constitutional court. Refusing to apply a provision in the statutes of the ICTY and the ICTR amounts to an exercise of judicial review over the Security Council, and it is highly doubtful that it was ever the intent of the Council to give the Tribunals such authority.[104] The ICTY Appeals Chamber, in Tadić, expressed what is surely the better view, namely, that 'it is open to the Security Council – subject to respect for peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law'.[105] The SCSL Appeals Chamber has said that it 'cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law', which is surely a rather fanciful idea.[106]

V. Crimes against Humanity and Customary International Law

Crimes against humanity were punished at Nuremberg with reliance on customary international law. However, there has been much debate over the years as to whether the article VI(c) of the Charter of the International Military Tribunal is an accurate codification of the concept. The Charter declared that crimes against humanity had to have been committed 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'. Known to specialists as the nexus, it has meant in practice that crimes against humanity were confined to acts or omissions committed in association with armed conflict. In other words, crimes against humanity were a subset of war crimes, although the victims were 'any civilian population' rather than combatants of the adversary or civilians in an occupied territory.

Article 5 of the ICTY Statute defines crimes against humanity as punishable acts 'committed in armed conflict, whether international or internal in character'. In effect, then, it confirms the limited scope of crimes against humanity set out at Nuremberg. There can be no doubt that these words were incorporated into the ICTY Statute in order to give effect to the Secretary-General's concern that the Tribunal only punish crimes that were unquestionably part of customary interna-

103 *Prosecutor* v. *Simić* et al. (Case No. IT-95-9-PT), Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, paras. 40-42 (see also paras. 74, 76, 80).

104 Subject to the great exception, the *kompetenx kompetenz* principle, which is explained in *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

105 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 296.

106 *Prosecutor* v. *Taylor* (Case No. SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004, para. 43.

tional law.[107] But in the first major ruling of the ICTY Appeals Chamber, the majority said that the Secretary-General, and the Security Council, had got it wrong. Therefore,

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[108]

The ICTY Appeals Chamber has explained that in 'drafting Article 5 of the Tribunal's Statute and imposing the additional jurisdictional requirement that crimes against humanity be committed in armed conflict, the Security Council intended to limit the jurisdiction of the Tribunal to those crimes which had some connection to armed conflict in the former Yugoslavia'.[109] This is reading a lot into the alleged intent of the Security Council, based on a rather sparse record. An equally plausible explanation is that the lawyers in the Secretariat who drafted the Statute believed that the nexus with armed conflict was still, in 1993, an element of the customary law concept of crimes against humanity.

Other aspects of the customary law definition of crimes against humanity have also been developed in the case law of the Tribunals. The early decisions at both tribunals were divided as to whether a State or organisational plan or policy was an element of crimes against humanity. In Kunarac, the ICTY Appeals Chamber held that the policy component was not an element of crimes against humanity at all 'at the time of the alleged acts'. In support, the Appeals Chamber referred to a number of authorities, including Eichmann.[110]

Of particular interest is the apparent contradiction between the Appeals Chamber's view of the requirements of customary international law and the text of the Rome Statute, which the ad hoc tribunals have sometimes cited as an authoritative codification of customary international law.[111] But article 10 of the Rome Statute

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107 See the Secretary-General's report: 'Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.' 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), para. 47.

108 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141.

109 *Prosecutor* v. *Šešelj* (Case No. IT-03-67-AR72.1), Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 13. See: Larry D. Johnson, 'Ten Years Later: Reflections on the Drafting', (2004) 2 *Journal of International Criminal Justice* 368, at p. 372.

110 *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 98. Also: *Prosecutor* v. *Blaškić* (Case No. IT-95-14-A), Judgment, 29 July 2004; para. 120; *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-A), Judgment, 17 December 2004, para. 98.

111 *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para.

states it shall not 'be interpreted as limiting or prejudicing in any way existing or developing rules of international law ... ', and the judges now seem to be taking its drafters at their word. It is disappointing that the Appeals Chamber did not provide more of an explanation for its position, or even attempt to account for the discrepancy with the plain text of article 7 of the Rome Statute.[112]

In Kunarac, the ICTY Appeals Chamber confirmed that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.

The Appeals Chamber explained that '[i]n the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of "chattel slavery" but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.'[113]

The ICTY and ICTR statutes define, as an act of crime against humanity, '[p]ersecutions on political, racial and religious grounds'.[114] The language is taken verbatim from the definition of crimes against humanity in the Nuremberg Charter. The Rome Statute of the International Criminal Court has a much more extensive equivalent provision: 'Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.'[115]

This 'modern' definition does not appear to have been influential in the case law of the three tribunals. Indeed, one ICTY Trial Chamber wrote that 'although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law', and rejected in particular the requirement that persecution be connected with a crime within the jurisdiction of the Court or another act of crime against humanity as too narrow.[116]

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112 For discussion of this issue, see: Guenael Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal tribunals for the Former Yugoslavia and for Rwanda', (2002) 43 *Harvard International Law Journal* 237, pp. 270-282. Cherif Bassiouni takes the view that a State plan or policy element is part of the customary law concept of crimes against humanity: M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I, Ardsley, New York: Transnational Publishers, 2005, pp. 151-152; M. Cherif Bassiouni, *Crimes Against Humanity*, 2nd rev. ed., The Hague: Kluwer Law, 1999, pp. 243-281.

113 *Prosecutor* v. *Kunarac* et al. (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 117.

114 ICTY Statute, art. 5(h); ICTR Statute, art. 3(h).

115 *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, art. 7(1)(h).

116 *Prosecutor* v. *Kupreškić* et al. (Case No. IT-95-16-T), Judgment, 14 January 2000, paras.

An ICTY Trial Chamber has described persecutions as 'the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5'.[117] Another has said that persecution refers to 'a discriminatory act or omission' that 'denies or infringes upon a fundamental right laid down in international customary or treaty law' and that is perpetrated with an intent to discriminate on racial, religious or political grounds.[118] In Kordić & Čerkez, the ICTY Appeals Chamber defined persecutions as 'an act or omission which: 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea)'.[119]

In Nahimana, an ICTR Trial Chamber found that hate speech, which it noted was prohibited by customary international law, could also amount to persecution. It said that persecution was 'broader' than the prohibition on direct and public incitement to commit genocide, a crime that ICTR trial chambers have found to overlap with persecution.[120] But the two concepts are conceptually quite different, and while both manifest ethnic or racial hatred, 'direct and public incitement' is an inchoate crime requiring no result whereas persecution is exactly to the contrary. They are at odds with the requirement in the ICTY case law that persecution have a result. Moreover, while a good argument can be made for the prohibition of hate speech directed at ethnic or racial minorities in customary international law, the ICTR goes much further in concluding that what may constitute a prohibition in international human rights law is also an international crime. Moreover, there is little or no support for the position that international law also prohibits hate speech directed against religious or political groups, however desirable this might be.

VI. Conclusions

Customary international law has provided the international criminal tribunals with an extraordinary opportunity for judicial creativity. Ostensibly, they claim to be undertaking a rigorous exercise involving research into two objectively verifiable sources, *opinio juris* and State practice. But the judges of the international crimi-

579-581.

117 *Prosecutor* v. *Kupreškić* et al. (Case No. IT-95-16-T), Judgment, 14 January 2000, para. 621. Also: *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 534.

118 *Prosecutor* v. *Naletilić* et al. (Case No. IT-98-34-T), Judgment, 31 March 2003, para. 634.

119 *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-A), Judgment, 17 December 2004, para. 101. Also: *Prosecutor* v. *Blaškić* (Case No. IT-95-14-A) Judgment, 29 July 2004, para. 131; *Prosecutor* v. *Krnojelac* (Case No. IT-97-25-A), Judgment, 17 September 2003, para. 185; *Prosecutor* v. *Vasiljević* (Case No. IT-98-32-A), Judgment, 25 February 2004, para. 113; *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003, para. 1071; *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-I), Judgment and Sentence, 1 June 2000, para. 21.

120 *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-I), Judgment and Sentence, 1 June 2000, para. 22; *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003 , para. 1078.

nal tribunals do not employ customary international law as if they were applying public international law in the classic sense, for example in determining the limits of fishing zones, or the scope of diplomatic immunities, or other issues involving reciprocal rights of states in which the distinct elements of practice and *opinio juris* usually manifest themselves rather clearly. Certainly there are efforts to anchor this normative process in earlier case law, such as the post-World War II decisions, and a range of eclectic sources such as the work of the International Law Commission, military manuals and Security Council debates. But overall, customary international law mainly seems to provide a convenient licence for judicial law-making, a process similar in many respects to the creation of judge-made rules of the English common law.

The ICTY Appeals Chamber hinted at such a 'judge-made' approach in Hadžihasanović:

> In considering this question, the Appeals Chamber is aware that it is incorrect to assume that, under customary international law, all the rules applicable to an international armed conflict automatically apply to an internal armed conflict. More particularly, it appreciates that to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*. However, it also considers that, where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle.[121]

These comments were repeated in a 2006 ruling.[122] In other words, the Tribunal considers that it may apply a rule to a 'new' situation that 'reasonably falls' within a principle that it has already recognized. The process seems little different, in practice, from that of English common law judges who build and develop the law using precedent to inspire their search for solutions to 'new' situations.

International criminal law owes much of its dynamism to this openness to judicial activism. It is fortunate that the judges welcomed the opportunity, rather than shrinking from the challenge. Legal positivists may be somewhat disturbed by these developments, arguing for more conservative interpretations, often in the name of strict respect for the principle of legality.[123] But on more than one occasion, the European Court of Human Rights has dismissed challenges that judge-made law from the English courts did not comply with the provisions of article 7 of the European Convention on Human Rights.[124] The approach of the tribunals may also

121 *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-AR72), Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12. Also: *Prosecutor* v. *Hadžihasanović* et al. (Case No. IT-01-47-AR72), Separate and Partially Dissenting Opinion of Judge David Hunt, 16 July 2003, para. 3.

122 *Prosecutor* v. *Karamera* et al. (Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6\), Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 15.

123 See, *e.g.*, Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', (2004) 2 *Journal of International Criminal Justice* 1007.

124 *S.W.* v. *United Kingdom*, Series A, No. 335-B, paras. 35-36; *C.R.* v. *United Kingdom*, Series A, No. 335-B, paras. 33-34.

trouble public international lawyers, who find the methodology imprecise or inconsistent.[125] It might be better if it was simply acknowledged that customary international law in the context of international criminal law means something different than customary international law in the context of traditional public international law.

The legislative process in the area of international criminal law has proven to be profoundly unsatisfactory. The initial effort of recent times, the Statute of the International Criminal Tribunal for the former Yugoslavia, has an anachronistic text in some important respects, notably its definitions of crimes and its description of modes of participation. Fortunately, the insightful jurists who composed the first ICTY Appeals Chamber effected a major jurisprudential correction so as to make the war crimes provision 'watertight and inescapable'.[126] They also declared that crimes against humanity could be committed in peacetime. Their bravado was welcomed at the Rome Conference, which incorporated much of the Appeals Chamber's philosophy into articles 7 and 8 of the Rome Statute.

But the Rome Conference did not provide a war crimes provision that is 'watertight and inescapable'. Article 8 of the Rome Statute is inferior in important aspects to article 3 of the ICTY Statute. Although the Rome Conference was a most open, transparent and democratic attempt at codification, it generated a verbose text that is riddled with inconsistencies, compromises, lacunae and 'constructive ambiguities'. Simply put, development of a logical, coherent, progressive and effective system of international criminal justice is better accomplished by judges than by diplomats qua legislators, as experience has shown. The pretext for the process is the application of so-called customary international law. In reality, the judges are exercising leadership not so much in the judicial codification of State practice as in the progressive development of a legal system that would never have emerged in the way that it has if this had been left to the initiative of States alone.

125 See, for example, the comments of J. Goldsmith & E. Posner, 'Notes Toward a Theory of Customary Law', [1998] *Proceedings of the 92nd Annual Meeting of the American Society of International Law* 53.

126 *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-PT), Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 March 1999, para. 23. Also: *Prosecutor* v. *Kvočka* (Case No. IT-98-30/1-PT), Decision on Preliminary Motions Filed by Mladko Radić and Miroslav Kvočka Challenging Jurisdiction, 1 April 1999.

Chapter 6

Bombardment: From "Brussels 1874" to "Sarajevo 2003"

Frits Kalshoven

> It's tempting to wonder how many of the inventions of the past century we might have been better off without. Take the aeroplane, for instance. It has transformed warfare from an event in which trained soldiers kill each other on distant battlefields to occasions when death is rained down indiscriminately on innocent civilians, while the professional fighters fly at great height in comparative safety. – John Mortimer, *Where There's a Will* (2003) ch. 28.

I. Introduction

The nineteen seventies were a period of active lawmaking in the sphere of the international humanitarian law of armed conflict, starting out with expert conferences and ending with the adoption by a diplomatic conference, on 8 June 1977, of two Protocols additional to the Geneva Conventions of 1949.[1] As a member of the Dutch delegation to these events I got to know Professor Igor Blishchenko, member of the delegation of the Union of Soviet Socialist Republics. Politically, we were on two sides of a fence, and in the course of the proceedings each of us must have expressed views that the other disliked enormously. Apart from politics, we got to respect and like each other on the frequent occasions we met, be it in the conference rooms in Geneva or on the boulevard of San Remo, the venue of the informal intersessional meetings organised by the fledgling International Institute of Humanitarian Law. I therefore accepted with alacrity the invitation to contribute to the Liber Amicorum commemorating my ex-colleague and friend.

Bombardment, the wartime activity chosen for this essay, has a long history behind it. An enormous distance separates the primitive artillery of the past from the current sophisticated launching contraptions. It is neither my competence nor my purpose to write about the technical side of the matter. Nor will I deal with the important question, frequently discussed in relation to operations such as Operation

1 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); text reprinted in Roberts & Guelff (eds.), *Documents on the Laws of War*, 3rd ed. (2000) 419, 481.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 103–139.

Allied Force,[2] whether such recourse to force is at all justifiable, be it under the Charter of the United Nations or, more generally, according to *jus ad bellum*.

Rather, my focus will be on bombardment as a method of warfare. As exemplified by the above quote from Sir John Mortimer's *Where There's a Will*, bombing operations may be criticised for the manner they are carried out or for their presumed effects, in particular on the civilian population. That the actions may be appraised differently by different people may be evident from episodes such as the targeting, in the course of the Kosovo campaign, of all the bridges in Serbia, or the bombardment of Falluja during the recent, second Iraq war in an operation I heard referred to, in a variant of General Sherman's ill-famed sound bite of the American Civil War, as an attempt to destroy the city in order to liberate it. My purpose is to try and discover the rules relating to bombardment as they have developed in the framework of *jus in bello*, i.e. the body of law that in the past was styled the law of war and that today, in softer tones, is usually referred to as the international humanitarian law of armed conflict. (I shall use the various terms intermittently or even the acronym IHL.)

My search starts at "Brussels 1874", as the first intergovernmental conference to broach the matter of bombardment. It stops at "Sarajevo 2003", as the first occasion for an international criminal tribunal to qualify a specific shelling and sniping campaign as a *crime of terror*.

Between these two events lie a series of conferences, notably, the Hague Peace Conferences of 1899 and 1907 and the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974-1977. There also lies a much longer list of armed conflicts, with the First and Second World Wars (1914-1918, 1939-1945) as particularly noteworthy episodes. As we shall see, the aeroplane plays an important part in our story. Yet it had nothing to do with our two extreme points in time: the Brussels conference was held before the air arm started its ascendancy, and the weapons used against Sarajevo were a land army's instruments such as howitzers, mortar and snipers' rifles.

II. The Conference of Brussels, 1874

On the invitation of the Russian Government, delegates of fifteen European states gathered in Brussels on 27 July 1874 to examine a Russian draft text for an international agreement on the law of land warfare. After one month of deliberations, the conference on 27 August 1874 adopted two texts: a Final Protocol and a Project of an International Declaration Concerning the Laws and Customs of War.[3] Since the conference was not mandated to conclude a treaty, it could only transmit the Declaration of Brussels (as the text became known) to the delegates' respective governments. With that, the matter came to a standstill: it would be a quarter of a cen-

2 The 1999 NATO Kosovo bombing campaign.

3 Text of Final Protocol and Declaration reprinted in Schindler & Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, 4th ed. (2004) 21. On the drafting history of the Declaration, see J. de Breucker, "La Déclaration de Bruxelles de 1874 concernant les lois et coutumes de la guerre", in 27 *Chronique de Politique Étrangère* (1974) 3; as he notes, the adoption by the Conference of rules on bombardment implied its recognition as a lawful method of warfare; at 59.

tury before the text was taken up as the basis of discussions on the law of war at the Hague Peace Conference of 1899.

At the time of the Conference of Brussels, warfare was the business of "armies in the field".[4] Yet the armies were not always "in the field": they often passed by or through towns, villages and other inhabited places. If a place was not defended, there was no use for bombardment and the ammunition could be spared for other occasions – a military logic that unfortunately was not always respected in practice. Of course, a fortified place was another matter: if it had to be captured, an artillery bombardment could greatly help preparing the final assault.

The section on "sieges and bombardments" of the Declaration of Brussels reflects this state of affairs. As Article 15 has it: "Fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded." Article 16 requires the commander of a force attacking a fortified place to "do all in his power to warn the authorities" prior to commencing the bombardment; a weak obligation that does not even apply in the event that the operation qualifies as an assault.[5] Article 17 calls for "all necessary steps" to spare a select group of buildings dedicated to culture and hospitals, but only "as far as possible" and "provided [the objects] are not being used at the time for military purposes." Moreover, the defenders themselves are ordered to "indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand."[6]

In drafting these rules, the delegates at Brussels evidently had short-range battle situations in mind where, for instance, distinctive signs marking buildings in a place under siege might be expected to be visible to the enemy outside the city walls. Another striking feature of the rules is that while specified buildings are singled out for protection, not a word is spent on the inhabitants of a defended place and their homes. Even so, the mere fact that the Conference adopted rules on bombardment at all and specifically prohibited bombardment of undefended places reflects a conscious choice between two opposing extreme tendencies in thinking about war: tendencies that are at issue in all lawmaking and law enforcement efforts in the sphere of so-called "battlefield law".[7] By way of explanation, let us listen to the voice of baron Jomini, Head of the Russian delegation. Addressing the plenary opening ses-

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4 This phrase is borrowed from the title of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864, reprinted in Schindler & Toman, *op. cit.* note 3, at 365.

5 Art. 16 provides that "if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities."

6 Art. 17 reads as follows:

> In such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.
>
> It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand.

7 I borrow the phrase from the title of the book by A. P. V. Rogers, *Law on the Battlefield*, 2nd ed. (2004).

sion of the Conference, he said:[8]

> There exist very conflicting ideas about war. While some would wish to make it even more terrible in order that it might occur less frequently, others would prefer to turn it into a tournament between the regular armies, with the peoples as simple spectators.

In terms of this choice between "conflicting ideas about war", the rules of 1874 imply that the inhabitants of an undefended place, although perhaps not just "simple spectators" of a tournament between the opposing armies, at least were saved the ordeal of bombardment. In contrast, the "peoples" in a place under siege were left exposed to the hardships of war. The outcome of the debate at the Conference of Brussels on the subject of artillery bombardment may thus be qualified as steering a middle course between baron Jomini's two extremes.

III. The Hague 1899, 1907, 1923

From 18 May to 29 July 1899, again on the initiative of the Russian Czar, the International Peace Conference convened at The Hague to discuss, *inter alia*, the law of war.[9] This time, the outcome was a treaty: the Conference adopted a Convention on land warfare.[10] As noted earlier, the annexed Regulations on land warfare largely confirmed the results of the Brussels Conference of 1874: the lapse of a quarter of a century had not led to different insights on matters such as treacherous killing vs. ruses of war, occupation, or the position of resistance fighters. In particular, Rules 25-27 on bombardment (in Section II – Hostilities, Chapter I – Means of Injuring the Enemy, Sieges, and Bombardments) simply copy the provisions on bombardment in the Declaration of Brussels.

However, a first sign of changes to come may be seen in the adoption by the Conference of a declaration by which contracting states agreed "to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature." While balloons already provided a platform for such launchings, the "other methods of a similar nature" referred to the aeroplanes which had made their first tentative flights and in future might perhaps play a similar role.

Strikingly, the declaration, with its flat prohibition of aerial bombardment, was signed and ratified by all the important states of the time.[11] Yet, as signified by its

8 As quoted by Jean de Breucker, *op. cit.* note 3, at 7; my translation from the original French: "Il règne en effet des idées très contradictoires sur la guerre. Les uns voudraient la rendre plus terrible pour qu'elle soit plus rare, d'autres voudraient en faire un tournoi entre les armées régulières, avec les peuples pour simples spectateurs."

9 Apart from war, the Conference discussed disarmament and international arbitration. On the 1999 centennial of the Conference see F. Kalshoven (ed.), *The Centennial of the First International Peace Conference; Reports and Conclusions* (2000).

10 The official title is: Convention with Respect to the Laws and Customs of War on Land, and Regulations Respecting the Laws and Customs of War on Land. Text reprinted in Schindler & Toman, *op. cit.* note 3, at 55.

11 Text reprinted in Schindler & Toman, *op. cit.* note 3, at 309; list of signatures, ratifications and accessions, at 312.

five-year period, the prohibition was tentative: the delegates at the Conference had not found agreement on a text that could be attached as a permanent rider to the rules on bombardment in the Regulations.

By the time of the Second Hague Peace Conference, 15 June – 18 October 1907, aircraft had developed to a stage where the prospect of their use as a platform for the "launching of projectiles and explosives" already began to be more realistic. In consequence, although the Conference did adopt a Declaration identical to the one of 1899, this time "for a period extending to the close of the Third Peace Conference" (a conference that would never be convened), the fate of the new Declaration was very different than that of its predecessor: among the main European states Great Britain would be the only one to ratify it.[12]

It should be added that the delegates at the same time completed the language of the existing categorical prohibition on bombardment of undefended towns etc. with the clause "by whatever means". This amendment effectively precludes the argument that the Hague Peace Conference of 1907 had been thinking of nothing but ground artillery and that the rule it was reaffirming therefore could not be deemed to apply to aerial bombardment as well. While the argument may strike the reader as detestable anyway, it is a popular line of reasoning with governments or military staffs that wish to escape from the strictures of general rules that date from before the introduction of a new means or method of warfare. The delegates at the Conference of 1907 are therefore to be praised for their foresight in closing this escape route for the specific case of aerial bombardment.

Another interesting product of the Conference of 1907 is the Hague Convention on naval bombardment.[13] While its opening article copies the prohibition in the Hague Regulations on bombardment of undefended places, Article 2 exempts from this prohibition a series of military works, establishments and other objects that "could be utilised for the needs of the hostile fleet or army" and therefore may be bombarded.[14] The rule reflects the plain fact that while undefended coastal places might be beyond the grasp of the land army, they could well be within the reach of the naval forces. The point is that here, for the first time, the notion of "military objective" makes its appearance in the discussion about limits to bombardment and,

12 Text of declaration reprinted in Schindler & Toman, *op. cit.* note 3, at 309; list of signatures, ratifications and accessions, at 313.

13 Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War. Text reprinted in Schindler & Toman, *op. cit.* note 3, at 1079.

14 The full text of Art. 2 reads as follows:

> Military works, military or naval establishments, depots of arms or war material, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed. He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances. If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph l, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

with that, about the middle course between baron Jomini's "conflicting ideas about war".

Meanwhile, developments in the air were going fast. Bombs were dropped from the air in 1911, in a war between Turkey and Italy. And a few months before the end of the First World War, both English and German airplanes dropped bombs on enemy military objectives. In our eyes, these events were no more than primitive tryouts. Yet the prospect of significant aerial attacks on the enemy hinterland and, with that, on the enemy civilian population was growing more realistic. Indeed, shortly after the War, high-ranking military commanders in more than one country (notably, the Soviet Marshal Tuchatsjevski, the French General Foch and his Italian colleague Douhet) could be heard speaking with enthusiasm about the prospect of devastating attacks on the enemy's capacity and will to fight, not least through attacks upon the morale of the population. In the perception of these leaders, war conducted thus would no longer be a long drawn-out struggle between opposing armies but a swift, terrible all-out struggle between nations.[15]

The prospect of using the air arm as an instrument to terrorise the enemy civilian population was received with less enthusiasm in governmental and other quarters. Discussions were opened with a view to finding agreement on rules for the waging of air warfare that would temper the high expectations of the generals and air marshals. When these negotiations failed, the Washington Conference of 1922 on the Limitation of Armaments set up a Commission of Jurists charged with devising a set of rules, *inter alia*, on air warfare. The text produced by the Commission, usually referred to as the 1923 Hague Rules on Air Warfare,[16] deals in detail with aerial bombardment. Opening the section on bombardment, Article 22 states that:

> Any air bombardment for the purpose of terrorising the civil population or destroying or damaging private property without enemy character or injuring non-combatants, is forbidden.

This was both a direct slap in the face of the air marshals as well as an important declaration of principle. Article 24, paragraph 1, establishes another equally important principle:

> An air bombardment is legitimate only when it is directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent.

Leaving the further specifics of Article 24 on one side,[17] I note that the rules on

15 The episode is referred to in this author's "Arms, Armaments and International Law", 191 *Recueil des Cours* (1985-II) 187, at 219. The military leaders quoted above, in the words of baron Jomini, evidently looked forward to wars that would be made even more terrible in order that they might occur less frequently.

16 The full title, reflecting also the other items on the agenda of the Commission, is: Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. For text, see Schindler & Toman, *op. cit.* note 3, at 315.

17 Para. 2 supplements this abstract definition with an enumeration of the objects falling under the definition: "Such bombardment is legitimate only when directed exclusively

bombardment in the Hague Rules of 1923 unmistakably represent a move away from the drastic ideas of the air marshals and back to the model of the middle course. Unfortunately, although widely regarded as an authoritative statement of the law on air warfare, the Rules were never adopted as a treaty.

An even more frontal attack on the ideas of the air marshals was undertaken some time later, at the League of Nations Conference for the Reduction and Limitation of Armaments, held at Geneva from 1932 to 1934. The Conference distinguished quantitative and qualitative disarmament (by numbers and by character, respectively). Under qualitative disarmament it decided to examine the range of land, sea and air armaments with a view to selecting those weapons that would be, inter alia, "most threatening to civilians." Not surprisingly, the air arm came up for close scrutiny in that category, and proposals were drawn up designed to shield civilian populations from the harm and demoralising effect of air attacks against centres of civilian population. If adopted, these proposals would have resulted in a virtual ban on long-distance aerial bombardment. However, the Conference petered out in 1934. With that, the proposals relating to the air arm likewise vanished into thin air.[18]

IV. The Second World War

By the time of the Second World War, the internationally agreed provisions designed to limit aerial bombardment as a method of warfare were still the same that had been in force at the time of the first World War, *i.e.*, the rules found in the Declaration of Brussels as reaffirmed and reinforced in 1899 and 1907 at the Hague Peace Conferences. Implementation of the more recent, non-binding rules of the Hague Rules of 1923 would remain dependent on the goodwill of the belligerent parties.

Official statements delivered shortly before the outbreak of the second World War aimed to confirm the validity of the rules in force. Thus, the Assembly of the League of Nations on 30 September 1938 unanimously adopted a resolution which, recognising the horror public opinion had repeatedly expressed at the bombing of civilian populations and the illegality and military uselessness of this practice, emphasised that air warfare urgently needed to be made the subject of special regulation.[19] Unfortunately, time was running out and serious efforts at creating new law

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against the following objectives: military forces, military works, military establishments or depots, manufacturing plants constituting important and well-known centres for the production of arms, ammunition or characterized military supplies, lines of communication or of transport which are used for military purposes."

The next paragraphs of Art. 24 deal with the specificities of aerial bombardment targeting objects in inhabited places that are situated either at some remove from ongoing ground operations or close to such activity.

18 On the Disarmament Conference, see, by this author, *Belligerent Reprisals* (1971, reprinted 2005) 90, and "Arms, Armaments and International Law", *op. cit.* note 15, 218, 308.

19 The relevant parts of the Resolution read as follows:

> Considering that on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations;
>
> Considering that this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under the recognized principles of international law;

in this area could no longer be expected. Accordingly, when President Roosevelt on 1 September 1939 addressed an appeal to the belligerent parties, he could only urge them to affirm that they would desist from aerial bombardment of civilian populations and unfortified cities, on the basis of reciprocity.[20] This pledge they all gave – on the basis of reciprocity.

Practice during the Second World War has been mixed. Innumerable bombing actions have had perfectly lawful targets. At the same time, the civilian population was frequently targeted as well, at times in an attempt to break its morale and, with that, the enemy will to fight. In effect, one of the first German bombing actions, the bombardment of London in August 1940, had the stated purpose of "bombing England out of the war". Yet, awareness of the illegality of plain terror bombardment persisted, and throughout the war these acts continued to be denounced as unlawful by the victims and equally loudly claimed to be justified as reprisals by the attack-

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> Considering further that, though this principle ought to be respected by all States and does not require further reaffirmation, it urgently needs to be made the subject of regulations specially adapted to air warfare and taking account of the lessons of experience;
>
> Considering that the solution of this problem, which is of concern to all States, whether Members of the League of Nations or not, calls for technical investigation and thorough consideration;
>
> Considering that the Bureau of the Conference for the Reduction and Limitation of Armaments is to meet in the near future and that it is for the Bureau to consider practical means of undertaking the necessary work under conditions most likely to lead to as general an agreement as possible:
>
> I. Recognizes the following principles as a necessary basis for any subsequent regulations:
>
> 1) The intentional bombing of civilian populations is illegal;
> 2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> 3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence; [etc.]

20 Appeal of President Franklin D. Roosevelt on Aerial Bombardment of Civilian Populations, addressed to the Governments of France, Germany, Italy, Poland and His Britannic Majesty, September 1, 1939:

> The ruthless bombing from the air of civilians in unfortified centers of population during the course of the hostilities which have raged in various quarters of the earth during the past few years, which has resulted in the maiming and in the death of thousands of defenseless men, women, and children, has sickened the hearts of every civilized man and woman, and has profoundly shocked the conscience of humanity.
>
> If resort is had to this form of inhuman barbarism during the period of the tragic conflagration with which the world is now confronted, hundreds of thousands of innocent human beings who have no responsibility for, and who are not even remotely participating in, the hostilities which have now broken out, will lose their lives. I am therefore addressing this urgent appeal to every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all of their opponents. I request an immediate reply.

ers.[21]

V. The Protocols of 1977

The law governing bombardment had barely survived the Second World War and in effect was in dire need of resuscitation. A first opportunity to do this arose with the Nuremberg Tribunal.[22] Its Charter lists under the heading of war crimes the "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity", and under crimes against humanity, "inhumane acts committed against any civilian population".[23] These formulations probably covered acts such as the bombing campaign against London. The opportunity was not taken up, however: none of the political and military defendants before the Tribunal were charged with the bombardment of civilian populations. This silence may be interpreted as reflecting an awareness on the part of the Prosecutors that since the Allied air forces had behaved no better, non-prosecution of these crimes was to be preferred over the defendants raising the argument of *tu quoque* at trial.[24]

A. General Protection of the Civilian Population

It would be another thirty years before the law on bombardment was actually resurrected and, in the process, significantly reinforced. The occasion was the conference of 1974-1977 that negotiated and ultimately adopted the two Additional Protocols.[25] Protocol I in particular provides detailed rules on bombardment, although not under this heading or in the section on methods and means of warfare; nor, indeed, in so many words: one exception apart, the term "bombardment" does not figure in the Protocol.[26] Rather, the relevant rules are found in Section I, General Protection

21 For a discussion of this episode, see *Belligerent Reprisals*, *op. cit.* note 18, 161-178.

22 International Military Tribunal established by virtue of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945. Text of the London Agreement and the annexed Charter of the Tribunal, reprinted in Schindler & Toman, *op. cit.* note 3, at 1253.

23 The Charter defines the war crimes that would fall under the jurisdiction of the Tribunal as "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;" and crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Art. 6, para. 2 (b), (c).

24 For an in-depth analysis of the various manifestations of *tu quoque*, see Sienho Yee, "The *Tu Quoque* Argument as a Defence to International Crimes, Prosecution or Punishment", 3 Chinese Journal of International Law (2004) 87.

25 *Supra*, text at note 1. The official title of the conference was Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977.

26 The exception is in Art. 51(5a) that lists among indiscriminate attacks, "an attack *by bom-*

against Effects of Hostilities, of Part IV, Civilian Population. The different presentation marks a significant shift in approach as well: while civilians hardly figured in the old rules, the protection of civilians and civilian objects is an important feature of the new provisions. I note the following highlights:

– it is prohibited to make the civilian population as such, or individual civilians, the object of attack.[27]
– as regards objects, attacks are permitted solely against military objectives, these are defined as objects which "by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage."[28]
– in attacking military objectives, everything feasible shall be done to avoid, or at any rate to minimise, injury to civilians and damage to civilian objects (so-called collateral damage). An attack that fails to do this is an indiscriminate attack.[29] Specifically, the limit of permissible collateral damage is overstepped when an attack may be expected to cause losses that could be deemed "excessive in relation to the concrete and direct military advantage anticipated."[30]

Chapter IV of Section I completes these substantive rules with provisions on implementation or "precautionary measures". Article 57, Precautions in attack, provides that "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." This statement of principle is followed by a detailed exposition of the precautions to be taken by those who plan, decide or carry out an attack. Tackling the issue from the other side, the much shorter Article 58, on Precautions against the effects of attack, specifies the necessary and feasible precautions that parties to the conflict must take in order to "protect

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bardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects."

27 Art. 51(2). Attacks aiming primarily to spread terror among the civilian population are treated separately in the next section.

28 Art. 52(2): "Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

29 Art. 51(4) defines indiscriminate attacks as: "those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat which cannot be limited as required by this Protocol."

Para. 5 gives two examples of attacks that must be considered as indiscriminate: "(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilian objects, and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

30 Art. 51(5).

the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."

Bombardment as a method of warfare is as common in situations of internal armed conflict as it is in international armed conflicts. This brings us to Protocol II, applicable in situations of internal armed conflict that meet the conditions set forth in Article 1(1).[31] This Protocol as well contains a Part IV entitled 'Civilian Population'. While in the course of the Diplomatic Conference, this Part had long expanded in line with its twin Part in Protocol I,[32] at the very last moment a strong majority at the Conference stripped it to the barest essentials. As far as relevant here, the surviving bits and pieces are found in Article 13. Paragraph 1 states the general principle: "The civilian population and civilians shall enjoy general protection against the dangers arising from hostilities." Paragraph 2 repeats verbatim the text of Article 51(2) of Protocol I, including the phrase that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

In striking contrast to these rules on the protection of civilian populations and individual civilians, Protocol II is completely silent on the protection of civilian objects, nor does it limit attacks to military objectives. This reflects the fear of the majority at the Conference that by introducing a definition of "military objective" in the context of internal armed conflict the impression might be created that attacks by armed opposition groups[33] on objects meeting this definition are legitimate acts of warfare (rather than acts of rebellion, treason or terrorism).[34]

Even so, the few rules on the protection of the civilian population, salvaged from the last-minute onslaught that destroyed the bulk of draft Protocol II, signify a more Radićal change in the law relating to internal armed conflict than was achieved in regard to international armed conflicts: after all, rules governing hostilities have been a feature of the law relating to international armed conflict since 1899, whereas such rules were almost completely absent from the pre-Protocol II law governing

31 Protocol II is applicable in conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

32 Asbjørn Eide, delegate of Norway, speaking on 29 March 1974 in a meeting of Committee III: "... the civilian population must be given the same protection irrespective of the nature of the conflict. [If provisions on protection of the civilian population in Protocol II are less detailed than those in Protocol I] it would mean that less precise rules were being laid down on the protection of civilians in cases of non-international armed conflicts. He strongly urged Governments favouring such a course to reconsider their position." CDDH/III/SR.9, Off. Records Vol. XIV, 71. In the end, the "Governments favouring such a course" won.

33 The term was introduced by Liesbeth Zegveld in her book on *The Accountability of Armed Opposition Groups in International Law* (2002).

34 In spite of this reluctance to deal with "civilian object" and "military objective", Arts. 14-16 of Protocol II extend protection from attack to certain specified objects. Art. 15 protects specified works and installations containing dangerous forces "even where these objects are military objectives, ...": the sole place where the Conference overlooked the "m" word!

internal armed conflict.[35]

The lack of a general rule in Protocol II on protection of civilian objects and of a definition of "military objective" loses some of its sting when it is realised that in practice, parties to internal armed conflicts are as much aware as are their counterparts in international armed conflicts of the distinction between a school that harbours four-to-six-year-olds and a military barrack, or, in more general terms, between civilian objects and military objectives. Indeed, in internal armed conflicts as well, civilian objects cannot be much else but objects that are not military objectives, and the latter objects are bound to be something quite similar to the objects defined in Article 52(2) of Protocol I.[36] The question remains whether parties to internal conflicts are prepared to act according to their insights – but this question extends as much to the situation of international armed conflict as it does to internal armed conflict.

B. Attacks With the Primary Purpose of Spreading Terror Among the Civilian Population

The second sentence of Articles 51(2) of Protocol I and 13(2) of Protocol II prohibits "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population." It may be recalled that the lawyers who drew up the 1923 Hague Rules on Air Warfare already included a specific prohibition of "air bombardment for the purpose of terrorising the civil population." Even more strikingly, the Disarmament Conference of 1932-1934 had placed the air arm in the category of weapons most threatening to civilians and therefore deserving to be submitted to stringent restrictions. From this historical perspective, the present prohibition in the Protocols of acts or threats of violence with the primary purpose of spreading terror among the civilian population stands in a long tradition. Yet, the scope of the new rule is significantly broader than its predecessor of 1923. Three parts of the phrase are discussed here, *viz.*, "acts of violence", "threats", and the "primary purpose to spread terror among the civilian population."

Article 49(1) of Protocol I defines attacks as "acts of violence against the adversary, whether in offence or in defence."[37] Paragraph 2 provides that the rules in the Protocol relating to attack apply to "any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land." Hence, the pro-

35 The only exception was Article 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which made those of its provisions "which relate to respect for cultural property" applicable in internal armed conflict as well. For text of the Convention, see Roberts & Guelff, *op. cit.* note 1, 371.

36 The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1996 Amended Protocol II) annexed to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, is applicable in all situations of armed conflict (Art. 1(2)) and in Art. 2(6) defines "military objective" in literally the same terms as used in Art. 52(2) of Protocol I. For text of the Convention, see Roberts & Guelff, *op. cit.* note 1, 515; 1996 Amended Protocol II, at 536.

37 The point is made by Waldemar Solf in his comment on Art. 51, in Bothe, Partsch & Solf, *New Rules for Victims of Armed Conflicts* (1982) 300, note 5.

hibition in Article 51(2) of "acts of violence" may be read as a prohibition on attacks with the said primary purpose, whether in the shape of land, aerial or naval bombardment, the launching of missiles, mortar fire or sniping.

Similarly, "threats of violence" may be explained as threats of attacks. One wonders why the Conference chose to add the element of threat to this particular provision and not to other provisions prohibiting equally dangerous behaviour. In effect, the term "threat" is rare in Protocol I: apart from the case under discussion, it figures in Articles 40 (Quarter) and 75 (Fundamental guarantees). It may help to cast a glance at these other provisions as well.

Article 40 (in Section I, Methods and Means of Warfare, of Part III, Methods and Means of Warfare, Combatant and Prisoner-of-War Status) prohibits "to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis." The text elucidates the rule in Article 23(d) of the Hague Regulations prohibiting "to declare that no quarter will be given". It was felt that the term "quarter" was no longer generally understood, and the verb "to declare" was replaced by three terms, each referring to a particular feature of the no-quarter declaration. In this construct, "to threaten" signifies a communication to the adverse party and emphasises the psychological impact that a "declaration of no quarter" may have – and may be intended to have – on the morale of enemy forces.[38]

Article 75 (in Section III, Treatment of Persons in the Power of a Party to the Conflict, of Part IV, Civilian Population) provides a code of humane treatment for persons falling under this heading. Article 75(2) lists a series of acts that "are and shall remain prohibited at any time and in any place whatsoever." The list, including acts such as murder, torture and the taking of hostages, takes its inspiration from common Article 3 of the 1949 Geneva Conventions. However, whereas that Article only lists the acts, Article 75(2)(e) adds as a closing phrase: "threats to commit any of the foregoing acts." As a result, the mere communication of the prospect of such acts is brought under the prohibition. The threat may be addressed to an individual person, a group of persons, or an adverse party. And again, the psychological effect a threat of committing such acts may exert on the morale of persons protected under Article 75 is evident.[39]

The threat of violence in Article 51(2) likewise may be assumed to signify a communication addressed to the adverse party, notably, (part of) its civilian population.

What then is meant by the primary purpose to spread terror among the civilian population? Any direct attack on the civilian population is bound to spread fear, panic, perhaps anger as well. Indeed, the effect of an indiscriminate attack may not be that much different, and even precision attacks on military objectives in built-up areas may bring about the same type of reaction among the inhabitants. All of this may apply to the threat of such attacks as well. The sentence in Article 51(2) cannot be meant to confirm these obvious truths. So, what else may be required for an attack

38 As Jean de Preux writes in his comment on Art. 40: "Strictly speaking, the text refers to the intention, the threat or pressure with a view to provoking an immediate surrender, or to terrorizing the adversary, ..." ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para. 1591.

39 The ICRC Commentary explains that "[t]his prohibition is actually concerned with intimidation; a similar formula was used in Article 40 of the Protocol ..." *Id.*, para. 3056.

or threat to qualify under this sentence?

"Terror" implies a considerable level of fear: a ripple of anxiety will not suffice. Yet, as the records show, the specific intention to spread terror was even more crucial than the level of fear actually inspired. Even the first draft text the ICRC submitted to the Conference refers to acts "intended to spread terror among the civilian population."[40] However, the point did not go uncontested, and actually, only two participants to the discussion in Committee III are on record as having explicitly supported the phrase "intended to".[41] A contestant explained that it was "dangerous to take a presumed intention as a criterion."[42] Another delegate, agreeing that intent would be difficult to prove, suggested that the solution might lie in replacing it with a phrase like "acts likely to spread terror".[43] Other amendments suggested that "intended to" might be replaced with "capable of" spreading terror.[44]

With that, discussion of the draft Article was transferred to the Working Group of Committee III. This produced a text that refers neither to intention nor capacity, and instead speaks of the "primary object" of spreading terror among the civilian population.[45] The report on the work of Committee III during the second session of the Conference places on record that the draft prohibition as formulated by the Working Group was "directed to intentional conduct specifically directed toward the spreading of terror [...]."[46] Evidently, the phrase "intended to" might have disappeared from the text but the phrase "primary purpose" was designed to cover the same intention with greater precision.[47]

This increased precision inevitably leads to the next problem: how to single out the primary purpose among the multiple purposes that may be pursued with one action? In the context of the second part of Article 51(2) this question may arise, for instance, when the violence takes the form of an indiscriminate attack on a city that

40 Article 46 of Draft Protocol I, I *Official Records*, Part Three, 16: CDDH/1. The representative of the ICRC explained in Committee III that "the words 'methods intended to spread terror' had been included to express an intention." (!) CDDH/III/SR.5, 14 March 1974, 14 *Off. Rec*. 35.

41 Messrs. Girard (France) and Aldrich (USA). CDDH/III/SR.8, 19 March 1974, 14 *Off. Rec.* 59.

42 Mr. Allaf (Syrian Arabic Republic). CDDH/III/SR.16, 15 March 1974, 14 *Off. Rec.* 43.

43 Mr. Blix (Sweden). CDDH/III/SR.8, 19 March 1974, 14 *Off. Rec.* 59.

44 Amendment proposed by Ghana, Nigeria, Uganda and Tanzania, CDDH/III/38; amendment of the Philippines, CDDH/III/51. Egypt and 10 other delegations proposed a variant: replace "intended to" with "that"; CDDH/III/48 Rev. 1 and Add. 1. – The proposed phrase "capable of" served another purpose as well, *viz.*, to cut off "the use of propaganda as a means of spreading terror among the civilian population." To this effect, Mr. Crabbe (Ghana), speaking in favour of CDDH/III/38 while withdrawing his own amendment (CDDH/III/28) which expressly referred to "propaganda in whatever form". CDDH/III/SR.7, 18 March 1974, 14 *Off. Rec.*, 51.

45 Report of the Working Group of Committee III, 24 Feb. 1975, CDDH/III/224, 15 *Off. Rec.* 327. – Two years later, at the fourth session of the Conference, the Working Group would replace "object" by "purpose", without a word in comment. 9 May 1977, CDDH/III/384.

46 Report of Committee III, Second Session; CDDH/215/Rev. I; 15 *Off. Rec.* 261.

47 In the further deliberations about Article 51, the second paragraph no longer played a role.

effectively spreads terror among the civilian population. Was terror the effect the attacker wished to achieve in the first place or, rather, an unwanted side effect of a military operation carried out for totally different reasons?[48] The answer to this question may depend on where one's sympathies lie. Apart from that, the conclusion that terror was the primary purpose of an attack cannot simply be deduced from the fact that terror was actually induced. In effect, this conclusion may only be drawn on the basis of reliable evidence – in times of armed conflict, a rare commodity.

A further complication arises if an attack is planned, not with the primary purpose of doing damage to a city as such but of destroying certain military objectives located within the city. Article 57(2c) of Protocol I requires a party planning an attack which "may affect the civilian population" to give advance warning, "unless circumstances do not permit." What if an actual warning turns out to induce terror: does it not risk being interpreted as a threat of violence that had the ensuing terror as its primary purpose?

This raises the question whether the second part of Article 51(2) covers attacks and threats of attack that are (only or also) directed against military objectives. One author, Waldemar Solf, implicitly denies this with respect to attacks when he notes that "this provision does not undertake to prohibit the effect (terror), but rather attacks on civilians for the specific purpose of producing this effect."[49] And when it comes to the relation of the second part of Article 51(2) to the rule on advance warning in Article 57(2c) he expands this view to cover threats as well:[50]

> As para. 2 prohibits only actual or threatened attacks directed against the civilian population, and the warning requirements of Art. 57 is relevant only to possible collateral damage resulting from attacks directed against military objectives, there is no inconsistency between the two provisions. The subjective nature of the operative element of intent may, however, afford a basis for propaganda allegations that warnings of impending attacks against military objectives intended to provide civilians with an opportunity to evacuate the vicinity of military objectives or to take shelter were in fact threats intended to induce terror.

While Solf does not offer any grounds for his statements, it is of interest to examine whether arguments one way or the other may be found in the text and context of the second part of Article 51(2). In effect, the view that the phrase covers attacks and threats of attacks against military objectives as well may find support in the consideration that the definition of "attack" in Article 49(1) includes attacks against military objectives as well. The definition of military objectives in Article 52(2) actually is preceded by the phrase that "[a]ttacks shall be limited strictly to military objectives."

A two-step counter-argument might run as follows. As noted above, the "acts or threats of violence" of the second sentence should be understood as "attacks and threats of attack". The next step is to interpret this construct in the narrowest conceivable context, *i.e.*, within the confines of paragraph 2 of Article 51. Since the term

48 As noted in the Report of Committee III, Second Session, the prohibition does not encompass "terror which was not intended by a belligerent." *Loc. cit. supra*, note 46.

49 *Op. cit.* note 37, 300-301: para. 2.3.1.

50 *Ibid.*, 301: para. 2.3.2.

"attacks" in the first sentence of this paragraph can only mean attacks against civilians, the "attacks and threats of attack" of the second sentence must be regarded as similarly limited to acts against civilians.

Neither of these lines of argument is compelling. As for the drafting history of Article 51(2), we note that participants at the discussions in Committee III expressed views that may be read either way.[51] Only one speaker explicitly stated "that attacks on the civilian population intended to spread terror should be prohibited", adding however that "the prohibition of the free flow of information was unacceptable."[52]

Both this last speaker, George Aldrich, and Waldemar Solf appear to have interpreted the phrase "acts of violence" as only referring to attacks directed against the civilian population. When it comes to "threats of violence", Solf again reads this part of the provision in the same sense and, thus, as not applying to attacks on military objectives. The statement by Aldrich concerning the free flow of information at a minimum means the same but may even be read as a mental reservation of the right to threaten attacks against the civilian population, provided always that such threats would not have the primary purpose of spreading terror.

In sum, this discussion of the second part of Article 51(2) yields more questions than firm answers. Notably, both the very notion of "primary" purpose and the relation of the provision to the matter of attacks on military objectives remain undetermined. On the latter point, I find it hard to accept that attacks or threats of attacks on military objectives in a city, town or village should remain outside the scope of the provision even if they had the primary purpose of spreading terror among the civilian population. Aldrich and Solf may have assumed that (threatened) attacks on military objectives will always have another, truly military, primary purpose.[53] I am afraid that this assumption is not borne out by practice.

A few words about the identical clause in Article 13(2) of Protocol II. The point

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51 Meeting of Committee III, 19 March 1974, CDDH/III/SR./8, 14 *Off. Rec.* 59:

Mr. Cameron (Australia): "The efficacy of the proposal to replace the word 'methods' in paragraph 1 by the word 'attacks' would depend entirely on the definition to be given to the word 'attack'. Reference to neither term could adequately limit what some regarded as permissible and others as reprehensible."

Mr. Ahmadi (Iran): "although objections had been raised to the phrase 'methods intended to spread terror' in paragraph 1, methods of war undoubtedly did spread terror among the civilian population, and those used exclusively or mainly for that purpose should be prohibited."

Sir David Hughes-Morgan (UK) "was opposed to the amendments in CDDH/III/38 and CDDH/III/51 [*supra* note 44] 'which referred to 'acts capable of spreading terror' without limiting the form such acts might take. He preferred the word 'attacks' suggested in document CDDH/III/27 [*supra* note 41] to the word 'methods' proposed by the ICRC."

Mr. Girard (France) "said that in traditional wars attacks could not fail to spread terror among the civilian population: what should be prohibited in paragraph 1 was the intention to do so."

52 Mr. Aldrich (USA); *loc. cit. supra* note 51. George Aldrich was the Head of the US Delegation as well as the Rapporteur of Committee III.

53 This appears to be the assumption in the Report of Committee III, Second Session, when it excludes "terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful." *Loc. cit. supra*, note 46.

that comes to mind here is the guerrilla technique of attacking relatively minor targets with the expectation and, indeed, primary purpose of thereby achieving much wider results, for instance, through the spreading of terror among the civilian population. In the post-World War II period, the discourse on this point was conducted in terms of "guerrilla or terrorist", with the choice of words often determined by the side one was on: "Parties, of course, piously condemn their opponent's resort to such 'outrageous, shocking' acts while cloaking their own conduct in euphemisms that deceive only those who wish to be deceived."[54] In contrast, lawyers and political scientists attempted to define the notions involved in more academic terms.

Thomas Thornton defines terror as "a symbolic act designed to influence political behavior by extranormal means, entailing the use or threat of violence." With "extranormal" he means to say that "terror lies beyond the norms of violent political agitation that are accepted by a given society." Taking an act of sabotage against a presumed military objective as an example, he explains that "if the objective [of the act] is primarily the removal of a specific thing (or person) with a view to depriving the enemy of its usefulness, then the act is one of sabotage. If, on the other hand, the objective is symbolic, we are dealing with terror."[55]

Although Thornton's perspective was that of the political scientist, his construction happily coincides with my interpretation of the provision adopted in 1977: an attack on a military objective may or may not amount to an act of terror, and whether it is depends solely on its primary purpose. This conclusion is in harmony with practice in guerrilla-type internal armed conflict, where symbolism is of overriding importance. Nor, for that matter, is this element absent from international armed conflict.

C. Conclusion

The rules on general protection of the civilian population, introduced into the Protocols of 1977, fall in the category of battlefield law, just like the rules in Part III of Protocol I on methods and means of warfare and on combatant and prisoner-of-war status. The rules do not grant civilians complete immunity from the effects of hostilities, or of bombardment in particular. In other words, the Diplomatic Conference of 1974-1977 once again steered a careful "middle course" between baron Jomini's two extremes. At the same time, the balance of the values and interests at stake has shifted noticeably in the direction of protection of civilians and civilian populations. Consider siege: while the conferences of Brussels, 1874, and The Hague, 1899/1907, had passed over in silence the fate of the inhabitants of a place under siege, the situation of these people must now be regarded as covered by the rules limiting attacks to military objectives (including enemy combatants) and prohibiting not only direct attacks on civilians but indiscriminate attacks as well. Even so, a place under siege

54 James Bond, *The Rules of Riot, Internal Armed Conflict and the Law of War* (1974) 84; quoted in Frits Kalshoven, "'Guerrilla' and 'Terrorism' in Internal Armed Conflict", in 33 *The American University Law Review* (1983) 67 note 1.

55 Thomas P. Thornton, "Terror as a Weapon of Political Agitation", in H. Eckstein, *Internal War* (1964) 73, 77, as quoted in "'Guerrilla' and 'Terrorism' in Internal Armed Conflict", *op. cit.* note 54, at 69, 70.

by definition is a defended place, and under the present rules the civilian inhabitants of such a place are far from enjoying a position as "simple spectators" of the ongoing hostilities.

Most far-reaching, indeed categorical, is the legal protection of the civilian population "as such" and individual civilians from direct attack. The prohibition of such attacks is enriched with the prohibition of attacks or threats of attack the primary purpose of which is to spread terror among the civilian population; a prohibition that in my opinion includes attacks with that primary purpose even when the actual target is a military objective.

A considerable number of states are party to the Protocols of 1977 and thus bound to respect their terms as a matter of treaty law. Then, as regards Protocol I in particular, signatory but non-ratifying states such as the United States are obliged, in terms of Article 18 of the Vienna Convention on the Law of Treaties,[56] to "refrain from acts which would defeat the object and purpose" of the Protocol. Providing a significant level of respect for the civilian population and individual civilians doubtless constitutes an important element in the object and purpose of the Protocol. It is moreover widely accepted that contemporary customary international law on the conduct of hostilities encompasses rules on the protection of civilians that do not differ all that much from the principal provisions in Protocol I. Israel and the few other states that did not even sign the Protocol are bound to respect these rules of customary international law. Again, to the extent that the rules in Protocol II on protection of civilians may be said to belong to customary law, these rules as well would need to be respected by parties to internal armed conflicts.

VI. Sarajevo 2003

The break-up, in 1991, of the Socialist Federal Republic of Yugoslavia into four separate entities has set in motion a series of armed conflicts between or within the various parts, waged with traditional means and for the most part on the ground.[57] The hostilities have yielded three classic cases of protracted bombardment and siege: Dubrovnik, Sarajevo, and Srebrenica, each leading to prosecutions before the International Criminal Tribunal for the Former Yugoslavia (or ICTY). As noted in the Introduction, this paper singles out Sarajevo, not because this was the worst case – Srebrenica may stand out as the most incomprehensibly inhumane of the three – but because the siege of Sarajevo has provided the first instance of an international tribunal sentencing a defendant for the "crime of terror".[58]

The Judgement in question, delivered on 5 December 2003 by Trial Chamber I in the case of the Prosecutor *v*. Stanislav Galić,[59] concerns a campaign of artillery and

56 Reprinted in 8 ILM 679 (1969).

57 This would change at a later stage, when NATO staged its bombing campaign against Serbia over the asserted suppression of the Kosovar people.

58 The siege and bombardment of Dubrovnik led to the convictions of Pavle Strugar (Case No. IT-01-42-T, Trial Chamber II, 31-01-05) and Miodrag Jokić (Case No. IT-01-42/1-S, Trial Chamber I, 18-03-04). The events in and around Srebrenica resulted in the conviction of Radislav Krstić (Case No. IT-98-33-A, Appeals Chamber, 19-04-04). – The bombardment of Zagreb, equally the subject of cases before the ICTY, lasted only two days.

59 Case No. IT-98-29-T; the Trial Chamber sentenced Galić to 20 years' imprisonment:

mortar shelling and sniping of Sarajevo, the capital of Bosnia-Herzegovina, that began in 1992 and continued with varying intensity for several years. The Indictment specifies that the Sarajevo Romanija Corps of the Bosnian Serb Army (or VRS) "implemented a military strategy which used shelling and sniping to kill, maim, wound and terrorise the civilian inhabitants of Sarajevo." It graphically describes the campaign as directed "at civilians who were tending vegetable plots, queuing for bread, collecting water, attending funerals, shopping in markets, riding on trams, gathering wood, or simply walking with their children or friends. People were even injured and killed inside their own homes, being hit by bullets that came through the windows." It adds that "[t]he attacks on Sarajevo civilians were often unrelated to military actions and were designed to keep the inhabitants in a constant state of terror."[60]

From September 1992 to August 1994, Stanislav Galić, Major General in the VRS, had served as the commander of these forces. The Indictment charges him with individual and command responsibility, as far as relevant here,[61] for three violations of the laws or customs of war. One is defined as "unlawfully inflicting terror upon civilians" (count 1). The other two, both defined as "attack on civilians", concern, respectively, "conduct[ing] a coordinated and protracted campaign of sniper attacks upon the civilian population of Sarajevo" (count 4) and "conduct[ing] a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population" (count 7). The Indictment specifies that all three imputed acts constitute violations of Article 51 of Protocol I and Article 13 of Protocol II and are punishable under Article 3 of the Statute of the ICTY.

The first task for the Trial Chamber is to establish whether the acts imputed in the Indictment actually fall under the scope of Article 3 of the Statute. Since both the opening sentence of the Article (empowering the Tribunal "to prosecute persons violating the laws or customs of war") and the examples it provides were drafted to reflect 1899/1907 Hague law[62] and thus do not mention civilians, it might not seem particularly suited to cover the acts set forth in the Indictment. However, the ICTY

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para. 769. – The weight the Tribunal attaches to "Sarajevo" may be appreciated from the fact that the campaign figures as the first charge in the recently published Indictment of Momcilo Perisić, chief of the Yugoslav military staff at the time of the campaign; Case No. IT-04-81, 22 Feb. 2005, paras. 40-46.

60 Indictment dated 26-03-99, Case No. IT-98-29-I.

61 For fear of getting too deeply entangled in matters of criminal law, I shall not enter into the charges of crimes against humanity in counts 2, 3, 5 and 6 of the Indictment.

62 The text was drafted with this purpose in mind in order to avoid possible objections by the United States of America in the Security Council. Art. 3 provides the following examples:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Appeals Chamber long ago levelled this barrier by deciding that Article 3 is a residual clause covering all violations of humanitarian law not falling under other articles of the Statute.[63]

By its same decision the Appeals Chamber established four conditions for alleged criminal conduct to fall under Article 3: it must infringe a rule of international humanitarian law; this rule must be "customary in nature or, if it belongs to treaty law, the required conditions must be met;" the violation of the rule must be serious, and it "must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule."[64] The Trial Chamber applies this format in its discussion of the crimes of "attack on civilians" and "terror against the civilian population" (in that order). In particular the fourth so-called Tadić condition, the requirement of individual criminal responsibility, involves typical criminal law elements like intent and *mens rea*. Rather than following the Trial Chamber in its discussion of these elements, I shall pick out for comment only those bits that I consider of interest from the point of view of international humanitarian law.

A. The Crime of Attack on Civilians

Tackling the crime of attack on civilians, the Trial Chamber needs few words to find that counts 4 and 7 meet the first Tadić condition since they are based on the first sentence of Article 51(2) of Protocol I and Article 13(2) of Protocol II.[65]

As regards the second condition (customary or treaty law?) the Chamber notes that according to well-established Tribunal jurisprudence "the principle of protection of civilians has evolved into a principle of customary international law applicable to all armed conflicts," so that the "prohibition of attack on civilians [...] reflects customary international law."[66] Given the conjunctive "or" in Article 3 of the Statute ("laws *or* customs of war") this should be enough. Not so: the Chamber goes on to explain that the principle "had also been brought into force by the parties by convention."[67] It asserts that parties to an armed conflict can, "by agreement, bring into force provisions of Additional Protocol I, regardless of the nature of the conflict."[68] And, lo and behold, this is exactly what the parties to the conflict in Bosnia-Herzegovina had done: starting with an agreement of 22 May 1992 (three days after the mock withdrawal of the Yugoslav army from Bosnia-Herzegovina) and under the auspices of the ICRC, they had concluded a series of agreements on application of humanitarian law, including the principle that "[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. They shall not be made the object of attack."[69]

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63 Judgement, para. 10, quoting the Tadić Jurisdiction Decision, paras. 89, 91.

64 *Ibid.*, para. 11, quoting the Tadić Jurisdiction Decision, para. 94.

65 *Ibid.*, para. 16.

66 *Ibid.*, para. 19.

67 *Ibid.*, para. 20.

68 *Ibid.*, para. 21.

69 The Trial Chamber gratefully notes that there is no need "to decide on the qualification of the conflict in and around Sarajevo." *Ibid.*, para. 22. In this and the next paragraphs it mentions the successive agreements.

The Trial Chamber sets surprisingly great store by these inter-party agreements which, with one exception, were blatantly and systematically disregarded from day one.[70] I for one doubt that any of the parties' representatives involved in the making of the 22 May agreement ever considered that it might one day be held against them in procedures before an international tribunal. Even so, the Trial Chamber reads into the agreement that "the parties to the conflict clearly agreed to abide by the relevant provisions of Additional Protocol I protecting civilians from hostilities." In consequence, Article 51, along with a list of other articles of the Protocol, "undoubtedly applied as conventional law between the parties to the conflict." Grounds on which the Chamber "finds that the second Tadić condition is met."[71]

A footnote to the Chamber's finding that parties to an armed conflict may agree to bring into force provisions of Protocol I, refers to Article 3 common to the 1949 Geneva Conventions and Article 96 of Protocol I.[72] It is worth noting that the third paragraph of common Article 3 extends this possibility solely to parties to an internal armed conflict. The oft repeated (and not implausible) thesis that the principles expounded in Article 3 apply in all armed conflicts does not affect this point, given the express reference in the third paragraph of the Article to "the Parties to the conflict": these cannot be other than the parties to an "armed conflict not of an international character" (etc.) of paragraph 1. Since the Chamber expressly desists from determining what was the character of "the conflict in and around Sarajevo",[73] the reference to common Article 3 of the Geneva Conventions does not really help.

The Chamber's reference to Article 96 of Protocol I may serve to bring out another point of interest. Article 96(3) deals with the special case of wars of national liberation. It provides that the authority representing a people engaged in such a war as defined in Article 1(4) may deposit with the Swiss Federal Council, as the depositary of the Protocol, a unilateral declaration holding the undertaking to apply the Conventions and the Protocol, with effect "upon its receipt by the depositary". The construction is not available to parties to an internal armed conflict: the drafters of Protocol II consistently rejected the idea that a unilateral declaration by the leadership of an armed opposition group could bring the Protocol into play. Nor is it available to parties to a normal inter-state armed conflict. For that situation a simpler yet more exacting construction applies: when a party to the conflict that is not bound by Protocol I "accepts *and applies* the provisions thereof," the parties that are already so bound will also be bound in relation to the "accepter-and-applier". Note the emphasis on the need to apply the provisions – a condition that in the Bosnian conflicts definitely was not fulfilled.

Passing over without comment the conclusions of Trial Chamber I that the third and fourth Tadić conditions are fulfilled as well, I single out two points of the

70 The exception was an agreement on release and transfer of prisoners, where parties had a mutual interest in implementation. – This is not the first time an ICTY judgment brings the inter-party agreements into play; an earlier instance is the Trial Judgement in the *Prosecutor v. Blaškić* (Case No. IT-95-14-T, 03-03-00), using the agreement of 22 May 1992 as a reinforcement of the argument that Protocol I was applicable as conventional law (para. 172).

71 Para. 25.

72 Footnote no. 28.

73 Para. 22.

Chamber's remaining deliberations on the law relating to the crime of attack on civilians: *viz.*, its views on direct participation in hostilities, and its discussion of the notions of indiscriminate attack and, in that context, proportionality.

Paraphrasing Article 51(3) of Protocol I,[74] the Chamber notes that the protection of individual civilians "is suspended when and for such time as they directly participate in hostilities." For its interpretation of this notion the Chamber relies on three sources: the ICRC Commentary on the 1977 Protocols, the *Kupreškić* Trial Judgement and the opinion of the Inter-American Commission on Human Rights in the *Tablada* case.

The ICRC starts out its comment by noting that "the immunity from attack afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, *i.*e., that they do not become combatants, on pain of losing their protection." Then follows the oft-quoted phrase that direct participation "means *acts of war* which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces." Clearly, nobody will contest that such plain acts of war entail loss of protection.[75]

The other two sources even more explicitly contemplate situations where groups of civilians rise in arms against the enemy. In *Kupreškić*, the Trial Chamber ruminates in the abstract about an armed group that "engages in fighting against the enemy belligerent."[76] And in the *Tablada* case, the Commission's reading of a real-life situation leads it to conclude that the thirty-hour struggle of a small group of armed civilians against an equally modest unit of the Argentine armed forces, in a situation where no other hostilities were in progress in the country, by itself had constituted an internal armed conflict.[77] Once again, there can be no doubt that groups of civilians engaging in combat may be targeted as long as they are so occupied.

However, it has long been realised that active participation in hostilities encompasses other, non-violent activities as well. Implicitly recognising this fact, the recently published ICRC study on customary international humanitarian law states that apart from "the few uncontested examples [...], in particular use of weapons or other means to commit acts of violence against human or material enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in State practice."[78] Nor is there agreement among experts about the definition

74 The paragraph reads as follows: "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."

75 ICRC Commentary, *supra* note 37, para. 1944; my emphasis.

76 Paras. 522-523.

77 Report No. 55/97, Case No. 11.137, *Argentina*, appr. 18 Nov. 1997; OEA/Ser.L/V/II.97, Doc. 38, para. 156: a pitched battle between civilian "attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities." Para. 178: the civilians by their activities had "become legitimate military targets ... subject to direct individualized attack *to the same extent as combatants*." (emphasis as in original) In para. 327, the Commission explicitly qualifies the events as having constituted "a non-international armed conflict." See also, by this author, "State Sovereignty versus International Concern in Some Recent Cases of the Inter-American Commission of Human Rights", in Gerard Kreijen et al. (eds.), *State, Sovereignty, and International Governance* (2002) 259, at 262-3.

78 ICRC, *Customary International Humanitarian Law*, Volume I: Rules (2005) p. 23. In 2003, the ICRC started a series of meetings with government and military lawyers and other

of direct participation in hostilities.

This leads up to the next question, how to distinguish combatants and other direct participants from non-participating civilians. As regards combatants, the Trial Chamber recalls their duty to distinguish themselves from civilians, as it says, "at all times"; duty combatants generally fulfil "by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly."[79]

It may be noted that Article 44(3) of Protocol I obliges combatants to distinguish themselves from civilians only for such time as "they are engaged in an attack or in a military operation preparatory to an attack." This leaves the many hours of non-activity, which need not only be night hours. Then, the "generally accepted practice" of wearing uniforms (etc.) may correctly describe the practice of regular armies in traditional battle situations but needs not reflect reality in a situation like the siege of Sarajevo, where a city is defended by armed forces of the same ethnic group as the other inhabitants.

As regards civilian direct participants, whether of the fighting or non-fighting variety, the situation is even worse: these persons are under no legal obligation to distinguish themselves from their innocent brethren and sisters.

The upshot is that a group of people in besieged Sarajevo may have been composed at any time of uniformed and non-uniformed combatants; direct participants of the fighting variety and whether or not so engaged at the time; direct participants of the non-fighting variety pursuing their activity and colleagues who are "off-duty"; and a rest group of "innocent civilians".

Recognising that "in certain situations it may be difficult to ascertain the status of particular persons in the population," the Chamber suggests that the "[c]lothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian."[80] I fear that apart from extremely low or old age, the sole determinant factor in this list is "activity" and, more specifically, visibly combat-related activity identifying the regular combatant and the civilian directly participating in hostilities in the narrow sense. This leaves unanswered the crucial question how, outside that narrow circle, the sniper or artillerist is to determine which individuals amidst a multitude of persons all looking exactly the same are legitimate targets and which ones are not – and how a court afterwards may decide that the sniper or artillerist acted within or outside the law. In practice, more important than the factors mentioned by the Trial Chamber will be the information available to the actor about military matters such as defence positions, location and movement of troops, points of origin of enemy fire, and so on.

I pass on to the next point: the Trial Chamber's treatment of the notions of indiscriminate attack and proportionality. It may not be superfluous to note at the outset that fire – whether sniping, artillery or mortar – launched towards a place under siege is perfectly lawful as long as it is directed against enemy combatants and civilians taking a direct part in hostilities, or against military objectives as defined in Article

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experts in hopes of further clarifying the notion of direct participation. A third meeting was planned for October 2005.

79 Judgement, para. 50.

80 *Loc. cit.*

52(2), including civilian objects being used for military purposes.[81] The fire is blatantly unlawful if it is purposely directed against civilians or civilian objects. It is also unlawful when it amounts to an indiscriminate attack as defined in Article 51(4).[82] In essence, this requires that weapons are fired with apparent disregard of what is likely to be hit: combatants and other persons and objects that may be attacked, innocent civilians and civilian objects that cannot lawfully be attacked, or a combination of these categories. Article 51(5) provides two examples of indiscriminate attacks: (a) an attack "which treats as a single military objective a number of clearly separated and distinct military objectives located in a city [etc.];" and (b):

> an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

The greatest difficulty, both in planning and executing an attack and in evaluating the events afterwards lies in applying the so-called proportionality standard of Article 51(5)(b). This is not a matter of simple calculation. Neither "loss of civilian life, injury to civilians [or] damage to civilian objects" nor "the concrete and direct military advantage anticipated" are numerical values. Indeed, the term "excessive" has been chosen to ban out the idea that the test would be one of applied arithmetic.

Rather, proportionality involves an application in practice of the normative idea underlying the law of armed conflict, of balancing humanity against military necessity, not in the course of a sedate lawmaking exercise but by the military in actual battle conditions – which in the Galić case were the worst-case scenario of a city under protracted siege. The Trial Chamber notes that "[t]he basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack."[83] Just so; but the attacker is equally, if not more, guided by the requirement of mission accomplishment. To put it bluntly: to attack is his job, to spare civilians, a luxury; a luxury he can permit himself the easier as the circumstances are less hectic: more may be expected here (and must be required) of the higher echelons of command than of the soldier in the field.

The Chamber states that "[i]n determining whether an attack was proportionate

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81 Art. 52(2) defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

82 Paragraph 4 reads as follows:

> Indiscriminate attacks are prohibited. Indiscriminate attacks are:
>
> (a) those which are not directed at a specific military objective;
> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
>
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

It may be noted that the Trial Chamber refers to Art. 51(4) only once, in footnote 102.

83 Para. 58.

it is necessary to examine whether a reasonably well-informed person *in the circumstances of the actual perpetrator*, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[84] I emphasise the italicised words: the test must not be reduced to one of reasonableness, with the actual attacker and the situation he found himself in (Sarajevo under siege!) being replaced with an imaginary (and actually non-existent) "reasonable soldier" in a sort of laboratory situation. In this respect, I prefer the test in a Canadian military manual, cited by the Chamber, that speaks of the "honest judgement" of "responsible" combatants – a good faith test, in one word.[85]

After further argument, the Trial Chamber finally finds that:[86]

> ... an attack on civilian[s] can be brought under Article 3 by virtue of customary international law and, in the instant case, also by virtue of conventional law and is constituted of acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.

With that, the Chamber broaches the next item on its agenda: the crime of "terror against the civilian population" – and immediately splits into a majority of two and a minority of one (Judge Rafael Nieto-Navia).[87]

B. The Crime of Terror against the Civilian Population

It is thus for the majority to "decide whether the Tribunal has jurisdiction over the crime of terror against the civilian population, but [it hastens to add] only to the extent relevant to the charge in this case [, *i*.e.,] whether a *specific* offence of killing and wounding civilians in time of armed conflict with the intent to inflict terror on the civilian population, as alleged in the Indictment, is an offence over which it has jurisdiction."[88] This form of words excludes the theoretically interesting case of an attack on military objectives not causing any significant damage to civilians yet planned and carried out with the stated specific intent. It also excludes the "threat of violence" specifically mentioned in the second sentence of Article 51(2). The majority places on record that it "has not neglected" this question but, since it "is not at issue

84 *Loc. cit.*; my emphasis.

85 The Chamber quotes the Canadian Law of Armed Conflict at the Operational and Tactical Level, Section 5, para. 27 (1992).

86 Para. 62.

87 The case before the Trial Chamber was not one of individuals shelling or sniping at targets in Sarajevo. The actual perpetrator-turned-defendant was a general who had been directing the violence against the besieged city of Sarajevo without ever firing a shot himself, and whose responsibility therefore could lie only in the orders he had given or in the conduct he had not prevented or corrected. One reason why the Chamber split may have been the closer affinity of the Colombian Judge Rafael Nieto-Navia with the military aspects of such a situation and his greater willingness to bring these aspects into play even in the starkly abstract legal analysis of the matter of jurisdiction.

88 Para. 87; italics as in the original.

in this case," there is no need to address it.[89]

The majority notes at an early stage that in its view, and in contrast to the description of the crime in count 1 of the Indictment, "actual infliction of terror is not a required element of the offence."[90] This interpretation is in accordance with the drafting history of Article 51(2). As well, the majority replaces "civilians" with "the civilian population", implying that in its view the intent of inflicting terror must be directed against a civilian population as a whole rather than against isolated civilians.

Having settled these points, the majority rapidly concludes that the first and second Tadić conditions are met: count 1 is clearly based on the second sentence of Article 51(2) and this applies as treaty law by virtue of, *inter alia*, the inter-party agreement of 22 May 1992.[91] As for the third Tadić condition, the majority correctly notes that it is not the rule but the alleged violation of the rule which must be serious. A protracted campaign of shelling and sniping directed at the civilian population of a city under siege implies "a very serious violation of a basic rule of international humanitarian law. [...] Since doing that much is a serious violation, doing the same with the primary purpose of spreading terror among the civilian population can be no less serious, nor can it make the consequences for the victims any less grave." So, the third Tadić condition is met as well.[92]

This leaves the fourth Tadić condition, which requires individual criminal responsibility of the perpetrator under existing customary or conventional law. The issue confronting the majority is "whether the intent to spread terror had already been criminalized by 1992."[93] Its attempt to prove that this was indeed the case results in a long series of arguments.

Two far-away items open the list: one, a sentence delivered in 1947 by a Dutch court-martial in Makassar, Netherlands East Indies, sentencing seven Japanese prisoners of war to death and six others to prison sentences, for acts qualified as "systematic terrorism practiced against civilians;"[94] and the other, a reference in Australia's War Crimes Act of 1945 to "systematic terrorism" as a war crime.[95] The legislators in both instances had taken their inspiration from a list of war crimes drawn up in 1919 by a commission of experts set up by the victor powers to "inquire into breaches

89 Para. 110. The majority makes this statement in its discussion of the third Tadić condition. In note 179, it notes that "a credible and well publicized threat to bombard a civilian settlement indiscriminately, or to attack with massively destructive weapons, will most probably spread extreme fear among civilians and result in other serious consequences, such as displacement of sections of the civilian population."

90 Para. 65. Count 1 speaks of "unlawfully inflicting terror upon civilians." *Supra*, text at note 60.

91 Para. 96.

92 Paras 107-109.

93 Para. 113.

94 Paras. 114-115. The sentence rests on a decree issued in 1946 by the Dutch authorities in the Netherlands East Indies that included "systematic terror" on a list of war crimes understood as "acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power [...]." The accused had committed their acts as members of the Japanese occupation force.

95 Para. 118.

of the laws and customs of war committed by Germany and its allies during the 1914-1918 war."[96] The catalogue of the commission was not included in the Treaty of Versailles, however. This leaves the two examples of domestic legislation standing apart as isolated incidents.[97]

Literally closer to home is the majority's description of the Yugoslav legislation on the topic. Also temporally and psychologically this bit of domestic legislation may be much more relevant than the above examples from the other side of the globe. The majority shows that both before and after Yugoslavia's ratification of Protocol I its criminal code has provided for the punishment of acts aimed to induce terror among the civilian population. As well, its Armed Forces *Regulations on the Application of International Laws of war* explicitly made "application of measures of intimidation and terror" a criminal offence.[98] Nor were these rules and regulations disavowed by the Republika Srpska – the Serbian Republic of Bosnia-Herzegovina: on the contrary, they were reaffirmed in several documents issued at high level, including by Radovan Karadžić himself.[99]

On top of all this, there is the famous inter-party agreement of 22 May 1992. As the majority recalls:

> This states in its section on "Implementation" that each party "undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence *and to punish those responsible* in accordance with the law in force."[100]

"Clearly", the majority adds, "the parties intended that serious violations of international humanitarian law would be prosecuted as criminal offences committed by individuals," and it mentions one case where this actually happened.[101]

It seems to me that the reference to the domestic legislation in force in Bosnia-Herzegovina, including in the Republika Srpska, read together with the language of the 22 May agreement, amounted to enough grounds to justify the conclusion of the majority that for the purposes of the trial of Major General Galić, the act of terror against the civilian population had duly been criminalised at the time of the siege of Sarajevo.

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96 Para. 116.

97 Apart from language concerning the planned (but failed) trial of the German Emperor William II, the Treaty of Versailles makes provision for "the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Art. CCXXVIII. See Leon Friedman, *The Law of War – A Documentary History* (1972) 417, at 432.

98 Paras. 121-122.

99 Para. 123.

100 Para. 124; emphasis as in the original.

101 *Ibid*. The majority refers to one instance where "the Split County Court in Croatia convicted Rajko Radulović and other members of the army of 'Republika Srpska' pursuant to provisions including Article 33 of Geneva Convention IV, Article 51 of Additional Protocol I, and Article 13 of Additional Protocol II, for, *inter alia*, 'a plan of terrorising and mistreating the civilians' [...]." Para. 126.

However, rather than resting its case, the majority advances an entirely different argument linking Article 51(2) of Protocol I to Article 33(1) of the 1949 Civilians Convention. This Article provides that "[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Stating the obvious, the majority notes that "purely by operation of Article 33, civilians in territory not occupied by the adversary are not protected against 'measures of intimidation or of terrorism' which the adversary might decide to direct against them."[102] However, the majority argues, Protocol I has "elaborated and extended the protections of the Geneva Conventions, including those of the fourth Convention on the protection of civilians in times of war."[103] The Protocol moreover is applicable in the same situations as are the Geneva Conventions, and these include "all cases of partial or total occupation."[104] Grounds for the majority to conclude that:[105]

> ... Protocol I applies to the aforementioned situations to the extent feasible, as well as to situations such as that which the present Indictment is concerned with, in which civilians not in the hands of an attacking force allegedly become victims of attacks by that force. In other words, whereas the cited part of Article 33 of Geneva Convention IV brought protection from intimidation or terrorism to only a subset of civilians in the context of armed conflict (those in the hands of a Party to the conflict), Article 51(2) of the Protocol elaborated and extended the protection from terror to civilians whether or not in the hands of the Party to the conflict conducting the attack, to the extent consistent with a purposeful and logical interpretation of Additional Protocol I.

I cannot pass by this argument without comment. Article 33, together with the rest of the Civilians Convention, concerns "protected persons", *i.e.*, persons who find themselves in the power of the enemy, whether on its territory or in territory occupied by the enemy.[106] As provided in Article 27 of the Convention, this enemy is under an affirmative duty to respect and protect the people concerned.[107] This case is totally different than the battlefield situation, covered by Article 51(2) of Protocol I, of an enemy directing a campaign of shelling and sniping against a city under siege. Admittedly, as stated in Article 1(3), the Protocol supplements the 1949 Conventions,

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102 Para. 119.

103 Para. 120.

104 As provided in common Art. 2.

105 Para. 120.

106 Art. 4(1) of Convention IV: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Paras. 2-4 specify categories of persons that are not protected under the Convention; these are of no relevance here.

107 Art. 27(1): "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."

and it applies in the same situations as those Conventions. However, the term "supplement" thinly disguises the fact that a significant part of the rules introduced into the Protocol properly belong to the area of battlefield law: rules, that is, on combatants and their conduct of combat and, in this context, on the fate of civilians caught in the turmoil. In battle, combatants are under no obligation to "respect and protect" civilians who are not in their power; their only duty is to spare civilians as far as possible. – Article 51(2) is a part of these rules, and the prohibition of attacks with the primary purpose of spreading terror among the enemy civilian population is as much part and parcel of battlefield law as is, for instance, the prohibition in Article 40 to order that no quarter shall be given to enemy combatants.

I fail to understand why the majority included this strange argument at all. Apart from being ill-founded, I do not see how it adds to the thesis that the "act of terror" was punishable by 1992. In the end, it may amount to no more than a piece of *obiter dictum*. In any event, on the basis of its arguments, the majority finds that "[b]ecause the alleged violations would have been subject to penal sanction in 1992, both internationally and in the region of the former Yugoslavia including Bosnia-Herzegovina, the fourth Tadić condition is fulfilled."[108]

The majority also "finds that serious violations of the second part of Article 51(2), and specifically the violations alleged in this case causing death or injury, entailed individual criminal responsibility in 1992 [...] and that this was known or should have been known to the Accused." The majority adds that terror "was the result which he specifically intended. The crime of terror is a specific-intent crime."[109] And it concludes:[110]

> The Majority is of the view that an offence constituted of acts of violence wilfully directed against the civilian population or individual civilians causing death or serious injury to body or health within the civilian population with the primary purpose of spreading terror among the civilian population – namely the crime of terror as a violation of the laws or customs of war – formed part of the law to which the Accused and his subordinates were subject to during the Indictment period. The Accused knew or should have known that this was so. Terror as a crime within international humanitarian law was made effective in this case by treaty law. The Tribunal has jurisdiction *ratione materiae* by way of Article 3 of the Statute. Whether the crime of terror also has a foundation in customary law is not a question which the Majority is required to answer.

C. The Outcome

Several hundred paragraphs further down, and after an impressive display of factual evidence and further deliberations about the legal side of the affair, the full Trial Chamber is satisfied that:[111]

108 Para. 129.

109 Paras. 130, 132, 136.

110 Para. 138.

111 Para. 596.

> the crime of attack on civilians within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period. In relation to the *actus reus* of that crime, the Trial Chamber finds that attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence. These acts of violence resulted in death or serious injury to civilians. The Trial Chamber further finds that these acts were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness.

On the matter of the crime of terror, the Majority is satisfied that:[112]

> [the] crime of terror within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period. [...] The Majority has also found that a campaign of sniping and shelling was conducted against the civilian population of ABiH-held areas of Sarajevo with the primary purpose of spreading terror.

Following deliberations and conclusions about the accused general's individual criminal responsibility for these crimes, it is again the Majority which "finds that General Galić is guilty of having ordered the crimes proved at trial."[113] This implies the general's individual criminal responsibility under Article 7(1) of the Statute (so-called direct responsibility). Having established the general's guilt under this Article, the Majority no longer sees a need to pronounce on his possible cumulative guilt under Article 7(3) as well.[114] In consequence, the Majority:[115]

> finds the accused General Galić guilty of the crime of terror (charged in count 1 of

112 Para. 597. In paras. 593 and 594, the Majority had developed the point, as follows:

> In view of the evidence in the Trial Record it has accepted and weighed, the Majority finds that the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition. The attacks on civilians had no discernible significance in military terms. They occurred with greater frequency in some periods, but very clearly the message which they carried was that no Sarajevo civilian was safe anywhere, at any time of day or night. The evidence shows that the SRK attacked civilians, men and women, children and elderly in particular while engaged in typical civilian activities or where expected to be found, in a similar pattern of conduct throughout the city of Sarajevo. The Majority finds that the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear.
>
> In sum, the Majority finds that a series of military attacks on civilians in ABiH-held areas of Sarajevo and during the Indictment Period were carried out from SRK-controlled territories with the aim to spread terror among that civilian population. The Majority accepts the Prosecution's stand that as such, these attacks carried out with a specific purpose, constituted a campaign of sniping and shelling against civilians.

113 Para. 749.

114 Para. 750.

115 Para. 752.

> the Indictment) [as well as of the crimes of murder and inhumane acts charged in counts 3, 4, 6 and 7]. The charges of attacks on civilians contained in counts 4 and 7 (because they are subsumed under count 1) are dismissed.

The Trial Chamber (and, wherever relevant the Majority) arrived at the above conclusions and findings on the basis, not only of the abstract legal arguments at the outset about the crimes of "terror" and "attacks on civilians" as punishable acts under Article 3 of the Statute, but of a painstaking investigation into and appreciation of the concrete facts brought before it by the Prosecution, and a legal analysis of the end result of these investigations. These further parts of the Judgement demonstrate that the Chamber was fully aware of the specific circumstances surrounding the siege of Sarajevo, an awareness it had so studiously kept hidden in its abstract first part.

The facts submitted to the Trial Chamber had been carefully selected with a view to proving that attacks on civilians had been committed and that many of these attacks were so clearly illogical from a military point of view that they could only be explained as acts intended to keep the population in a state of perpetual terror. Nor was it news that these acts had been performed at the time of the siege: the media had kept the world well informed about what was actually happening.

For the Trial Chamber, the main difficulty in assessing the evidence was not to determine whether the facts had actually occurred. On this, the three Judges were united, as evidenced by the sentence I omitted from a paragraph quoted above:[116] "In relation to the *actus reus* of the crime of terror as examined above, *the Trial Chamber* [my emphasis] has found that acts of violence were committed against the civilian population of Sarajevo during the Indictment Period." The point was, rather, whether the proven facts, taken together, actually constituted a campaign of shelling and sniping directed, not merely against individual civilians but against the civilian population, as an essential element of the crime of terror and of General Galić's individual criminal responsibility for this crime as well. The Majority was convinced that this was the case, and Judge Nieto-Navia was not.

In the foregoing I have placed a number of critical notes in comment on the Judgement of Trial Chamber I in the case of the Prosecutor *v.* Galić. These were all concerned with the exposé on the law permitting the conclusion of the Chamber and the Majority, respectively, that the ICTY has jurisdiction over the crime of *attack on civilians* and the crime of *terror*, as acts punishable under Article 3 of its Statute. And each bit of criticism had to do with my particular perspective, which is that of international humanitarian law, or, more accurately, the law of armed conflict. The following remarks may further clarify why I felt the need to make these comments.

By the time the Trial Chamber wrote its Judgement, it must have been fully acquainted with the facts of the case. These facts, carefully selected and presented by the Prosecutor, without exception concerned attacks on civilians or evidently indiscriminate attacks. Questions such as whether a particular targeted person or group of persons fell in the category of innocent civilians or of direct participants in hostilities, or perhaps even of combatants in civilian dress, did not arise. There was, moreover, some evidence that the long siege with its spasmodic firing episodes and the ensuing continual state of terror among the population of Sarajevo was planned and

116 Text at note 112.

directed from high up, even, as the Majority accepted, by orders of General Galić himself. And of course, it was the General who was on trial and not the persons under his command who had carried out the individual attacks. These circumstances may explain why the Trial Chamber in its initial, abstract exposé of the law did not refer to matters that could have happened and, indeed, are not unlikely to have actually happened during the siege, but that simply never turned up in the proceedings.

However, precisely *because* the Trial Chamber was presenting its interpretation of Article 3 of the Statute in totally abstract terms, it ought to have developed its argument, first on the crime of *attack on civilians* and then on the crime of *terror*, with an open eye to the numerous complicating factors it could have had to consider had the siege of Sarajevo been put before it in all its chaotic complexity. One would hope, for instance, that the Chamber then would have realised that Article 13 of the Fourth Geneva Convention and Article 51(2) of Protocol I are not so easily linked, and that humanitarian law *stricto sensu* and battlefield law each apply within their proper domain and under their own paradigm.

Having said all this, I just add that I am quite happy with the outcome of the trial of General Galić. Although, by a quirk of the procedure, the General was not sentenced for the crime of *attack on civilians*, his individual criminal responsibility for this crime was duly established. This yet again adds force to the rules prohibiting the targeting of civilians and indiscriminate bombardment.[117] Indeed, it will give satisfaction to those who believe (as I do not) that rules qualify as law only if violation of the rules entails the individual criminal responsibility of the perpetrators.

In effect, the Statute of the International Criminal Court contributes to satisfying this desire by bringing the act of "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" under the serious violations of the law of armed conflict that qualify as war crimes, and this both for the case of international armed conflict and for a Protocol II type internal armed conflict.[118] Even so, the trial of the commanding officer of an army that over a period of several years subjected the inhabitants of a besieged city to acts of shelling and sniping adds, so to speak, flesh and blood to the notion of individual criminal responsibility.

General Galić was actually sentenced for the crime of *terror against the civilian population*. Here, the Trial Chamber broke new ground. In order to achieve this, it had to establish, first, that all the individual acts of shelling and sniping of Sarajevo, taken together, amounted to a campaign (which they indubitably did); second, that the campaign had been conducted with the specific intent of spreading and maintaining terror among the civilian population, and third, that General Galić had direct responsibility for the campaign. Only two members of the Chamber were convinced that all of this had been the case. It seems to me, however, that this was not so much a matter of law as of interpretation of evidence.

Far be it from me to take sides in this intra-Chamber controversy. Rather, I simply reiterate what I wrote a moment ago, that I am happy with the outcome. The Majority took good care to keep its case within the confines of the second part of

117 The Trial Chamber refers to earlier instances where ICTY Chambers have held accused responsible for attacks against civilians; para. 19 with notes 24 and 25.

118 Statute of the ICC, art. 8(2) under (b)(i) and (e)(i).

Article 51(2), which prohibits "acts of violence the primary purpose of which is to spread terror among the civilian population." It refrained from pronouncing on the element of "threats of violence", nor was there a need for it to do so since the matter did not arise at trial.

The Majority construed *terror* not as an aggravating circumstance but as an especially serious version of the crime of *attack on civilians*, incorporating the latter when it came to sentencing. This, again, I find a felicitous solution.

It may be noted that the crime of *terror against a civilian population* does not figure in the Statute of the International Criminal Court. Should the case arise in some future case, it will be interesting to see whether the Judges of this Court dare to follow the example set by the Majority of Trial Chamber I in construing this crime as a distinct, more serious version of the war crimes the ICTY has been given jurisdiction to try. In the alternative, these Judges may be confined to treating it as an aggravating factor.

VII. Conclusion

As shown in the foregoing, bombardment has been the object of regulation from the very outset of the attempts at codifying the law of war. Brussels 1874 proposed, and The Hague 1899 accepted, that bombardment of undefended places would be prohibited and that in attacking defended places, certain classes of buildings should be spared as much as possible. Regulation implied the recognition of bombardment as an acceptable method of warfare. An early attempt at outright prohibition was undertaken only with respect to bombardment from the air, resulting in a five-year moratorium in 1899 (the balloon era) and even less effective steps and suggestions in later years (1907 and 1932-1934), when the airplane was ever more clearly showing its war-fighting capabilities.

Brussels 1874 and The Hague 1899 paid hardly any attention to the situation of the civilian population in a defended place. The exception was the 1907 Convention on naval bombardment, which introduced the notion of military objective and, with that, the idea that other objects could not be targeted. The 1923 Hague Rules on Air Warfare elaborated this idea into a set of detailed rules, starting out with the principle that air bombardment for the purpose of terrorising the civil population is prohibited. Although quoted more than once in official publications, the Rules remained an expert text without force of law, however.

It took the Second World War (and the Spanish civil war before it) to expose the horrendous death and destruction ruthless air attacks could bring about deep into enemy territory, thus demonstrating the urgent need of internationally agreed rules that might reduce the impact of air-to-ground operations on the civilian population. However, no matter the urgency, it would take another twenty-five years before the work on this endeavour could be seriously started.

The rules in the 1977 Protocols Additional to the 1949 Geneva Convention relating to protection of the civilian population against the effects of hostilities have been hailed as a particularly significant achievement of the 1974-1977 diplomatic conference. I have always believed, and continue to believe, that the appreciation is correct. At the same time, this enthusiasm about the achievement of the conference should not obscure the fact that attack, as an important part of military operations, remains

a wartime activity, a belligerent act. The rules governing this activity may have been negotiated and voted in Geneva[119] but they must be accepted and understood as battlefield law. That being said, I am also convinced that the rules relevant to our topic of bombardment make good military sense, so that a well trained and equipped professional armed force should encounter no insurmountable problems in implementing the rules.

Indeed, the negotiators of the nineteen seventies heeded the warning implied in the words spoken a century earlier by baron Jomini: one should neither aim to make war terrible beyond endurance in the naive hope that it will last only a short while, nor attempt to turn it into a tournament between the armed forces and with the peoples as simple spectators. Knowing that they were drafting rules for the real world, our negotiators avoided both extremes and steered a careful middle course. The rules relating to bombardment in particular represent a well-balanced compromise between the ideas of the post-World War I marshals and generals who looked forward to blasting away at the enemy civilian population, and those idealists who would have wished to achieve absolute immunity for civilians.

The rules on bombardment, as all other rules of international humanitarian law, are apt to be violated, whether incidentally or systematically. While it is primarily the task of the parties concerned to cope with such violations, the recent establishment of international criminal jurisdictions must be warmly welcomed. The ICTY and ICTR have already developed an important body of case-law; quasi-international courts are following suit, and it may be hoped that the International Criminal Court will soon start contributing to the work.

Miracles should not be expected of these (quasi-)international criminal courts. The prospect of being brought before such a court may deter some and for some time, but it will not withhold all potential violators all the time. In particular, the policymaker who is determined to achieve an objective he regards as all-important but the realisation of which implies the violation, say, of a rule of battlefield law governing the conduct of bombardment, may simply discount the risk of prosecution and trial or, at best, take it in his stride. In this respect, to this day I have not been able to discover any deterrent effect of the jurisprudence of ICTY and ICTR.

Apart from individual criminal liability, there is also state responsibility. An armed conflict that led to two entirely different court cases is Operation Allied Force: the air attacks carried out from 24 March to 8 June 1999 by NATO forces against targets in the Federal Republic of Yugoslavia (or FRY, now Serbia and Montenegro), in connection with the ongoing conflict in Kosovo between Serbian and Kosovar forces.

The first case, before the International Court of Justice (the ICJ), arose from the application instituting proceedings the FRY filed on 29 April 1999 against Belgium and nine other NATO member states. The application alleged, *inter alia*, violations of international humanitarian law committed in the course of the bombing cam-

119 Part One of the Handbook of the International Red Cross and Red Crescent Movement, entitled International Humanitarian Law Conventions and International Agreements, includes the Protocols in section A: Law of Geneva; and the Hague Convention and Regulations on land warfare in section B: Law of The Hague. This is geographically correct, and of course it would have been impossible to split up the Protocols into parts that deal with Geneva-type protection law and Hague-type rules of battlefield law.

paign. The FRY also requested provisional measures, a request the ICJ rejected on 2 June 1999. The ICJ lacked jurisdiction in relation to the United States and Spain, by virtue of the reservations attached to these states' acceptance of its jurisdiction. On 15 December 2004, the ICJ dismissed the remaining eight complaints, on the grounds that on the date of filing its application, the FRY had lacked standing to sue before the Court.[120]

The other case concerns the application Vlastimir and Borka Banković *et al.* lodged on 20 October 1999 with the European Court of Human Rights, against the European member states of NATO.[121] The applicants complained about the bombing, in the night of 23 April 1999, of *Radio Televizije Srbije* (RTS), an act that had resulted in the death or injury of a number of persons inside the building at the time of the bombing. The applicants invoked the following provisions of the European Convention for the Protection of Human Rights and Political Freedoms: Article 2 (right to life), Article 10 (freedom of expression) and Article 13 (right to an effective remedy). The states claimed in response that the application was inadmissible. The Court, noting that the bombing had been performed outside the territory of these states, considered as the "essential question ... whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States." Since in its view, the act of bombing from the air had not resulted in these states acquiring the requisite "effective control" over the territory, the Court answered this question in the negative and declared the application inadmissible. It may be noted that nowhere in the case do either the applicants, the respondent governments or the Court so much as refer to international humanitarian law.

The judgment of the European Court on Human Rights in the case of Isayeva *et al. v.* Russia once again demonstrates its reluctance to refer to a situation as one of armed conflict.[122] On 29 October 1999, Russian military planes launched 12 S-24 non-guided air-to-ground missiles at a convoy of civilians near the village of Shaami-Yurt in Chechnia. The acts killed a number of civilians and destroying several vehicles. The people had earlier attempted to gain access to neighbouring Ingushetia, in order to escape from the fighting in and around Grozny between Russian armed forces and Chechen fighters. They were attacked while on their way back to Grozny. The Russian government, in contrast, asserted that the attacks were directed against armoured vehicles of the rebel forces and therefore had the aim to "protect persons from unlawful violence" as provided in Article 2(2)(a) of the European Convention.[123] The Court

120 *Legality of Use of Force (Serbia and Montenegro* v. *Belgium) Preliminary Objections*, Judgment of 15 December 2004.

121 *Banković, et al.*, v. *Belgium, et al.*, Application no. 52207/99, decided by the Grand Chamber of the Court on 12 December 2001.

122 *Case of Isayeva, Yusupova and Bazayeva* v. *Russia* (Applications nos. 57947/00, 57948/00 and 57949/00), Judgment of 24 February 2005.

123 Art. 2 of the Convention deals with the right to life. Para. 2 provides that "Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully undertaken for the purpose of quelling a riot or insurrection."

politely conceded that,[124]

> the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2 [of the European Convention].

Assuming for the sake of argument "that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack,"[125] the Court wondered whether the air strikes had been no more than absolutely necessary for achieving the purpose of "protecting persons from unlawful violence." After a close scrutiny of the available evidence, and assuming once again "that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999, the Court [concluded that it did] not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population."[126] This is as close as can be to a description of an indiscriminate attack! The Court, however, simply found that "there ha[d] been a violation of Article 2 of the Convention in respect of the responding State's obligation to protect the right to life" of the victims.[127]

The Inter-American Commission on Human Rights, from its inception much closer to the phenomenon of armed conflict than its European brethren, has tried to be more audacious. At one time it went so far as to hold states party to an internal armed conflict responsible for violations of Article 3 common to the 1949 Geneva Conventions or, where applicable, Protocol II of 1977, alongside their responsibility under the American Convention on Human Rights. A protest by Colombia in the *Las Palmeras* case ultimately resulted in a finding by the Inter-American Court of Human Rights that neither this Court nor the Commission had the competence to apply rules of international humanitarian law in contentious cases.[128] What remains is the possibility, and frequently the perceived need, for the Commission (and the Court as well) to refer to rules of humanitarian law in the process of interpreting human rights norms not written for the specific situation of armed conflict, such as the treaty provisions on the right to life.

Even so, we welcome the fact these human rights bodies do not shrink away from cases that clearly arise from a situation of armed conflict, for instance, claiming

124 Para. 178.

125 Para. 181.

126 Para. 199.

127 Para. 200.

128 *Las Palmeras* case, preliminary objections, judgment of 4 Feb. 2000, Series C No. 66. See, by this author, "State Sovereignty *versus* International Concern in Some Recent Cases of the Inter-American Court of Human Rights", in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance* (2002) 259-280.

lack of competence or inadmissibility of the cases simply on the grounds that they concern a reserved domain where human rights bodies have no access. Indirectly, their jurisprudence may thus contribute to the enforcement of applicable rules of international humanitarian law, including the rules of battlefield law governing recourse to bombardment. *Isayeva* et al. v. *Russia* shows how this can work, and *Banković*, where the boundaries lie.

Chapter 7

The Relationship between Complicity Modes of Liability and Specific Intent Crimes in the Law and Practice of the ICTY*

José Doria

Introduction

Over the last 14 years, the ICTY has developed a web of groundbreaking decisions on key issues of theory and practice of international criminal law which represent a remarkable work towards a clear identification of customary law rules. The international criminal law is indeed becoming each time more a system of norms independent not only from its immediate offspring the international humanitarian law, but as well as from national jurisdictions of states.

As a result of this law-finding process, the contours of international criminal law are becoming clearer. While they endorse positions defended in certain domestic jurisdictions in some aspects, they run against others. Therefore, one should not be surprised to see opposing views regarding these developments. One of the aspects of this contours defining process of the customary international criminal law that has attracted particular attention, remains the issue of complicity modes of liability and how they interact with offences, in particular, specific intent crimes in an international set.

As this research will show, much of the apparent polemic around this problem is due to a fundamental misunderstanding regarding the way in which this interaction occurs, essentially the conflation and confusion that is constantly made between mental state requirements of accomplice modes of liability and those engaging directly the physical perpetrator of a particular offence. We hope that this research that sets itself the aim of clarifying the relationship between complicity modes of liability and specific intent crimes can assist in dissipating these misunderstandings.

This chapter continues with Section I which gives a brief description of the building blocks of the definition of an offence under the ICTY Statute. A number of sections defining and analysing accomplice modes of liability and its interaction with specific intent crimes properly come after. The last Section reviews some of the philosophical foundations advanced to justify the particular nature of *mens rea* for accomplices, and why it should be kept differently from the *mens rea* of physical perpetrators of international offences. Conclusions and remarks follow next.

* The views expressed herein are solely those of the author and do not necessarily reflect those of the Office of the Prosecutor or those of the United Nations.

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I. Objective and Subjective Elements of International Offences

The ICTY Statute just as any domestic criminal code contains a list of offences. These offences are grouped in war crimes, crimes against humanity and genocide.[1] Normally, for every offence incorporated into this Statute one would have a set of so-called objective elements (conduct, circumstance, result) and another set of so-called subjective elements (intent/purpose, knowledge, recklessness).

A. Conduct, circumstances and result

The objective elements of an international offence normally describe *grosso modo* the conduct prohibited, *i.e.* they define the rules of conduct. Like this, an offense definition generally prohibits conduct under certain circumstances (for example, extensive destruction of property *not justified by military necessity*) or conduct that causes a specified result (for example, willful *killing*). Therefore, the main building blocks of an offence definition are: conduct, circumstances, and result.

This view is supported by the ICTY jurisprudence. For example in *Kordić and Čerkez*, the Trial Chamber held that for the crime of willful killing – a grave breach of the Geneva Conventions, "the *actus reus* – the physical act necessary for the offence – is the death of the victim as a result of the actions or omissions of the accused. The conduct of the accused must be a substantial cause of the death of the victim who must have been a "protected person".[2]

Similarly, in *Brđanin,* the Trial Chamber held that for the crime of murder, "the *actus reus* consists in action or omission of the accused resulting in death of the victim. The prosecution needs only to prove beyond reasonable doubt that the accused's conduct contributed substantially to the death of the victim."[3]

B. Subjective element

All the crimes under the ICTY Statute require proof of culpability – *i.e.* proof that the offender committed the prohibited act with a specified blameworthy state of mind, or *mens rea*. This follows the well-known latin maxim: *actus non facit reum nisi mens sit rea,* which literally means that "it is the mind, not the act that makes a person guilty".

Culpability can be established through evidence that the offender did a voluntary act either "intentionally", "knowingly," "recklessly" or "negligently."[4] In this group of levels of culpability, only the first three would normally require proof that

1 See Articles 2-5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by UN SC resolution 827 (1993).

2 *Prosecutor v. Dario Kordić and Mario Čerkez*, Case IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 229.

3 *Prosecutor v. Radoslav Brđanin*, Case IT-99-36-T, Trial Judgment, 1 September 2004, para. 382.

4 There has been a tendency in the ICTY case law in the last while to move to a more continental law approach to the definition of the mental states, with the introduction of terms like "dolus directus", "dolus indirectus", "dolus eventualis". See *Prosecutor v. Milomir Stakić,* Case IT-97-24-T, Trial Judgement, 31 July 2003.

the offender was *subjectively* aware of the pertinent facts. Whereas negligence is not truly a culpable *mental* state, rather a lack of it[5] and applies in situations where any other reasonable person would have been aware of the facts imputed to the culpable person.[6]

The ICTY Statute, general rule, while referring to the offences, does not make any specific reference to the *mens rea*. Since the judges found this to be implied in the definition of the offences under jurisdiction of the Tribunal, it is conceivable to assert that there is a presumption of existence of the element of *mens rea* in any definition of an international offence, as a matter of customary law.

The Appeals Chamber in *Tadić* held indeed that:

> "The basic assumption must be that in international law, as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[7]

We should note, however, that in certain cases, mental elements were expressly attached to the definition of certain crimes under the ICTY Statute. For example, we will find definitions such as: '*willful* killing'; '*willful* causing great suffering or serious injury to body or health'; '*willful* depriving a prisoner of war of rights of a fair trial'; 'extensive destruction or appropriation of property not justified by military necessity and carried out *unlawfully and wantonly*'. The crime of genocide is also defined as the commission of any of the enumerated acts with *the intent* to destroy in all or in part, a national, ethnic or religious group as such, and etc.

All this has led prosecutors, defense teams and commentators to presume that certain crimes included in the ICTY Statute would perhaps not require proof of a general intent, but rather a particular one defined as *dolus specialis*[8] crimes or specific intent crimes.[9]

II. General Intent Crimes v. Specific Intent Crimes

14 years after the establishment of the ICTY, there continues to be a bit of confusion regarding what can be considered a *specific* intent crime, and if such crimes exist, what makes them *specific* as opposed to the remaining crimes. Some scholars thought initially that it was the reference to a particular mental state attached to the definition of an international offence that would make it specific. For example, Michael

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5 For an extended, interesting and useful discussion about culpable mental states and culpable conduct see, Kenneth W. Simons, 'Rethinking Mental States', 72 *Boston University L. Rev.*, 1992, at 463.

6 The standard "had reasons to know" in the doctrine of command responsibility is sometimes equated by commentators to a "negligence" standard. See *infra* notes 15, 42.

7 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 186 (hereinafter *Tadić* Appeal).

8 *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeal Judgement, 5 July 2001, para. 51 (hereinafter *Jelisić* Appeal).

9 *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, para. 134 (hereinafter *Krstić* Appeal)

Bothe has argued that repetition of words denoting intent in the definitions of particular war crimes denotes that "not only the actual conduct (e.g. the dropping of a bomb), but also the consequences (e.g. hitting a civilian object) must be covered by the intent,"[10] thus suggesting they were a sort of *specific* intent crimes.

This approach was, however, rejected by our jurisprudence on war crimes. In the *Čelibići* case, for example, the Trial Chamber examined the meaning of "*willful* killing", and its relationship to "murder", the term used for war crimes under Article 3 of the ICTY Statute to define intentional homicide. The ICTY Trial Chamber came to the conclusion that "there can be no line drawn between "*willful* killing' and "murder' which affects their content,"[11] finding that in both situations "the necessary intent, meaning *mens rea*, required to establish the crimes of willful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life."[12]

Moreover, our jurisprudence has advocated the same level of *mens rea* for all war crimes under the ICTY jurisdiction irrespective of any particular labeling denoting a mental element.[13]

The impelling conclusion from these findings would be that not every reference to a mental element in the offense definition meant anything else than the same general intent. In particular, the mere inclusion of a mental element in the definition of an offence was not bound to indicate any specific intent. Therefore, one can agree with Johan D. Van der Vyver that in the particular circumstances of war crimes, "the element of intent is here *redundantly repeated* in the definition of the war crimes concerned and that this redundancy is entirely attributable to definitions being taken from existing treaties in force and the drafters' resolve to retain that language as far as possible."[14]

The confusion with the definition of what is meant by "specific intent", accounts also for much of the confusion in applying complicity modes of liability to these offences.

Thus, Allison Marston Danner and Jenny S. Fernandez argued, purportedly rely-

10 Michael Bothe, "War Crimes", in A. Cassese *et al.* (eds.) *The Rome Statute of the International Criminal Court, A Commentary*, Oxford University Press, 2002, 370, at 389.

11 *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, Case No.: IT-96-21-T, Trial Judgement, 16 November 1998, paras. 420-422, 433, 437 (hereinafter *Delalić et al.* Trial Judgement) (also noting that: "While different legal systems utilise differing forms of classification of the mental element involved in the crime of murder, it is clear that some form of intention is required. However, this intention may be inferred from the circumstances, whether one approaches the issue from the perspective of the foreseeability of death as a consequence of the acts of the accused, or the taking of an excessive risk which demonstrates recklessness.")

12 *Delalić et al.* Trial Judgement, para. 439.

13 *Delalić et al.* Trial Judgement, paras. 543, 552 (finding for example "inhuman treatment" under Article 2 or "cruel treatment" under Article 3 of the ICTY Statute also to be "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.")

14 Johan D. Van der Vyver, 'The International Criminal Court and the concept of mens rea in International Criminal Law', 12 *University of Miami Int'l & Comp. L. Rev.*, 2004 , 57, at 113, (emphasis added).

ing on the ICTY jurisprudence that "the ICTY has made it clear that the most salient feature of these crimes and the source of the enhanced stigma of these crimes is their *elevated* mens rea", before concluding that "this *distinctive feature* of these serious crimes is weakened by *the lowering of the mental state to recklessness or negligence*, as would occur in a category three or under the looser versions of command responsibility."[15]

In this author's opinion, not only these conclusions would appear wrong, but the statement attributed to the ICTY jurisprudence would also be an apparent misinterpretation of what the ICTY judgement cited actually stated. In the *Krstić* Appeal judgement cited by the authors in their polemic paper it was indeed held that "genocide is one of the worst crimes known to humankind and its gravity is reflected in the stringent requirement of specific intent."[16] However, it does not follow from this accurate statement that the Appeals Chamber was suggesting any "elevated" *mens rea* as those authors have indicated. What the Appeals Chamber simply meant, was that proving the specific intent to destroy the group under genocide was a requirement of the offence of genocide.

Indeed, if there was any doubt as to what the Appeals Chamber meant, it would be clear from various other decisions, for example, the *Jelisić* Appeal judgement.

In proceedings both in the *Jelisić* and the *Sikirica et al.* cases, the Office of the Prosecutor argued itself that the concept of *dolus specialis*, which is also a civil law term used to describe the *mens rea* of a crime, set too high a standard, and could not be equated with the common law concepts of "specific intent" or "special intent."[17] However, the Appeals Chamber itself rejected this interpretation and held that the reference to "specific intent" was intended solely to describe "the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such" as it is stated in the chapeau of the definition of genocide in the ICTY Statute and nothing else.[18]

Following the Appeals Chamber's position in *Jelisić*, the Trial Chamber in *Sikirica et al.* specifically criticized the Prosecutor for introducing a debate about theories of intent for the crime of genocide, and also suggested that the issue should be resolved with reference to the text of the provision and held:

> "The first rule of interpretation is to give words their ordinary meaning where the text is clear. Here, the meaning of intent is made plain in the chapeau to Article 4(2). Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent."[19]

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15 Allison Marston Danner, Jenny S, Fernandez, 'Guilty associations: joint criminal enterprise, command responsibility and the development of international criminal law', 93 *California L. Rev.,* 2005, 75, at 151, (emphasis added).

16 *Krstić* Appeal, para.134.

17 *Prosecutor v. Goran Jelisić*, Case No.: IT-95-10-A, Prosecution's Appeal Brief (Redacted Version), para. 4.22.

18 *Jelisić* Appeal, para. 45.

19 *Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija*, Case No.: IT-95-8-I, Judgement on Defence Motions to Acquit, 3 September 2001, para. 60.

A. The meaning of "specific intent" crimes

Therefore, whereas proof of a so-called conduct (or general intent) crime requires proving the intention of the person to engage in the prohibited conduct, the so-called result –oriented (or specific intent) crime would require proving not only the *intention* to engage in the prohibited conduct, but also the *intention* to bring about a particular consequence of that conduct.

In other words, result-oriented or specific intent crimes are distinguished from conduct or general intent crimes in that they require proof of two intentions not one: an intention with regard to the prohibited conduct, and an intention with regard to the prohibited specific consequence.

Johan D. Van der Vyver was right in concluding that what distinguishes general intent crimes from specific intent ones is not any hightened *mens rea*, but simply the additional requirement of "purpose" or "consequence" that specific intent crimes entail.[20]

Besides the ICTY jurisprudence, this also reflects what international criminal law usually required an Office of the Prosecutor to prove. Already during the WWII trials, international jurisprudence recognized indeed, the need to distinguish between the general intent or conduct crimes and crimes where criminal liability is dependent upon the act serving as a means of bringing about certain specified consequences (result-oriented or specific intent crimes). This was reflected in particular in the *Krupp et al case* in which the judges specifically stated that the special intent required for result-oriented category of crimes may not be presumed as a consequence of the act but must be proved.[21]

B. The specific intent crimes recognized under the ICTY Statute

Among the result-oriented or specific intent crimes recognized by the ICTY jurisprudence, we should refer to genocide (acts intended to destroy a group), persecution (acts intended to discriminate), and torture (acts intended to achieve any unlawful purpose). In *Galić,* our jurisprudence has also included acts of terror in the list of result-oriented crimes (acts intended to spread terror).[22]

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20 Johan D. Van der Vyver, 'The International Criminal Court and the concept of mens rea in International Criminal Law', at 100-101 (noting that:" "In these instances [specific intent crimes], the mental element required for criminal liability must be established in relation to both the act and the designated purpose of the act: in relation to the conduct, it must be demonstrated that the accused meant to engage in the conduct; and in relation to the consequence of the act, it must be proved that the accused meant to cause the consequence or was aware that the consequence will occur in the ordinary course of events.").

21 "The United States of America v. Alfried Felix Alwyn Krupp von Bohlen und Halbach & Others", 9 *Trials of war Criminals before the Nuremberg Military Tribunal under Control Council Law*, No. 10, 1378 (U.S. Gov. Printers) (1950).

22 See *Prosecutor v. Stanislav Galić*, Case IT-98-29-A, Appeal Judgement, 30 November 2006, para.104, (the Appeals Chamber holding that "The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the *specific intent* to spread terror among the civilian population. Further, the Appeals Chamber finds that …the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or

Elsewhere commentators also include in this category other offences not yet interpreted as specific intent crimes by our jurisprudence, such as extermination, and forced pregnancy.[23]

III. Modes of Liability for International Offences (primary v. secondary prohibitions; physical perpetrators v. accomplices)

A. Primary v. secondary prohibitions

The elements describing the conduct and circumstances of specific offenses define also what is normally considered the *primary prohibitions*, i.e. what the law expects the physical perpetrator not to do.

However, international criminal law prohibits not only conduct that violates a primary prohibition (i.e. the acts of the physical perpetrator), but also conduct and acts of those others that is intended to *facilitate and assist* the violation of the primary prohibition. These are the so-called *secondary prohibitions*, i.e. what the law expects participants other than physical perpetrators not to do. Secondary prohibitions therefore extend the scope of the primary prohibitions.[24]

The dual nature of modes of liability finds expression in the Statute of the ICTY. For example in *Blagoje Simić, Tadić and Zarić*, the Trial Chamber held that:

> "Article 7(1) reflects the principle of criminal law that criminal liability does not attach solely to individuals who physically commit a crime, but may also extend to those who participate in and contribute to the commission of a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability."[25]

B. Two kinds of secondary prohibitions

It is generally recognized that secondary forms of participation in an offence are of two kinds:

(1) the first kind is represented by doctrines expanding the primary prohibition by imputing to the actor the conduct of another, as it happens in complicity modes of liability,

(2) and the second, by doctrines expanding the primary prohibition by prohibit-

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threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration").

23 See Johan D. Van der Vyver, 'The International Criminal Court and the concept of mens rea in International Criminal Law', at 100.

24 For a detailed examination of these doctrinal foundations see Paul H. Robinson, 'Rules of conduct and principles of adjudication', 57 *University of Chicago L. Rev.*,1990, 729 at, 735,736.

25 *Prosecutor. v. Blagoje Simić, Miroslav Tadić, Simo Zarić,* Case IT-95-9-T, Trial Judgement, 17 October 2003, para. 135.

ing conduct short of the substantive harm or evil, as it happens in the inchoate offenses of attempt, and conspiracy in the crime of genocide under Article 4 of the ICTY Statute.[26]

For the purpose of this research we will deal only with the secondary modes of participation of the first kind described above i.e the complicity modes of liability.

C. Objective and subjective elements of secondary modes of participation

Just as in the case of the primary prohibitions, in the secondary prohibitions (complicity modes of liability) the objective and subjective elements are present as constituents of the rules of conduct for accomplices. The conduct and circumstance elements of the doctrine constitute the rules of conduct, while the mental elements required by the doctrine serve as the subjective component of these secondary modes of participation in an offence.

The conduct and circumstance elements of these doctrines typically define the ways in which the rules of conduct of the primary prohibition have been expanded to cover the accomplice's conduct. The mental elements function to assess the accomplice's culpability for the violation of the primary prohibition by the physical perpetrator.

IV. Complicity Modes of Liability: Nature of its *Mens Rea*

Complicity rules are normally said to permit the imposition of criminal liability upon a secondary offender (the accomplice) for the violation of a prohibited secondary conduct because he instigates, helps or encourages the principal in violating the primary conduct (i.e. in committing the offense in question properly). The accomplice does not personally commit the proscribed act, nor does he necessarily fulfill the culpability requirements of the substantive offense; he only contributes to its commission. Yet, he is still held liable pursuant to the perpetration of the criminal wrong.[27]

This postulate is confirmed by our jurisprudence. Both in *Vasiljević* and in the *Brđanin,* the Appeals Chamber recognized that "the elements of a crime are those facts which the Prosecution must prove to establish that the conduct of the perpetrator constituted the crime alleged. However, participants other than the direct perpetrator of the criminal act may also incur liability for a crime, and in many cases different *mens rea* standards may apply to direct perpetrators and other persons."[28]

As such, therefore, complicity is conceptually a difficult doctrine, because it embodies a unique rule of criminal responsibility that may impose the same punishment on different individuals - principal and accomplice - according to different sets of acts and different criminal states of mind.[29]

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26 Paul H. Robinson, 'Rules of conduct and principles of adjudication', at 735.

27 See Daniel Ohana, 'The Natural and Probable Consequence Rule in Complicity: Section 34A of the Israeli Penal Law, (Part I)', 34 *Israel L. Rev*., 2000, 321, at 322.

28 *See Prosecutor v. Radoslav Brđanin*, Case IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, (hereinafter *Brđanin* Appeal), para. 5, citing *Prosecutor v. Vasiljević*, Case IT-98-33-A, Judgement, 25 February 2004 (hereinafter *Vasiljević* Appeal), para. 102.

29 See Tyler B. Robinson, 'A Question of Intent: Aiding and Abetting Law and the Rule of

It is, therefore, recognized that "the derivative nature of accomplice liability underscores an important distinction in the law of complicity between the mental state required of the accomplice toward the principal's commission of the offense, and that required of the accomplice toward his own act in furtherance of the principal's commission of the offense."[30]

For example, the Appeals Chamber in *Vasiljević* recognized that aiding and abetting the commission of a crime as a mode of participation in a crime "is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime" properly.[31]

In the same token the Trial Chamber in *Brđanin* held that the *mens rea* of joint criminal enterprise category III (JCEIII), which "consists of the Accused's awareness of the risk that genocide would be committed by other members of the JCE" was "a different *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Article 4(3) (a)."[32]

However, as correctly noted by the Appeals Chamber in the same case,

> "the third category of joint criminal enterprise liability is, as with other forms of criminal liability, such as command responsibility or aiding and abetting, not an element of a particular crime. It is a mode of liability through which an accused may be individually criminally responsible despite not being the direct perpetrator of the offence. An accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed."[33]

Degrees of *mens rea* of accomplices and whether or not they need to meet the mental elements of the underlying offence

There has been a long, ongoing debate, in national jurisdictions, about the requisite mental standard for an accomplice.[34] As far as international jurisdictions are concerned and, in particular, under the jurisprudence of the ICTY, an accomplice must have two mental states: one, is to assist the principal,[35] and second, his mental state

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Accomplice Liability Under 924(c)', 96 *Michigan L. Rev.*, 1997, 783, at 791.

30 See Tyler B. Robinson, 'A Question of Intent', at 791.

31 See *Vasiljević* Appeal, para. 102.

32 *See Prosecutor v. Radoslav Brđanin,* Case No IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, 28 November, 2003, para. 57.

33 *Brđanin* Appeal, para. 5

34 For discussions in US see *infra,*Section VI.

35 See Prosecutor v. Dario *Kordić* and Mario *Čerkez,* Case IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 29 (hereinafter *Kordić and Čerkez* Appeal) (noting that: "the mens rea for these modes of responsibility [planning, instigating, and ordering] is established if the perpetrator acted with direct intent in relation to his own planning, instigating, and ordering").

with regard to the substantive offense.[36]

Just like in national jurisdictions, the jurisprudence of the ICTY has recognized different standards of *mens rea* with regard to the substantive offence, for different categories of accomplices. These standards range from objective standards of "natural foreseeability" (in joint criminal enterprises (category III)[37] and "reasons to know" (in command or superior responsibility),[38] to subjective ones of the awareness and knowledge that the accomplice's assistance will help in the commission of the offense (planning, ordering, instigating, aiding and abetting),[39] or the accomplice's subjective intent to commit the offense (joint criminal enterprises, categories I and II).[40]

Accordingly, provided that the corresponding *actus reus* for the specific accomplice mode of liability is also present (for example for command responsibility this *actus reus*, would be his effective control over, and failure to prevent or punish his subordinates); for JCEIII, – being a member and active supporter of a JCE for the commission of another offence; for aiding and abetting -having substantially contributed to the commission of the offence by another person), the *mens rea* prescribed for that specific mode of liability is the only thing he needs to meet to be held responsible for an offence committed by another person, the physical perpetrator.

International customary law does not require an accomplice to meet the culpability requirements of the offence itself as if he was the physical perpetrator,[41] unless he acted as an active member of a JCE I or JCEII.

V. Application of Complicity Modes of Liability to Specific Intent Crimes

The conflation and confusion made between *principals* and *accomplices*, and the rules through which culpability is attached to accomplices as opposed to principals is what lies behind the unfounded criticism unleashed against the jurisprudence of the ICTY.[42]

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36 See *Kordić and Čerkez* Appeal, para. 112 (noting that: "the Appeals Chamber considers that a person who orders, plans or instigates an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, plan or instigation, has the requisite *mens rea* for establishing liability under Article 7(1) of the Statute pursuant to ordering, planning, or instigating. Ordering, planning or instigating with such awareness has to be regarded as accepting that crime.")

37 *Tadić* Appeal, para. 220.

38 *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, Case IT-96-21-A, Appeal Judgement, 29 February 2001, para. 241.

39 See *Kordić and Čerkez* Appeal, *para. 112* (for planning, ordering and instigating*),* and *Prosecutor v. Tihomir Blaškić* Case IT-95-14-A, Appeal Judgement, 29 July 2004, para. 45, 46 *(*for aiding and abetting).

40 *Tadić* Appeal, paras. 196, 220.

41 In domestic jurisdictions, commentators have long defended such a position. See, for example, Larry Alexander 'Insufficient Concern: A Unified Conception of Criminal Culpability', 88 *California L. Rev.,* 2000, 931, at 946 (noting that "complicity should not be limited to those who assist with harm as their conscious object; rather, it should extend to all whose assistance involves risk imposition that is excessive relative to their reasons for so acting.").

42 See William A. Schabas, 'Mens rea and the International Criminal Tribunal for the Former Yugoslavia', 37 *New England L. Rev.,* 2003, 1015, at 1032, and 1034 (noting that:

The confusion is also made about the *nature* of specific intent crimes. Only this confusion explains why the same opponents support the application, without exception, of all modes of liability to conduct or general *intent* crimes, but reject the same modes of liability for result-oriented or specific *intent* crimes.[43] Yet a coherent approach should necessary tell opponents that a mode of liability that is not applicable to specific intent crimes, should not apply either to general intent crimes.[44]

"Since the theory of "joint criminal enterprise" was first mooted by the Tribunal, in Tadić in July 1999, it has become *the magic bullet* of the Office of the Prosecutor"; But *negligence-type* offences are not treated as the most serious crimes, and they do not attract the most serious penalties. It is a form of anti-social behaviour judged by a different yardstick than those *who commit crimes with malice and premeditation*."; "*Dilution of the mens rea standard* in the case of prosecutions that rely upon superior responsibility or joint criminal enterprise raises issues of a policy nature"). (Emphasis added).

See also Allison Marston Danner, Jenny S. Fernandez, 'Guilty associations', at 137 (noting that "JCE raises the specter of guilt by association and provides ammunition to those who doubt the rigor and impartiality of the international forum. If conspiracy is the darling of the US prosecutor's nursery, then *it is difficult to see how JCE can amount to anything less than the nuclear bomb* of the international prosecutor's arsenal).

43 See Allison Marston Danner, Jenny S. Fernandez, 'Guilty associations', at 151 (noting that "*liability should not be permitted for specific intent crimes of genocide and persecution*. Similar caution should be used in holding defendants liable under a theory of command responsibility for such crimes, absent proof that the defendant knew or had reasons to know the subordinates were committing those particular crimes.") (Emphasis added). In a recent 2007 paper former Judge Cassese, appears to support somehow this position making, respectfully, the same confusion by admitting the application of aiding and abetting (that requires knowledge) to genocide (requiring specific intent), but disallowing contradictorily the application of JCEIII (arguably because it requires a mental state short of intent). His suggestion to consider JCEIII issues at the sentencing level could be considered, however, one problem with this suggestion is that Cassese overlooks that in collective forms of criminality like in JCEIII, the co-perpetrators, just as commanders under the doctrine of command responsibility are generally considered to be more dangerous than the physical perpetrators, because they are the ones who put the system in motion (though do not physically commit themselves the crimes), and as such, they deserve higher, not lower sentences. See Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *J. of Int'l Crim. Jus.*, 2007, 109.

44 One important issue that commentators seem to overlook is that the point is not whether *unintended* complicity should apply to crimes requiring *two or three* intents, the question is whether or not *unintended* complicity should at all apply to *intent* crimes. Professor Kadish, for example, may be right or wrong, but he is at least fairly consistent in his position, and thinks that 'unintended complicity' should apply only to 'unintended' crimes, and not to those requiring *intent*. Under this position, none of the forms of 'unintended complicity' such as aiding and abetting, JCEIII or command responsibility should apply to any crime under the ICC Statute, since Article 30 of the ICC Statute specifically excludes unintended crimes. Consistently applied this position would also invalidate the *Tadić* findings in relation to murder under JCEIII, and allow the accused to request the revision of his sentence. Otherwise, to admit that JCEIII can apply to murder (committed with one intent), but not to genocide (committed with two intents (intent to murder, plus intent to destroy the group to which belongs the murdered person), is to *miss the point*. The issue is *intent* crimes, not *number of intents* required for specific crimes. (See detailed discussion below). Admittedly it is difficult to prove, as Judge Cassese points out in his last paper on this issue, that a Commander had reasons to know about murder committed with intent, that amounted to genocide requiring that the commander had in addition also reasons to know of the subordinate's intent to destroy a group, but this is a matter for the prosecution

Therefore, people who criticize the application of the modes of participatory liability to specific intent crimes, never entirely answer the question to whom is addressed the so-called "elevated" mental state in those crimes. Is it addressed to *physical perpetrators* or to their *accomplices*? And if we require that the accomplices meet the mental state requirements of the offence, does not it make better sense to call anyone who participates in a crime, *physical perpetrator*?[45]

But then with such an approach, many active contributors to the crimes would have been left out of the fishing net. Saing that anyone who is guilty of a crime of specific intent has to meet the requirements of that crime would mean that the law and society should not recognize in such cases any other form of participation to these types of crimes apart from physical perpetration indeed. Those who in any other way helped it to be committed should be set free. We are unable to subscribe to this assertion, because this would amount to a very narrow unjustified retributive (causation) policy that eliminates any utilitarian preventive purpose in criminal punishment. From a preventive utilitarian point of view, this position cannot stand against serious criticism. Only the balanced combination of these two fundamental cannons of the doctrine of criminal law ensures an effective fight against impunity.

At the end of the day, in complicity forms of liability, what is at stake is that the international community, as much as domestic societies, recognizes that a person who contributes to the commission of a crime by another person manifests in one or the other way an intent for such crime, and the method of proving this intent is the

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to prove his/her cases with the facts that he/she has (not a matter of *impossibility* or *reasonableness* as of law. Once the commentators become consistent, they will have either to admit that JCEIII, command responsibility and aiding and abetting (all modes of liability requiring a mental state short of intent) apply to any *intent* crimes, and therefore, that these modes of liability apply to acts of terror and persecutions just as they apply to intentional murder, or then that they do not apply at all to any *intent* crime and thus invalidate unintended forms of complicity as modes of liability in international criminal law. Consistently applied this position would also invalidate ordering, planning, and instigating persecutions, acts of terror or genocide (since these modes of liability require only knowledge (mental states short of specific intent). See Sanford H. Kadish 'Reckless complicity', *infra* note 58.

45 In the US discussions on the need for reforms of doctrines of culpable mental states, for example, Prof. Kadish's assumptions against the so-called "reckless or intended complicity" in intentional crimes is heavily criticized. Kadish's rationale is based on a strong *causation* theory. His basic position is that the so-called "reckless or intended complicity" should be opposed because "*Even if we can predict another's freely chosen act, we may still feel that such an act is not our responsibility, even if we have facilitated and encouraged it*." This position has met with serious criticism from his colleagues, who viewed it as contradictory. Prof. Alexander, for example, rightly notes that the objection raised would not be "*to the recklessness side of the equation. Rather, it is an objection to liability for complicity tout court. For according to this view, even purposeful aid should not implicate one in the criminal choices of another. In the end, then, even those who buy this objection should favor dropping complicity from the criminal law rather than retaining complicity but restricting it to purposeful aiding.*" Equally Prof. Dressler also finds Kadish's position contradictory and noted that while advocating intent i.e. causation for complicity too, Kadish himself remarked that "*when we seek to determine the responsibility of one person for the volitional actions of another, the concept of cause is not available to determine the answer*." Prof Dressler finds that if this statement is accurate "*it renders meaningless the suggestions for reform based on causation.*" See for the sources *infra* notes 52-63.

one specified for his particular situation of an accomplice.[46]

A. The character of the crime as a general intent or specific intent crime does not change the applicability of the accomplice modes of liability to it

A careful radiography has just shown that from a culpability point of view, the result-oriented crimes differ from conduct crimes only but for the requirement of an additional intent. Why then the number of intents should make a difference in the application of a particular mode of liability or a method of proving the intent of an accused? *Grosso modo* if it does not make any difference applying a particular mode of liability to a crime of one intent requirement, it should make no difference either to apply that mode of liability to a crime of two or more intent requirements. Number of intent requirements should not add a distinctive qualifying element to an offence.

This reasoning is confirmed by the jurisprudence of the Tribunal. In *Brđanin* the Appeals Chamber held:

> "the fact that the third category of joint criminal enterprise is distinguishable from other heads of liability is beside the point. Provided that the standard applicable to that head of liability, i.e. "reasonably foreseeable and natural consequences" is established, criminal liability can attach to an accused for *any crime* that falls outside of an agreed upon joint criminal enterprise."[47]

Once it becomes clear that result-oriented (or specific intent) crimes are no more than crimes requiring proof of two intents, it also becomes clear that if one admits that accomplice modes of liability can apply to general intent crimes (crimes of one intent), they should apply to specific intent crimes as crimes of two intents basically. The only problem then becomes the fact that the mental state requirement of that relevant mode of liability should be proved in relation to both the conduct and the consequences of the specific offence in question.

In other words, if what is required to prove for aiders and abettors, is only knowledge of the perpetrator's intentions in conduct (or general intent) crimes such as for example the crime of murder, then in result-oriented (or specific intent) crimes such as, for example, genocide or terror acts, one needs to prove that the accomplice aider and abettor, for example, of a crime of genocide had knowledge of the *intention* of the perpetrator to commit a certain crime (i.e. murder) with the *intention* to have as a consequence the destruction of the group, no more than that.

46 See further on the philosophical foundations of the *mens rea* of accomplices, *infra,* Section VI.

47 *Brđanin* Appeal, para. 9 (emphasis added).

B. Command responsibility, aiding and abetting and JCE III are all complicity modes of liability requiring a so-called 'lower mens rea*' than specific intent crimes do*

One can also truthfully argue that if the application of similar accomplice modes of liability is admitted in relation to specific intent crimes, there is no apparent reason why one particular mode of liability would be singled out, as not applicable. Elementary rules of consistency require that equal rules are applied to equal situations. If you state that *A1* and *A3* apply to Z, then you have to admit that A2 also applies to Z since A2 is part of the same class of *A*s.

Since opponents of the application of command responsibility and JCEIII to genocide concede that aiding and abetting can apply to genocide, persecution, torture and acts of terror (all result-oriented crimes too), they have to admit that command responsibility and JCEIII can apply to the same acts too, since they are similar modes of liability.

This was the approach that the Appeals Chamber took in *Brđanin,* where it held:

> "As a mode of liability, the third category of joint criminal enterprise is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach. Aiding and abetting, which requires knowledge on the part of the accused and substantial contribution with that knowledge, is but one example. Command responsibility liability, which requires the Prosecution to establish that a Commander knew or had the reason to know of the criminality of subordinates, is another."[48]

Further on, the Appeals Chamber endorsed its own position in a previous case (*Krnojelac)* and argued:

> "This is the approach that the Appeals Chamber has taken with respect to aiding and abetting the crime of persecution. An accused will be held criminally responsible as an aider and abettor of the crime of persecution where, the accused is aware of the criminal act, and that the criminal act was committed with discriminatory intent on the part of the principal perpetrator, and that with that knowledge the accused made a substantial contribution to the commission of that crime by the principal perpetrator.[49]

VI. Philosophical Foundations Behind the So-called "Discounted" *mens rea* of Accomplices

The discussion whether or not complicity modes of liability can be applied to specific intent crimes, also turns to a large extent into a discussion of the philosophical nature of the *mens rea* of accomplices.

48 *Brđanin* Appeal, para. 7.

49 *Brđanin* Appeal, para. 8, citing *Prosecutor v. Krnojelac*, Judgment, Case IT-97-25-A, 17 September 2003, para. 52.

Unified approach v. variation of mental states

It can be said that there are at least two ways of understanding the *mens rea* requirement for accomplices: one is a unified approach and the second which admits for a variation of mental states of accomplices.

A. Unified approach to the mental state of accomplices

The unified approach to the mental state of accomplices, in the doctrine of international criminal law could be called the *Shahabuddeen's approach*[50] and finds much support in domestic doctrines of criminal law, for example, in the position of Prof. Larry Alexander in the US.[51] This approach reduces the issue of *mens rea* into one single and the same mental state.

In judge *Shahabuddeen's approach* this single mental state is *intent*, and in Prof. Alexander's, this single mental state is *recklessness*.

Judge Shahabuddeen argues, for example, that in joint criminal enterprises, the different mental state requirements including "natural and foreseeable consequences" are no more than *methods of showing the same intent*, rather than a distinct state of mind.[52]

In similar terms, Prof. Larry Alexander comes to the conclusion that the existing culpability system in which the law distinguishes between intent, knowledge and recklessness, is not wise and is not necessary, since intent and knowledge are no more than variations of the same recklessness, and since they share the same "basic moral vice of insufficient concern for the interests of others"[53] in that they all are manifestations of "callousness" or "indifference".[54] Therefore, they should be replaced by *recklessness* alone.[55]

Judge Shahabuddeen, reacting to the question whether or not a mental state lower that intent could be applied to genocide for accomplices, he responded in the negative agreeing with the judges of the Trial Chamber, however, his agreeing with the Trial Chamber was only due to the fact that he thought, contrary to the Trial

50 See *Prosecutor v. Radoslav Brđanin*, Case IT-99-36-A, Decision on Interlocutory Appeal. 19 March 2004, Separate Opinion of Judge Shahabuddeen, (hereinafter Brđanin Appeal. Shahabuddeen's Separate Opinion).

51 Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', 88 *California L. Rev.* 2000, at 931.

52 See *Brđanin Appeal*. Shahabuddeen's Separate Opinion, para. 5 (noting that "… the third category of joint criminal enterprise mentioned in *Tadić* does not dispense with the need to prove intent; what it does is that it provides *a mode of proving intent* in particular circumstances, namely, by proof of foresight in those circumstances.') (Emphasis added).

53 Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', at 931.

54 Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', at 931.

55 See Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', at 953 (noting that "If negligence is not a type of culpability, then recklessness can serve as a comprehensive, unified conception of criminal culpability. It can encompass knowledge, purpose, and willful blindness. And it can serve as the *mens rea* for complicity as well as for completed "attempts.")

Chamber, that intent is also shown by proof of foreseeability.[56]

To a similar question, whether a mental state short of intent, such as recklessness, could be applied to the conduct of accomplices or not, Prof Alexander responds in the negative too agreeing with Prof. Kadish[57], a known opponent of "unintentional" complicity in the US[58], however, his agreeing with Prof. Kadish was equally due only to a fact that he defends that intent was no more than a degree of *recklessness* anyway.[59]

Prof. Alexander's approach of the unified concept of culpability is, however, criticized on grounds of the wide discretion left to the judges in the process of evaluation of the degrees of recklessness that would fit a particular accused. His opponents essentially argue that the existing "imperfect" system that already contemplates various degrees of this "recklessness" is better placed to meet with the various circumstances in which judges would be called to apply a culpability theory.[60]

Shahabuddeen's approach is more refined, and better placed, since it does not pretend to replace all the variations of intent with a single (intent category). He retains the intent with all the variations, only considers these variations to be no distinct mental states, but just different *methods of showing* this intent.

Shahabuddeen's approach that views the actions of accomplices as manifestations of intent has support in domestic doctrines of criminal law. For example, Daniel Ohana, commenting on the law of Israel criminalizing JCEIII, disputes that the natural and probable consequence rule in complicity operates to make criminal, conduct that otherwise is lawful. In his opinion, by jointly engaging in or contributing to the joint enterprise, "the participant already entangles himself with the criminal law and thus proves that he is a proper object of criminal sanctions. Therefore, he crosses the threshold *before* the principal perpetrates the collateral offense, so his liability for offenses committed beyond the common design does not proceed solely on the basis of his inadvertent contribution to the confederate's further criminal conduct. Rather, his initial (voluntary) decision to embark on or contribute to a criminal course of conduct is most relevant in delimiting the acceptable boundaries of his responsibility in light of the paradigmatic limits of the criminal law."[61]

Those who support JCEIII in domestic jurisdictions correctly emphasize the destructive forces that are unleashed when a group of offenders agree to the commission of a crime as JCE members. The team spirit and singleness of purpose, which

56 See *Brđanin Appeal*. Shahabuddeen's Separate Opinion, paras. 4, 5.

57 Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', at 946-947.

58 Among Professor Kadish's most celebrated works on this issue are: Sanford H. Kadish, 'Complicity, cause and blame: A study in the interpretation of doctrine', 73 *California L. Rev*., 1985, at 323; and Sanford H. Kadish 'Reckless Complicity', 87 *Journal of Criminal L. & Criminology*, 1997, 369, at 378-379.

59 Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', at 947.

60 See Joshua Dressler, 'Does one *mens rea* fit all? Thoughts on Alexander's unified conception of criminal culpability', 88 *California L. Rev.* 2000, 955. See also Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', at ft. 621.

61 See Daniel Ohana, 'The Natural and Probable Consequence Rule in Complicity', at 322.

typically characterize joint enterprises in crime, strengthen the members' resolve by provoking expectations of mutual defense and support and bolster them to take all measures necessary to realize the common design, including the commission of more crimes. In addition, the risk is always present in the mind of the accomplice that in putting the plan into operation, things might take an uncontrollable turn, and further offenses might be committed which do not necessarily advance the common purpose. But with this awareness the accomplice decides to remain a part of the enterprise therefore eliciting his true intent.[62]

Judge Shahabudeen notes with regard to the nature of intent of the accomplice in *Brđanin* that in effect, "the accused in this case knew that genocide could be committed; any uncertainty in his mind went to the question whether it would in fact be committed, not to acceptance by him of it (if and when it was committed) as something which he could "predict" as the "natural and foreseeable consequence" of the activities of the joint criminal enterprise to which he was a willing party. In that important sense and for the purposes of determining such a submission, he contributed to the commission of the genocide even though it did not form part of the joint criminal enterprise. Putting it another way, his intent to commit the original crime included the specific intent to commit genocide also *if and when genocide should be committed*."[63]

B. Variation of mental states approach

The second approach which is the favoured approach in the ICTY jurisprudence could be called the *Brđanin majority's approach,* and in domestic doctrines of criminal law, in particular in the US, the *Justice Holmes's approach*[64]. It considers that there are various degrees of mental states also for accomplices, each of which has an independent status. But that this only reflects the multiplicity of states of mind with which different kinds of accomplices decide of their free will to associate themselves with crimes.

Indeed the *Brđanin* majority did not find that there was a violation of the law in the application of a degree apparently lower that the mental state required for an offence, since accomplices (who by definition *are not the physical perpetrators* of an offence) are not supposed to share the mental state of principals anyway in every situation. All depends on who the accomplices are. The intent requirement of a given crime is the one that the physical perpetrator must have. However international law, just as domestic law, recognizes that apart from the physical perpetrators, other secondary participants are involved in group crimes with different degrees of engagement of their mental state. For this reason, they can and should also be liable for the same crime, provided that they meet the mental state requirements of their particu-

62 See Paul Robinson, 'Imputed Criminal Liability', 93 *Yale L. J.*, 1984, 609, at 644-45. See also Daniel Ohana, 'The Natural and Probable Consequence Rule in Complicity', at 336-351.

63 *Brđanin Appeal*, Shahabuddeen's Separate Opinion, para. 7.

64 US Justice Holmes is reported to have stated in 1881 in reference to the need for different culpability levels that ""even a dog distinguishes between being stumbled over and being kicked." See Dane S. Ciolino, 'The Mental Elements of Louisiana Crimes: It does not matter what you think', 70 *Tulane L. Rev.*, 1996, 855 at 858.

lar situation, not that of the offence (which is reserved for the physical perpetrator).

The Appeals Chamber in *Brđanin* held:

> "The elements of a crime are those facts which the Prosecution must prove to establish that the conduct of the perpetrator constituted the crime alleged. However, participants other than the direct perpetrator of the criminal act may also incur liability for a crime, and in many cases different *mens rea* standards may apply to direct perpetrators and other persons. An accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed."[65]

We cannot but humbly agree with this correct statement of international criminal law and policy.

Conclusions

Complicity modes of liability apply to specific intent crimes, however, they do not substitute themselves for the elements of the crimes. The unfounded criticism unleashed against the ICTY jurisprudence is evidence of a confusion and conflation of complicity forms of liability with those that reflect the involvement of *physical perpetrators* in the commission of a crime. It also shows lack of knowledge of the way in which the Office of the Prosecutor goes about to build its cases. The Office of the Prosecutor uses and chooses the modes of liability that customary international law provides as valid grounds of culpability imputation not because it feels they may allow *easier* convictions, but because in the particular circumstances of a certain cas,e the modes of liability chosen better reflect the evil magnitude and scope of the mental state of the accused standing trial.

The modes of liability chosen are the ones that better reflect the way in which the accused has decided to engage his free will to the atrocities for which he is held accountable together with the physical perpetrator. Therefore, accomplice modes of liability are not easier ways of finding a conviction, as some commentators wrongly find out.[66] Instead, they are valid methods of proving the free association of a defendant with the crimes. What is important is that the state of mind required for accomplices (in rules of conduct for *secondary* prohibitions) is not confounded with the *mens rea* required for a physical perpetrator of the offence (in rules of conduct for

65 *Brđanin* Appeal, para. 5.

66 See William A. Schabas, 'Mens rea at the ICTY', at 1033, 1034 (noting that: "Granted, these two techniques [JCE and Command responsibility] *facilitate the conviction of individual villains* who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy."). (Emphasis added); see also notes 13, 39, 40.

primary prohibitions).

On the other side, it is important to remind that all modes of liability applied at the ICTY were found, in carefully elaborated Appeal decisions, to be sound manifestations of international customary law at the time of the relevant events in the former Yugoslavia, and therefore meet the strict requirement of international legality.[67]

As for the nature of the *mens rea* for accomplices, one cannot but agree with Prof. Yeager and Prof. Alexander that at the domestic as much as at the international level an accomplice is recognized "guilty of a crime not because he necessarily causes the crime to occur, but because he is "an excessive risk-taker" with respect to the crime's occurring."[68] and since "criminal culpability is always a function of what the actor believes regarding the nature and consequences of his conduct and what the actor's reasons are for acting as he does in light of those beliefs."[69]

Accomplices should be held equally accountable for the criminal consequences of their free willed actions and omissions without unfounded discount of their blameworthiness. This is a rule that applies across the board both for the so-called conduct crimes (or general intent crimes) and the so-called result-oriented crimes (or specific intent crimes).

67 An author has recently attacked the entire JCE theory as not customary law. My respectful submission is that the author just went too far in his position, since what he is basically suggesting is that we should revise most of the judgements so far at the *ad hoc* tribunals (that rely on customary law in the way in which it is usually found to exist under the Tribunal's jurisprudence) and set free the Accused. A more reasoned and realistic position is, however, the one defended in a paper by William A. Schabas included in this Blishchenko Memorial Volume. See Attila Bogdan, 'Individual Criminal Responsibility in the execution of a 'Joint Criminal Enterprise', in the jurisprudence of the ad hoc Tribunal for the Former Yugoslavia', in 6 *Int'l* Crim. *L. Rev*., 2006, 63-120.

68 Daniel Yeager, 'Helping, Doing, and the Grammar of Complicity', 15 *Criminal justice and ethics* (1996), 25, 31.

69 Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability', at 953.

Section 3

The Progressive Development of International Procedural Criminal Law by the *Ad Hoc* Tribunals

Chapter 8

Plea Bargaining: The Uninvited Guest at the International Criminal Tribunal for the Former Yugoslavia*

Mark Harmon

I. A Description of Plea Bargaining

Plea bargaining refers to the practice of resolving criminal charges against a criminal defendant through negotiations and by agreement between the prosecutor and a suspect or an accused. The eventual product of plea negotiations is the settlement of the criminal case through the admission of guilt in the form of a guilty plea.[1] Plea bargaining with a suspect may occur at the pre-indictment stage or with an accused during the post-indictment stage.

In broad terms, plea agreements may take two different forms: a "charge bargain" or a "sentence bargain." A "charge bargain" is clearly the more controversial type of plea agreement[2] and typically it relates to concessions made in respect of charges that

* The views expressed herein are solely those of the author and do not necessarily reflect those of the Office of the Prosecutor (hereinafter OTP) or those of the United Nations.

1 In the United States, the possibility exists for an accused to enter a plea of *nolo contendere* (no contest) to criminal charges. Both a plea of *nolo contendere* and a plea of guilty can be the subject of plea negotiations. A *nolo contendere* plea does not exist in the RPE and therefore will not be discussed further in this paper.

2 One reason why charge bargains are entered into is frequently misunderstood or ignored by the critics of the practice, and it relates to the quality of the evidence available to the Prosecutor at the time the case must proceed to trial. To understand this problem, one needs to compare the quantum of evidence necessary to support an indictment with the quantum of evidence necessary to support a conviction at trial. Article 18(4) of the Statute states: "Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The Indictment shall be transmitted to a judge of the Trial Chamber." Rule 47(B) of the Tribunal's Rules of Procedure and Evidence (hereinafter RPE) regulates the submission of indictments to a confirming Judge of the Tribunal and states that "The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material." This standard means "... essential facts, that when supported by evidence could result in a conviction. This does not mean conclusive evidence or evidence beyond a reasonable doubt." *The Prosecutor v. Nyiramashuko and Ntahobali, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment,* Case No. ICTR-97-21-I, 4 September 1998, par. 3. The gap between the standard of proof required to obtain a conviction at trial, proof beyond a reasonable doubt, and the stand-

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are pending against an accused. The concessions can include the reduction or elimination of charges that are contained in an existing charging instrument[3] (hereinafter "indictment"[4]). Frequently, "charge bargaining" agreements result in an accused pleading guilty to a specific offence in an indictment or involves pleading guilty to a lesser or related offence.

In a "sentence bargain," the prosecutor and the accused agree to specific terms relating to punishment, usually a fixed term of years of imprisonment or a range of years of imprisonment.[5] The essence of a "sentence bargain" is that an accused knows in advance of tendering his/her guilty plea what the position of the Prosecutor is regarding punishment in advance of accepting responsibility for the crime or crimes to which he or she pleads guilty. At the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY), a "sentence bargain" recommendation is not binding on the court[6] although in some jurisdictions an accused will be given an opportunity to withdraw his or her guilty plea should the court reject the terms of the plea agreement.[7] A "charge bargain" and a "sentencing bargain" are not exclusive of one another and frequently plea agreements incorporate both types of agreements.

In common law jurisdictions, particularly in the United States, where the practice of plea bargaining as a manner of resolving cases is an essential component of the criminal justice system, the practice of plea bargaining is a judicially sanctioned practice[8] and is regarded with favour. In *Blackledge v. Allison,* 431 U.S. 63, 71 (1977), the United States Supreme Court observed, "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly

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ard of proof for a *prima facie* case is considerable. At the time of trial, an assessment of the evidence by the Prosecution may reveal that, while there remains sufficient evidence to support a *prima facie* case, there is insufficient evidence to support a charge or charges in the indictment when measured against the standard required of proof required at trial. This may be because investigative efforts since the confirmation of the indictment failed to yield evidence sufficient to meet the higher standard of proof required at trial or because of such developments as the unexpected unavailability of critical witnesses whose evidence was counted upon for trial. Such developments may militate in favour of resolving the case through the process of negotiation.

3 Charge bargaining can also occur before an indictment is issued. In the pre-indictment context, negotiations between the parties result in a criminal charge or set of charges being agreed upon. Thereafter the agreed upon charges are reflected in a charging instrument.

4 In certain jurisdictions criminal charges may be brought by instruments other than indictments. For example, in the United States, another formal charging document, a "criminal information," exists. For purposes of this article, the term "indictment" will be used to define the formal charging instrument as it is the only relevant manner of charging an accused at the Tribunal.

5 A "sentence bargain" can also include a recommendation that an accused not be incarcerated. This type of sentence bargain has not occurred at the Tribunal.

6 Rule 62 *ter* (B) RPE.

7 See Federal Rules of Criminal Procedure, Rule 11(c)(5).

8 The United States Supreme Court recognized the legitimacy of plea bargaining in the case of *Santobello v. New York*, 404 U.S. 257 (1971).

administered, they can benefit all concerned."[9] In the United States, in excess of 95% of criminal cases resolve by guilty pleas,[10] figures that are comparable with statistics relating to guilty pleas in other common law jurisdictions.[11]

By contrast to the common law adversarial system of justice, where a judge's role in the search for the truth tends to be passive, the role of judges in countries that follow the civil law inquisitorial model of justice is considerably more active with judges routinely questioning witnesses and, as required, seeking additional evidence and requesting the attendance of additional witnesses. Given the role of judges in the civil law legal systems, the practice of plea bargaining with an accused is unacceptable or is severely restricted. However, the practice of plea negotiation has found its way into some civil law countries, albeit in a form significantly different than in countries that have adopted the common law model.[12]

Moreover, and in stark contrast to common law jurisdictions, a defendant's admission of guilt in civil law jurisdictions is not determinative on the issue of criminal culpability but merely part of the evidence that will be considered by the court in its ultimate determination of the case. Even with an admission of guilt, the prosecution is still obliged to present its case to the court and the court may absolve an accused of criminal responsibility notwithstanding his/her admissions of guilt.

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9 Rule 11 of the Federal Rules of Criminal Procedure regulates guilty pleas and the procedure relating to plea agreements in the Federal Courts in the United States.

10 The percentages of criminal cases that resolved through guilty pleas and through trial (percentage noted in brackets) from 1999 to 2003 are as follows: 1999: 94.6% (5.4%); 2000: 95.5% (4.5%); 2001: 96.6% (3.4%); 2002: 97.1% (2.9%); and 2003: 95.7% (4.3%). See U.S. Sentencing Commission, 1999-2003 Data files, USSCFT99-USSCFY03.

11 In England and Wales, in proceedings before magistrates, over 90% of defendants on summary trial pleaded guilty and in cases before the Crown Court, around 65% pleaded guilty. See *Criminal Statistics England and Wales 2003* published by the Home Office. In Australia, where information was available about the process of determining whether or not the defendant was guilty, the data showed that three-quarters of these defendants (74%) pleaded guilty. See Australian Bureau of Statistics, Media Release 4513.0 *Statistical look at Australia's criminal courts* (the statistics relate to the period from 1 January 1995 to 31 December 1995). In the province of Ontario in Canada, a 1998 study revealed that 91.3% of pending criminal cases were concluded without proceeding to trial (this figure includes all charges that were resolved by guilty pleas or withdrawn by the prosecutor). See *Statistical Monitoring Report of Ontario Court, Provincial Division*, 12 December 1997.

12 In Germany for example, informal agreements (*informelle Absprachen)* between defense counsel and prosecution counsel is a practice that is akin to plea bargaining. Through this practice, agreements between the parties in respect of the number and nature of criminal charges and the possible length of incarceration may be concluded and presented to the court for approval. Judges are not bound by the agreements reached by the parties. In The Netherlands, the prosecutor can resolve certain criminal offenses (usually less serious offenses) if an accused agrees to certain conditions set by the prosecutor. These "conditions ... are often a matter of negotiation between the Prosecution Service and the defense, a practice that closely resembles plea bargaining." Van den Wyngaert, *Criminal Procedure Systems in the European Community*, (1993) at 295. Similarly in Belgium the practice of transactions exists wherein a prosecutor may forego the criminal prosecution of certain types of cases if an accused accepts conditions proposed by the prosecutor.

II. Plea Bargaining at the ICTY – From Pariah to Pillar of Justice

At the inception of the ICTY, the concept of plea bargaining as a method of case resolution was rejected as being inimical to the practice of international criminal law, and regulations relating to such agreements were not included in the Tribunal's RPE. As reported by then President Cassese in his first annual report to the UN about the work of the ICTY, "... the granting of immunity and the practice of plea-bargaining find no place in the rules."[13] According to one commentator, plea bargaining was declared inconsistent with the Tribunal's purpose and functions[14] and this accounts for the subject of plea agreements not being addressed in early versions of the Tribunal's procedural rules.[15]

Without debating the wisdom or the rationale for the early rejection of plea bargaining and the absence of procedural rules relating to the same, it was not long before plea agreements became a reality in the everyday practice of the Tribunal. In the case of *The Prosecutor v. Erdemović*, Dra`en Erdemović, a member of the 10th Sabotage Detachment of the Bosnian Serb army, pleaded guilty on 31 May 1996 at his initial appearance before the Tribunal to a single count of a crime against humanity for his participation in a large-scale massacre of Bosnian Muslim men following the capture of the U.N. "Safe Area" of Srebrenica. He was sentenced to a 10 year term of imprisonment and he appealed his sentence.

The Appeals Chamber vacated Erdemović's guilty plea and remanded his case to a new Trial Chamber, holding, *inter alia*, that his guilty plea was not informed and permitted him the opportunity to re-enter his plea in full knowledge of the consequences of pleading guilty and of the inherent difference between the alternative charges.[16] In its decision, the Appeals Chamber focused, in part, on how a guilty plea should be dealt with in an international tribunal, given the vast differences between how common law and civil law jurisdictions deal with admissions of guilt. In finding that the concept of a guilty plea *per se* was consistent with the Tribunal's Statute and RPE, the Appeals Chamber concluded:

> The common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearing if they are to go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.[17]

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13 *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/49/342, 29 August 1994, par. 74.

14 See 'Trading Justice for Efficiency', Michael P. Scharf, 2 *Journal of International Justice* (2004), 1070-1081.

15 Notwithstanding the absence of specific regulatory authority to engage in plea agreements, such powers were implied in the existing RPE. Rule 39(ii) RPE provided that the Prosecutor may "undertake such other matters as may be necessary for completing the investigation and the preparation and conduct of the prosecution at trial."

16 *The Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997.

17 *Id.* at 2

The Appeals Chamber decision also articulated guidelines that should be applied to the acceptance of guilty pleas.

Following his successful appeal, Erdemović re-appeared before a Trial Chamber on 14 January 1998 and entered a guilty plea to a single charge of a violation of the laws or customs of war relating to the identical conduct that served as the factual basis of his former guilty plea. This guilty plea was entered pursuant to a written plea agreement filed on 8 January 1998,[18] the first plea agreement in the Tribunal's history. In its new sentencing judgement, the Trial Chamber recognised the legitimacy of plea agreements in the context an international tribunal:

> Plea bargain agreements are common in certain jurisdictions of the world. There is no provision for such agreements in the Statute and Rules of Procedure and Evidence of the International Tribunal. This is the first time that such a document has been presented to the International Tribunal. The plea agreement in this case is simply an agreement between the parties, reached on their own initiative without the contribution or encouragement of the Trial Chamber. Upon being questioned by the Presiding Judge of the Trial Chamber, the accused confirmed his agreement to and understanding of the matters contained therein. The parties themselves acknowledge that the plea agreement has no binding effect on the Chamber, although submissions recommending it were made by both the Prosecutor and Defence Counsel at the hearing on 14 January 1998, in addition to the recommendations in the joint motion. Whilst in no way bound by this agreement, the Trial Chamber has taken it into careful consideration in determining the sentence to be imposed upon the accused.[19]

The safeguards for the acceptance of a guilty plea that were articulated by the Appeals Chamber in the *Erdemovi}* case were later codified in amendments to the RPE. The relevant provision of the RPE relating to guilty pleas is Rule 62 *bis* and it reads:

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18 The essential elements of the plea agreement were that: (a) The accused would plead guilty to count 2, a violation of the laws or customs of war, in full understanding of the distinction between that charge and the alternative charge of a crime against humanity, and the consequences of his plea; (b) The accused's plea was based on his guilty and his acknowledgement of full responsibility for the actions with which he is charged; (c) The parties agreed on the factual basis of the allegations against the accused, and in particular the fact that there was duress; (d) The parties, in full appreciation of the sole competence of the Trial Chamber to determine the sentence, recommended that seven years' imprisonment would be an appropriate sentence in this case, considering the mitigating circumstances; (e) In view of the accused's agreement to enter a guilty plea to count 2, the Prosecutor agreed not to proceed with the alternative count of a crime against humanity. *The Prosecutor v. Erdemović*, Case No. IT-96-22-T*bis*, Sentencing Judgment, 5 March 1998, page 20.

19 *The Prosecutor v. Erdemović*, Sentencing Judgement, (Case No. IT-96-22T*bis),* 5 March 1998, par. 19. The plea agreement recommended a sentence of seven year's imprisonment. The Trial Chamber did not accept this recommendation and sentenced Erdemovic to a term of five years' imprisonment.

> Rule 62 *bis*
> Guilty Pleas
>
> If an accused pleads guilty pleads guilty in accordance with Rule 62(vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:
> (i) the guilty plea has been made voluntarily;
> (ii) the guilty plea is informed;
> (iii) the guilty plea is not equivocal; and
> (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,
>
> The Trial Chamber may enter a finding of guilt or instruct the Registrar to set a date for the sentencing hearing.[20]

Approximately four years later, the RPE were amended to incorporate a specific rule relating plea agreements.[21] This provision is found in Rule 62 *ter* which reads:

> Rule 62 *ter*
> Plea Agreement Procedure
>
> (A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
> (i) apply to amend the indictment accordingly;
> (ii) submit that a specific sentence or sentencing range is appropriate;
> (iii) not oppose a request by the accused for a particular sentence or sentencing range.
>
> (B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).
>
> (C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62(vi), or requests to change his or her plea to guilty.

The evolution of the thinking of the Judges at the Tribunal from initially not recognising plea bargaining and guilty pleas to a more pragmatic approach that has accepted both has had a positive and constructive impact on the Prosecutor's ability to secure convictions against persons indicted by the Tribunal and to identify fruitful new investigative leads, obtain important evidence not otherwise available to the Prosecutor's office, and develop and present at trials credible testimonial evidence

20 Adopted 12 November 1997; amended 10 July 1998, 4 December 1998, and 17 November 1999.

21 Adopted 13 December 2001.

from insider/co-perpetrator witnesses at trial.

III. Judicial Control over Plea Agreements at the ICTY

The RPE allow the Trial Chambers considerable control over the plea agreements and guilty pleas and with ensuring that the agreed upon charges to which an accused person pleads guilty are supported by sufficient facts.

At the Tribunal, once a plea agreement has been reached by the parties, the agreement is formalised in writing and presented to a Trial Chamber. Plea agreements normally occur after an indictment has been confirmed and after an accused has made his/her initial appearance before the Tribunal. Since plea agreements before the Tribunal usually include "charge bargaining," it has been the practice of the Trial Chambers to require that the original indictment on file be amended to reflect only the charges to which the accused proposes to enter a guilty plea or pleas. In compliance with this practice, the Prosecutor submits a motion to amend the existing indictment to reflect the charges agreed upon by the parties. Accompanying the proposed amended indictment are a copy of the plea agreement and a copy of a written factual basis to support the new charges contained in the proposed amended indictment. At this point in the proceedings, a Trial Chamber *de facto* retains significant control over the process of resolving cases through plea agreements as amendments to existing indictments can only be granted by leave of a Trial Chamber or a Judge of that Trial Chamber after having heard the parties.[22] If the Trial Chamber or a Judge of that Chamber rejects the application to amend the indictment, which is within its discretion,[23] the plea agreement will no longer be viable.

Assuming the Trial Chamber grants the motion to amend, the plea agreement and the written factual basis will be reviewed by the Trial Chamber. In order to plead guilty under the terms described in the plea agreement, Rule 62 *bis* (iv) RPE requires that the Trial Chamber be satisfied that there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on

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22 Rule 50

Amendment of Indictment

(A) (i) The Prosecutor may amend an indictment:
  (a) at any time before its confirmation, without leave;
  (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
  (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

(ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.

(iii) Further confirmation is not required where an indictment is amended by leave.

(iv) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

23 Rule 62 *ter* (B) RPE

a lack of any material disagreement between the parties about the facts of the case. If the Trial Chamber is satisfied that the factual basis supports the charges agreed upon, the inquiry ends. However, if it concludes that it needs additional evidence from the parties to augment the written factual basis, a Trial Chamber may order additional proceedings and, as in civil law jurisdictions, can request that the parties produce additional evidence or summon witnesses or may, *proprio motu,* do the same. Furthermore, if a Trial Chamber has questions about the terms of the plea agreement or wishes to make additional inquiries of the parties, it may request additional hearings if it deems it necessary or appropriate to do so.[24]

Finally, in relation to a specific recommended sentence or sentencing range agreed upon by the parties and contained in the plea agreement, the Trial Chamber is not bound by such agreements and has the discretion to impose a sentence below or above the sentence recommendations contained in the plea agreement.[25]

IV. The Benefits of Plea Bargaining

The work of investigating crimes in far off lands against political, military, police and paramilitary leaders, many of whom remain powerful figures in their countries and continue to exert considerable influence, directly or through their followers, is a daunting task that had been made more difficult by the Tribunal's structural infirmities: the lack of a police force, the lack of judicial powers to compel the production of evidence, and the absence of immediate and credible sanctions for recalcitrant States that fail to comply with their international legal obligations to cooperate with the Tribunal or that actively obstruct the work of the Tribunal. Many of the critics of the practice of plea bargaining minimise or tend to ignore the impact that these significant problems have had on everyday work of investigators and prosecutors at the Tribunal, obstacles that have enfeebled the Prosecutor's ability to secure the presence of fugitives[26] and to secure vital evidence necessary for prosecutions.[27]

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24 See *The Prosecutor v. Deronjić,* Case No. IT-02-61-S, Sentencing Judgment, 30 March 2004, paras. 35-39.

25 Rule 62 *ter* (B) RPE. See *The Prosecutor v. Erdemović* (Case No. IT-96-22-T*bis*), 5 March 1998, where the plea agreement recommended a sentence of 7 years and the Trial Chamber imposed a sentence of 5 years; *The Prosecutor v. Momir Nikolić* (Case No. IT-02-60/1-S) where the plea agreement recommended a sentencing range of 15-20 years and the Trial Chamber imposed a sentence of 27 years; and *The Prosecutor v. Dragan Nikolić* (Case No. IT-94-2-S), where the parties jointly recommended a sentence of 15 years and the Trial Chamber imposed a sentence of 23 years.

26 Radovan Karadzić, the former President of the Republika Srpska, and Ratko Mladić, the former Chief of the Main Staff of the Bosnian Serb Army. Both individuals were indicted by the Tribunal in 1995 and remain fugitives from international justice.

27 In the case of *The Prosecutor v. Blaškić* (Case No. IT-95-14-PT), the Prosecutor engaged in protracted legal efforts to obtain military documents from the Bosnian Croat and Croatian authorities and numerous production orders were issued by the Trial Chamber for documents relating to events in Bosnia and Herzegovina. Bosnian Croat and Croatian state authorities refused to produce the majority of the requested documents. Later it was revealed that these authorities conspired to and did conceal the requested documents by moving them from Bosnia and Herzegovina to secret locations in Croatia. Portions of these archives were subsequently made available to the Prosecutor's office following the death of Croatian President Franjo Tudjman.

As discussed below, the benefits of plea agreements and guilty pleas are numerous and significant. For investigators and prosecutors working in this demanding investigative environment, the process of securing plea agreements and guilty pleas has been critical in yielding concrete evidence beneficial to investigations and prosecutions. Furthermore, this process has also benefited the Tribunal by conserving judicial resources, combating historical revisionism, and contributing to the process of reconciliation.

A. Plea Bargaining Contributes to Obtaining Valuable Evidence

Convicting persons responsible for the serious crimes over which the Tribunal has jurisdiction can only succeed if credible evidence, admissible in a court of law, is at the disposal of the Prosecutor. At the end of the day, no matter how much public sentiment is aroused against an accused, prosecutions fail without evidence. In the closed world of organised crime, and I include in that milieu crimes that are associated with systematic ethnic cleansing and genocide that were committed in the former Yugoslavia, various factors have contributed to the OTP's inability to not being able to obtain the co-operation of those most knowledgeable about the authors of crimes, particularly those at the pinnacle of political and military power. These factors include ethnic solidarity (you are a traitor if you speak against your people), actual threats and intimidation, fear of retribution if it becomes known that one co-operated with the OTP, and unstable and underdeveloped civil and police structures in the former Yugoslavia that would normally afford protection for witnesses.

It is axiomatic that the authors of the most serious crimes committed in the former Yugoslavia did not have saints as confidants. When the perpetrators of crimes or their confidants are in custody, a prosecutor faces a dilemma – either attempt to acquire evidence from those most knowledgeable about the crimes by negotiating with them or do nothing to secure their evidence.

Fortunately, the drafters of the RPE wisely included Rule 101, which identifies factors that the Trial Chamber shall take into account in determining a proper sentence to impose on a convicted person. Subpart (B)(ii) of the Rule reads: "any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction." This is the only element of mitigation expressly identified in the RPE and, to an accused person, it represents a critical waypoint where the Prosecutor's interest and the self-interest of an accused intersect. As such, this rule affords a powerful inducement to an accused person to break the barrier of silence and come forward and assist the Prosecutor.

Making concessions to accused persons in the custody of the Tribunal, through plea negotiations, has yielded critical evidence about ongoing investigations and prosecutions. To illustrate this point succinctly I refer to two cases, *The Prosecutor v. Erdemović* and *The Prosecutor v. Deronjić.*

i. The Prosecutor v. Erdemović

Following the Bosnian Serb takeover of the UN "Safe Area" of Srebrenica in July 1995, members of the Bosnian Serb army massacred thousands of defenceless Bosnian Muslim men and boys in what is now recognised as the largest set of massacres in

Europe since the end of World War II, massacres that have been legally characterised as genocide by the Tribunal.[28]

In July of 1995, the OTP opened an investigation into the Srebrenica crimes. We were aware of reports that thousands of Bosnian Muslim men had disappeared and presumably had been killed, but the details about how, where, and by whom they had been killed were unknown to the OTP. Severely complicating the investigation was the fact that investigators did not have access to the terrain where the massacres had occurred as it was controlled by the Bosnian Serb authorities who asserted that such allegations were the result of "violent Muslim propaganda."[29]

On 30 March 1996, Erdemović came into the custody of the Tribunal and was indicted shortly thereafter for his role in one of the principal Srebrenica massacres. During his detention, he was cooperative with OTP investigators and provided them with invaluable details that advanced significantly the investigation into the Srebrenica crimes. On 31 May 1996, at his initial appearance, he pleaded guilty to one count of a crime against humanity.[30]

At the sentencing hearing following Erdemović's first guilty plea the prosecution identified the nature of his substantial cooperation that had significantly advanced the Srebrenica investigation.[31] It included his providing details about the summary execution of a Bosnian Muslim civilian in Srebrenica on 11 July 1995; providing information about the locations of two massacre sites where a total of 1700 Bosnian Muslims were summarily executed on 16 July 1995,[32] neither of which were known at that stage of the investigation; providing the identities of individual perpetrators who were responsible for these crimes; providing invaluable information about the structure of the Drina Corps (the Corps of the Bosnian Serb Army in whose area of operation the crimes were committed); publicly testifying in proceedings held at the Tribunal against Radovan Karadzic and Ratko Mladić;[33] and publicly refuting, through his evidence, the concerted efforts of the Bosnian Serb authorities to characterise the claims of large-scale massacres at Srebrenica as "Muslim propaganda."

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28 See *The Prosecutor v. Krstić* (Case No. IT-98-33-T) and *The Prosecutor v. Blagojević and Jokić* (Case No. IT-02-60-T).

29 Jovan Zamatica, advisor to Radovan Karadzić, quoted on Banja Luka Srpska Televizija, 1830 GMT 17 July 1995.

30 *The Prosecutor v. Erdemović,* Case No. IT-96-22-T. The original indictment contained two counts: a crime against humanity and an alternative count, a violation of the laws or customs of war.

31 The Srebrenica investigation has resulted in the indictment of 19 individuals, 6 of whom have been convicted. The remaining individuals are either in trial, awaiting trial, or are fugitives from international justice.

32 Erdemović provided information about a massacre that occurred at the Branjevo Military Farm where approximately 1200 Bosnian Muslims were summarily executed, and about a massacre that occurred at the Pilica Dom on the same day where 500 Bosnian Muslims were executed.

33 The hearings were conducted between 27 June 1996 and 5 July 1996 pursuant to Rule 61 of the RPE and resulted in international arrest warrants being issued for Radovan Karadzić and Ratko Mladić.

ii. The Prosecutor v. Deronjić

In the *Deronjić* case, Miroslav Deronjić, a high ranking Bosnian Serb municipal leader and close confidant of Radovan Karadzić, entered a plea of guilty to a charge of persecutions as a crime against humanity for his role in the May 1992 attack on the Muslim village of Glogova, in which all the Muslim villagers were forcibly expelled from their village, the village was razed to the ground, and at least 68 villagers perished. His guilty plea was the result of a plea agreement in which the Prosecutor recommended a sentence of 10 years imprisonment based on his substantial cooperation with the OTP.

At Deronjić's sentencing hearing, the Prosecutor asserted that Deronjić had provided substantial assistance within the meaning of Rule 101(B)(ii) and identified the nature of that assistance: Deronjić provided information about the organisation of the Bosnian Serb leadership in 1991-1992; he authenticated a significant and highly disputed Bosnian Serb document and testified about its dissemination to Bosnian Serb municipal leaders; he provided significant evidence about the supply of arms to the Bosnian Serbs by the Socialist Republic of Yugoslavia; he provided detailed information about the Bosnian Serb take-over of the municipality of Bratunac and the subsequent ethnic cleansing of that municipality, including the village of Glogova, as well as the identities of those responsible for this conduct; he provided detailed information about the co-ordination between local and paramilitary units and the Yugoslav National Army (JNA); he provided information about the presence of Yugoslav Army (JA) units in Bosnia in 1993;[34] he provided detailed information about the events relating to the Bosnian Serb take-over of Srebrenica and the subsequent massacres, including the identities of some of the perpetrators; he acknowledged that massacres had occurred at Srebrenica at a time when the Bosnian Serb authorities, a decade after the massacres, continued to insist that no such thing had occurred; he testified as a Prosecution witness in three trials[35] and as an Appeals Chamber witness in one appeal hearing;[36] he provided the OTP with valuable original documents that were subsequently used as evidence in other prosecutions; he provided the OTP with information about a crime committed in the Bratunac municipality that was unknown to OTP investigators; and he identified numerous perpetrators of crimes whose identities were unknown to the OTP.

As illustrated by the Erdemović and Deronjić cases, the acceptance by the Tribunal of the practice of negotiating settlements of cases and the promulgation of a procedural rule that encourages accused persons to co-operate with the Prosecutor has created an environment that is conducive to the Prosecutor being able to obtain valuable evidence that, in many circumstances, would otherwise be unavailable.

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34 The official position of the Federal Republic of Yugoslavia authorities was that the JA was not in Bosnia in 1993.

35 *Prosecutor v. Slobodan Milošević* (Case No. IT-02-54-T)*; Prosecutor v. Momir Nikolić* (Case No. IT-02-60/1-S)*; Prosecutor v Blagojević and Jokić* (Case No. IT-02-60-T). In addition, at the time of his sentencing hearing, he had been identified as a witness scheduled to testify in the case of *Prosecutor v. Krajišnik.* He subsequently provided testimony in that case.

36 *The Prosecutor v. Krstić* (Case No. IT-98-33-A).

B. Plea Agreements Conserve Judicial Resources

In civil law and common law jurisdictions, the trial of every criminal case to a verdict would result in the collapse of the criminal adjudicative system absent substantial additional resources in the form of more judges, more prosecutors, more courtrooms, more administrative staff and the like. This is no less true at the Tribunal where there are only three courtrooms, a single Appeals Chamber, sixteen permanent judges,[37] and 13 Senior Prosecutors.[38]

Trial proceedings at the Tribunal are more time consuming than most cases heard in domestic jurisdictions. The nature of the cases litigated before the ICTY was described to the United Nations General Assembly by President Theodor Meron:

> The types of cases on the Tribunal's docket are necessarily large and complex, and our proceedings necessarily lengthy and costly. Often the crimes charged, connected to entire military campaigns, occurred over the course of months or years, across many locations, and involved several defendants. With many counts of indictment, tens or hundreds of witness, thousands of pages of documents – most of which must be translated from Serbo-Croatian into English and French, the Tribunal's working languages – these trials are extremely complex.[39]

Besides the factual complexities of the cases, the legal elements of certain crimes contribute to the length of trials. Elements contained in Articles 2 and 5 of the Statute illustrate the problem. Amongst the elements that must be proved to establish a violation under Article 2 of the Statute, grave breaches of the Geneva Conventions of 1949, is that the offence must have occurred within the context of an international conflict. This requires that the Prosecutor establish beyond a reasonable doubt that a State intervened through its troops in the internal armed conflict on the territory of another State, or alternatively establish that some of the participants in the internal armed conflict acted on behalf of that other State.[40] Proving this element of Article 2 violations, which generally bears no relation to the acts of the accused, has resulted in what amounts to a "trial within a trial" as governments such as Croatia and the Federal Republic of Yugoslavia persistently and vehemently denied that their forces had intervened in the armed conflict in Bosnia and Herzegovina.

Under Article 5 of the Statute, crimes against humanity, the Prosecutor must prove the existence of a widespread or systematic attack directed against a civilian population. The crimes that were committed against the civilian population in the former Yugoslavia occurred over a vast geographic area and to reflect this, indictments typically contain lengthy schedules identifying the separate killing incidents,

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37 In addition, there are eight *ad litem* judges. See Articles 13 *ter* and 13 *quater* that regulate the status *ad litem* judges.

38 Supporting the Senior Prosecutor are 36 trial lawyers.

39 Address of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations General Assembly 15 November 2004. ICTY Press Release of 17 November 2004, JP/P.I.S/912-e.

40 *The Prosecutor v. Tadić,* Case No. IT-94-1, Appeals Chamber, Judgment, 15 July 1999, para. 84.

the detention facilities where killings and physical abuses occurred, and the locations where cultural monuments and sacred sites were destroyed.[41] To establish this single element of an Article 5 violation, a significant number of the incidents listed in the schedules must be proved.

The consequence of these factual and legal complexities is that trials are quite long. For example, as of the date of writing this article, trial proceedings in the case of the *Prosecutor v. Slobodan Milosević* are entering their fourth year; the trial of the *Prosecutor v. Blaškić* lasted 25 months; and the trial of the *Prosecutor v. Kordić and Čerkez* lasted 18 months. Much work remains. As of 27 July 2005, there were 44 accused in the pre-trial stage and 8 accused currently in trial.[42]

Directly related to the issue of lengthy trials is a problem too often ignored by the critics of plea agreements – the problem of victim/witness fatigue.[43] Plea agreements and guilty pleas ameliorate this critical problem, limiting the demands placed on witnesses to return repeatedly to the Tribunal to provide the same evidence about the same events. To illustrate the point, I refer to five separate cases relating to the attack on the village of Ahmići in Central Bosnia.[44] Tihomir Blaskić, the military commander of Bosnian Croat forces, Dario Kordić, the paramount political figure in the region, and Mario Čerkez, a Bosnian Croat brigade commander, were all charged in the same indictment for identical crimes, including the notorious killings that occurred in the village of Ahmići in April 1993. A separate indictment against five other defendants, Kupreskić *et al*., charged those accused with similar crimes related to the attack on Ahmići. Because the Tribunal had no control over the timing of when these accused were arrested, co-defendants in the same indictments were arrested of surrendered at different times. Blaskić was the first to arrive and he was tried alone. His trial commenced on 24 June 1997 and ended on 30 July 1999. While the Blaskić trial was in progress, Kordić and Čerkez surrendered together to the Tribunal. Their trial started 12 April 1999 and concluded on 15 December 2000. The trial of Kupreskić *et al.* started on 17 August 1998 and was completed on 10

41 For example, the indictment in *The Prosecutor v. Krajišnik* (Case No. IT-00-39) contains four schedules: Schedule A listing 59 separate incidents of killings that occurred in 18 different municipalities; Schedule B listing 38 separate incidents of killings that occurred in detention facilities in 21 different municipalities; Schedule C listing 399 detention facilities located in 34 separate municipalities; and Schedule D listing the names and the locations of 120 cultural and sacred sites that were damaged or destroyed in 29 different municipalities.

42 Fact Sheet on ICTY Proceedings. http://www.un.org/icty/cases-e/factsheets/profact-e.htm.

43 Witnesses who come to the Tribunal to testify are unlike witnesses in trials in domestic jurisdictions who testify in their own communities and are able to return to their homes and their families at the end of each day. Witnesses at the Tribunal typically travel from the former Yugoslavia to The Hague where they remain in a foreign environment. While many witnesses express anxiety about traveling abroad and testifying, it is not infrequent that witnesses who have testified at the Tribunal express reluctance to return on repeated occasions to testify and indeed some witnesses have refused to return to give their evidence. The seriousness of this problem cannot be overstated.

44 Ahmići was a Muslim village that was extirpated by Bosnian Croat forces in a surprise attack that occurred on 16 April 1993. During this attack, in excess of 100 civilians (men, women and children) were murdered, both mosques destroyed, Muslim homes set afire, and every Muslim occupant of the village forcibly expelled.

November 1999. Three separate trials were required to hear many of the same witnesses and much of the same evidence. And yet the tale does not end there.

Following the conclusion of the three trials described above, two other defendants surrendered, at different times, on charges related to the attacks in Central Bosnia: Pasko Ljubićić and Miroslav Bralo. Ljubićić and Bralo both engaged in plea negotiations with the OTP. On 19 July 2005, Bralo, pursuant to a plea agreement, entered a guilty plea to crimes that included his role in the Ahmići attack, thereby conserving precious judicial resources and saving many witnesses from having to make a fourth appearance before the Tribunal. In the Ljubicić case, the Prosecutor has applied to have the case transferred to Bosnia and Herzegovina[45] and, if the application is granted, the victims and witnesses in that case will be required to reappear before the State Court and testify about events that have been the subject of their earlier testimonies before the Tribunal.[46]

The Tribunal has grappled with the problem of making trials more efficient while at the same time preserving the fairness of the proceedings. These efforts, manifested through the promulgation of new evidentiary rules that have streamlined the manner in which evidence can be presented to the Trial Chambers, have helped to shorten the length of trial proceedings.[47]

The need to shorten the length of trials is made more imperative because the Tribunal is an *ad hoc* institution, limited in duration, yet it must complete its work in an orderly and satisfactory fashion. To this end, the Tribunal has announced a "completion strategy" that anticipates that the trials of all accused currently within the custody of the Tribunal will conclude by the end of 2009,[48] and has established procedural rules that permit the Tribunal to refer low and mid-level accused back to the former Yugoslavia for trial.[49] Notwithstanding these efforts, concluding the Tribunal's ambitious agenda remains akin to trying to fit an elephant through a keyhole.

It is evident that plea agreements and guilty pleas have played a vital role in the Tribunal being able to efficiently manage its scarce resources by obviating the need for lengthy trials. To date, there have been 19 guilty pleas,[50] 18 of which were pursuant

45 Rule 11 *bis* RPE.

46 In the Ljubičić case, the Prosecutor has filed a motion pursuant to Rule 11 *bis* of the RPE to have his case referred to Bosnia and Herzegovina for trial in the War Crimes Chamber of the State Court. If the motion is not granted, Ljubičić will be tried before the Tribunal. Whether the motion is granted or denied, what is certain is that absent a guilty plea, witnesses who have testified on numerous occasions will be required once again to testify.

47 See Rules 89(f), 92 *bis*, and 94 RPE.

48 See *Statement by Judge Theodor Meron, President, International Criminal Tribunal for the former Yugoslavia, to the Security Council 13 June 2005*, ICTY Press Release, TM/MOW/976e. This strategy does not take into account the lengthy and complex trials related to the Tribunal's most notorious fugitives, Radovan Karadzić, Ratko Mladić, and Ante Gotovina.

49 Rule11 *bis* RPE

50 The jurisprudence of the Tribunal recognizes that an accused person's early guilty plea – before the commencement of trial – is a mitigating factor for sentencing purposes because "one, it obviates the need for victims to give evidence and saves considerable time and resource (*sic*) of this *ad hoc* Tribunal; two, it is important in establishing the truth

to plea agreements.[51] Had these cases required complete trials, it is fair to say that the Tribunal's work would have been extended for years and the human toll on victims and witnesses needlessly exacerbated.

C. Plea Bargaining Creates a Clear Historical Record and Combats Revisionism

Joseph Goebbels' chilling maxim that "the bigger the lie, the more often it's told, the more who believe it" continues to flourish in the former Yugoslavia where elements of that society persistently are engaged in attempting to distort the historical truth about massive crimes that occurred in the region.

To understand how plea bargaining contributes to establishing a clear record of historical events, let us return to the case of Srebrenica, a case that has been litigated extensively at the ICTY. Despite the exhaustive evidentiary record created by two trials[52] and three guilty pleas[53] a troubling legacy of the Srebrenica tragedy is the culture of denial that persists in the Republika Srpska to this day. Its seeds were planted by the perpetrators of these crimes and by their acolytes and have been cultivated for over a decade. For example, on 17 July 1995, while these massacres were taking place, Jovan Zametica, advisor to Radovan Karadzić, was quoted in a press release as saying. "In the past several days, the international media, aided by the Muslim authorities, have been using violent propaganda, unrealistically reporting on the events related to the situation in Srebrenica. The accusations concerning alleged torture, killing, rape, and deportation of Muslim civilians are being repeated without any independent verification. The truth is that none of these accusations has a firm basis ... the truth is that nothing like the above-mentioned happened."[54]

Approximately 4 months later, Radovan Karadzic was asked about the Srebrenica massacres and he stated, "Nothing happened."[55]

In September 2002, seven years after the massacres occurred, a draft report prepared by the "Documentation Centre of Republika Srpska Bureau of Government

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about what happened; and three, it is a fundamental step in contributing to reconciliation." *The Prosecutor v. Deronjic,* Case No. IT-02-61-S, Sentencing Judgment, 30 March 2004, paragraph 227.

51 *The Prosecutor v. Erdemović* (Case No. IT-96-22); *The Prosecutor v. Todorović* (Case No. IT-95-99/1); *The Prosecutor v. Kolundžija* (Case No. IT-95-8); *The Prosecutor v. Dosen* (Case No. IT-95-8); *The Prosecutor v. Sikirica* (Case No. IT-95-8); *The Prosecutor v. Simić* (Case No. IT-95-9/2); *The Prosecutor v. Plavsić* (Case No. IT-00-39&40); *The Prosecutor v. Momir Nikolić* (Case No. IT-02-60/1); *The Prosecutor v. Obrenović* (Case No. IT-02-60/2); *The Prosecutor v. Banović* (Case No. IT-02-65); *The Prosecutor v. Mrda* (Case No. IT-02-59); *The Prosecutor v. Jokić* (Case No. IT-01-42); *The Prosecutor v. Dragan Nikolić* (Case No. IT-94-02); *The Prosecutor v. Deronjić* (Case No. IT-02-61); *The Prosecutor v. Cesić* (Case No. IT-95-10/1); *The Prosecutor v. Babić* (Case No. IT-03-72); *The Prosecutor v. Bralo* (Case No. IT-95-17); and *The Prosecutor v. Rajić* (Case No. IT-95-12).

52 *The Prosecutor v. Krstić* (Case No. IT-98-33-T) and *The Prosecutor v. Blagojević and Jokić* (Case No. IT-02-60-T).

53 *The Prosecutor v. Erdemović*, Case No. IT-96-22-T*bis*; *The Prosecutor v. Momir Nikolić* (Case No. IT-02-60/1-S); and *The Prosecutor v. Obrenović,* Case No. IT-02-60/2-T.

54 Press release, Banja Luka Serb Television, 1830 GMT 17 July 1995.

55 Belgrade SRNA, 5 November 1995.

of RS for relation (*sic*) with ICTY" published its *Report About Case Srebrenica (the first part*). The report purported to be the result of a serious investigation conducted over a period of several years and its stated goal was to "present the whole truth about crimes committed in Srebrenica ..." Amongst the assertions contained in the report was that "... the number of Muslim soldiers who were executed by Bosnian Serb forces for personal revenge or for simple ignorance of international law ... would probably stand less than 100."[56]

In March 2005, a member of the Srebrenica Municipal Assembly was quoted in the *Guardian* newspaper: "The massacre is a lie; it is propaganda in order to make a bad picture of the Serbian people. The Muslims are lying, they are manipulating the numbers, they are exaggerating what happened."[57]

Do these pernicious falsehoods have an impact on public opinion, particularly in the former Yugoslavia? According to recent polling information from Belgrade, close to 50 percent of the persons in Serbia who had heard of the Republika Srpska Government report on crimes in Srebrenica, cited above, believed that it reflected what actually had happened.[58]

The important role of the Tribunal in establishing the facts relating to crimes that occurred in the former Yugoslavia was clearly articulated in case of the *Prosecutor v. Erdemović:*

> The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetuated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.[59]

Does the evidence adduced at trials and do guilty pleas of perpetrators obtained through plea agreements contribute to the process of establishing the truth about crimes committed in the former Yugoslavia?[60] Are they a means by which to inocu-

56 As a result of outrage expressed by members of the international community following the release of the draft report, it was repudiated by the Bosnian Serb government on 12 June 2004 in a second Srebrenica report. The very existence of the draft report, however, illustrates a strong revisionist tendency remains within elements of Bosnian Serb society. See also the addendum to the second report dated 15 October 2004.

57 Ed Vulliamy quoting Milos Milovanović from Srebrenica in his articles *Srebrenica: Ten Years On* and *After the Massacre, a Homecoming* published in the *Guardian* newspaper in 2005.

58 See *Public Opinion in Serbia, Attitudes to National Courts Trying War Crimes and to ICTY*, Belgrade Centre for Human Rights (April 2005). In addition to distorting the historical record, perpetuating falsehoods about the war fosters an environment where it is acceptable to shelter fugitives from international justice and where it is acceptable for potential witnesses, who have relevant information about these crimes, to remain silent and to abdicate their moral responsibility to bear witness.

59 *The Prosecutor v. Erdemović*, Case No. IT-96-22-T*bis*, Sentencing Judgment, 5 March 1998, page 21.

60 The tension between the purpose of a criminal trial to establish legal justice and to serve a

late the public against the bacillus of revisionism? Most certainly they are. In the trials of *The Prosecutor v. Krstić* and *The Prosecutor v. Blagojević and Jokić*, trials that lasted a total of 248 trial days, two separate Trial Chambers heard the evidence of 259 witnesses and received 2338 exhibits. Both trials resulted in guilty verdicts as to each defendant and confirmed that approximately 7,500 Bosnian Muslim men and boys had been massacred in July 1995 by members of Bosnian Serb forces. In addition, the Prosecutor secured guilty pleas through plea agreements from three members of the Bosnian Serb army – Dražen Erdemović, Major Dragan Obrenovic, and Captain Momir Nikolic. Their guilty pleas, their detailed descriptions of the crimes, and their public acknowledgements of their roles in them are matters of public record that, together with the considerable body of evidence developed in the *Krstić* and *Blagojević and Jokić* trials, leave no room for doubt that these crimes occurred.

Finally, Miroslav Deronjić, who pleaded guilty to crimes that occurred in May 1992, also provided substantial assistance to the OTP in respect of the Srebrenica crimes and in exposing deception in important Srebrenica-related documentation. The Trial Chamber credited him for his important assistance in preventing revisionism and "attributes significant weight to this factor in mitigating Miroslav Deronjić's sentence."[61] In its final judgement, the Trial Chamber stated:

> The Trial Chamber agrees that the Accused's and others' acknowledgement of these crimes serves two purposes: it establishes the truth and it undercuts the ability of future revisionists to distort historically what happened.[62]

When examining the meticulous and extensive record establishing the historical facts relating to the massacres of Bosnian Muslim civilians and the forcible expulsion of them from the Srebrenica enclave, the Tribunal's role in establishing the truth, in part through the process of negotiating guilty pleas, has been critical and has left no cover behind which Srebrenica deniers can credibly hide.

D. Plea Agreements and Guilty Pleas Promote Reconciliation

Three months after the adoption of the resolution establishing the ICTY, the U.S. representative to the United Nations, Madeline Albright, emphasised the importance of establishing the truth in the Yugoslav conflict in a speech before the Security Council in which she said, "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."[63]

Criminal trials establish the legal truth. Guilty pleas do the same. However, one demonstrable difference between case resolution through the trial process, where

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larger didactic purpose is thoughtfully addressed in *The Memory of Judgment, Making Law and History in the Trials of the Holocaust* by Lawrence Douglas, Yale University Press (2001).

61 See *The Prosecutor v. Deronjić,* Case No. IT-02-61-S, Sentencing Judgment, 30 March 2004, para. 260.

62 *Id*. at para. 260.

63 S/PV.3217, page 12.

generally crimes are denied or the responsibility of the accused in them is denied, and through the plea agreement/guilty plea process is that in the latter process, accused persons acknowledge that crimes occurred, admit their criminal responsibility for those crimes, and are more inclined to express remorse for their conduct.[64]

During the sentencing hearing of Biljana Plavsić,[65] Alex Boraine, former Co-Chair of the South African Truth and Reconciliation Commission, testified about the relationship between the acceptance of responsibility and the process of reconciliation in societies that have been riven by conflict:

> Systems of criminal justice exist not simply to determine guilt or innocence, but also to contribute to a safe and peaceful society. And therefore, these systems are absolutely critical in the process of reconciliation. They are not at odds. They are not a contradiction. In my experience, accepting responsibility for terrible crimes can have a transformative and traumatic impact on the perpetrator, but also on the victims and the wider community. Such acceptance, whether by a guilty plea in a criminal case or in some other forum, can, I believe, be a significant factor in promoting reconciliation and creating what I would call space for new attitudes and new behaviour. It has that potential. I'm not saying it's always realised.
> Genuine reconciliation, in my view, in the former Yugoslavia will remain illusive until responsibility is accepted by those who through defiant declarations or silent indifference explicitly or implicitly endorse these atrocities.

In respect of the crimes committed following the fall of Srebrenica, I have discussed the culture of denial that persists in the Bosnian Serb community. Following the first public acknowledgement by a perpetrator, Dražen Erdemović, that horrific crimes had occurred following the fall of Srebrenica, Srebrenica-deniers went to considerable length to discredit him and his evidence. For example, in the draft report of the Republika Srpska discussed earlier, *Report About Case Srebrenica (the first part*), the authors characterised Erdemović as "mentally sick" and implied that he had relations with the intelligence services of Croatia and France.

The efforts of Srebrenica-deniers were dealt a mortal blow in 2003 with the

64 When determining the appropriate sentence to impose, a Trial Chamber may consider a convicted person's remorse as a mitigating factor. See *The Prosecutor v. Erdemović* Case No.IT-96-22-T*bis,* Sentencing Judgment, 5 March 1998, par. 16(iii); *The Prosecutor v. Todorović,* Case No. IT-95-9/1, Sentencing Judgment, 21 July 2001, paras. 89-92; and *The Prosecutor v. Sikirica et al.,* Case No. IT-95-8-S, Sentencing Judgment, 13 November 2001, paras. 152, 194, 230;

65 Pursuant to a plea agreement, Biljana Plavsić, the 72 year old former co-President of the Republika Srpska, entered a guilty plea to a charge of a crime against humanity. Given that she was the first and only significant Bosnian Serb leader to acknowledge her government's policy of ethnic separation by force, and to plead guilty, and given her moving expression of remorse that was made during her sentencing hearing, the disposition of her case was considered quite significant. While the Prosecutor recommended a term of imprisonment of 15-25 years be imposed for the crime to which she pleaded guilty, the Trial Chamber sentenced her to 11 years in prison, thereby inviting considerable criticism. That criticism was further exacerbated by statements made by her and widely reported in newspapers that called into question the sincerity of her expressions of "remorse." *The Prosecutor v. Plavsić*, Case No. IT-00-39&40/1-S, Sentencing Judgment, 27 February 2003.

guilty pleas and public expressions of remorse by two respected Bosnian Serb officers who participated in the Srebrenica crimes, Major Dragan Obrenović and Captain Momir Nikolić.[66] In his address to the Trial Chamber at the sentencing hearing, Nikolić stated:

> I sincerely wish before this Chamber and before the public, especially the Bosniak[67] public, to express my deep and sincere remorse and regret because of the crime that occurred and to apologise to the victims, their families, and the Bosniak people for my participation in this crime. I am aware that I cannot bring back the dead, that I cannot mitigate the pain of the families by my confession, but I wish to contribute to the full truth being established about Srebrenica and the victims there and for the government organs of Republika Srpska, and all the individuals who took part in these crimes should follow in my footsteps and admit to their participation and their guilt, that they should give themselves in and be held responsible for what they have done.
>
> By my guilty plea, I wanted to help the Tribunal and the Prosecutors to arrive at the complete and full truth and the victims, their brothers, mothers should – I wanted to avoid their being subjected to additional suffering and not to remind them of this terrible tragedy. Your Honours, I feel that my confession is an important step to war rebuilding of confidence and coexistence in Bosnia and Herzegovina and after my guilty plea and sentencing, and after I have served my sentence, it is my wish to go back to my native town of Bratunac and to live there with all other peoples in harmony, such as prevailed before the outbreak of the war.[68]

On 12 June 2004, thirteen months after the guilty pleas of Nikolić and Obrenović, the Bosnian Serb government, released the official Srebrenica report and in it, for the first time, publicly acknowledged that, "In July 1995, several thousand Muslims at Srebrenica were liquidated in a way that represents grave violations of international humanitarian law."[69] Thereafter the Bosnian Serb government formally apologised for the crimes committed at Srebrenica: "The Government of the Republika Srpska commiserates with the pain of the relatives of the perished people of Srebrenica and truly regrets and apologises for the tragedy they experienced."[70]

Srebrenica is a difficult truth for humanity to face, particularly so in the Republika Srpska. The Tribunal's unremitting efforts to prosecute the perpetrators crimes in the former Yugoslavia, through trials and through the process of negotiated justice, have forced unassailable truths from the crepuscular culture of denial

66 Nikolić pleaded guilty on 7 May 2003, *The Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-S; Obrenović pleaded guilty on 21 May 2003, *The Prosecutor v. Obrenović,*Case No. IT-02-60/2-T.

67 Bosniak is a term used to describe Bosnian Muslims.

68 *The Prosecutor v. Momir Nikolić* (Case No. IT-02-60/1-S), Sentencing Judgment, para. 158, 2 December 2003.

69 *The Events In and Around Srebrenica Between 10th and 19th July 1995,* Republika Srpska Government (The Commission For Investigation of the Events In and Around Srebrenica Between 10th and 19th July 1995), Banja Luka, 11 June 2004, page 41.

70 Conclusion 02/1-020-1301/04 of the Government of Republika Srpska, 28 October 2004.

that stubbornly remains in parts of the society of the former Yugoslavia and have contributed to the process of healing and reconciliation in the region.

V. Conclusion

After creating the first tribunal since Nuremberg, those responsible for drafting the practical rules that regulated its everyday business rejected plea bargaining and plea agreements as incompatible with international justice. Had this position remained immutable throughout the Tribunal's existence, the means of obtaining evidence from accused persons uniquely knowledgeable about crimes and the authors of crimes would have been significantly diminished. Moreover, the Tribunal's limited resources needlessly would have been expended in lengthy trial and unnecessary trial proceedings.

Fortunately the Tribunal, which prides itself as being a hybrid system combining common and civil law features, demonstrated its flexibility and wisely incorporated the common law practice of plea bargaining into its justice system while at the same time creating complementary incentives in the form of procedural rules and judicial decisions for an accused person to co-operate with the Prosecutor and to plead guilty. This common sense approach to case resolution, and the authority of the Tribunal's judges to regulate the practice, has benefited the Tribunal and has been a positive development in the development of international criminal law.

Chapter 9

Provisional Release in the Law of the International Criminal Tribunal for the Former Yugoslavia*

Fergal Gaynor

I. Introduction

Few of us would wish to encounter at the local bookshop a person accused of mass murder, perusing the shelves, freed on provisional release while he waits for his trial to begin. But most of us would express unease at the concept of a person, presumed innocent, detained in a prison block for several years before his trial, and for several more until the trial concludes. It is clearly no easy task to decide an application by a person accused of committing atrocities to be provisionally released. That task is no easier when a prominent accused asks to be released to the very region where the crimes were allegedly committed, and where dozens of surviving victims, traumatised and vulnerable, continue to reside. Worse still, that region may be in a State which has shown itself to be hostile to the court ordering the release, and unwilling to arrest other persons indicted by that court for abominable crimes.

This article examines the law and practice concerning provisional release at the international tribunal with the most jurisprudence to date on the issue: the International Criminal Tribunal for the former Yugoslavia (hereinafter "the Tribunal" or "ICTY"). That jurisprudence initially implicitly recognised a presumption against provisional release, but now appears to recognise a presumptive right to pre-trial release where the accused has genuinely voluntarily surrendered, the period of pre-trial detention is likely to be long, there is a satisfactory guarantee from a reasonably co-operative State, the risk of flight is low and there is no clear danger of interference with witnesses or evidence.

II. The Early Years: A Presumption against Provisional Release

In the early years of the Tribunal's existence, "it is certainly accurate to say that there was a presumption against provisional release."[1] There are a number of reasons for this. The number of accused transferred to the Tribunal was very low, so there was no major backlog of defendants in detention awaiting trial. It was recognised that the Tribunal was dealing exclusively with a specialised pool of participants in very seri-

* The views expressed herein are solely those of the author and do not necessarily reflect those of the Office of the Prosecutor or those of the United Nations.

1 Wolfgang Schomburg and Nina H. B. Jørgensen: Review of "*Towards an International Criminal Procedure*" Eur J Int Law, Feb 2003; 14: 205 – 207 at 207.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 183–207.

ous crimes, so domestic laws and international norms directed to a broader group of offenders, suggesting the existence of a presumptive right to pre-trial release, were considered to be of limited utility. The Dutch government was not generally supportive of the concept of releasing accused awaiting trial to the region of The Hague.[2] There was a reluctance within the Tribunal to release those few accused who were in the Tribunal's custody (several of whom had been arrested by international forces in operations which had carried a high risk of death to the forces involved[3]) to the unco-operative and politically unstable States of the former Yugoslavia. While on release to those States, the Tribunal has no police force of its own to monitor their movements, nor to secure their re-arrest if they should escape. It was considered that "the risk of non-appearance when an accused is released to a distant country whose co-operation is essential to his return poses a greater threat to the integrity of the Tribunal's processes than is normal in domestic courts."[4]

The test set out in the Tribunal's Rules of Procedure and Evidence for ordering provisional release was therefore stern, and included a requirement that the accused demonstrate the existence of "exceptional circumstances" warranting release. As a result, "[i]n case after case, the various trial chambers adhered unrelentingly to the presumption against release and in favour of detention."[5]

But then things began to change. For several reasons,[6] the "exceptional circumstances" requirement was dropped in 1999. The Tutman regime in Croatia came to an

2 *See* Patricia Wald and Jenny Martinez "Provisional Release at the ICTY: A Work in Progress", in *Essays on ICTY Procedure and Evidence 231* (R. May and others, eds. 2001), (hereinafter "Wald and Martinez"), an article which cogently describes the early years of operation of the Tribunal's provisional release provisions, at pages 235-236.

3 On 10 July 1997, as part of the first SFOR arrests of ICTY accused, British SFOR troops attempted to arrest Simo Drljača. During the arrest attempt, Drljača opened fire on the troops, injuring one of the British SFOR soldiers. The soldiers returned fire, killing Drljača. On 9 January 1999, French SFOR troops established a road checkpoint in order to arrest Dragan Gagović. Gagović approached the checkpoint at high speed in a car and attempted to run over one of the French troops at the checkpoint. The soldiers opened fire in response, killing Gagović. On 13 October 2000, German SFOR troops attempted to arrest Janko Janjić, who detonated two grenades during the arrest attempt, killing himself. Four of the German soldiers were injured by grenade shrapnel.

4 Wald and Martinez, page 237.

5 Wald and Martinez, page 233.

6 Patricia Wald (who was then a judge at the Tribunal) and Jenny Martinez set out the factors influencing the decision to drop the "exceptional circumstances" requirement in late 1999 as follows: "[P]rompted in part by an investigation into the death of two defendants in the detention unit, the judges became increasingly concerned about the depressive effects of lengthy pre-trial detention without regular contact with the court. The Tribunal nevertheless rejected suggestions that the Rule be amended to adopt the ECHR approach in full, with a presumption in favour of release and automatic review of detention every 90 days. Instead, in mid-1999, it adopted a requirement of status conferences every 120 days at which the defendant would be present and asked about the conditions of his detention. In late November 1999, however, a groups of United National experts still concerned with the length of ICTY trial and pre-trial detention recommended that the Tribunal experiment with granting provisional release more liberally in cases where the defendant had voluntarily surrendered. As a result, in November 1999, Rule 65 (B) was amended to eliminate the requirement of "exceptional circumstances"". Wald and Martinez, page 233. Footnotes omitted.

end in December 1999, as did the Milošević regime in Serbia in October 2000, and the quality of co-operation with the Tribunal, particularly from Croatia and Serbia, but also from entities in Bosnia drawing support from Croatia and Serbia, began to improve. This had a number of results. First, the number of accused delivered to the Tribunal for trial, and consequently the number in pre-trial detention, considerably increased. Second, as the quality of co-operation improved, it became somewhat less likely that an accused provisionally released to the region would attempt to abscond while on release, and more likely that he would be rearrested if he did.

More defendants were granted provisional release until trial, such that by 2006 the figures suggested that the presumption against granting provisional release had disappeared.[7] To date, none of those provisionally released has absconded while on release, and breaches of the conditions of release are rare.[8] It remains to be seen, however, whether all of those granted release will in fact appear for their trials.

III. General Standards Concerning Provisional Release

The Statute of the Tribunal is silent on the issue of provisional release. It guarantees that measures shall be taken to ensure the protection of victims and witnesses.[9] It also provides that all accused shall "be tried without undue delay"[10] and that trials shall be "fair and expeditious".[11]

Article 9(3) of the ICCPR states that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial". Article 5(3) of the ECHR provides that "everyone arrested or detained ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial". It is notable that the guarantees set out the ICCPR and the ECHR are directed at *all* those arrested or detained, and were not conceived in reference to a tribunal dealing exclusively with those accused of very serious crimes.

7 In April 2006, of the 40 accused persons awaiting trial at the Tribunal, 17 were detained at the Tribunal's detention unit (within the grounds of a Dutch prison) and 23 others were on provisional release in various parts of the former Yugoslavia.

8 On 18 March 2006, three accused on provisional release (ex-Yugoslav deputy prime minister Nikola Šainović and two former chiefs of staff of the Yugoslav army, Dragoljub Ojdanić and Nebojsa Pavković) appeared at the funeral of Slobodan Milošević at Pozarevac outside Belgrade, in what appeared to be a breach of the terms of their provisional release that they remain within the confines of the city of Belgrade. Counsel for the accused later explained that they had been authorized by Serbian authorities to attend the funeral and had been accompanied by police at all times. See further the transcript of 31 March 2006, *Milutinović et al.* (IT-05-87-PT), pages 173-183.

9 ICTY Statute, Articles 15, 20 and 22 refer to the protection of victims and witnesses.

10 ICTY Statute, Article 21 (4)(c).

11 ICTY Statute, Article 20 (1).

IV. Rule 65 of the ICTY RPE

Provisional release is governed by Rule 65 of the Tribunal's Rules of Procedure and Evidence (RPE),[12] which provides that, once detained, an accused may not be released except upon an order of a Trial Chamber.[13] A Trial Chamber may order release only if is satisfied that (i) the accused will appear for trial if released, and (ii) will not pose a danger to any victim, witness or other person.[14] Where a Trial Chamber finds that one of these two conditions has not been met, it need not consider the other and must deny provisional release.[15] The Trial Chamber must also give the host country[16] and the State to which the accused seeks to be released the opportunity to be heard prior to granting release. The Appeals Chamber may grant provisional release to a convicted person pending an appeal or for a fixed period; the test to be applied is essentially the same as that for an accused person, but with the additional requirement that the convict must demonstrate that "special circumstances exist warranting such release".[17]

Only a chamber (and not a single Judge) can render a decision on an application for provisional release.[18] If released, the order for release will usually require the accused to remain within a fixed geographical area, not to discuss his case with anyone other than his counsel, and not to hold any official or governmental position while on release. Unlike the ICC Statute,[19] and the law in many domestic jurisdictions, there is no provision in the Tribunal's Statute or Rules for automatic review of

12 Rule 65 of the Rules of Procedure of Evidence of the ICTR is, in essence, identical to the ICTY provisions. The Special Court for Sierra Leone applies the RPE of the ICTR in its own proceedings.

13 Rule 65 (A) RPE ICTY and Rule 65 (A) ICTR RPE: "(A) Once detained, an accused may not be released except upon an order of a Chamber."

14 Applicants generally seek provisional release until the beginning of trial. However, some applicants have sought and have been granted short-term provisional release in order to attend the funeral or memorial service of a relative, or to receive medical attention.

15 Rule 65 (B) RPE ICTY: "Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."

16 The Netherlands is the host country for the ICTY and Tanzania is the host country for the ICTR. A decision to grant release must record whether the host country has been given the opportunity to be heard. In *Pavković*, the Trial Chamber's decision to grant provisional release did not indicate whether the Trial Chamber gave The Netherlands the opportunity to be heard. The Appeals Chamber held that this failure constituted an error of law. *Prosecutor v. Milutinović et al.* (IT-05-87), Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005, § 12.

17 Rule 65 (I) RPE ICTY.

18 *Prosecutor v. Rukundo* (ICTR-2001-70-AR65(D)), Decision on Appeal from the Decision of Trial Chamber III of 18 August 2003 Denying Application for Provisional Release, 8 March 2004.

19 ICC Statute Article 60 (3): "The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require."

the necessity to detain an accused who has been remanded in custody pending trial.

V. The Practical Application of Rule 65 of the ICTY RPE

An applicant for provisional release typically produces a guarantee from the State to which he wishes to be released, or, in the case of Kosovo, from UNMIK (the UN body which currently administers Kosovo). There is no requirement to produce a guarantee from any State, but it is certainly advisable to do so.[20] In the guarantee, the State (or UNMIK) typically undertakes to monitor the accused while he is on release and to rearrest him if he should attempt to escape. An applicant for provisional release also often files character references from others, as well as a signed personal guarantee, in which he undertakes to appear for trial and not to interfere with any potential witnesses or other persons while on release. These guarantees and assurances are discussed further later below.

VI. The Onus and Standard of Proof in Rule 65 Proceedings

The onus rests on the applicant to demonstrate that, if released, he will appear for trial and will not pose a danger to any victim, witness or other person.[21] The burden on the accused is a "substantial" one.[22] This does not mean that the standard of proof is one of "beyond reasonable doubt": rather, it is the "balance of probabilities".[23] In other words, the applicant must satisfy the Trial Chamber that it is more likely than not that he will appear for trial and will not pose a danger to others.[24] Judge Shahabuddeen has opined that this standard is too low, as it merely requires the accused to show that the odds are 51-49 that he will appear for trial and will not pose a danger to others.[25] Judge Shahabuddeen said that the correct standard is an intermediate one somewhere between "more likely than not" and "beyond reasonable doubt".

He opined that "the required test is represented by an obligation of an applicant for provisional release to produce substantial grounds to the Trial Chamber to make it believe that he would in fact appear for trial and, if released, would not pose

20 *Prosecutor v. Blagojević et al.* (IT-02-53-AR65), Decision on Application by Dragan Joki} for Leave to Appeal, 18 April 2002, §§ 7, 8.

21 See, for example, *Prosecutor v. Prlić et al*. (IT-04-74-AR65), Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, § 28.

22 *Prosecutor v. Brđanin and Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, IT-99-36PT, 25 July 2000, §18.

23 See *Prosecutor v. Prlić et al.* (IT-04-74-PT), 30 July 2004, Order on Provisional Release of Jadranko Prlić, § 14; *Prosecutor v. Mičo Stanišić* (IT-03-69-PT), "Decision on Provisional Release", 28 July 2005, § 14 & n.15.

24 *Prosecutor v. Milošević* (IT-02-54-T), Decision On Assigned Counsel Request For Provisional Release, 23 February 2006, § 18. See also *Prosecutor v. Šainović & Ojdanić* (IT-99-37-AR65), Separate Opinion of Judge Shahabuddeen, 30 October 2002, §§ 32 and 37.

25 *Prosecutor v. Šainović & Ojdanić* (IT-99-37-AR65), Separate Opinion of Judge Shahabuddeen, 30 October 2002, § 37.

a danger to any witness, victim or other person."[26] In a recent decision, the Appeals Chamber said that, under Rule 65 (B), "there must be a convincing showing that the Accused will appear for trial; and there must be a convincing showing that the Accused, if released, 'will note pose a danger to any victim witness or other person'";[27] no authority was cited for the expression "convincing showing", and there is nothing in the decision to suggest that this choice of words was intended to set a new standard of proof.

VIII. Whether the Accused Will Appear for Trial

In assessing whether the accused appear for trial, there are, in essence, two questions to consider. First, what is the likelihood that the accused will abscond while on release? Second, if he does flee, what is the likelihood that he will be rearrested and delivered back to the Tribunal?

A. Factors Relevant to Determining Flight Risk

i. Voluntary surrender

Perhaps the single most influential factor in a provisional release application is whether the accused has voluntarily surrendered to the Tribunal on learning of his indictment. An accused who has done do is in a much stronger position when seeking pre-trial release than one who has avoided transfer to the Tribunal for as long as possible.

But it is not always clear when a surrender is truly "voluntary". For example, Nikola Šainović and Dragoljub Ojdanić were publicly indicted in May 1999, and "surrendered" to the Tribunal nearly three years later, in April 2002. A question arose as to whether their surrender to the Tribunal was truly voluntary. The two accused argued that, prior to the adoption on 11 April 2002 in the Federal Republic of Yugoslavia (FRY) of a domestic law on co-operation with the Tribunal, it would not have been possible for them to surrender, but that, thereafter, it was. The prosecution submitted that the true interpretation of the facts was that the accused eventually surrendered only after it became clear that they would no longer find a reliable refuge in the FRY. It also pointed to public statements by both accused to the media prior to their "surrender" to the effect that they would not surrender voluntarily.

The Trial Chamber found that their surrender was indeed "voluntary", but the Appeals Chamber disagreed with this finding, and, for this and other reasons, quashed the order for release.[28] Other chambers have rejected similar arguments by Milan Martić (who was aware of the indictment against him for seven years prior

26 *Ibid.*

27 *Prosecutor v. Haradinaj* (IT-04-84-AR65.1), Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, Appeals Chamber, § 26.

28 *Prosecutor v. Šainović & Ojdanić* (IT-99-37-AR65), Decision on Provisional Release, 30 October 2002, §§ 10 and 11.

to his transfer)[29] and Mile Mrkšić (who knew of his indictment for six years)[30] that they had voluntarily surrendered.

If an accused is arrested on a sealed indictment, no adverse inference can be drawn from his failure to surrender; the fact of his non-surrender is neither positive nor negative; merely "neutral".[31] But while this factor is described as neutral, the fact remains that an accused arrested on a sealed indictment is not entitled to a benefit which is available to an accused who is publicly indicted. Is this fair? It may be more in accordance with the principle of fairness to afford an accused who is arrested on a sealed indictment the benefit of a rebuttable presumption that he *would* have surrendered if he had been given an opportunity to do so, and also to give the prosecution to opportunity to make submissions to rebut this presumption, in order to show why, on the balance of probabilities, it is unlikely that the accused would have voluntarily surrendered.

ii. Length of expected sentence

In assessing flight risk, a chamber will usually take into account the fact that the accused is charged with participating in serious crimes, and therefore, if convicted, is likely to face a long prison term, which constitutes a strong incentive to flee. But the seriousness of the charges against an accused cannot be the sole factor determining the outcome of an application for provisional release; a chamber is required to take into account the seriousness of the charges *in addition* to several other factors.[32] By definition, all persons indicted for crimes punishable under the Tribunal's Statute are charged with serious crimes, so this element is not particularly illuminative in determining the relative merit of a particular application for release.

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29 *Prosecutor v. Martić* (IT-95-11-PT), Decision On The Motion For Provisional Release, 10 October 2002.

30 Mrkšić argued, among other things, that he had evaded arrest for six years because he was deterred from surrendering as a result of a decision of a military tribunal preventing him from doing so. The Chamber rejected this argument and found that "in light of the circumstantial evidence surrounding his presence before this Tribunal, it seems rather doubtful whether the Accused, having failed to voluntarily surrender during all these years can be treated as if he had in fact, voluntarily surrendered." *Prosecutor v. Mrkšić* (IT-95-13/1-PT), Decision on Mile Mrkšić's Application for Provisional Release, § 43.

31 The *Krajišnik* Trial Chamber said: "The Trial Chamber has considered what weight should be given to the submission of the accused that since he was arrested on a sealed indictment he was not given the opportunity to surrender and would have done so had he been given that opportunity. The Trial Chamber considers this to be a neutral factor which does not lend support to the contentions of either side. It does not permit the accused to rely in support of his application on the fact that he has surrendered. On the other hand, it does not permit the Prosecution to claim that he was evading arrest." *Prosecutor v. Krajišnik & Plavšić* (IT-00-39-40-PT), Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, § 20.

32 *Prosecutor v. Šainović & Ojdanić* (IT-99-37-AR65), Decision on Provisional Release, 30 October 2002, § 6; *Prosecutor v. Čermak & Markač* (IT-03-73-AR65.1), Decision On Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, §§ 26 and 27.

iii. Previous history of avoiding capture

A previous history of successfully avoiding arrest will obviously weaken an application for provisional release. In *Ljubičić*, the accused had, prior to his transfer to the Tribunal, avoided arrest under a national arrest warrant for 14 months, living under a false name and with false identification papers. At the hearing on his application for provisional release, Ljubičić confirmed: "I fled from the Croatian judiciary for somewhat less than 14 months."[33] When further questioned by the Chamber concerning the fact that he was at large for fourteen months evading arrest by the national authorities, the Defence described the accused's conduct as "irrational".[34] The Chamber noted *inter alia* that there was "a risk that the accused's behaviour could again turn 'irrational'" and denied the motion for provisional release, on the basis that it was not satisfied that the accused, if released, would appear for trial.[35]

iv. Personal guarantee and character references

As mentioned above, an applicant will often file a signed personal guarantee in which he undertakes to appear for trial, and not to interfere with others while on release. Such guarantees are often attacked by the prosecution as self-serving and virtually worthless.[36] Applicants also sometimes file, in support of their application, character references from political and religious figures, who testify to the applicant's good character.[37] If the person providing the letter of reference has expressed hostility to the Tribunal in the past, this may weaken the weight to be afforded to any such letter.[38]

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33 *Prosecutor v. Ljubičić* (IT-00-41-PT), Transcript, 1 July 2002, page 41.

34 *Prosecutor v. Ljubičić* (IT-00-41-PT), Decision on the Defence Motion for the Provisional Release of the Accused, 2 August 2002.

35 *Ibid.*

36 In one such guarantee, the accused undertook, somewhat unpersuasively, "to be immediately detained should I attempt to escape from the locality where I reside" and "to be immediately arrested and detained pending my return to the United Nations Detention Unit, should I attempt to escape." *Prosecutor v. Krajišnik,* "Notice of Motion for Provisional Release" 9 August 2001, Annex D, §§ 9 and 12.

37 Former Bosnian Serb president Biljana Plavšić filed letters of support from Robert Frowick and Madeleine Albright, the former U.S. Secretary of State (*Prosecutor v. Krajišnik & Plavšić* (IT-00-39&40-PT), Motion for an Order of Provisional Release of Ms. Biljana Plavšić, 11 July 2001). Similarly, the former Prime Minister of Kosovo, Ramush Haradinaj, filed an extract of an address by Senator Joe Biden to the U.S. Senate, in which Senator Biden (who admiringly described Haradinaj as "a young man who looks like he could lift an ox out of a ditch") saluted Haradinaj for his courage and statesmanship in surrendering to the ICTY on learning of his indictment. *Prosecutor v. Haradinaj et al.* (IT-04-84-PT), Defence Motion of Ramush Haradinaj for Provisional Release, 21 April 2005, eighth attachment.

38 In *Krajišnik*, the Trial Chamber noted that the Prosecution had argued that little weight could be attached to letters of support from the Patriarch of the Serbian Orthodox Church and the President of the Federal Republic of Yugoslavia filed by Momčilo Krajišnik, in support of his application for provisional release (see *Prosecutor v. Krajišnik & Plavšić* (IT-39&40-PT), Notice of Motion for Provisional Release, 9 August 2001), on the ground that both the President and the Patriarch had made statements expressing opposition to

v. Pre-transfer statements

Many accused, prior to their "surrender", will make statements of hostility towards the Tribunal and will express a firm intention never to surrender to the Tribunal. These must be taken into account by the chamber deciding the application for release. In *Pavković*, for example, the Appeals Chamber found that a Trial Chamber had erred in failing to consider public statements allegedly made by the accused prior to his transfer to the effect that he would never surrender to the Tribunal. The Appeals Chamber said that the statements were highly relevant to an evaluation of the circumstances in which the accused surrendered, and a reasonable Trial Chamber would have considered them in relation to its evaluation of the personal guarantees offered by the accused.[39] The failure to consider whether the accused in fact had made the alleged statements, and if so, whether this would have cast doubt on his reliability to return for trial if released, merited reversal and remand.[40]

vi. Agreeing to be interviewed by the prosecution

An accused has a fundamental right to remain silent.[41] He is therefore under no obligation to agree to a pre-trial interview with the prosecution. But if he does so, this may weigh in his favour when he applies for provisional release insofar as it shows his general attitude of cooperation towards the Tribunal, which is relevant to the determination as to whether he will appear for trial if released. No adverse inference can be drawn from a refusal to agree to an interview: provisional release is not conditioned upon any agreement to be interviewed.[42]

But, curiously, the jurisprudence does not offer an incentive for telling the truth in any interview with the prosecution. In denying a prosecution appeal against the provisional release of two high-ranking accused, Jovica Stanišić and Franko Simatović,[43] the Appeals Chamber rejected the argument that the Trial Chamber had given excessive weight to the fact that both accused had given interviews to the prosecution before they were indicted.

The prosecution argued that the Trial Chamber's evaluation of the evidence

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the Tribunal. *Prosecutor v. Krajišnik & Plavšić* (IT-00-39&40-PT), Decision on Momčilo Krajišnik's Notice of Motion for Provisional release, 8 October 2001, § 9.

39 *Prosecutor v. Milutinović et al.* (IT-05-87-AR65.1), Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavković's Provisional Release, 1 November 2005, § 9.

40 *Ibid.*

41 This is expressed in Article 21.4(g) of the ICTY Statute as the right "not to be compelled to testify against himself or to confess guilt."

42 *Prosecutor v. Šainovic & Ojdanić* (IT-99-37-AR65), Decision on Provisional Release, 30 October 2002, § 8.

43 Jovica Stanišić is alleged to have been head of the State Security Service ("DB") of the Ministry of the Internal Affairs of the Republic of Serbia from late 1991 to 1998. His co-accused, Franko Simatović, is alleged to have been the commander of the Special Operations Unit of the DB. The two are charged with five counts, including persecutions, murder, deportation and forcible transfer as crimes against humanity committed in Croatia and Bosnia and Herzegovina between August 1991 and December 1995.

provided was wholly erroneous, as the accused had not provided genuine co-operation but had provided evasive and inaccurate information in their interviews. The accused pointed to their right not to agree to be interviewed at all, and argued that they had in fact provided co-operation by agreeing to be interviewed. The Appeals Chamber said that it did not accept the prosecution's assertion that the cooperation should be assessed by reference to the value of the information the accused provides. It went on to say:

> The fact that an accused agrees to be interviewed is evidence of some degree of cooperation that a Trial Chamber is entitled to consider in assessing whether the accused, if released, will appear for trial. The fact that the Prosecution does not accept the information provided by an accused to be credible or as extensive as the accused could provide, is *irrelevant*. Every accused before this Tribunal has a right to silence and a right not to incriminate him or herself. To restate a first principle of the International Tribunal, an accused is not required to assist the Prosecution in proving its case against them.[44]

An accused seeking provisional release is therefore offered an incentive for agreeing to be interviewed by the prosecution, which arguably devalues the right to remain silent, but, on the other hand, is offered no incentive to tell the truth in any such interview.

vii. Relevance of Rule 11 bis proceedings

ICTY Rule 11 *bis* provides a mechanism for the ICTY to transfer cases concerning mid-level and lower-level accused for trial before domestic courts. In *Mejakić et al.*,[45] the Appeals Chamber said that it was reasonable for the Trial Chamber to find that the existence of Rule 11*bis* transfer proceedings and the fact that the accused had opposed the motion for transfer gave him a greater incentive not to return for trial.[46]

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44 *Prosecutor v. Jovica Stanišić* (IT-03-69-AR65.1), Decision on Prosecution's Appeal against Decision on Provisional Release, 3 December 2004 § 14; *Prosecutor v. Simatović* (IT-03-69-AR65.2), Decision on Prosecution's Appeal against Decision on Provisional Release, 3 December 2004 § 9. Emphasis added. This position was reaffirmed by the Appeals Chamber in *Prosecutor v. Haradinaj et al.* (IT-04-84-AR65.2), Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, § 18.

45 *Prosecutor v. Mejakić et al.* (IT-02-65-AR65.2), Decision on Dušan Fuštar's Request for Interlocutory and Expedited Appeal, Appeals Chamber, 16 December 2005. Fuštar had applied for provisional release in order to attend a 40-day memorial service for his late mother-in-law.

46 *Ibid.*, § 9.

B. Whether the Accused Will Be Rearrested

i. The quality of the State guarantee

The likelihood that the accused will be properly monitored while on release, and rearrested if he attempts to escape,[47] depends to an extent on the quality of the guarantee of the State to which release is sought. The quality of the guarantee depends in part on the general level of co-operation provided by that State to the Tribunal. For example, guarantees from the notoriously uncooperative *Republika Srpska*, the Bosnian Serb-run entity in Bosnia, have until recently held little weight at the ICTY. In *Brđanin,* the Trial Chamber, in deciding to reject a *Republika Srpska* guarantee, noted the total failure of the *Republika Srpska* authorities to arrest indicted persons on its territory, and also noting the inadequacy of the remedy available to the Tribunal if a State does not co-operate: "The only sanction which the Tribunal possesses for the failure of Republika Srpska to comply with its "Guaranty" is to report it to the Security Council of the United Nations. Previous reports of non-compliance by Republika Srpska with its obligations to the Tribunal to arrest persons indicted by it have had no effect upon the continuing total failure of that entity to comply with those obligations."[48]

As mentioned earlier, the quality of co-operation with the Tribunal from governments in the former Yugoslavia has improved in recent times. A reasonably high level of co-operation seems likely to continue as conditions from Brussels which require full co-operation with the Tribunal in order to open and continue EU accession talks have become clearer. As a result, the value of State guarantees from the region has gone up considerably. In *Čermak*, for example, the Appeals Chamber, seized of an appeal by the accused in which they argued that the Trial Chamber had not allocated sufficient weight to guarantees offered by the Government of Croatia, agreed that there had been a "substantial improvement in the cooperation of the Croatian authorities" and found that the Trial Chamber had "erred in exercising its

47 The Tribunal has no police force to execute an arrest warrant upon a provisionally-released accused in the event that he does not appear for trial. It must rely upon local authorities to effect arrests on its behalf. Nor could reliance be placed on IFOR/SFOR (the NATO-led international force which kept the peace in Bosnia under the terms of the Dayton peace agreement) in the early years of its mandate to rearrest those accused provisionally released to Bosnia who might abscond. IFOR/SFOR troops were initially instructed *not* to seek out and arrest persons indicted by the Tribunal who were on the territory of Bosnia and Herzegovina, but only to detain those indictees "who come into contact with IFOR in its execution of assigned tasks" (*Rules of Engagement on the Detention and Transfer of Persons Indicted by the ICTY in Bosnia and Herzegovina*, adopted by the North Atlantic Council on 16 December 1996). This led one chamber to note "the unfortunate fact that reliance cannot be placed upon SFOR to arrest indicted persons who fail to appear for trial, in the way a police force may be expected to act in domestic legal systems." *Prosecutor v. Brđanin & Talić,* Decision on Motion by Radoslav Brđanin for Provisional Release, Case No. IT-99-36PT, 25 July 2000, § 29.

48 *Prosecutor v. Brđanin & Talić* (IT-99-36PT), Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, § 15. The Trial Chamber referred to, *inter alia*, the Tribunal's Fourth Annual Report (1997), § 187: "Republika Srpska is clearly and blatantly refusing to meet the obligations that it undertook when it signed the Dayton Peace Agreement, by which it solemnly undertook to co-operate with the Tribunal".

discretion in its assessment of the reliability and effectiveness of the guarantees of Croatia". For this and other reasons, the Appeals Chamber ordered the provisional release of the accused.[49] But the value of guarantees can go down as well as up, and the Appeals Chamber in *Mrkšić* cautioned:

> The reliability of guarantees by any particular authority necessarily depends to some extent upon the vagaries of politics and of personal power alliances within the relevant authority as well as upon the impact of any international pressure (including financial pressure) upon the authority at any time, and indeed even the likelihood in the future of a change of government in any particular case. A difference in cooperation as a result of a change of government is a fact of life (even though a political one) which must be taken into account in determining whether a guarantee will be enforced by an authority in relation to the accused person in question.[50]

ii. The prior position of the accused as a factor in assessing the State guarantee

The value of a State guarantee depends to some extent on the prior position of the accused. In *Brđanin,* the Trial Chamber noted that, as a result of the accused's prior senior position in the *Republika Srpska*, he "inevitably has very valuable information which he could disclose to the Tribunal, if minded to co-operate with the prosecution for mitigation purposes. That would be a substantial disincentive for Republika Srpska to enforce its guarantee to arrest, for the first time, an indicted person within its Territory."[51]

This principle is now embedded in Tribunal jurisprudence to the extent that a chamber is now almost required[52] to discuss in a decision granting provisional release what would happen if the authority providing the guarantee were obliged under its guarantee to arrest the particular accused in question. That is, it must consider whether the evidence suggests that an accused, by virtue of a prior senior position in the State providing the guarantee or in any other State, may have any information that would provide a disincentive for the State authority providing the guarantee to enforce that guarantee.[53]

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49 *Prosecutor v. Čermak & Markač* (IT-03-73-AR65.1), Decision On Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004.

50 *Prosecutor v. Mrkšić* (IT-95-13/1-AR65), Decision on Appeal against Refusal to grant Provisional Release, 8 October 2002, §§ 11 and 12.

51 *Prosecutor v. Brđanin & Talić* (IT-99-36PT), Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, § 15.

52 *Prosecutor v. Milutinović et al.* (IT-05-87), Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release, 1 November 2005, § 8, in which the Appeals Chamber said that a reasoned decision should include a discussion of this factor.

53 *Prosecutor v. Mićo Stanišić* (IT-04-79-AR65.1), Decision On Prosecution's Interlocutory Appeal Of Mico Stanišić's Provisional Release, Appeals Chamber, 17 October 2005, §§ 19 and 20.

VIII. Whether the Accused Will Interfere with Any Victim, Witness or Other Person

A. Discharge of the Burden of Proof

As mentioned above, there is a "substantial" burden on the applicant to demonstrate that, if released, he will not pose a danger to others. It is an unusual onus. In criminal proceedings, it is not often that the defendant is required to prove anything. It is even rarer to require him to prove that a *future* event is likely to occur or, trickier still, *not* to occur. How, the applicant may wonder, does he discharge his burden of proof?

The precise manner in which that burden must be discharged remains unclear. In *Pavković*,[54] the Appeals Chamber noted with disapproval that the Trial Chamber appeared to have "switched the burden to the Prosecution to show that the Accused would pose a danger if released ... the Trial Chamber appears to have assumed the lack of a danger posed by the Accused's release."[55] The Appeals Chamber remanded the matter to the Trial Chamber for reconsideration.

In its decision complying with the Appeals Chamber's instructions, the Trial Chamber noted what it described as "a practical problem posed by the format of Rule 65."[56] It said that, if the accused asserts that he will not pose a danger to victims and if the prosecution does not set out a basis[57] indicative of the potential of such danger,

> "it is difficult to see that a Trial Chamber could do other than conclude that the Accused will not pose such a danger.
> Since the Trial Chamber is not in a position to conduct an investigation but must rely upon the material presented by the parties in view of the general adversarial nature of provisional release hearings, it would be much more satisfactory if the onus were upon the Prosecution to show that the Accused would not appear for trial and would pose a danger. There seems no reason, consistent with the presumption of innocence, why that should not be the order of things."[58]

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54 Pavković was a 60-year-old former commander of the Yugoslav Third Army, charged with murder, deportation and other crimes allegedly committed in Kosovo in 1999.

55 *Milutinović et al.* (IT-05-87), Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release, 1 November 2005, § 11.

56 *Milutinović et al.* (IT-05-87-PT), Second Decision On Nebojša Pavković's Provisional Release, 18 November 2005, § 10

57 The prosecution had alleged that the accused was involved in the attempted killing of Vuk Drašković (a prominent opposition figure in Serbia in the 1990s and, at the time of the application, the Minister of Foreign Affairs of Serbia and Montenegro) and also had publicly threatened every person who would surrender him to the Tribunal. Interestingly, Mr. Drašković, in his capacity as Foreign Minister, was party to a guarantee in support of the application by the accused for provisional release. The Trial Chamber found that there was before it "absolutely no information whatsoever about the basis for that allegation or the detailed nature of the allegation. The Trial Chamber sees nothing in either point to substantiate a claim that the Accused will, if released at this stage, pose a danger to any victim, witness or other person." *Prosecutor v. Milutinović et al.* (IT-05-87-PT), Second Decision On Nebojša Pavković's Provisional Release, 18 November 2005, § 11.

58 *Prosecutor v. Milutinović et al.* (IT-05-87-PT), Second Decision On Nebojša Pavković's Provisional Release, 18 November 2005, § 12. In a dissenting opinion in 2001, Judge

The jurisprudence appears, however, to have accepted the position that once the accused makes a bare assertion that he will not pose a danger to others, the onus in practice *does* shift to the prosecution to demonstrate that such a danger exists. The Trial Chamber in *Ljubičić* said that "the Prosecution's suggestion that, if released, the Accused may pose a danger to witnesses and victims is insufficiently supported by the evidence. No concrete danger has been identified. The assessment under Rule 65 cannot be done only *in abstracto*."[59]

In *Mićo Stanišić*, the Appeals Chamber said that "the Prosecution has failed to provide any evidence showing that the Accused would represent a concrete risk of harm to victims and witnesses upon release. No information has been provided showing that he has influenced or threatened them in the past or intends to do so in the future."[60] This finding was referred to in *Haradinaj*, where the Appeals Chamber acknowledged that, while the burden is formally on the defence to show that the accused will not pose a danger, it had demanded in *Mićo Stanišić* that the prosecution "present at least *some* evidence that the Accused poses a danger, at which stage the burden is on the Defence to refute it."[61]

In summary, the formal position remains that the accused bears a "substantial" onus of establishing that he will he will not pose a danger to others. But once he makes a mere assertion that he will not pose a danger, the onus in practice shifts to the prosecution to show that he *will* in fact pose a danger to others while on release.

B. The Relevance of the Accused's Knowledge of Identities of Prosecution Witnesses

Upon arrival in custody at the Tribunal, an accused is entitled under the Tribunal's liberal pre-trial discovery rules to receive a considerable quantity of material supporting the prosecution's case against him, including the names and expected evidence of prosecution witnesses. The prosecution has argued that the accused's appreciation of the strength of the prosecution's case and of his prospects of acquittal may well change as he reviews the material disclosed to him, with the result that his determination to escape or to interfere with witnesses while on release is increased. This argument has enjoyed limited support. In denying provisional release to Ivan Čermak and Mladen Markač, the chamber said:

Robinson opined that the onus should be on the Prosecution to establish, on the balance of probabilities, that the accused has not satisfied the criteria for provisional release set out in Rule 65. *Prosecutor v. Krajišnik & Plavšić* (IT-00-39-40-PT), Dissenting Opinion of Judge Patrick Robinson (§§ 18 and 30), attached to Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001. For a critique of Judge Robinson's dissent, see *ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change*, Matthew M. DeFrank, Texas Law Review, v. 80, no. 6 (May 2002), pp. 1429-63.

59 *Prosecutor v. Ljubičić* (IT-00-41-PT), Decision on Second Application for Provisional Release, 26 July 2005, § 29.

60 *Prosecutor v. Mićo Stanišić* (IT-04-79-AR65.1), Decision On Prosecution's Interlocutory Appeal Of Mico Stanišić's Provisional Release, Appeals Chamber, 17 October 2005, § 27.

61 *Prosecutor v. Haradinaj et al.* (IT-04-84-AR65.1), Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, Appeals Chamber, § 41.

> The nature and detail of the evidence on which the Prosecution intends to rely is yet to be provided to each of the accused under the processes of the Tribunal. Their appreciation of the strength of the Prosecution case and of their prospects in the proceedings may well change as they learn more about these matters. Hence, their past conduct may not provide a reliable guide to their future conduct in respect of the proceedings.[62]

It may also be argued that, as the accused is now armed with the identities of prosecution witnesses and the substance of their expected testimony, there is a risk that he may wish to silence some of those witnesses while on provisional release. In *Blaškić*, the Trial Chamber, in denying release, noted *inter alia* that "the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a situation permitting him to exert pressure on victims and witnesses".[63] In *Brđanin*, however, the Trial Chamber flatly rejected the argument that this ability to interfere with witnesses amounted to a likelihood that interference would occur:

> The prosecution draws attention to the facts that Brđanin is seeking to be released in order to return to one of the very localities in which the crimes are alleged to have taken place, and that (as the prosecution has been ordered to provide unredacted statements of those witnesses not entitled to protective measures) he will know the identity of several witnesses, thus heightening his ability to exert pressure on victims and witnesses. The Trial Chamber does not accept that this heightened *ability* to interfere with victims and witnesses, by itself, suggests that he *will* pose a danger to them.
> It cannot just be assumed that everyone charged with a crime under the Tribunal's Statute will, if released, pose a danger to victims or witnesses or others. Indeed, it is a strange logic employed by the prosecution – that, once it has complied with its obligation under Rule 66 to disclose to the accused the supporting material which accompanied the indictment and the statements of the witnesses it intends to call, the accused thereafter should not be granted provisional release because his mere ability to exert pressure upon them is heightened. The Trial Chamber does not accept that logic.[64]

While the Appeals Chamber has not yet clearly pronounced on this issue, it appears to consider that the ability of an accused to threaten identified witnesses while on release does not weigh heavily against release. In *Mičo Stanišić*, the Appeals Chamber said that the fact that the accused "has been informed by the Prosecution of potential witnesses does not provide support for the argument that he now has [the intent to threaten them]".[65]

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62 *Prosecutor v. Čermak & Markač* (IT-03-73-PT), Decision on Ivan Čermak's and Mladen Markač's Motions For Provisional Release, 29 April 2004.

63 *Prosecutor v. Blaškić* (IT-95-14-T), Decision Rejecting a Request for Provisional Release, 25 Apr 1996 ("*Blaškić* Decision"), p 5.

64 *Prosecutor v. Brđanin & Talić* (IT-99-36PT), Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, § 19.

65 *Prosecutor v. Mičo Stanišić* (IT-04-79-AR65.1), Decision On Prosecution's Interlocutory Appeal Of Mičo Stanišić's Provisional Release, Appeals Chamber, 17 October 2005, § 28.

IX. The Discretionary Power

Once a chamber has satisfied itself that the applicant will return for trial if released, and will not interfere with any person while on release, it must then consider whether to exercise its discretion to order release. The nature of the discretionary power is that "it is a discretion to *refuse* the order notwithstanding that the applicant has established the two matters that that Rule identifies. It is *not*, in general, a discretion to *grant* the order notwithstanding that the applicant has failed to establish one or other of those two matters".[66] The only exception to this rule is granting provisional release for humanitarian reasons to terminally ill persons, who are obviously unable to establish that they will reappear for trial.[67]

When considering an application for provisional release, several chambers have argued that the principle of proportionality must be taken into account: "A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure than mandatory detention, it must be applied."[68]

In deciding whether to exercise the discretion to release, chambers have mentioned a number of factors not mentioned in Rule 65, such as the advanced age of the accused, his health, whether the accused's trial is in progress, whether there is a possibility that the accused will tamper with non-witness evidence and, perhaps most controversially, the anticipated period of pre-trial detention.

A. The Anticipated Period of Pre-Trial and Trial Detention

Despite several amendments to the ICTY and ICTR rules concerning provisional release, the anticipated period of detention before and during trial has never been expressly included in those rules as a relevant factor. But one of the most worrying features of international criminal proceedings is the fact that many accused spend years before trial and during trial remanded in custody. It is to the ICTR that we turn for an example which illustrates most clearly the seriousness of this problem.

On 28 June 1995, Élie Ndayambaje and Joseph Kanyabashi were arrested in Belgium. On 8 November 1996, the two men were transferred to the custody of the ICTR following a July 1996 request from the ICTR.[69] Their trial, on charges of genocide and other crimes, began on 12 June 2001, four and a half years after arriving at Arusha.[70] At the time of writing, April 2006, the defence phase of their trial is in

66 *Prosecutor v. Brđanin & Talić* (IT-99-36PT), Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, § 22.

67 See further section XIV below, which concerns the humanitarian release of terminally ill accused.

68 *Prosecutor v. Limaj et al.* (IT-03-66-AR65.2), Decision On Haradin Bala's Request For Provisional Release, Bench of the Appeals Chamber, 31 October 2003, § 13; *Prosecutor v. Dragan Jokić* (IT-02-53-PT), Decision on Request for Provisional Release of Accused Jokić, Trial Chamber, 28 March 2002, § 18.

69 ICTR press release ICTR/INFO-9-2-024, 11 November 1996.

70 While this is undoubtedly a long period of pre-trial detention, international human rights jurisprudence does not support the view that it is an unreasonably long period.

progress. They have therefore spent almost a decade in ICTR custody without seeing a judgement on the charges against them, and nearly 11 years have passed since their arrest in Belgium.

The accused filed applications for provisional release, both before and during trial, which were denied. In dismissing Kanbayashi's application for leave to appeal against a denial of provisional release, a Bench of the Appeals Chamber ruled in 2001 that "although the long pre-trial detention the Applicant has served may, if attributable to the Tribunal, entail the need for a reparation for a violation of fundamental human rights, it does not constitute *per se* good cause for release".[71]

Similarly, in denying Ndayambaje's motion for provisional release during trial, the Trial Chamber noted that the accused had been in detention for more than seven years. It held: "In the present case, having regard to the general complexity of the proceedings and the gravity of the offences with which the Accused is charged, the Chamber concludes that the Accused's detention remains within acceptable limits."[72] In denying leave to appeal that decision, a Bench of the Appeals Chamber noted that the Appeals Chamber had affirmed that "the length of pre-trial detention does not constitute *per se* exceptional circumstances for the purposes of provisional release",[73] and said that Ndayambaje had not shown any reason why the Appeals Chamber should depart from that previous jurisprudence. It also said that "the Trial Chamber rightly took into account the fact that there is an ongoing trial, which commenced in June 2001 and needs to be completed in an orderly manner, and found that in these circumstances, provisional release would not be justified".[74] The Bench added that the applicant had not shown "how the Trial Chamber may have erred in failing to conclude that the anticipated length of the Applicant's ongoing trial is an exceptional circumstance warranting provisional release."[75]

As mentioned earlier, the Statutes of both the ICTY and the ICTR guarantee that an accused will be tried without undue delay, and that his trial shall be fair and expeditious. His presumption of innocence until convicted is assured. Detention on remand, as one chamber has noted, is not meant to serve as a punishment but only as a means to ensure the presence of an accused at trial.[76] But the fact that many

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In *Ferrari Bravo v. Italy* (33440/96 [1999] ECHR 64 (28 July 1999) for example, the European Commission of Human Rights, in declaring an application inadmissible, said that a pre-trial detention period of 4 years and 11 months was "not unreasonable, having regard to the seriousness and nature of the charges, and the sentence which he faced".

71 *Prosecutor v. Kanyabashi* (ICTR-96-15-A), Decision On Application For Leave To Appeal Filed Under Rule 65(D) Of The Rules Of Procedure And Evidence, 13 June 2001, Bench of the Appeals Chamber.

72 *Prosecutor v. Ndayambaje* (ICTR-98-42-T), Decision On The Defence Motion For The Provisional Release Of The Accused, 21 October 2002, § 23.

73 *Prosecutor v. Ndayambaje* (ICTR-96-8-A), Decision On Motion To Appeal Against The Provisional Release Decision Of Trial Chamber II Of 21 October 2002, Bench of the Appeals Chamber, 10 January 2003. The ICTR's rules of procedure and evidence, at the time, required that the applicant demonstrate the existence of "exceptional circumstances" when seeking provisional release. The requirement has since been dropped from the ICTR RPE.

74 *Ibid.*

75 *Ibid.*

76 *Prosecutor v. Brđanin & Talić* (IT-99-36PT), Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002.

accused spend very long periods detained on remand before and during their trials sits uncomfortably alongside the right to an expeditious trial, without undue delay, nobly enshrined in the Statutes of the ICTY and the ICTR.

For an international court to hold in custody an accused for over a decade before issuing a judgement at first instance on the charges against him, even taking into account the gravity of those charges and the complexity of the proceedings, is of particular concern. The availability of financial reparation in the event of an acquittal after a decade in custody is hardly of great comfort to the accused, or indeed to anyone else.

X. Provisional Release Following Conviction after a Guilty Plea

There is one precedent for an accused remaining on provisional release after the entry of conviction following a guilty plea, and again after the sentencing hearing. Biljana Plavšić, who was 72 at the time, was granted pre-trial provisional release on 29 August 2001 and pleaded guilty by videolink while on provisional release on 2 October 2002. She was permitted to remain on provisional release for the period after her guilty plea until her sentencing hearing in December 2002. Further, she was permitted to remain on release between the date of her sentencing hearing and delivery of sentence on 27 February 2003,[77] when she returned to detention to serve her sentence of 11 years' imprisonment. The applications for provisional release were unopposed by the prosecution.

XI. Provisional Release Following a Conviction at Trial

Provisional release for convicted persons awaiting the outcome of appeals is governed by ICTYRPE Rule 65 (I), which sets out essentially the same test for granting provisional release as applies to pre-trial detainees seeking provisional release, with the additional requirement that "special circumstances" exist warranting release.[78] Provisional release of a convicted person is unusual but not unknown.[79]

On 21 October 2004, the Appeals Chamber ordered the provisional release of Blagoje Simić for three days to attend a memorial service in Bosnia for his late father.[80] Simić was convicted at trial and sentenced to 17 years' imprisonment; his appeal was

77 By oral order of 18 December 2002 at the end of the sentencing hearing the Presiding Judge, Judge May, said: "There being no objection and the circumstances exceptional, the accused may remain on provisional release until required to return here for sentence." *Prosecutor v. Krajišnik and Plavšić* (IT-00-39&40), transcript page 652.

78 ICTY RPE Rule 65(I) provides that the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that (i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the appellant, if released, will not pose a danger to any victim, witness or other person; and (iiii) special circumstances exist warranting such release.

79 See the example of Blagoje Simić in this section, and that of Pavle Strugar in the next section.

80 *Prosecutor v. Simić (*IT-95-9-A), Decision On Motion Of Blagoje Simić Pursuant To Rule 65(I) For Provisional Release For A Fixed Period To Attend Memorial Services For His Father, 21 October 2004.

pending. The prosecution opposed Simić's application for provisional release, submitting that there was a serious risk that he would abscond if released. It argued that, as the presumption of innocence no longer applied since the appellant had already been convicted, the standard of proof to be met by the appellant to satisfy the Appeals Chamber that he would return to detention should be higher than proof on the balance of probabilities. The Appeals Chamber rejected this argument, and said:

> [T]here is no explicit or implicit provision in the Rules suggesting that a higher standard of proof should be applied on appeal. The Appeals Chamber deems that the inclusion of a provision on provisional release in the Rules was driven by humane and compassionate considerations together with concerns related to the principle of proportionality in international law. These concerns remain even if the applicant has been convicted at trial. The Appeals Chamber considers that the fact that the person has already been sentenced is a matter to take into account when balancing the probabilities.[81]

While the Appeals Chamber recognized that "the more severe the sentence is, the greater is the incentive to flee",[82] it noted that this could not be the sole factor to take into account in deciding an application for provisional release, and said that it was satisfied that the appellant would surrender into detention at the end of his period of release, as indeed he did. Citing ECHR jurisprudence[83] concerning respect for a convicted person's right for a private and family life, the judges said:

> [T]he International Tribunal is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Achieving justice, however, also requires respect for the convicted persons' fundamental rights, in particular their right for private life and family life. By granting provisional release to convicted persons pending an appeal when the special circumstances of a case allow it, the International Tribunal fulfils its obligation to pursue justice for all parties involved.[84]

Stanislav Galić, a former army general, who was appealing his conviction and sentence of 20 years' imprisonment for crimes concerning the siege of Sarajevo, unsuccessfully applied for provisional release until the beginning of his sentencing hearing. Galić's argument that his position was similar to that of an accused before trial was rejected. The Appeals Chamber observed that, unlike an accused awaiting trial, Galić had been convicted of serious crimes which had to be taken into account when assessing whether, if released, he would appear at his appeal hearing. It recalled that

81 *Ibid.*, § 14.

82 *Ibid.*, § 15.

83 *Ibid.*, footnote 12, which refers to *Ploski* v. *Poland*, Judgment, European Court of Human Rights, 12 November 2002 ((26761/95) (202) ECHR 729), § 39: refusal of leave to attend the funerals of the detainee's parents was a violation of article 8 of the Convention (right to respect for private life and family life. But see § 38: "article 8 of the Convention does not guarantee a detained person an unconditional right to leave to attend a funeral of his relative."

84 *Ibid.*, § 22.

the more severe the sentence, the greater the incentive to flee, and, in Galić's case, the remaining years of his sentence created a strong incentive to flee.

It also noted that the outcome of the appeal was unforeseeable: while there was a possibility of a reduction in sentence, it was equally true that there might be an increase in sentence.[85] Finally, the Appeals Chamber was unpersuaded by Galić's valiant argument that because he was convicted he had a particular interest in attending the appeal hearing in order to prove that he was not guilty of the crimes for which he was convicted.[86]

XII. Provisional Release for Medical Treatment

Where there is a low flight risk, chambers will release an accused for medical treatment to another State; if the chamber considers that a flight risk exists, it will may require the accused to demonstrate that the medical treatment cannot be carried out in the host State.

On 8 December 2005, the Appeals Chamber denied a convicted person, Pavle Strugar (whose appeal against conviction and sentence was pending) provisional release in order to enable him to receive hip surgery in Montenegro and to rehabilitate afterwards in Montenegro. The chamber noted that, although the fact that Strugar "needs a total hip prosthesis implantation is undisputed", Strugar "did not demonstrate that the preparation for, and the placement of a total hip prosthesis and the ensuing rehabilitation treatment cannot be adequately carried out in health institutions within The Netherlands".[87]

However, on 16 December 2005, the Appeals Chamber granted Strugar's request for provisional release to undergo hip surgery in Montenegro and for subsequent rehabilitation in Montenegro.[88] It did not repeat its earlier finding that the operation and the ensuing rehabilitation could not be adequately carried out in health institutions within The Netherlands. The chamber merely noted a submission by Strugar's defence (which was before it when making the 8 December 2005 decision) that "the Appellant submits that it is necessary for a successful surgery and rehabilitation that the surgery be undertaken in the Clinical Center in Podgorica/Montenegro and the rehabilitation in the specialized rehabilitation center 'Dr. Simo Milošević' in Igalo/Montenegro".[89]

The Trial Chamber in the *Milošević* case on 23 February 2006 dismissed a request made by lawyers assigned to Slobodan Milošević for provisional release to permit the accused to undergo medical treatment at the Bakoulev Center in Moscow. In its decision, the Trial Chamber noted that neither of the two doctors from the Bakoulev

85 *Prosecutor v. Galić* (IT-98-29-A), Decision On Second Defence Request For Provisional Release Of Stanislav Galić, Appeals Chamber, 31 October 2005, § 16.

86 *Ibid.*

87 *Prosecutor v. Strugar* (IT-01-42-A), Decision on "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", Appeals Chamber, 8 December 2005, pp. 3–4.

88 *Prosecutor v. Strugar* (IT-01-42-A), Decision On "Defence Motion: Defence Request For Provisional Release For Providing Medical Aid In The Republic Of Montenegro", Appeals Chamber, 16 December 2005.

89 *Ibid.*

Center stated that the Center was the only possible location for appropriate diagnosis and treatment. "Rather, it is their preferred location because of its position and experience in the field. Moreover, Assigned Counsel have made no real attempt to demonstrate that the Accused's medical needs cannot be met in the Netherlands. The Chamber considers that an application for provisional release on medical grounds cannot be granted unless such a showing is made."[90]

In support of this finding, the Trial Chamber referred to the Appeals Chamber's 8 December 2005 Decision in Strugar[91] but did not mention the 16 December 2005 decision, in which the requirement that treatment be not available in The Netherlands was not repeated. The *Milošević* chamber also said that it agreed with the prosecution that, if Milošević "wishes to be treated by specialists who are not from the Netherlands, such physicians may come here to treat him."[92]

However, the critical difference between the *Strugar* decision and the *Milošević* decision is that of flight risk: in *Strugar*, the Appeals Chamber found in its 16 December 2005 decision that it was satisfied that the Strugar would appear for his appellate proceedings after his provisional release.[93] In contrast, the *Milošević* chamber found that it was not satisfied that, if Milošević did go to Moscow for treatment, that he would reappear for the rest of his trial.[94] The *Milošević* decision attracted a considerable amount of comment[95] following the death of Slobodan Milosević on 11 March 2006.

90 *Prosecutor v. Milošević* (IT-02-54-T), Decision On Assigned Counsel Request For Provisional Release, 23 February 2006, § 17.

91 *Ibid.*, footnote 23.

92 *Ibid.*, § 17.

93 *Prosecutor v. Strugar* (IT-01-42-A), Decision On "Defence Motion: Defence Request For Provisional Release For Providing Medical Aid In The Republic Of Montenegro", Appeals Chamber, 16 December 2005, § 3.

94 "In any event, the Chamber notes that the Accused is currently in the latter stages of a very lengthy trial, in which he is charged with many serious crimes, and at the end of which, if convicted, he may face the possibility of life imprisonment. In these circumstances, and notwithstanding the guarantees of the Russian Federation and the personal undertaking of the Accused, the Trial Chamber is not satisfied that the first prong of the test has been met – that is, that it is more likely than not that the Accused, if released, would return for the continuation of his trial." *Prosecutor v. Milošević* (IT-02-54-T), Decision On Assigned Counsel Request For Provisional Release, 23 February 2006, § 18.

95 Russian Foreign Minister Sergei Lavrov said on 13 March 2006: "The Russian Federation provided the tribunal with 100 percent state guarantees that after the completion of the treatment Milosevic would return to The Hague. Those guarantees were examined during a special session of the tribunal, which found them insufficient. Essentially they did not believe Russia. This can only disturb us. It can only worry us that Milosevic passed away shortly afterwards." ("Russia: Milosevic's Death Sparks Fury With UN Tribunal", March 16, 2006 (Radio Free Europe/Radio Liberty). Former Soviet President Mikhail Gorbachev also criticised the Tribunal's decision not to grant Milosevic provisional release to receive medical treatment in Russia. "That he made this request so recently and that the tribunal reacted the way it did – I believe that they made a big mistake. It was somewhat inhuman," he was reported to have said. ("Refusal to let Milosevic receive treatment in Moscow a mistake – Gorbachev", 11 March 2006, INTERFAX).

XIII. Provisional Release of an Accused Who Is Unfit to Stand Trial

An accused who is unfit to stand trial may be provisionally released in order for him to undergo treatment which may improve his condition to such an extent that he is fit to stand trial. In *Kovačević*, the chamber provisionally released to a medical facility in Serbia and Montenegro the accused, who was suffering from "a serious mental disorder which presently renders him unfit to enter a plea and to stand trial"[96] The chamber found that psychiatric treatment " – apart from providing relief to someone who is in need of and entitled to treatment – is also necessary at this stage of the proceedings in order to ascertain whether the Accused, after receiving adequate treatment, would be capable of standing trial in the future".[97]

The chamber explained that "the purpose of the provisional release of the Accused in this case is to make available to him the specialized medical treatment he needs, until such time as the Chamber can make a final determination of his fitness to stand trial."[98] The chamber also said that it was satisfied by guarantees offered by Serbia and Montenegro that "the Accused will appear for trial if he is eventually declared fit to stand trial".[99]

XIV. Provisional Release of Terminally Ill Accused for Humanitarian Reasons

An accused who is suffering from a terminal illness rendering him unfit to stand trial may be provisionally released for humanitarian reasons, notwithstanding that he will not "appear for his trial" as required by Rule 65. Dorde Djukić was provisionally released on 24 April 1996,[100] and died on 18 May 1996. Momir Talić, who was suffering from an inoperable terminal cancer, was provisionally released in 20 September 2002,[101] eight months before he died.

XV. Freedom of Speech While on Provisional Release

One of the features of proceedings before international tribunals is that many of the accused held high political office before their transfer to the custody of the tribunal. If the accused is on provisional release, should he be permitted to resume his political career? If not, why not?

The removal from powerful political and military positions in the former

96 *Prosecutor v. Kovačević* (IT-01-42/2-I), Decision on Provisional Release, 2 June 2004, page 1. The accused was released for an initial period of six months, which was extended "until further notice": *Prosecutor v. Kovačević* (IT-01-42/2-I), Decision To Extend The Order For Provisional Release, 2 December 2004.

97 *Prosecutor v. Kovačević* (IT-01-42/2-I), Decision on Provisional Release, 2 June 2004.

98 *Ibid*., page 2.

99 *Ibid.*

100 *Prosecutor v. Djukić* (IT-96-20-T), Decision Rejecting The Application To Withdraw The Indictment And Order For Provisional Release, 24 April 1996.

101 *Prosecutor v. Brđanin & Talić*, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002. "The Trial Chamber believes that, given the medical condition of Talic, it would be unjust and inhumane to prolong his detention on remand until he is half-dead before releasing him." *Ibid.*

Yugoslavia of so many destabilizing individuals, following their indictment by the Tribunal, is arguably one of the greatest contributions which the Tribunal has made to peace and security in the region. But what if the accused is *not* a destabilizing factor, and his continued participation in political life while on release might enhance, rather than frustrate, regional peace and security?

On 6 June 2005, the Trial Chamber ordered the provisional release to Kosovo of Ramush Haradinaj, a former prime minister of Kosovo, subject to certain conditions restricting his movement within Kosovo and severely limiting his involvement in political activity.[102] But UNMIK took the view that Haradinaj's involvement in public political activities would be likely to contribute in a constructive manner to the positive development of the political and security situation in Kosovo.[103] The defence made an application to relax the restriction on political activity, and on 12 October 2005, the Trial Chamber, by majority,[104] ordered that Haradinaj could appear in public and engage in public political activities "to the extent which UNMIK[105] finds would be important for a positive development of the political and security situation in Kosovo".[106]

The Trial Chamber, by majority, also required UNMIK to assume responsibility to authorise or deny Haradinaj political activities on a case-by-case basis, and to include any such activity in bi-weekly reports submitted to the Trial Chamber. In a dissenting opinion, Presiding Judge Carmel Agius agreed that, due to the position taken by UNMIK, there should be some limited and controlled possibility for Haradinaj to take part in public political activities and negotiations.

However, Judge Agius strongly disagreed with the decision of the Trial Chamber to delegate to UNMIK responsibilities and controls which, in Judge Agius's belief, pertain exclusively to the Trial Chamber and the Tribunal.[107] On appeal, the Appeals Chamber agreed, by 3-2 majority, with the majority of the Trial Chamber that the delegation of authority to UNMIK was lawful, but allowed the prosecution the

102 *Prosecutor v. Haradinaj et al.* (IT-04-84-PT), "Decision on Ramush Haradinaj's Motion for Provisional Release", 6 June 2005.

103 *Ibid.*, first page.

104 *Prosecutor v. Haradinaj et al.* (IT-04-84-AR65.1), Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, 12 October 2005.

105 The United Nations Interim Administration Mission in Kosovo (UNMIK) operates governmental functions in Kosovo. UNMIK's origins lie in Security Council Resolution 1244 of 10 June 1999, in which the Security Council authorized the UN Secretary-General to establish in Kosovo an interim civilian administration.

106 *Prosecutor v. Haradinaj et al.* (IT-04-84-AR65.1), Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, 12 October 2005, disposition.

107 Judge Agius said that the Trial Chamber's decision "to delegate to UNMIK important inherent powers and responsibilities of Chambers as unprecedented and one which, in my opinion, amounts to a misguided and dangerous abdication by the Trial Chambers of its responsibilities to oversee and control, at all times, all matters related to the freedom of operation and movement of the Accused." Dissenting Opinion of Judge Agius (attached to *Haradinaj et al.* (IT-04-84-AR65.1), Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, 12 October 2005), first paragraph.

opportunity to make written submissions to UNMIK as to whether the accused should be allowed to participate in each proposed political activity.[108]

But the more interesting question is one which was not under appeal: whether it was right to restrict Haradinaj's right to freedom of expression while on provisional release. Certain comments in the Appeals Chamber's decision suggest that, provided that an accused will reappear for trial and will not pose a danger to any other person, his freedom of expression while on provisional release should not be interfered with.

The Appeals Chamber noted that international human rights instruments "provide that freedom of expression *can only be curtailed* by restrictions properly codified in law: when restricting a person's freedom of expression, a decision maker cannot assert untrammelled discretion, but must be guided by law".[109] In respect of the argument that the effect of the decision was to reinstate Haradinaj in Kosovo's political life, the Appeals Chamber said that this was irrelevant: "So long as these activities pose no danger to victims and witnesses, and do not create a risk that the accused will not appear for trial, it is irrelevant whether the decision to permit political activity effects a "*de facto* re-instatement" or not."[110]

This position is clearer in the dissenting opinion of Judges Shahabuddeen and Schomburg, who opined that the restriction on the accused – that he only engage in a political activities which, in the view of UNMIK would be important for a positive development of the political and security situation in Kosovo – "simply has nothing to do with securing the presence of the accused at trial and the protection of others."[111] They also said:

> [I]t bears noting that this is a substantial restriction of political liberty imposed with no apparent basis in the objectives of Rule 65. ... Subject to such conditions as are necessitated by his lawful detention, the accused retains his fundamental right of freedom of expression. If he is released provisionally, *prima facie* he continues to be entitled to that right. But this is subject to the conditions of provisional release that are adopted solely in order to permit the effective administration of justice and the protection of victims, witnesses or other persons. Restrictions on his fundamental right to freedom of expression must be "provided by law" and "must be justified as necessary" to secure those objectives."[112]

This logic is persuasive. But it is not hard to think of other accused whose participation in political life while on provisional release would be likely, if not almost certain, to detrimentally affect regional peace and security. To permit untrammelled freedom of speech for *all* accused on provisional release in the former Yugoslavia

108 *Prosecutor v. Haradinaj et al.* (IT-04-84-AR65.1), Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, Appeals Chamber, disposition at page 30.

109 *Ibid.*, § 84. Emphasis in original.

110 *Ibid.*, § 94.

111 Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg, attached to *Haradinaj et al.* (IT-04-84-AR65.1), Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, Appeals Chamber, § 6.

112 *Ibid.*, §§ 6-8

would impede, rather than enhance, the Tribunal's mandate to assist in maintaining regional peace and security and to encourage interethnic reconciliation.

XVI. Conclusion

International tribunals have a number of competing duties: first, to fairly put on trial a reasonable number of those most responsible for the crimes committed in the conflict in question; second, to try each of those accused for a set of crimes which is reasonably representative of the overall criminal conduct of that accused; third, to protect victims and witnesses; and fourth, to respect the fundamental right of each accused to a fair and expeditious trial, which begins without undue delay. To simultaneously fulfil these competing duties is not easy. The mechanism of provisional release provides very necessary relief from the pressures which build up; no international criminal court will want to repeat the experience of detaining a defendant for over a decade before issuing a judgement at first instance on the charges against him.

But provisional release will always be an unsatisfactory mechanism: flight risk and the risk of intimidation of vulnerable witnesses can never be fully eliminated. Sooner or later, it is likely that an accused on provisional release will manage to abscond or to interfere with an already traumatised witness. These risks could be avoided if proceedings were speeded up, reducing the need to order provisional release. Use of time-saving initiatives – tighter indictments, more use of written evidence-in-chief, more rigorous judicial control over parties who fail to make good use of courtroom time – could result in defendants being brought to trial, and trials brought to conclusion, more efficiently. Until international tribunals can speed up proceedings in a fair manner, they will have to resort increasingly to the ultimately unsatisfactory mechanism of provisional release.

Chapter 10

Undue Delay and the ICTY's Experience of Status Conferences: A Judge's Personal Annotations

Almiro Rodrigues

I. The Right to Be Tried without Undue Delay

The right to be tried without undue delay is a fundamental component of any criminal trial. The importance of this right is demonstrated by the fact that it is recognised specifically in all binding international human rights conventions.

It is contained, namely, in Article 14 (3) (c) of the International Covenant on Civil and Political Rights (ICCPR); Article 6 (1) of the European Convention on Human Rights (ECHR); Article 7 (1) (d) of the African Charter on Human Peoples' Rights (ACHPR) and Article 8 (1) of the Inter-American Convention on Human Rights (IACHR).

The right is also recognised in Article 67 (1) of the Rome Statute of the International Criminal Court (ICC); Article 20 (4) (c) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); Article 24 (1) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 17 (4) (c) of the Statute of the Special Court for Sierra Leone.

The effective implementation of this right requires that criminal proceedings be started (and thus a final judgment be rendered) within a reasonable time (or without undue delay). Its protection in international criminal tribunals and "internationalized" courts is of paramount importance, owing to the role played by such tribunals and courts in bringing peace and reconciliation to societies afflicted by conflict. Such courts can only function legitimately if they are seen to abide by the rule of law in their dispensation of justice. The trial process itself and the way in which procedural rules are applied is where their adherence to the rule of law is perhaps most tested.

For this reason, paying absolute heed to this principle is equally important for domestic tribunals, such as those currently being established in Bosnia and Herzegovina (the State Court's War Crimes Chamber) and Cambodia (Extraordinary Chambers), which seek to bring prosecutions for international crimes in their own domestic courts. If justice is not seen to be done by domestic institutions within those post-conflict settings, then those very institutions may themselves cause further conflict and ethnic strife.

In this light, it is important for both national and international tribunals dealing with international crimes to both study ways in which the applicable laws may be used and transposed in order to render trials more expeditious, and also to think of practical ways in which to do so. The ICC is still at an embryonic stage in its devel-

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opment, no cases having as yet been tried there. It is also the most important development in the international community's quest for universal accountability.

However, following the ICTY and other courts adjucating international crimes, the ICC should pay heed to the experiences and jurisprudence of existing tribunals and courts in order to render its own procedures more efficient, and its trials fairer.

The ICTY benefits from the experience of developing procedural measures with the aim of expediting trials, particularly the status conference. Even if the experience is not to be strictly followed, it cannot be ignored.

II. The ECHR Principles in the Context of International Criminal Tribunals

In the light of the fact that international law and international relations remain, to this day, premised upon sovereign nation-states, international criminal tribunals entertain a complex relationship with international human rights conventions, including the European Convention on Human rights (ECHR). Human rights conventions legally bind states parties to them, and therefore do not directly apply to other legal entities.[1] In this sense, international criminal tribunals are part of a novel and specific legal order. Unlike states, they do not have the power to become parties to treaties. Nor are they judicial arms of states. Customary international law, formulated as it is by dint of state practice and supported by *opinio juris*, directly binds states. Nevertheless, other subjects of international law are equally bound to take it into account. It is therefore difficult to sustain the argument that international criminal tribunals are not bound by those human rights norms, which are deemed to have crystallised into custom, as custom itself remains tied to the acceptance of those norms by sovereign states.

Indeed, international tribunals exist in an "inter-state" sphere, which overrides sovereignty, where the applicability of norms, which relate to sovereign states is blurred. Their very existence is a direct challenge to the conceptualisation of sovereignty as a fundamental building block of the current world order, and is another step towards a supranational legal order. It is for this very reason that the status of internationally recognised and protected human rights must be specifically addressed and defined in their context.

International criminal tribunals, rather like emanations of sovereign states, do not possess the power to abuse human rights. In fact, this is particularly demanding in the context of trials involving international crimes, with the impact that such crimes have on the population affected by their commission, as well as the complexities involved in investigating them.

The right to trial without undue delay is particularly vulnerable to abuse in the context of such trials. Lengthy and complex investigations in order to obtain sufficient evidence of the commission of war crimes, for instance, are often accompanied by the impossibility of releasing suspects, prior to and during trial, into the community in which those crimes were committed. Human rights scrutiny of these institutions should, if anything, therefore be heightened, in order to enhance their

1 Although the doctrine of state responsibility, which has evolved under the ECHR and Inter-American Convention has challenged the traditionally horizontal application of these mechanisms, and may, by analogy, pose a challenge to their present ambit.

legitimacy as arbiters of international justice.

The right to trial without undue delay, as a right recognised in all international human rights conventions, can therefore act as a template upon which to assess the way in which human rights norms are applied in the context of international criminal trials, and to determine ways in which human rights protection can be rendered more effective in the context of such trials.

The operation of the ECHR in relation to international criminal tribunals, in particular the ICTY and the ICTR is interesting in the above regard. The right to trial without undue delay is provided for in Article 6 (1) of the ECHR, which states that

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 5 (3) ECHR also requires that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

A similar provision exists in Article 14 (3) of the ICCPR. It states that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (c) To be tried without undue delay.

For the purposes of Article 6 (1) ECHR, the period to be taken into account begins to run, in criminal matters, as soon as a person is "charged." "Charge," for the purposes of Article 6 (1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."[2]

The reasonableness of the duration of criminal proceedings must be assessed in each case according to the particular circumstances, taking into account, inter alia: the complexity of the factual or legal issues raised by the case, the applicant's conduct, the manner in which the matter was dealt with by the administrative and judicial authorities and what was at stake for the applicant.[3]

The above provisions apply to all parties to court proceedings and their aim is to protect those parties against unreasonable procedural delays. Particularly in criminal matters, it is designed to prevent an accused from remaining in a state of uncertainty about his fate for too long a period of time.[4] This is a constituent part of the right to liberty and associated precepts, such as the presumption of innocence and

2 *Reinhardt and Slimane-Kaid v. France*, 31 March 1998, Para.93.

3 See *Konig v. Germany*, 28 June 1978, Para. 99 and *Zimmerman and Steiner v. Switzerland*, 13 July 1983, Para. 24.

4 *Stogmuller v. Austria*, 10th November 1969, Para. 5.

the right to defend oneself. In trials of such magnitude and complexity as genocide, crimes against humanity and war crimes, the presumption of innocence can easily be jeopardised, particularly as regards the length of time normally taken to investigate them.[5] Attention has to be paid to the very fact that a person accused of such criminal offences is regularly seen as a criminal by one side and as a hero by another one.

This is aggravated by the fact that evidence in such cases normally takes a very long time to collect, and the trial period understandably lasts much longer than in ordinary criminal matters. These two aspects combined can very easily engender a sense of injustice on the part of the accused and the wider public observing the procedures adopted by such a tribunal. It in turn reinforces the need for international tribunals and courts trying such crimes to pay the utmost regard to these principles.

Despite the legal specificities of trials involving international criminal law, international criminal tribunals have had due regard, on various occasions, to the jurisprudence relating to international conventions, in particular that of the Strasbourg Court (ECtHR). Recourse to such jurisprudence has proved to be of use in resolving various problems associated with the length of proceedings.

International tribunals refer to the principles contained in the ECHR and developed by the Court as "general principles of law." Having said this, international criminal tribunals have naturally been conscious, for the reasons outlined above, of the limitations inherent in their status as international entities, of referring directly to the jurisprudence of the ECtHR. This is in line with the so-called "wise" approach, advocated by Antonio Cassese. This interpretative method entails using the ECHR and other jurisprudence as an auxiliary way in which to elucidate certain core principles, which later assist tribunals in determining the ambit and scope of certain rights.

This involves a tribunal asking itself the following three questions: (i) whether a norm of customary international law has been formed, (ii) whether a particular norm constitutes a general principle of law and (iii) whether the interpretation of a particular norm/rule by another judge is compelling and therefore whether it ought to be shared. In adopting this approach, an international judge should assume the pre-eminence of principles developed under international law to those developed under domestic laws.[6]

Another problem with the application of principles derived from the ECHR is that the two mechanisms deal with largely different phenomena. The ECHR refers itself to human rights violations in ordinary domestic criminal cases, whereas international criminal tribunals are called upon to address themselves to a much more complex reality.

This issue was addressed in the case of *Kovačević*.[7] The ICTY referred directly

5 This has proved a particular problem in war crimes prosecutions at the state level, in Bosnia and Herzegovina, which has, since 2004, had jurisdicition under its own Criminal Code (CC) and Criminal Procedure Code (CPC) to prosecute cases of war crimes, crimes against humanity and genocide, as well as to take over cases from the ICTY under Rule 11bis of the ICTY's Rules of Procedure and Evidence (RPE).

6 Antonio Cassese, "L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux," in *Crimes internationaux et juridictions nationales*, (Antonio Cassese and Mireille Demas-Marty, eds.), Paris, Presses Universitaires de France, 2002.

7 *Prosecutor v. Kovačević,* decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, dated 2 July 1998.

to "internationally recognised standards," when deciding whether the addition of a large number of counts to the accused's indictment would breach the right to trial without undue delay. In making its decision, the Appeal Chamber referred to both the jurisprudence of the ECtHR and to that of the UN Human Rights Committee, and, upon deriving general principles from that jurisprudence, it applied those principles directly to an interpretation of Article 21 (2) of its own Statute.

In this case, the Panel drew a direct analogy with both the ICCPR and the ECHR by stating: "This (its interpretation of the abovementioned jurisprudence) is consistent with the provisions of the Statute, which, in Article 21 (2), provides that all accused are entitled to a fair and public hearing, and thereafter in sub-paragraph (4) sets out the right of the accused to be informed promptly of the charge against him, and to be tried without undue delay, as part of the specific minimum guarantees necessary to ensure that this general requirement of fairness is met."

Therefore, the ICTY clearly recognised that, although the international human rights regime constitutes a different legal order to that of international war crimes tribunals, many principles are indeed interchangeable and may therefore be cross-applied in accordance with Cassese's approach. The exceptional character of war crimes prosecutions, and the difficulty of drawing such analogies, was however referred to in the separate opinion of Judge Mohamed Shahabuddeen,[8] who recalled the decision of the European Commission of Human Rights in the case of X v. Federal Republic of Germany,[9] which concerned the length of the Nuremberg trials: "The exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission's opinion, inapplicable the principles developed in the case-law of the Commission and Court of Human Rights in connection with cases involving other criminal offences." Judge Shahabuddeen adapted this contention to the facts of the said case by stating that "the application of the principles has to take account of the peculiarities and difficulties of unearthing and assembling material for war crimes prosecutions conducted in relation to the territories of the former Yugoslavia."

This therefore establishes that there is no procedural bar to applying those principles, as long as, in doing so, account is taken of the fact that they are being applied in a very different and often far more complex context. Such principles should therefore consciously be adapted, in order to be rendered applicable to that specific context. Therefore, international criminal tribunals and courts may refer to the ECHR as an interpretative guide to the principles contained within their own statutes, and these courts may indeed further develop these human rights principles.

The right to trial without undue delay is subject to this interpretive principle. However, international criminal tribunals are not directly bound by ECHR jurisprudence. Therefore, it is important to have regard to the free-standing principles and mechanisms that have been developed by the ICTY in order to render this right effective.

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8 *Prosecutor v. Kovačević*, separate Opinion of Judge Mohamed Shahabuddeen, dated 2 July 1998.

9 Application/Requete No.6946/75, at pp.115-116.

III. The ICTY's Experience of Status Conference

Article 1 of the Statute (competence of the International Tribunal) establishes that

> [T]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

The goal of the Tribunal is threefold: delivering justice, contributing to the process of peace and reconciliation and giving satisfaction to the victims. These are more or less the same objectives as those of the ICC. Those objectives can be reached only with having expeditious and fair trials. Therefore, it is worth taking a look at how the ICTY has endeavoured to achieve this.

Primarily, it is important to highlight the role played specifically by the status conference as a procedural mechanism with which to expedite trials dealing with international crimes. It will hereby be argued that the status conference is an important means of guaranteeing, as effectively as possible, the right to trial without undue delay. The mechanism will be considered in the context of the procedural rules relating to both the ICC and ICTY.

A. The ICTY context

In the light of the prior experiences of the Nuremberg and Tokyo trials, as well as those of certain national jurisdictions, the implementation of that complex goal in the context of an armed conflict has proved to be particularly difficult.

Primarily, a few fundamental differences between the Nuremberg trials and the setting up of the ICTY ought to hereby be noted.

The Tribunal was established and commenced its judicial activity prior to the cessation of hostilities in the former Yugoslavia; in relation to Nuremberg, the conflict had ended before the trials began.

Moreover, in the case of the ICTY, the accused were at large, which was not the case at Nuremberg, where they had all been arrested and detained. All archives, for the purposes of the ICTY, were in the hands of sovereign states, which had been created as a result of the fall of Yugoslavia. Nuremberg, on the other hand, had access to the necessary evidence, as the archives were in the hands of the victorious states.

Finally, the ICTY, having its seat at The Hague, is located at a distance from the site of the conflict, while the Nuremberg tribunal, located as it was in Germany, was seated in close proximity to the places in which the crimes being prosecuted had been committed, and in the state of which the alleged perpetrators were citizens.

The experience of the ICTY, as described above, may largely prove to be the same for the ICC, which is likely to experience similar difficulties in investigating, indicting and trying extremely grave and complex criminal offences.

Waiting for a trial and not knowing its opening frequently generates anxiety and tension, which is difficult to manage not only from the legal perspective, but also in relation to the human, resource-based and financial aspects of a case.

The ICTY faced these problems as a result of the slow pace of proceedings at

the start of trials when some accused were already in detention. On the other hand, the climate in the detention unit would deteriorate as a result of the uncertainty about the dates on which trials would begin, while the accused were waiting for an expeditious trial.

At the time of its conception, the Tribunal did not have a procedural mechanism to accelerate its own proceedings at all. The following question therefore arose: how to speed up proceedings before starting the actual trial. It was this very question that gave rise to the status conference, with its all dynamism, as a contribution to the expedition of trials.

The parties and the judge played a central role in the management of cases, and the expedition of a trial depended exclusively on both their willingness and their effectiveness in doing so. Faced with such a situation, it was necessary to adopt specific measures to address this matter. Some of these measures are described below.

The historical development of the status conference, where these measures were born, may be traced in the Aleksovski, Kvoćka, Krstić and Galić cases. There we can see certain theories being put into practice (organization, mediation and negotiation) and certain practices being instilled in theory, principles and rules (now contained in Rules 65 (a), 65 (b), 71, 71 (a), 84 (a), 92 bis, 94 (a) and others of the ICTY RPE.

B. Adopted Measures

In the course of the Aleksovki case (the third case in the then very short history of the ICTY), it was established as a rule that, as far as possible, motions and decisions should be presented orally. In the same case, it was decided that some testimonies should be taken by a presiding officer (then Rule 71 of the RPE). For that, the conditions were agreed with the parties. Ultimately, the measure was not used, as the parties gave up a large part of their testimonies. Nevertheless, it was a clear indication for the future. In fact, not only was that measure applied in other cases, but it also enabled Rule 71 to be developed, with the insertion of Rule 92 bis.

A significant factor is that the ICTY, as a new institution of its kind, had no jurisprudence at its disposal with which to deal with these matters. In this regard, legal interpretation and procedural rules acquired an added dimension and new priorities.

In the context of war crimes prosecutions, ensuring that trials were expeditious was and continues to be a difficult task. Lengthy and complex investigations in order to obtain sufficient evidence of the commission of war crimes, for instance, are often accompanied by the impossibility of releasing suspects, prior to and during trial, into the community in which those crimes were committed. Judges are also bound by custody time-limits, at least in principle, in order to ensure the perception of justice and to pay due heed to the presumption of innocence. The method of legal reasoning applied to new situation (Statute of the Tribunal, Rules of Procedure and Evidence, general principles of law, general principles of international law, and common principles to the different national legal systems) was proving to be too long, slow and costly.

Thus, in the Aleksovski case, and after intensive discussions with the parties, a minimal rule of understanding was adopted, which was underpinned by willingness on both sides to find agreement, deal equally with parties and guarantee always the

contradictory. Not only did this prevent decisions from being procedurally challenged, but also, at the same time, the relationship and communication between the Chamber and the parties intensified with the opportunity of frequent meetings. This therefore presaged the status conference, which, as this example demonstrates, constituted a great opportunity for an open, engaged and fecund discussion, as well as the early resolution of a variety of factual and legal issues.

On the other hand, after Dokmanović and Kovačević had passed away in custody, in the UN Detention Unit, a working group on detention conditions was established to determine whether there was a real relationship between the commencement of trials and the detention conditions.

This resulted in an amendment of Rule 65 *bis*, establishing that a status conference must take place in the 120 days after the initial appearance of the accused and, after that, at least every 120 days. The conference envisaged the obligatory review of the accused's detention and health conditions, and to intensify the exchanges with the parties, in order to prepare for trial.

The preparation of the General Krstić (the Srebrenica genocide) and Kvočka (Omarska, Keraterm and Trnopolje camps) cases was an excellent opportunity to improve the relationship between theory and practice in relation to the measures applied to speed up the commencement of cases.

When the preparation of these cases started, Rule 65 *bis* of the RPE was already in force. The position of pre-trial judge was further anticipated in practice as a solution. This mechanism was indeed introduced, in November 1999, into the Rules by Rule 65 *ter*.

IV. Lessons drawn from the Cases of Aleksovski and General Blaškić

A. Aleksovski

Here, the accused chose to exercise his right to remain silent throughout the entirety of the proceedings. This was impressive in the light of the extreme gravity of the charges against him. The defendant also could, if he wished it, appear in the capacity of witness in his own defense, under Article 85 c) of the RPE (presentation of evidence). It was, however, considered necessary to broaden the accused's opportunities to further participate in the proceedings against him.

The result was the introduction, in July 1999, of Rule 84 (a) (statement of the accused), which provides as follows: "After the opening statements of the parties (...) the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement".

Zoran Zigić, one of the five accused in Kvočka case, made this statement.

This brought about the opportunity for the accused himself to clarify certain aspects of his case, without taking the oath and being cross-examined on the content of the statement, which would otherwise be clarified by other evidence, incurring costs and further loss of time.

B. General Blaškić

The General Blaškić case took 25 calendar months to complete. The accused testified for three months. Much time was spent in proving the events of Ahmici of which he was accused. Gen. Blaškić accepted the events contained in the indictment, but he contested his responsibility. Thus the true subject for the trial discussion was his responsibility for the facts that he had already accepted.

The following obvious question therefore surfaced: why not to start with the testimony (Rule 85 c) or the statement of the accused (Rule 84 *bis*)?

Starting with the testimony of the accused was a method practiced in the Omarska case: Kvočka and Radić accepted to testify at the beginning of the case. Various complex matters and issues for lengthy debate were thereby swiftly resolved at the very beginning of the trial, leaving the accused's criminal responsibility the sole issue to be determined thereafter.

V. Status Conferences and Undue Delay

The status conference was not foreseen in the initial version of the Rules of Procedure and Evidence (RPE). The convening of status conferences was formally introduced, on 25 July 1997, by the entry into force of Rule 65 *bis* of the Rules of Procedure and Evidence of the ICTY. Their purpose is expressed as being "to organize exchanges between the parties so as to ensure expeditious preparation for trial." On 4 December 1998, Rule 65 *bis* was amended, in order to compel the convening of a status conference within 120 days of the initial appearance of the accused and thereafter every 120 days (at the latest).

In the meantime, a new amendment of the Rules, adopted on July 1998, not only developed Article 65 *bis*, but also introduced Article 65 *ter*, which created the pre-trial judge.

It is interesting to note that Rule 132 of the Rules of Procedure of the International Criminal Court (ICC) also recognised the significance of status conferences. This Rule provides that:

> 1. Promptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. The Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may postpone the date of the trial. The Trial Chamber shall notify the trial date to all those participating in the proceedings. The Trial Chamber shall ensure that this date and any postponements are made public.
> 2. In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary.

Accordingly, it seems that the ICC, when conducting proceedings in future, will take measures, which will enable it to guarantee the right to trial without undue delay as effectively as possible. This involves the utilisation of the status conference as a tool with which the Court may take into account at once the time needed to deal with a case justly and to reach an adequate cognisance of the relevant facts and law to be considered.

VI. Some Innovative Solutions

Several other measures, with the common aim of improving the expedition of trials, were later introduced into the RPE having previously been implemented in cases themselves.

A. In the General Krstić case

It was important to both establish matters of fact and of law in the case, and to reach an agreement on the very issues upon which the parties disagreed. Reading the indictment together, as an exploratory step, was one of the strategies aimed at reaching these objectives, as far as it allowed not only the establishment of a better functioning relationship between the parties, but also to clarify the different views of the parties on the main legal and factual issues in the case.

The presentation of evidence was considered once these preliminary matters had been fully settled. In relation to expert witnesses (very significant in this genocide case), it was decided, after the agreement of the parties, that the experts would only be cross-examined on their contested conclusions and, as regards any disagreement relating to the content of their evidence, limited time was also fixed for the expert examination.

It is easy to anticipate that the translation of the documents is of utmost relevance in an international tribunal working in three languages, not only in relation to the translation costs, but also as regards the time required for translation. Bearing that in mind, it was decided, after discussion with the parties, that, in principle, only the conclusions of the expert reports would be translated, unless good cause was shown to the contrary.

Furthermore, some organizational aspects, apparently not important, proved to be decisive, like the time and place designated for the status conference. In fact, it was noticed at a very early stage that the parties did not have time for the discussions, as the defense lawyers, at least during the preparation of the case, were residing away from the seat of the Tribunal in the Netherlands. Thus, a plan was adopted in view of determining the questions to be analyzed, the date and place of the meetings where the parties should discuss the issues, the estimated time for the discussion, and the date for a new status conference to analyze the results of the discussion.

New questions would restart the same procedure. That procedure "obliged" the parties, mainly the defense, to remain in the vicinity of the seat of the Tribunal. The break between the status conferences was taken in accordance with the number, complexity, urgency and other aspects related to questions, which were in the process of being debated.

Another measure adopted in this case was the opening to the public of the status conference. The opening would allow the public to be aware, from the outset, of the reasons for the delay in starting the case.

Finally, the "collective" instead of the "individual" testimony was encouraged, thus saving time and resources. Genocide, crimes against humanity and war crimes are massive in character. Trials are manifestly important to society at large and have a very public character. Therefore, instead of presenting a certain number of witnesses to prove the consequences of the criminal offence, an effective measure may be to

permit representatives of victims' associations to testify or, similarly, in the case of damage to world heritage, offer some Unesco experts or representatives of Patrimony defense associations the opportunity to testify.

As a result of all these measures, the General Krstić case (Srebrenica being the only event, until now, in relation to which a conviction for the crime of genocide has been secured) took sixteen calendar months (but was conducted at the same time as the Kvočka case) and ninety-nine working days (in fact half days, because of General Krstić health problems).

It is assumed that the General Krstić case (genocide of Srebrenica) was larger and more complex than the General Blaškić case. It would therefore be reasonably expected that such a trial would last longer than the General Blaškić case, which took 25 months.

In sum, the adopted measures seemed to be adequate as regards the method and efficiency, taking into account the results achieved.

B. In the Kvočka (Omarska, Keraterm and Trnopolje) case

In the Kvočka case, the principle "of finding agreement on the disagreement" was used in the same way as in the Srebrenica case.

On the other hand, a list of adjudicated facts in other cases (mainly Tadić and Čelebići) was proposed to the parties to be taken as judicially noticed in the Kvočka case. The direct responsibility of the accused was the main directive criterion for the discussion. After long discussions with the parties, the five accused accepted 484 out of the 586 facts proposed. It is impossible to calculate the time and resources saved with the agreement obtained.

Furthermore, as above mentioned, the accused Radić and Kvočka accepted to testify and do it at beginning of the case (Rule 85 c)). Also the accused Zigić made a statement without giving oath (Rule 84 bis).

To conclude, the Kvočka case had five accused: Kvočka and Prcać were indicted as deputy commanders of the Omarska camp; Radić as a chief of the Guards of the Omarska camp; Kos as a guard and Zigić as someone who allegedly committed crimes while visiting Omarska and Keraterm camps (exactly the same position as Duško Tadić). Therefore, the case had a dimension and a complexity greater than that of Tadić (the first case of the Tribunal, a 9 month trial) and Čelebići (the second case of the Tribunal, an 18 month trial). Thus, a duration of 27 (9+18) months would have been reasonably expected in the light of the above-mentioned cases, if the above-mentioned measures were not applied. The Kvočka case in fact lasted 18 calendar months and 101 working days, but it was tried together with the Krstić case. The Krstić and Kvočka cases also started before amendment of article 65 *ter* of the Rules of Procedure and Evidence, introduced in July 1999.

C. In Conducting Krstić and Kvočka cases at the same time

Contrary to the practice of the Tribunal of conducting individual and successive cases, the trial chamber of the Krstić and Kvočka cases decided to conduct these cases simultaneously. The purpose was not only to take advantage of the regular breaks in these cases, but also to keep the accused active in participating in their case.

The decision permitted the trial to continue in spite of General Krstić's health problems (including a surgical operation) and the suspension of the Kvočka case to allow an accused joined at a later stage to adequately prepare his defense.

VII. In General Galić Case (Sarajevo)

This one trial related to various cases: 34 incidents of bombardment and 8 of snipers. The Galić case provided an opportunity to test and improve all the measures adopted in the Krstić and Kvočka cases and of the new article 65 *ter*. The central issue was to put a theory into practice and vice versa.

The opportunity to do so was heralded by certain critical issues that came up in the case. For example, the defense counsel had been replaced, leaving the new lawyer with six months to prepare the case. On top of this, the Tribunal had to deal with three thousand five hundred documents and six hundred and fifty witnesses as evidence. Discussions followed on how to reduce the numbers where possible and finding alternatives where feasible.

The measures discussed in the preceding paragraphs were the key to the resolution of this problem. The preparation of the case of General Galić started in December 1999. The trial chamber was, at this time, conducting the Krstić and Kvočka cases, while preparing other cases. Before that, it was decided in the Galić case, with the agreement of the parties, to engage the Senior Legal Officer in the preparation of the case, giving him non- judicial tasks and ensuring his close cooperation with the pre-trial judge. That measure was introduced later in Rule 65 *ter* of the RPE, in April 2001.

VIII. Current Article 65 *ter* Main Principles

The current Rule 65 *ter* contains many (almost all) of the measures of speeding up a trial described above. The main principles are the following:

(A) No later than seven days after the initial appearance of the accused, a "pre-trial Judge" will be designated;
(B) It is up the pre-trial Judge to coordinate communication between the parties to ensure that the proceedings are not unduly delayed and take any measure necessary to prepare the case for a fair and expeditious trial;
(C) The pre-trial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to meet and the dates by which these obligations must be fulfilled. The pre-trial Judge may be assisted by a Senior Legal Officer who acts under the supervision of the pre-trial Judge;
(D) The pre-trial Judge shall order the parties to meet to discuss issues related to the preparation of the case. These meetings are held inter partes or, at his or her request, with the Senior Legal Officer and one or more of the parties. The presence of the accused is not necessary for meetings convened by the Senior Legal Officer;
(E) The pre-trial Judge shall order the Prosecutor to file the following:
    (i) the final version of the Prosecutor's pre-trial brief including, for each

count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law;

(ii) the list of witnesses the Prosecutor intends to call with:

(a) the name or pseudonym of each witness; (b) a summary of the facts on which each witness will testify; (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment; (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count; (e) an indication of whether the witness will testify in person or pursuant to Rule 92 bis by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and (f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case;

(iii) the list of exhibits the Prosecutor intends to offer stating where possible whether the defense has any objection as to authenticity. The Prosecutor shall serve on the defense copies of the exhibits so listed;

(F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defense to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

(i) in general terms, the nature of the accused's defense; (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and (iii) in the case of each such matter, the reason why the accused takes issue with it.

(G) After the close of the Prosecutor's case and before the commencement of the defense case, the pre-trial Judge shall order the defense to file the same elements indicated under (E) (ii) and (iii).

(H) The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact.

(I) In order to perform his or her functions, the pre-trial Judge may proprio motu, where appropriate, hear the parties without the accused being present. The pre-trial Judge may hear the parties in his or her private room.

(J) The pre-trial Judge shall keep the Trial Chamber regularly informed, particularly where issues are in dispute and may refer such disputes to the Trial Chamber.

(K) The pre-trial Judge may set a time for the making of pre-trial motions and, if required, any hearing thereon. A motion made before trial shall be determined before trial unless the Judge, for good cause, orders that it be deferred for determination at trial. Failure by a party to raise objections or to make requests, which can be made prior to trial at the time set by the Judge, shall constitute waiver thereof, but the Judge for cause may grant relief from the waiver.

(L) The pre-trial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings.

(M) The Trial Chamber may proprio motu exercise any of the functions of the pre-trial Judge.
(N) Upon a report of the pre-trial Judge, the Trial Chamber shall decide, should the case arise, on sanctions to be imposed on a party that fails to perform its obligations. Such sanctions may include the exclusion of testimonial or documentary evidence.

IX. Applying the Test in Proceedings before the Court of BiH War Crimes Chamber

In the coming months and years, it is likely that the number of cases transferred from the ICTY to the State Court of Bosnia and Herzegovina (BiH), as well as the number of cases prosecuted by the State Court's War Crimes Chamber (WCC) under domestic law, will increase.

It is therefore necessary to look for ways in which trials can be expedited and to seek ways of transposing norms common to both domestic and international jurisdictions in this regard. The status conference is not specifically provided for in the Criminal Procedure Code (CPC) of BiH. Although there was some reluctance at the time of the Court's establishment to use status conferences, it is now fully accepted as a mechanism and frequently made use of. The CPC has now been amended to include the introduction of the status conference.

Nevertheless, the CPC of BiH already gives the State Court a variety of mechanisms with which to influence the length and speed of criminal proceedings. These examples from the CPC of BiH can also be useful strategies applied at the international level to speed up trials.

Article 239 of the CPC of BiH provides as follows:

> The judge or presiding judge shall direct the main trial.
> It is the duty of the judge or the presiding judge to ensure that the subject-matter is fully examined, that the truth is found and everything is eliminated that prolongs the proceedings, but does not serve to clarify the matter.

Article 239 gives the judge or presiding judge the general responsibility to direct the main trial in a way that ensures that the truth is found in an effective and swift manner. This is, for instance, analogous to the judge's duty to "effectively manage cases" in the English Criminal Procedure Rules. This obligation should be borne in mind while examining the provisions, which relate to the main trial, especially those relating to the evidentiary procedure."

Article 262 (3) of the CPC of BiH expressly provides for the expediting of trials. It states that the judge or presiding judge shall "exercise appropriate control over the manner and order of the examination of witnesses and the presentation of evidence, so that the examination of and presentation of evidence is effective in ascertaining the truth, in avoiding loss of time and in protecting the witnesses from harassment and confusion." As above, this is a fundamental component of the judge's role in the effective management of a case.

Exercising "appropriate control" implies that the presiding judge or judge can make arrangements with the parties, in order to fulfil her duty under this provision.

Under this provision, it is incumbent upon the judge to control the process and thereby to avoid loss of time. This paves the way for pre-trial meetings with both the prosecution and the defence, in order to determine, among other things, the quantity and purpose of the evidence that both parties want to present. An analogy can here be made with Rule 65 *bis*, above, as both provisions work to achieve the same goal.

Article 263 of the CPC of BiH is equally important in terms of effective case management, as it forbids the asking of certain types of questions, which would waste the Court's time:

> The judge or presiding judge shall forbid inadmissible questions or the repetition of irrelevant questions, as well as answers to such questions.
> If the judge or the presiding judge finds that the circumstances that a party tries to prove are irrelevant to the case or that the presented evidence is unnecessary, the judge or the presiding judge shall reject the presentation of such evidence.

This provision is also fundamental to the judge's powers of case management and to his/her role in directing the trial. The judge's decision as to the above prohibition is final, but can constitute a ground for appeal against the first-degree verdict (incorrectly or incompletely established facts).

Article 270 of the CPC of BiH imposes certain constraints on the testimonies of expert witnesses. In principle, the expert shall only present her conclusion orally. The basis of this conclusion, as well as her research and arguments, must be submitted in writing, and all parties must receive a copy prior to her presentation. The expert should only be cross-examined if parties do not agree with her conclusion and research and therefore want to examine her. Much time will therefore be saved in the many instances in which parties do indeed agree with the expert's conclusions.

Cooperation between the ICTY and the BiH State Court is fundamental in expediting those cases, which are transferred to BiH under Rule 11 *bis* of the RPE. An important aspect of the Law on Transfer (LoT), which governs the transfer of cases from the international to the domestic realm, is the acceptance by the BiH Court of evidence collected by the ICTY. Article 3 of LoT states that, as a general rule, evidence collected in accordance with the ICTY Statute and the RPE can be used in proceedings before the BiH Court. Article 4 of LoT further expands on this principle:

> At the request of a party or proprio motu, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.

The above provisions appear not to be restricted to cases referred to the BiH Court from the ICTY, therefore it would appear that, in all other cases before other Bosnian courts, all relevant facts that have been established before the ICTY can be deemed proven.

These provisions can therefore work in tandem with Article 263 of the CPC, in that the parties can be prevented from addressing issues that have already been

decided by the ICTY. The "judicial notice" regime in the ICTY may also be applicable to findings already established before the ICTY. This is strictly regulated by Rule 94 (B) RPE. The procedural impact of taking judicial notice of an adjudicated fact is not that the fact cannot be challenged or refuted at trial, but rather that the burden of proof to disqualify that fact is shifted to the disputing party. In the case of Krajišnik, the ICTY formulated a set of criteria that must be satisfied for judicial notice of facts to be taken:

- It is distinct, concrete and identifiable;
- It is restricted to factual findings and does not include legal characterisations;
- It has either not been appealed or has been factually settled on appeal;
- It was contested at trial and now forms part of a judgment, which is under appeal, but falls within issues, which are not in dispute during the appeal;
- It does not attest to the criminal responsibility of the accused;
- It is not the subject of a (reasonable) dispute between the parties in the present case; and
- It does not impact on the right of an accused to a fair trial.

The above has been recognised by the BiH Court and has facilitated the expedition of war crimes trials. One such fact was the existence of "a widespread and systematic attack of the Army of Bosnian Serbs directed against the civilian Bosniak population in the territory of the Municipalities of Foča, Kalinovik and Gačko" in the period covered by the Indictment in the said case.[10] These were facts established by a variety of ICTY decisions.[11] It would indeed hinder many a trial if, in each war crimes case, the Court were to prove the existence of this particular phenomenon.

Article 5 of the LoT states that transcripts of witness testimonies or dispositions shall be admissible before the BiH Court if they are relevant to the issue at hand. The judge or presiding judge should encourage the use of this provision. Parties have the right to request attendance for cross-examination, but, if this request is approved, the Panel should ensure that only those issues, which are challenged, are addressed.

X. Conclusion

The principles contained in the Rule 65 *ter* of the RPE are the result of a relationship dynamic process in between theory and practice with the aim to ensure the accused an expeditious and fair trial.

The principle according to which the judge ensures that the proceedings are not unduly delayed and take any measure necessary to prepare the case for a fair and expeditious trial was always present in the preparation and trial of the Aleksovski, Krstić, Kvočka and Galić cases, even before being formally introduced into the RPE.

Trying to find points of agreement and disagreement on matters of law and fact and organizing the presentation of evidence was the leitmotiv that presided over the

10 See *Samardžić*, No. X-KR-05/49, 7 April 2006.

11 ICTY Judgments Case No. IT-96-23-T and Case No. IT-96-23/1-T, dated 22 February 2001 and Appeals Chamber Judgments Case No. IT-26-23-A and Case No. IT-96-23/1-A, dated 12 June 2001, as well as Judgment Case No. IT-97-02, dated 15 March 2002 and Appeals Chamber Judgment Case No. IT-97-25-A, dated 17 September 2003.

preparation of the Krstić, Kvočka and Galić cases. The assistance of the Senior Legal Officer acting under the supervision of the pre-trial Judge in performing administrative and organizational tasks was introduced in practice in the Galić case.

In sum, it seems that the establishment by the RPE of some measures aiming to speed up proceedings was not without difficulties, namely taking into account the dimension and complexity of the cases to be tried by the Tribunal. It is also important to look at the practice of domestic tribunals, in particular the Bosnian State Court, to draw lessons from their experiences of devising mechanisms to expedite war crimes trials.

The application of these principles and consequent jurisprudence can surely be helpful to the ICC's future judicial activity. The ICC currently finds itself in the advantageous position of being a direct time successor to the ICTY. Unlike the case of the ICTY at the time of its conception, the ICC can look to examples of jurisprudence and specific mechanisms, which have already been established to deal with matters, which are highly likely to arise when it eventually tries some of the gravest criminal cases known to mankind. It should therefore pay due attention to the way in which its own predecessors have endeavored, maybe successfully, to expedite trials and ensure the effectiveness of the right to trial without undue delay.

Section 4

The Work of Mixed National/International Jurisdictions

Chapter 11

The Work of the Special Court for Sierra Leone through Its Jurisprudence*

José Doria

Introduction

Most issues that will normally resurface in a research about an international criminal Court, its particularities and evolution, may be followed by reviewing its jurisprudence. This applies more than in other cases to the Special Court for Sierra Leone. The Special Court for Sierra Leone represents, to a certain extent, a new experience that the international community has developed in trying to reconcile the need for ending impunity, on one side, and to adjust the process to the limits of what is realistic and achievable in terms of available resources[1] and the impact in the region, on the other.

Lack of resources (as compared to the experience of the open-ended multi-billion project of the two UN *ad hoc* Tribunals) was one of the reasons that prompted the UN Security Council to recommend a number of steps for the setting-up of the Special Court for Sierra Leone among which the following : a) the Court was to be established not under a Chapter VII resolution of the UNSC, but through an agreement to be signed between the UN and Sierra Leone; b) the funding for the Court operations was to be ensured by voluntary contributions; c) the Court was recommended to concentrate on those who bear the "greatest" responsibility, rather than on those "mostly" responsible as the UN Secretary-General had suggested.[2]

These measures had a well-calculated objective, which was, essentially, reducing to a minimum the resources available to the Court, with the implication that only a specific number of cases involving those considered as bearing the greatest responsibility would be tried by the Special Court.

These restricting innovations, apart from provoking evident logistic problems,[3]

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* The views expresses herein are solely those of the author and do not necessarily reflect those of the Office of the Prosecutor or those of the United Nations.

1 See David Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts', 37 *Case W. Res. J. Int'l L.* 2005, *1*, at 2 (noting that: "The Special Court for Sierra Leone (the Court) is a bold new experiment, set up to test whether international criminal justice can be efficiently and effectively delivered within general time frames and budget. This we are doing").

2 See UN SC Resolution 1315 (2000), 14 April 2000.

3 First Annual Report of the President of the Special Court for Sierra Leone for the period

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 229–254.

also had implications for the legal status of the Court itself, the legality of its establishment, and the efficiency of its work.

Indeed the Accused, before the Special Court for Sierra Leone, challenged the legality of the establishment of the Court by the UN through an agreement with Sierra Leone and not under a Chapter VII resolution. The Accused argued that the agreement was in conflict both with international law, and the national law of Sierra Leone. The Accused also challenged the independence of the Court, its personal and temporal jurisdictions as well as its authority to impose binding obligations on States and accused other than Sierra Leone and its nationals.

This chapter reviews the establishment and early work of the Special Court through its jurisprudence and is divided in 6 sections:

1) The question of the legality of the Court under International Law;
2) The question of the legality of the Court under National Law of Sierra Leone;
3) The question of the legality of Amnesties and the Temporal Jurisdiction of the Court;
4) The question of how funding the Court from Voluntary contributions impacts on its judicial independence;
5) The question of the personal jurisdiction of the Court (the meaning of "those who bear the greatest responsibility"); and
6) The question of how the Treaty basis of the Court can influence its work.

I. The question of the legality of the Court under International Law

On 14 November 2003, the Defence for the Accused Moinina Fofana[4] filed a preliminary motion alleging lack of jurisdiction *ratione materiae* of the Special Court based on purported illegal delegation of powers by the United Nations to the Special Court.[5]

The Appeals Chamber of the Special Court in its decision of 24 May 2004,[6] after reviewing the submissions made by the parties, concluded that the question of the legality of the Court under international law required giving an answer to the

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2 December 2002 – 1 December 2003, available at http://www.sc-sl.org/Documents/specialcourtannualreport2002-2003.pdf.

4 *Moinina Fofana* is one of the Accused in the mega case of the Civil Defence Forces (CDF) leadership which included Sam Hinga Norman and Illieu Kondewa. Moinina Fofana was the National Director of War of the CDF and acted of Leader of CDF in the absence of Sam Hinga Norman; Sam Hinga Norman was the National Coordinator of CDF and the Leader and Commander of the Kamajors – traditional hunters forming the main basis of CDF, and Illieu Kondewa was the High Priest of CDF. All of them formed the so-called top leaders of the CDF. See *The Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No. SCSL-2004-14-PT, Consolidated Indictment, 5 February 2004.

5 *Prosecutor v. Moinina Fofana*, Case No. SCSL-2003-11-PT, Preliminary Defence Motion on Lack of Jurisdiction *materiae*: Illegal delegation of powers by the United Nations, 14 November 2003.

6 *Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR (72(E)), Decision on Preliminary Motion on Lack of Jurisdiction *materiae*: Illegal delegation of powers by the United Nations, 25 May 2004 (hereinafter *Moinina Fofana* Decision on Unlawful exercise of the UNSC powers).

following four issues:

1. Whether or not the UN SC was entitled to delegate its powers to the Secretary-General to conclude an agreement between the UN and the government of Sierra Leone
2. Whether or not the UN Secretary-General was entitled to conclude the agreement on his own
3. Whether or not the UN SC had authority to establish an international tribunal through an agreement
4. Has the UN SC acted *ultra vires* in creating an organ such as the Special Court for Sierra Leone over which it lacked control?

Issue 1:
Whether or not the UN SC was entitled to delegate its powers to the Secretary-General to conclude an agreement between the UN and the government of Sierra Leone
Rather than answering directly to this question, the Appeals Chamber stated that in the case at issue the UN SC was not even required to delegate any powers to the UN Secretary-General, as the he was already entitled to sign such agreements under Articles 97-100 of the UN Charter. The Appeals Chamber made the argument that the Secretary-General as an executive organ of the UN is required to follow the UN SC orders and in doing so he did not require additional powers. Accordingly, the question whether or not the UN SC had authority to delegate its powers to the UN Secretary-General was not relevant in that case.[7]

Issue 2:
Whether or not the UN Secretary-General was entitled to conclude the agreement on his own
Since the Appeals Chamber already found that the UN Secretary-General was fulfilling an order of the power-bear – which is the UN SC according to the Statute - the Appeals Chamber had no problem in solving the second issue by simply arguing that the UN Secretary-General acted at the request of the UN Security Council in his capacity as an executive organ.[8]

Issue 3:
Whether or not the UN SC had authority to establish an international tribunal through an agreement
The Appeals Chamber stated that since the UN Charter did not limit the powers of the UN SC to find means and measures to end a situation of threat to international peace and security, beyond the prohibition of using arms under Article 42, and the obligation to act within the purposes and principles of the UN Charter, this issue was irrelevant.

More concretely, relying on Article 1(1) of the UN Charter, the Appeals Chamber argued that the UN SC was entitled to take effective collective measures for the removal of threats to peace and that the establishment of the Special Court

7 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, paras. 15, 16.
8 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, para. 17.

for Sierra Leone was part of such collective measures.[9]

Comments:
The Appeals Chamber was in principle right, however, for one reason (which is the legal implications for other states of the establishment of the court through an agreement), the determination of the legal basis on which the UN SC was entitled to establish the Court was important. It is only when the UN SC acts under Chapter VII that it can impose binding obligations on member States to cooperate with the Court, including the obligation to assert jurisdiction for the punishment of the crimes falling under the Statute of the Special Court for Sierra Leone.

Since the Court was not established with a Chapter VII mandate, Ghana and Nigeria decided that they were not compelled to arrest and surrender Charles Taylor to the Court. Similarly, the Netherlands also refused to host the trial of Charles Taylor in The Hague in the absence of a Chapter VII mandate of the UN SC.[10]

However, the non-Chapter VII mandate of the Special Court does not prevent it from exercising its power to try whoever has committed a crime irrespective of his/ her official position or immunities that may attach, provided that both States, the State of the territory of the crimes (Sierra Leone), and the state of nationality of the accused (for example Liberia in the case of Charles Taylor) were bound by the relevant norms of international law on the basis of which the jurisdiction of the Court is asserted.

For this reason the issue of jurisdiction *ratione materae*, should not be confounded with the issue of jurisdiction *ratione personae*. Immunities or any other *procedural* factors don't bar the jurisdiction of the Court *ratione materiae*, but they need to be properly *removed* before the Court can actually be able to assert this jurisdiction.[11]

Issue 4:
Has the UN SC acted ultra vires *in creating an organ such as the Special Court for Sierra Leone over which it lacked control?*
The Defense argued that since the Court was established by an agreement and Sierra Leone, retained the power unilaterally to terminate the agreement under the terms of the agreement or general international law, the Court was illegally established as the agreement virtually meant that the UN SC has delegated its powers to an organ over which it lost control.[12]

The Defense suggested that the UN SC was entitled under international law and the law of the UN in particular, to delegate its powers to maintain peace and security either to a subsidiary organ or to an external organ, provided that it remained in permanent control of that organ.[13] The Defense argued that under international

9 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, paras. 20, 21.

10 See discussion *infra, S*ection VI.

11 This can only be done either via an agreement to which the state of the Accused is a party, or via a binding UN SC Chapter VII resolution. See discussion *infra, S*ection III.

12 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, paras. 1, 4, 5, 9, and 10.

13 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, paras. 3, 4.

law permanent control of an organ by the UN SC was a requirement purportedly because otherwise the organ to which the UN SC has lent its powers could have used them for purposes different from those of the UN itself. It argued that it is only when the UN SC remains in control of such organ, that the UN SC is able to terminate its activity if the organ deviates from the purposes of the UN.[14]

The prosecution disagreed and stated that no powers to adopt measures to establish peace and security were transferred on to the Special Court by the UN SC, rather its establishment was itself one of the measures taken by the UNSC, in the exercise of its powers, to reestablish peace and security.[15] The prosecution further held that even if the UNSC had indeed transferred to the SCSL its powers to take measures to reestablish peace and security, the UNSC would still have had a panoply of ways of keeping under its control the non-judicial aspects of the work of the Special Court, and therefore the Defense allegation about lack of control was misplaced anyway.[16]

The Appeals Chamber agreed with the Prosecutor that the SCSL had no responsibility for the maintenance of peace and security, but constituted itself one of the measures available to the UN SC in fulfilling this aim. Therefore, there was no question of UN SC delegation of its powers to the SCSL.[17]

The Appeals Chamber emphasized that "no agreement can influence the duties of the Security Council within the framework of the Charter of the United Nations. In this regard, the agreement cannot override the mandate of the UN Security Council as stated in the Charter nor can it bar the Security Council in the fulfillment of the above mentioned duties, as the primary responsibility for maintenance of international peace and security of the Security Council cannot be challenged."[18]

Comments:

In my opinion the Defense erred when it viewed the establishment of the Special Court as a transfer of UN SC powers, whereas in reality the act represented in itself the exercise of the UN SC powers. But even if the argument was valid, the need to continue exercising control over such organ does not appear to be a legal duty, but *a right* that the UN SC may choose not to exercise, if the organ created is such in nature that pressure on it would be contrary to international law. In the circumstances of the case, a Court which is a judicial organ must remain at all times independent from any influences.[19] Once created it is only dependant upon itself in the exercise of its judicial function. Whatever the manner in which this has to be exercised, for example, whether or not the Court would acquit or punish everyone, this

14 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, paras. 1, 4.

15 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, para. 2.

16 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, paras. 7, 8.

17 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, paras. 25, 26.

18 *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, para. 29.

19 Judge Robertson in his separate opinion has rightly made a rhetoric question about whether or not there was anything wrong in having a Court beyond influence and control of the UN, since independence of the judiciary is one of the most fundamental norms of due justice. See *Moinina Fofana* Decision on Unlawful exercise of the UN SC powers, 'Separate Opinion on Justice Robertson', para. 5.

issue would have to remain at the discretion of the Court itself. Indeed it would be contrary to the recognized principle of independence of judicial bodies, if the UNSC closed it, simply because the Court had decided to acquit everyone from responsibility, or because it had decided that the establishment of the Court violated the Constitution of Sierra Leone.

The judicial activity of courts of justice should be out of control of any external bodies to enable them to properly fulfill their role.

II. The question of the legality of the Special Court under National Law of Sierra Leone

The Accused were also concerned that the Agreement signed by the UN with Sierra Leone contemplated a number of innovations that in their view were intended to please the Sierra Leone government. In particular, the Agreement provided for jurisdiction over crimes under national law of Sierra Leone.[20] In addition, the appeal procedures for crimes under national law were to be held before the Sierra Leone Supreme Court[21] and a number of positions in the Court such as the position of Deputy Prosecutor and judges of the Court were to be filled on appointment by the Government of Sierra Leone.[22] The Agreement also contemplated the participation of Sierra Leone in the management Committee, the organ established to exercise oversight over the non judicial activities of the Court,[23] and the entry into force of the agreement was subject to ratification by the Parliament of Sierra Leone.[24] Under the terms of the SCSL Agreement the parties also decided specifically to override the amnesty given to the rebels.[25]

All these factors added to the lack of Chapter VII powers of the Court, made the accused think of the Special Court as being either a national court or a hybrid court, whose true legal foundation was uncertain. A number of motions were filed challenging the jurisdiction of the Court. One of these challenges raised the issue of possible unconstitutionality of the Court: Three cases were filed with the Appeals Chamber of the Special Court: *Prosecutor v. Morris Kallon*;[26] *Prosecutor v. Sam Hinga*

20 See Articles 5; 6(5), of the Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the government of Sierra Leone, on the establishment of the Special Court for Sierra Leone, signed 16 January 2002 (hereinafter, SCSL Statute).

21 Article 20 (3), SCSL Statute.

22 See Article 2(2)(c); 2(3);2(5) of the Agreement between the United Nations and the government of Sierra Leone, on the establishment of the Special Court for Sierra Leone, signed 16 January 2002 (hereinafter SCSL Agreement); and Article 12(1)(b) of SCSL Statute, regarding appointment of judges. See also Article 3(2) of the SCSL Agreement, and Article 15(4) SCSL Statute, on appointment of the Deputy Prosecutor by Sierra Leone respectively.

23 Article 7, SCSL Agreement.

24 Article 21, SCSL Agreement.

25 Article 10, SCSL Statute.

26 *Prosecutor v. Morris Kallon*, Case No. SCSL 2003-07-PT, Preliminary Motion based on lack of jurisdiction: Establishment of the Special Court violates Constitution of Sierra Leone, 16 June 2003. Morris Kallon was together with Issa Hassan Sesay and Augustine Gbao, senior officer and commander in the Revolutionary United Front (RUF), Junta

Norman,[27] and *Prosecutor v. Brima Bazzy Kamara*.[28] They were joined in one single case, as they raised similar issues of unconstitutionality and lack of jurisdiction.[29]

A number of submissions were made by the parties after which the Appeals chamber issued its decision on 13 March 2004.[30]

A. Position of the parties

The accused in their motions essentially argued that the creation of the Special Court clearly amends the judicial framework and the Court's structure of Sierra Leone and this could not be done without a referendum under the Constitution of Sierra Leone. Since no referendum was held, they argued the establishment of the Special Court was illegal under the Sierra Leonean Law.[31]

In response, the prosecution argued that according to the rectification Act adopted by the Sierra Leonean Parliament, the Special Court was actually not part of the judiciary of Sierra Leone anyway, and asked the dismissal of the Defense motions.[32]The prosecution further asserted that the Report of the UN Secretary-General to the UN SC indicated that the Special Court agreement was a treaty under international law which bound both parties even if in conflict with domestic law. Therefore, the Special Court functioned within the international sphere and the judicial power that it exercised was not the judicial power of Sierra Leone.[33] The Prosecutor also argued that under Articles 27 and 46 of the 1969 Vienna Convention on the Law of Treaties and similar provisions in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, a party could not invoke provisions of its national law for its failure to perform a treaty, unless that vio-

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and AFRC/RUF Forces. See *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-2004-15-PT, Corrected Amended Consolidated Indictment, 2 August 2006.

27 *Prosecutor v. Sam Hinga Norman,* Case No. SCSL2003-08-PT, Preliminary Motion on Lack of Jurisdiction: Lawfulness of Court's Establishment, 26 June 2003.

28 *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL 2003-10-PT, Application by Brima Bazzy Kamara in respect of Jurisdiction and defects in Indictment, 22 September 2003. Brima Bazzy Kamara was together with Alex Tamba Brima and Santigie Borbor Kanu, a senior Member of the Armed Forces Revolutionary Council (AFRC), Junta and AFRC/RUF Forces, the top leaders of AFRC and members of the group of 17 that staged a successful coup and ousted the government of President Kabbah in 1997. See *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borobor Kanu*, Case No. SCSL-2004-16-PT, Further Amended Consolidated Indictment, 18 February 2005.

29 *Prosecutor v. Morris Kallon, Sam Hinga Norman, Brima Bazzy Kamara*, (Cases No. SCSL 2003-07-PT ; SCSL 2003-10-PT ; SCSL 2003-10-PT), Decision and Order on Prosecution Motions for Joinder, 27 January 2004.

30 *Prosecutor v. Morris Kallon, Sam Hinga Norman, Brima Bazzy Kamara*, (Cases No. SCSL 2003-14-PT; SCSL-15-PT; SCSL-16-PT), Decision on Constitutionality and lack of Jurisdiction, 13 March 2004 (hereinafter *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction).

31 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 3, 8 and 10.

32 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 9.

33 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 9.

lation was manifest and concerned a rule of fundamental importance.[34] In the present case, the violation was not a breach of a fundamental rule of the Constitution, concluded the Prosecutor. Since the defense recognized that the Agreement was ratified by the Parliament when it enacted the Ratification Act, therefore *prima facie* all constitutional requirements for the conclusion of the Special Court Agreement were satisfied.[35]

The defence Counsel for *Brima Bazzy Kamara* further insisted that the prosecution was wrong, stating that the ratification Act was a Sierra Leonean act creating Sierra Leonean law, therefore, it had to be interpreted according to the Constitution. It further argued that the crimes established in that Act were unknown to Sierra Leoneans prior to the passing of the Act and therefore would violate the principle *nullum crimen sine lege*.[36]

The prosecution argued that the Constitution was only capable of regulating the judicial powers of Sierra Leone, within the sphere of domestic law, whereas the Special Court was not part of the judiciary of Sierra Leone.[37] It also argued that the principle *nullum crimen sine lege* only requires that the acts were unlawful at the time of their commission as a matter of international law, because the Special Court only functions in this area. Therefore the Constitution was inapplicable.[38]

During the oral hearings each of the parties insisted on its positions.[39]

The Prosecutor argued in addition that the reference to *sui generis* Court in the UN Secretary General Report was only an indication that was the first international Court created by a treaty between the UN and a State. The description of the Special Court in the Report as of "mixed composition" only meant that it was composed of a mixture of national Sierra Leonean people and internationals, and did not mean that it functions in the domestic sphere of Sierra Leone.[40]

Further arguments by the defence

The Defence motion on behalf of Sam Hinga Norman argued in addition the following:

a) The concurrent jurisdiction and the primacy accorded to the Special Court was in contravention with the Constitution of Sierra Leone;
b) When in 2000 the government negotiated the peace agreement, it was only in control of 1/3 of the territory and therefore was not in a position to negotiate the agreement.[41]

The Prosecution responded arguing that where it is established that a state exists

34 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 9.
35 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 9.
36 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 15.
37 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 16, 17.
38 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para.18.
39 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 22, 23, 24, 25, 27.
40 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 27.
41 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 12, 14.

there is no need to prove that it controls a greater part of its territory.[42]

B. The Appeals Chamber position

The Appeals Chamber concluded that the issue could be sorted out by answering to two questions: Whether or not the SCSL had competence and jurisdiction to determine the lawfulness and the validity of its own creation and if so, whether or not it was lawfully established.[43]

Concerning the first question, the Appeals Chamber found that it had jurisdiction to decide about its own competence based on Article 1 of the SCSL Agreement, Article 14 of the SCSL Statute and Rule 72(B) of the Rules of Procedure and Evidence of the Special Court.[44] On the second question about the lawfulness of the establishment of the Court, the Appeals Chamber stated that it required reviewing the following sub-questions:

i) How was the Special Court established? And was it a treaty based *suis generis* Court or not?
ii) Was the Special Court incorporated into the national legislation in accordance with the constitutional requirements or not? And what was the role played by the Act of notification of the SCSL Agreement?
iii) Does the SCSL provide for fair trial safeguards to the accused, a requirement of a Court "established by law"?
iv) Does the stated primacy of the Court require amending the Constitution?
v) Was the principle *nullum crimen sine lege* violated with the adoption of the SCSL agreement or not?
vi) Is effective control of territory needed for a state to sign agreements?

i) SCSL as a *suis generis* Court

Regarding the first two questions, the Appeals Chamber endorsed what the UN Secretary-General Report states about the nature and specificity of the Special Court. This specificity distinguished it according to the Appeals Chamber from the ICTY and the ICTR, Tribunals that were established by a UN SC Chapter VII resolution, whereas the SCSL was established by an agreement between the UN and the government of Sierra Leone. For this reason, it was considered a treaty based *suis generis* Court of mixed jurisdiction and composition. The Appeals Chamber further recalled that the UN Secretary-General himself stressed that the implementation at national level of the agreement establishing the Special Court would require the incorporation of the SCSL Agreement into the national law of Sierra Leone in accordance with the constitutional requirement.[45]

42 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 13.
43 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 29
44 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 30-37.
45 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 40-43.

ii) National implementation of the SCSL Agreement

Regarding the next two questions (incorporation into the national law and the role played by the notification Act) the Appeals Chamber essentially relied on the ratification Act adopted by the Sierra Leone parliament to conclude that all the constitutional requirements were fulfilled. It stated that the ratification Act itself clearly provided that the Special Court was not a part of the judicial system of Sierra Leone.[46]

The Appeals Chamber argued that the issue of the constitutionality of the Special Court was further definitively sealed with the exchange of notifications between the UN and Sierra Leone on the fulfillment of all internal requirements for the entry into force of the SCSL Agreement as a valid and binding act for the state of Sierra Leone.[47]

iii) SCSL as a Court established by Law

Although not an issue raised by the submissions of the parties, the Appeals Chamber also decided *proprio motu* and *obiter* the question of whether the Special Court could be considered a Court properly established by law. Based on Articles 17, 13 of the SCSL Statute and the SCSL Rules of Procedure and Evidence it came to the conclusion that the Special Court was a Court properly established by law.[48]

iv) Primacy of the SCSL

Concerning the primacy of the Sierra Leonean Special Court, and how this has been incorporated into the national law of Sierra Leone, the Appeals Chamber came to the conclusion that the ratification Act of the Sierra Leone Parliament meant that the provisions giving primacy to the Special Court in the Agreement were duly incorporated into the national law of Sierra Leone.[49] The Appeals Chamber further concluded that the Special Court was an international tribunal just as the *ad hoc* Tribunals and this justified its primacy[50] and that the only difference between the Special Court and the *ad hoc* Tribunals was that these last were established by Chapter VII resolutions whereas the Special Court was created by an Agreement between the UN and Sierra Leone. For this reason, the primacy and the obligation to cooperate of the Special Court was restricted to the territory of Sierra Leone.[51]

v) *Nullum crimen sine lege* and the crimes under the SCSL Statute

The *nullum crimen sine lege* argument was also rejected by the Appeals Chamber. In reaching its conclusion the Appeals Chamber found that it was sufficient that the

46 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 49-52.
47 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 59-62.
48 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 54-58.
49 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 67.
50 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 70-71.
51 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 68-69.

crimes existed under international law, for it to become irrelevant whether they were offences under the domestic law of Sierra Leone. In addition, the Appeal Chamber argued, there was also the fact that the Court was a Tribunal exercising its jurisdiction in an entirely international sphere.[52]

vi) Validity of an international Agreement signed by a state lacking control of territory

Concerning this challenge, the Appeals Chamber argued that occupation and acquisition of territory through use of force is illegal under international law and territory acquired in this way does not belong to the conqueror.[53]

III. The question of the legality of amnesties and the temporal jurisdiction of the Special Court

The establishment of the Court through an agreement between the UN and Sierra Leone was yet another ground for a set of motions alleging illegality of the SCSL in light of amnesties granted by the government to the rebels. These motions were filed by the accused Morris Kallon on 16 June 2003,[54] Brima Bazzy Kamara on 22 September 2003,[55] Augustine Gbao on 6 November 2003,[56] Allieu Kondewa on 7 November 2003,[57] and Moinina Fofana on 14 November 2003.[58] These accused raised similar issues of illegality of the SCSL Agreement based on provisions of the 1999 Lomé Peace Agreement granting Amnesty to the rebels and therefore invalidating the personal and temporal[59] jurisdiction of the Special Court. The Appeals Chamber issued a joint decision on 13 March 2004,[60] regarding the motions by Morris Kallon and Brima Bazzy Kamara, and separate but similar decisions on 25 May 2004, on the

52 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, paras. 80-82.

53 *Morris Kallon* Decision on Constitutionality and lack of Jurisdiction, para. 75.

54 *Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07-PT, Preliminary Motion based on lack of Jurisdiction/Abuse of Process: Amnesty provided by the Lomé Accord, 16 June 2003.

55 *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-2003-10-PT, Application by *Brima Bazzy Kamara* in respect of Jurisdiction and Defects in Indictment, 22 September 2003.

56 *Prosecutor v. Augustine Gbao*, Case No. SCSL-2003-09-PT, Preliminary Motion on the Invalidity of the agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, 6 November 2003.

57 *Prosecutor v. Allieu Kondewa*, Case No. SCSL-2003-12-PT, Preliminary Motion based on Lack of Jurisdiction/ Abuse of Process: Amnesty provided by the Lomé Accord, 7 November 2003.

58 *Prosecutor v. Moinina Fofana*, Case No. SCSL-2003-011-PT, Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 14 November 2003.

59 Article 1 of both the SCSL Agreement and the SCSL Statute confer the temporal jurisdiction on the Special Court to prosecute crimes committed since 30 November 1996.

60 *Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, Cases No. SCSL-2004-15-AR72 (E); SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 (hereinafter *Kallon and Kamara* Amnesty Decision).

motions by Moinina Fofana[61] Augustine Gbao,[62] and Allieu Kondewa.[63]

A. The position of the parties

The Accused raised the following main arguments: an international Court established by a treaty does not acquire new rights and powers, but is rather an institution that exercises derivative powers, therefore, states can only transfer to it rights that they already possess; by agreeing on Article IX of the 1999 Lomé Agreement (a treaty under international law), that grants amnesty to rebels, Sierra Leone gave up its right to exercise its personal jurisdiction over the accused. Therefore, the jurisdiction of Sierra Leone was unlawfully transferred over to the Special Court for Sierra Leone; the Special Court should not assert jurisdiction over crimes committed prior to July 1999 covered by the amnesty provisions of the Lomé Agreement; a treaty is invalid if concluded on the basis of a fundamental error, since the government induced the accused to disarm by alleging that the accord was still valid; the Special Court should use its discretion and grant a stay of proceedings for abuse of due process.[64]

The Prosecution, in response, opposed the relief sought stating that the Special Court was bound by Article 10 of its Statute (invalidating the amnesty) and that the Lomé Agreement was an agreement between two national entities (not an international treaty), and as such was limited to domestic law, and had no force under international law;[65] it was not intended to cover crimes mentioned in Articles 2 to 4 of the Statute of the Special Court; and there is a *crystallizing* international norm that a government cannot grant amnesty for serious violations or crimes under International Law.[66]

The prosecution further contended that given the gravity of the crimes charged, discretion should not be exercised by the Court to grant a stay of proceedings on the basis that there has been an abuse of process of the Court, and that the allegations of fraud are unsubstantiated as the UN was privy of what was happening in Sierra Leone at all time.[67]

Amicus curie concurred with the Prosecution and noted that the Special Court

61 *Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR72 (E), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, 25 May 2004 (hereinafter *Fofana* Amnesty Decision).

62 *Prosecutor v. Augustine Gbao*, Case No. SCSL-2004-15-AR72 (E), Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004 (hereinafter *Gbao* Amnesty Decision).

63 *Prosecution v. Allieu Kondewa*, Case No. SCSL-2004-14-AR72 (E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty provided by the Lomé Accord, 25 May 2004 (hereinafter *Kondewa* Amnesty Decision).

64 See Moinina *Fofana* Amnesty Decision, para. 1; *Kallon and Kamara* Amnesty Decision, paras. 1, 22-31; *Gbao* Amnesty Decision, para. 1(3),(4).

65 *Kallon and Kamara* Amnesty Decision, paras. 2, 32; *Moinina Fofana* Amnesty Decision, para. 2.

66 *Gbao A*mnesty Decision, para. 2; *Moinina Fofana* Amnesty Decision, para. 2.

67 *Gbao* Amnesty Decision, para. 2; *Kallon and Kamara* Amnesty Decision, para. 2.

would in effect be questioning a measure taken by the UN SC under Chapter VII, if it took upon itself to review the validity of the exception from the Lome Agreement on amnesties. The *amicus curie* also stated that "premised on an obligation to prosecute or extradite persons accused of crimes under international law, the application of an amnesty would be an unlawful interference with that duty."[68]

Amicus curie also argued that "any amnesty that encompasses crimes against humanity, serious war crimes, genocide or torture would be of doubtful validity under international law; and that States cannot use domestic legislation to bar international criminal liability.[69]

B. The position of the Appeals Chamber

i) Was the Lomé Agreement a treaty under international law or not?

The Appeals Chamber noted that sometimes when an agreement to end a non-international armed conflict is signed in addition to the parties to the conflict, by other States and international organizations, it is defensible to argue that the agreement of the parties is *internationalized* with the hope that it can be seen as having created obligations under international law.[70] However, this was a false impression since these agreements are not in fact *internationalized, argued the Appeals Chamber.* According to it, "the role of the UN as a mediator of peace, the presence of peacekeepers which generally is by consent of States cannot add up to a source of obligation to the international community to perform an agreement to which the UN is not a party."[71]

The Appeals Chamber further asserted that the Lomé Agreement created neither rights nor obligations capable of being regulated by international law. An agreement such as the Lomé Agreement which brings to an end an internal armed conflict no doubt creates a factual situation of restoration of peace that the international community acting through the UN SC may take note of. But that, argued the Appeals Chamber, would not convert it to an international agreement which creates an obligation enforceable in international, as distinguished from municipal law.[72]

The Appeals Chamber went on to state that a peace agreement that settles an internal armed conflict cannot be ascribed the same status as one which settles an international armed conflict, which essentially must be between two or more warring states.[73]

ii) Whether or not rebel forces have treaty-based capacity?

In reviewing this question the Appeals Chamber noted the provision of Article 3 common to the Geneva Conventions according to which the parties to an internal

68 *Kallon and Kamara* Amnesty Decision, para. 32.
69 *Kallon and Kamara* Amnesty Decision, para. 34.
70 *Kallon and Kamara* Amnesty Decision, para. 37.
71 *Kallon and Kamara* Amnesty Decision, para. 39.
72 *Kallon and Kamara* Amnesty Decision, para. 42.
73 *Kallon and Kamara* Amnesty Decision, para. 42.

armed conflict should endeavor to bring into force by way of special agreements, all or part of the other provisions of the Geneva Conventions. But it also noted that Article 3 Common to the Geneva Conventions further states that the application of that provision shall not affect the legal status of the parties to the conflict."[74]

Based on this, the Appeals Chamber found that the rebels had no treaty making capacity and the Lomé Agreement did not create obligations under international law, but only municipal law. It stated that there was no doubt that the Sierra Leone government regarded the rebels as an entity with which it could enter into an agreement, but that "however there was nothing showing that any other state had granted rebels recognition as an entity with which it could enter into legal relations or that the government of Sierra Leone regarded it as an entity other than a faction within Sierra Leone."[75]

iii) Limits to lawful amnesties and abuse of due process

The Appeals Chamber held that "where jurisdiction is universal, a state cannot deprive another state of its jurisdiction to prosecute the offender by the grant of amnesty".[76]

The Appeals Chamber also noted that not every activity that is seen as an international crime is subject to universal jurisdiction, however, it held that "the crimes mentioned in Articles 2 to 4 are international crimes and crimes against humanity. Indeed no suggestion to the contrary has been made by counsel."[77]

The Appeals Chamber further considered whether it was prohibited for national states to declare amnesties for crimes against humanity, and it found, relying on authorities, that it was not yet prohibited. However, other States and international tribunals were not prevented from prosecuting such crimes.[78]

The question therefore that still remained to answer was whether the declared amnesty could be a bar for the Special Court. Having found that amnesties to crimes against humanity can be proclaimed legally by national states, the question which remained to know is whether Sierra Leone did not violate its internal law by entering into an agreement to try crimes for which it has already granted lawful amnesties.

The Appeals Chamber argued that "even if it can be said that the government of Sierra Leone has reneged on its undertakings, it would not be a valid basis for declaring the invalidity of Article 10." According to it the grounds on which a party to a treaty can challenge its validity, apart from the ground that it is unlawful are a manifest violation of a rule of internal law of fundamental importance, error, fraud, corruption and coercion. These grounds operate as vitiating the consent of the party impugning the validity of the treaty and must be raised by the part who claims that its consent has been vitiated. The Appeals Chamber concluded that no such grounds have been raised in this case in which the consent of Sierra Leone to the treaty was

74 *Kallon and Kamara* Amnesty Decision, para. 46.
75 *Kallon and Kamara* Amnesty Decision, para. 47.
76 *Kallon and Kamara* Amnesty Decision, para. 67.
77 *Kallon and Kamara* Amnesty Decision, paras. 68,69.
78 *Kallon and Kamara* Amnesty Decision, paras. 71, 72.

itself the grievance of the accused.[79]

Responding to the question whether it amounted to an abuse of due process, to disregard such amnesties since it was provided under national law, the Appeals Chamber held that the submission of the Prosecution that there is a *crystallizing* international norm that a government cannot grant amnesty for serious violations of crimes under international law" is amply supported by material before the court.[80] The Appeals Chamber found however that the *amicus curie* was wrong when stated that this norm has already crystallized. It accepted only that such a norm was developing in international law.[81]

For these reasons, the Appeals Chamber then concluded that "even if the opinion is held that Sierra Leone may not have breached customary law, in granting an amnesty, this court is entitled in the exercise of its discretionary power to attribute little or no weight to the grant of such amnesty which *is contrary to the direction in which customary international law is developing* and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity."[82]

The Appeals Chamber also argued that since the understanding of the UN in signing the Lomé Agreement was that the amnesty granted therein will not extend to such crimes covered by Articles 2 to 4 of the SCSL Statute, and that since the understanding of Sierra Leonean government was also that the amnesty only affected prosecutions before national courts, then all this was consistent with the provisions of Article 10 of the SCSL Statute (invalidating the amnesty) and the universal jurisdiction of other States by virtue of the nature of the crime, to prosecute the offenders.[83] The allegation of due process was therefore untenable, concluded the Appeals Chamber.

Comments:

Regarding the status of agreements signed in internal armed conflicts, one should note that the ICTY has on several occasions relied on Agreements signed between the warring parties in Bosnia extending the protections of the Geneva Conventions to victims in their internal conflict as the legal basis of criminal responsibility of the accused under International law. It is also important to note that the SCSL is obliged under its Statute to have regard to the jurisprudence of the *ad hoc* Tribunals in reaching its decisions.

Regarding the decision on amnesty itself, which was based, as the Appeals Chamber found, on *crystallizing* norms of international law, one can only agree with A. Cassese that it creates more problems than it solves them.[84]

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79 *Kallon and Kamara* Amnesty Decision, para. 63.

80 *Kallon and Kamara* Amnesty Decision, para. 82.

81 *Kallon and Kamara* Amnesty Decision, para. 82.

82 *Kallon and Kamara* Amnesty Decision, para.83 (emphasis added).

83 *Kallon and Kamara* Amnesty Decision, para.85.

84 *See* Antonio Cassese, 'The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty', 2 *J. of Int'l Crim. Jus.,* 2004, 1130-1140.

IV. The question of how funding the Court from voluntary contributions impacts on its judicial independence

One of the main reasons for establishing the Special Court not as a Chapter VII subsidiary organ of the UN SC but as a treaty-based external organ had to do with the mode of funding its activities. Indeed since the very beginning whereas the UN Secretary-General advocated a Court financed from the UN budget as it happens with the *ad hoc* Tribunals, the UNSC expressed the view that funding of the Court had to be granted from voluntary contributions, with the donor countries being the ones responsible for the administrative aspects of the Court. This latest position found its way into the Agreement signed by the UN with Sierra Leone on the establishment of the Special Court.

Article 6 of the Agreement on the Special Court specifically provides that "the expenses of the Special Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation."

In addition, Article 7 provides that: "it is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court."

A. The position of the parties

In the motion filed on 26 June 2003, the accused Sam Hinga Norman challenged the jurisdiction of the Court to try him, arguing that the right to a fair trial is breached where there are legitimate grounds to fear that a tribunal is not independent. According to the Accused, the funding arrangements made for the Court in the Agreement and the function of the management Committee which consists of representatives of donor States create a legitimate fear of interference in justice delivery by the Court through economic manipulation, since donor States could indicate their displeasure with any decision of the Court by withholding their contribution to the funds of the Court.[85]

The Prosecution refuted these allegations stating that the Court was insulated from *bias* or reasonable apprehension of *bias* by the selection process of judges of the Court, diplomatic immunity granted to judges of the Court, the merely advisory nature of the role of the Management Committee and the several structural safeguards contained in the basic documents of the Court.[86]

85 See *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence), 13 March 2004 (hereinafter *Sam Norman* Judicial Independence Decision), para. 18.

86 *Sam Norman* Judicial Independence Decision, para. 19.

B. The position of the Appeals Chamber

The Appeals Chamber noted that the main question put by the motion was whether funding of the Court by voluntary contribution of interested states coupled with the structure of the management committee deprived the Court of the necessary guarantees of independence and impartiality.[87]

The Appeals Chamber found that it was not every inadequacy in funding arrangements that could lead to an inability of Courts to dispense justice without *bias.* According to it, judicial independence rested on the twin pillars of security of tenure of the judges and guarantee of judicial remuneration on one side and its protection from the whims and caprices of governments or bodies charged with the responsibility of funding the judiciary, on the other.[88]

The Appeals Chamber concluded that the most important was "whether such funding arrangement lead to a real likelihood that the Court would be influenced by such arrangement to give decisions, not on the merits of the case, but to please the funding body or agency."[89] But even this, according to the Appeals Chamber, was not yet enough. The "mere complaint about funding arrangements of a Court cannot by itself be a ground for imputing a real likelihood of bias to a judge. What was material and has to be established is that such funding arrangements were capable of creating a real and reasonable apprehension in the mind of an average person that the judge is not likely to be able to decide fairly.[90]

Applying the tests thus elaborated to the facts of the case at issue the Appeals Chamber found manifest that the assumptions on which the Accused based his challenge to the jurisdiction of the Court were far-fetched and had no factual basis that could support the contention that the funding arrangement of the Court could reasonably occasion the denial of a fair hearing.

In reaching this conclusion the Appeals Chamber noted that the judges of the Court were on fixed term contracts of three years, subject to re-appointment; and that the remuneration payable to each judge was also certain and fixed by the contract of appointment.

It also noted that the ability of the Court to pay such remuneration was not in any way conditional upon whether the parties to the agreement establishing the Court were able to raise voluntary contributions to fund the Court, since the agreement itself stipulated that if the voluntary contributions are insufficient for the Court to implement its mandate the UN Secretary-General would explore alternative means of financing the Special Court.[91]

Moreover according to its Article 23, the SCSL Agreement could only be terminated upon completion of the judicial activities of the Court. All these were, in the eyes of the Appeals Chamber, factors strong enough to dismiss any probability of manipulation of the judges by donor states contributing to the Court.[92]

87 *Sam Norman* Judicial Independence Decision, para. 29.
88 *Sam Norman* Judicial Independence Decision, para. 26.
89 *Sam Norman* Judicial Independence Decision, para. 24.
90 *Sam Norman* Judicial Independence Decision, para. 30.
91 *Sam Norman* Judicial Independence Decision, para. 37.
92 *Sam Norman* Judicial Independence Decision, para. 38.

V. The meaning of "those who bear the greatest responsibility" under Article 1 of the Statute of the Special Court

The voluntary funding of the Court operations also had an impact on the UNSC position regarding who was supposed to be tried by the Court, or better, both issues were interlinked. A discussion evolved regarding whether or not the activities of the Court were to be restricted to "the most responsible", a position defended by the UN Secretary-General or to those "who bear the greatest responsibility" as defended by the UNSC and retained in the final text of the SCSL Statute. Whatever was intended, with these words in the Statute, became known in a motion challenging the personal jurisdiction of the Court.[93] The Trial Chamber issued its decision on 3 March 2004.[94]

A. The position of the parties

In his motion the accused Moinina Fofana argued that pursuant to article 1(1) of the Statute, the Court had jurisdiction only over those "who bear the greatest responsibility" for the serious violations of international humanitarian law. And since Moinina Fofana "does not belong in that category of persons", the Special Court for Sierra Leone cannot exercise its jurisdiction over him.[95] The accused further argued that although the phrase those "who bear the greatest responsibility" was unclear and could be interpreted in two ways, however under neither of the interpretations it could be said that he "bears the greatest responsibility".[96] One way of interpreting the provision was to view it as covering only the leaders. Moinina Fofana stressed that if this was the interpretation then he was not covered since he was not the leader of CDF. Moreover the CDF was actually fighting on the side of the government the Head of which was President Kabbah himself. Another way of interpreting it –argued the accused- would be to view it as meaning those who are responsible for the majority of crimes committed during the conflict. Again based on that criterion it could not be said that he belonged to that category.[97]

The accused rejected the interpretation given by the UN Secretary-General to the effect that the words "persons who bear the greatest responsibility" was only a guide to the prosecutor in adopting his prosecutorial strategy, and relied instead on the provisions of UN SC resolution to submit that it defined the personal jurisdiction of the court, i.e. the persons over which the Court was supposed to have jurisdiction. Moreover, according to the accused, in a letter to the UN Secretary-General dated 22 December 2000, the UN SC expressly held that "persons who bear the

93 See *Prosecutor v. Moinina Fofana*, Case No. SCSL2004-14-PT, Preliminary Defense Motion on the Lack of Personal Jurisdiction, 17 November 2003.

94 See *Prosecutor v. Moinina Fofana*, Case No. SCSL 2004-14-PT, Decision on the Preliminary Defense Motion on the Lack of Personal Jurisdiction filed on behalf of the Accused Fofana, 3 March 2004 (hereinafter *Moinina Fofana* Decision on Lack of Personal Jurisdiction).

95 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 1(a).

96 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 2.

97 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 2.

greatest responsibility should be seen as a jurisdictional threshold to the competence of the Court."[98]

The Prosecution, in its response, refuted the accused's allegations and suggested that the provision in question was a measure of prosecutorial discretion, since it was impossible to know at the pre-trial stage the precise scope of the criminal liability of any person who was involved in the conflict in Sierra Leone. And that it was contrary to the presumption of innocence to determine at the pre-trial stage that the accused was one of the persons who bears the greatest responsibility".[99]

The Prosecution further argued that it was by using its discretion that it came to the conclusion that the accused does indeed fulfill the criteria of person "bearing the greatest responsibility" since the indictment clearly alleged that the accused was in a leadership role including that: the accused was the director of war of the CDF; that he was second in command and acted as a CDF leader in the absence of Sam Hinga Norman; that the accused together with others exercised authority, command and control over all subordinate members of the CDF.[100]

B. The position of the Trial Chamber

In deciding the case the Trial Chamber noted the distinction between the competence of the Special Court and that of the *ad hoc* tribunals. Whereas the *ad hoc* tribunals were given competence to prosecute "persons responsible" for serious violations of international humanitarian law", the Special Court had competence to prosecute only "those who bear the greatest responsibility" for serious violation of international humanitarian law. For this reason it was important to find out whether it was a jurisdictional requirement or merely an articulation of prosecutorial discretion, justified the trial chamber.[101]

After carefully reviewing the *travaux preparatoires,* the Trial Chamber came to the conclusion, agreeing with the accused, that it was clear that the drafters intended that the category of persons over whom the SCSL had personal jurisdiction was limited. The Trial Chamber reasoned that in expressing its preference for "persons who bear the greatest responsibility" instead of persons "most responsible" the UN SC directed that the fact that an individual held a leadership role should be the primary consideration; whereas severity of crime or the massive scale of a particular crime should not be the primary consideration.[102] The Trial Chamber held that "the issue of personal jurisdiction is a jurisdictional requirement and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the prosecution has submitted."[103]

The Trial Chamber further reviewed the question when should the issue of whether or not the accused fulfils the necessary requirements of personal jurisdiction be determined. It concluded that such determination should be made at the

98 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, paras. 3, 14, 15.
99 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, paras. 4-9.
100 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 10.
101 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 21.
102 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 40.
103 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 27.

confirmation of the indictment stage, when the subject matter jurisdiction and the temporal jurisdiction are also reviewed.[104]

The Trial Chamber turned to the question of the test required for a judge to satisfy himself that the personal jurisdiction of the Court has been fulfilled, and came to the conclusion that this standard should be the same as the one necessary to satisfy the subject- matter jurisdiction of the Court, mainly that the judge must satisfy himself or herself that there is sufficient information to believe that the accused is a person who bears the greatest responsibility for serious violations of International Humanitarian Law.[105]

On the facts of the case at issue, the Trial Chamber concluded that the designated judge satisfied himself that the temporal and personal jurisdictional requirements were satisfied."[106]

However it warned that in the ultimate analysis, whether or not in actuality the accused is one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law still remained an evidentiary matter to be determined at the trial stage. At the pre-trial stage, the Trial Chamber was essentially concerned with a mere allegation, according to which the accused Moinina Fofana held a leadership position in one of the factions in the armed conflict.[107]

VI. How the establishment of the Special Court for Sierra Leone through a bilateral Agreement with the UN has influenced its work

The establishment of the Special Court through an agreement and not through a Chapter VII resolution of the UN SC had implications for the work of the Court.

In particular it is true that the Special Court was conferred with the power to override the jurisdiction of national Courts of Sierra Leone, and the Sierra Leone government and citizens of that country were obliged to comply with orders of the Special Court.

Since the agreement was signed solely by Sierra Leone, and the United Nations in its own rights as an institution with international legal personality, a legitimate question arises as to whether or not orders of the Special Court would also bind others countries and their citizens, and second whether or not the primacy accorded to the Special Court could be extended to include countries other than Sierra Leone willing to assert their jurisdiction over suspects of serious crimes against humanity committed on the territory of Sierra Leone. Put in other words, the question is about the limits of the binding powers of the Special Court for Sierra Leone.

Three cases decided by the Special Court allow us to clarify these questions: a) the question of Head of State immunities, and b) the arrest warrant against Charles Taylor, and c) the question of the transfer of the Court's proceedings from the seat of the Court in Sierra Leone to a location in the Netherlands. Since the question of the head of state immunities and the arrest warrant against Charles Taylor were decided in one single case, they will be dealt together here below.

104 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 31.

105 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, para. 38.

106 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, paras. 35,36,41,42.

107 *Moinina Fofana* Decision on Lack of Personal Jurisdiction, paras. 44,45.

a) Head of State Immunities and the Arrest Warrant against Charles Taylor

A motion on behalf of former President of Liberia to quash the indictment and to set aside the warrant of his arrest on the ground that he is immune from any exercise of the jurisdiction of the Court was filed by Counsel for Mr. Taylor and for the state of Liberia on 23 July 2003.[108]

1. The background to the case

The indictment and the arrest warrant were confirmed on 7 March 2003, when Charles Taylor was still head of state of Liberia. At the request of the Prosecutor on 4 June 2003, they were transmitted to the appropriate authorities in Ghana, where Mr. Taylor was visiting, but proved ineffective to secure his apprehension. In August 2003, Mr. Taylor stepped down from the presidency of Liberia and was allowed to take up residency in Nigeria.[109]

Mr. Taylor was elected President in 1997, and he remained in power until August 2003, when he was forced to step down, his tenure covering most of the temporal jurisdiction of the Court (which starts from 30 November 1996).[110]

In the initial indictment, Mr. Taylor was accused of commission of crimes against humanity and grave breaches of the Geneva Conventions[111] with intent "to obtain access to mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone and to destabilize the state." It was alleged that he provided "financial support, military training, personnel, arms ammunition, and other support and encouragement" to the rebel factions throughout the armed conflict in Sierra Leone.

The counts accused him of "terrorizing the civilian population and ordering collective punishment", sexual and physical violence against civilians, use of child soldiers, abductions and forced labour, widespread looting and burning of civilian property, and attacks on and abductions of UNAMSIL peacekeepers and humanitarian assistance workers.

The Prosecution alleged that from an early stage and acting in a private rather than official capacity, he resourced and directed rebel forces, encouraging them in campaigns of terror, torture, and mass murder, in order to enrich himself from a

108 See "Applicant's Motion made under protest and without waiving of Immunity accorded to a Head of State Charles Ghankay Taylor requesting that the Trial Chamber do quash the said approved indictment of 7th March 2003 of Judge Bankole Thompson and that the aforesaid purported Warrant of Arrest and Order for Transfer and detention of the same date issued by Judge Bankole Thompson of the Special Court for Sierra Leone, and all other consequential and related ORDER(S) granted thereafter by either the said Judge Bankole Thompson OR Judge Pierre Boutet on 12th June 2003 against the person of the said President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled and/OR set aside as a matter of law", 23 July 2003.

109 *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, para. 1 (hereinafter *Charles Taylor* Decision on Immunity from jurisdiction).

110 *Charles Taylor* Decision on Immunity from Jurisdiction, paras. 3-4.

111 The reference to grave breaches of the Geneva Conventions was later removed in a subsequent Amended Indictment.

share in the diamond mines that were captured by the rebel forces.[112]

2. The submissions of the parties

The accused in his motion to quash the indictment raised the following issues:

a) According to the *Belgium v Congo* case, as an incumbent Head of State at the time of his indictment, Charles Taylor enjoyed absolute immunity from criminal prosecution; following this decision, it is now beyond doubt that a head of State enjoys immunity from foreign jurisdictions and inviolability whether the Head of State is on foreign territory on an official mission or not;
b) Exceptions from diplomatic immunities can only derive from other rules of international law such UNSC Chapter VII resolutions; and since the Special Court does not have Chapter VII powers, therefore judicial orders from the Special Court have the quality of judicial orders from a national court;
c) There is nothing in the Special Court agreement to suggest that the Special Court is an international criminal court of the kind referred to in the *Congo v. Belgium case; t*he Indictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution, and the timing of the disclosure of the arrest warrant and the indictment on 12 June 2003 in Ghana caused prejudice to his functions as head of State since he was involved in peace negotiations;
d) The principle of sovereign equality prohibits one state from exercising its authority on the territory of another, therefore the Special Court's attempt to serve the Indictment and arrest warrant on Charles Taylor in Ghana was a violation of the principle of sovereign equality. The Special Court had no jurisdiction to issue the arrest warrant and in doing so violated the sovereignty of Ghana.[113]

The Prosecution in its response raised *inter alia* the following issues:

a) The *Congo v. Belgium* case concerned only the immunities of an incumbent head of State from the jurisdiction of the Courts of another State;
b) Customary international law permits international criminal tribunals to indict acting head of State and the Special Court is an international court established under international law;
c) In the *Congo v. Belgium case*, the ICJ enumerated a number of circumstances in which a Minister of Foreign Affairs could be prosecuted for international crimes, including certain international criminal courts where they have jurisdiction. The Special Court is such an international criminal court and therefore has jurisdiction. Article 6(2) of the Statute clearly envisages that the Special Court has the power to try a head of State;
d) The lack of Chapter VII powers does not affect the Special Court's jurisdiction over heads of State. The International Criminal Court which does not have Chapter VII powers explicitly denies immunity to heads of state for international crimes;
e) The transmission of documents to Ghanaian authorities could not violate the

112 An Amended Indictment was filed on 16 March 2006 that reduced the counts of the initial indictment to 11, and reformulated the initial allegations. See P*rosecutor v. Charles Ghankay Taylor*, Case SCSL-2003-01-I, Amended Indictment, 16 March 2006.

113 *Charles Taylor* Decision on Immunity from Jurisdiction, paras. 6-8, 10-12.

sovereignty of Ghana.[114]

3. The position of the Appeals Chamber

The Appeals Chamber distinguished two clearly identifiable basis of the challenge: i) Are third states required to cooperate with the Special Court or not? ii) Is the immunity of head of states a bar to criminal prosecutions before the Special Court or not?

It responded in the negative to both questions.

i) third states cooperation in matters of arrest

In relation to the obligation of third states to cooperate, the Appeals Chamber held that: "Other than a situation in which the receiving state has an obligation under Chapter VII of the United Nations Charter or a treaty obligation to execute the warrant, the receiving authority has no obligation to do so. That states asserts its sovereignty by refusing to execute it. In the result, merely requesting assistance far from being an infringement of sovereignty of the receiving state is in fact a recognition of sovereignty. In other words, Ghana's sovereignty could not be in question as it was merely the receiving state. A warrant of arrest transmitted by one country to another is not self-executing. It still requires the cooperation and authority of the receiving state for it to be executed."[115]

Therefore, not only Ghana had no obligation to honor the arrest warrant issued by the Special Court for Sierra Leone but also Nigeria, who gave asylum to Charles Taylor in the aftermath of his resignation from the post of President of Liberia.[116]

ii) Head of state immunities of serving officials

Regarding the question whether head of state immunities could be a bar to prosecutions before the Special Court, the Appeals Chamber expressed the view that this question turns to a large extent on the issue of the legal status of the Special Court, mainly the question whether the Special Court was an international tribunal or not.

The Appeals Chamber minimized the importance of the lack of the so-called Chapter VII powers of the Special Court and found that when the UNSC carries out its duties under Chapter VII it acts on behalf of the members of the UN anyway, and therefore the agreement between the UN and Sierra Leone on the establish-

114 *Charles Taylor* Decision on Immunity from Jurisdiction, paras.9, 10, 13, 16. See also the *amicus curie* position, ibid., paras. 17-19.

115 *Charles Taylor* Decision on Immunity from Jurisdiction, para. 57.

116 As matter of fact in its resolution 1638 (2005) of 11 November 2005, in which the UNSC determined under Chapter VII the apprehension and detention of "former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone" the UNSC also expressed "its appreciation to Nigeria and its President, Olusegun Obasanjo, for their contributions to restoring stability in Liberia and the West African sub region", and acknowledged that "Nigeria acted with broad international support when it decided to provide for the temporary stay of former President Charles Taylor in Nigeria". See UN SC resolution 1638 (2005), 11 November 2005, (preamble and paragraph 1).

ment of the Special Court could be considered an agreement between all members of the UN and Sierra Leone. Since the agreement was an expression of the will of the international community, the Special Court should be considered truly international as it was established to fulfill an international mandate and was part of the international machinery.[117]

With regard to the distinction made in the *Congo v. Belgium* case between the jurisdictions of national courts that need to respect immunities and the jurisdictions of "certain international criminal courts", that are not required to do so, the Appeals Chamber found that that distinction existed probably because the principle of state immunity derives from the principle of equality of sovereign states and since international criminal tribunals are not organs of a state but derive their mandate from the international community, immunities have no relevance for the work of international tribunals.[118]

The Appeals Chamber went further and admitted that a principle "seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[119]

The Appeals Chamber considered that as an international tribunal the Special Court could not ignore "whatever the Statute directs, permits or empowers it to do *unless* such provisions are void as being in conflict with a peremptory norm of general international law,"[120] and that since Article 6(2) of the SCSL Statute (on immunities), was not in conflict with any peremptory norm of general international law, its provisions had to be given effect by the Special Court.[121]

The Appeals Chamber also noted that even if the Accused succeeded in his application, the consequence would have been only to compel the Prosecutor to issue a fresh warrant, since by the time the case was heard the accused had ceased to be a Head of State, and the immunity *ratione personae* that he claimed had ceased to attach to him anyway.[122]

b) Cooperation of third states concerning Court's proceedings in places other than the seat of the Court

The establishment of the Special Court through an agreement with the UN and not through a UN Chapter VII resolution had an impact on the relationship of the Court with third States not only in terms of the cooperation required for the serving of arrest warrants, but also in terms of the cooperation required for the relocation of the proceedings to a place other than the usual seat of the Court.

After Charles Taylor was finally surrendered to the Special Court in March 2006, the Office of the Prosecutor had concerns about the destabilizing effect that the detention and trial of the accused Charles Taylor could bring both for the Safety of the Court and peace in the region, if the trials were held in Sierra Leone. This prompted the Special Court to seek an alternative venue under Rule 4 of its Rules of

117 *Charles Taylor* Decision on Immunity from Jurisdiction, paras. 38, 39.
118 *Charles Taylor* Decision on Immunity from Jurisdiction, para. 51.
119 *Charles Taylor* Decision on Immunity from Jurisdiction, para. 52.
120 *Charles Taylor* Decision on Immunity from Jurisdiction, paras. 43-46.
121 *Charles Taylor* Decision on Immunity from Jurisdiction, para. 53.
122 *Charles Taylor* Decision on Immunity from Jurisdiction, para. 59.

Procedure and Evidence.[123]

The Special Court contacted three of the exiting jurisdictions: the ICTY, the ICTR and the ICC. The ICTY and ICTR reportedly showed reluctance to assist the Special Court in this, for lack of available facilities and the need to give priority to their own completion strategies. At the same time the Special Court contacted the government of the Netherlands for permission for the holding of proceedings in the Netherlands.[124] In a 29 March letter the government of the Netherlands expressed its willingness to grant the request, subject the following 3 conditions:

– The necessary legal basis in the way of a chapter VII resolution of the UNSC is created for the Special Court to detain and conduct the trial of Mr. Taylor in the Netherlands;
– The arrangements are in place to ensure that Mr. Taylor is transferred to a place outside of the Netherlands, immediately after the final judgment of the Special Court;
– That the Special Court ascertains that one or more of the existing international criminal courts in the Netherlands are in a position to make available appropriate facilities, including a courtroom and a detention cell, to the Special Court for the purpose of trial of Mr. Taylor.[125]

In requesting a Chapter VII resolution mandating it to host the temporary proceedings of the Court in the case of Charles Taylor, the government of the Netherlands argued that in the absence of such a mandate, the detention and trial of Charles Taylor in the Netherlands would be challenged before Dutch National Courts. The Government of the Netherlands argued that under Dutch laws arrest and detention of a person cannot be based on an executive instrument, as it would be an agreement signed between the Netherlands and the Special Court. Nor was the Agreement between the UN and Sierra Leone on the establishment of the Special Court found a sufficient basis to legitimize the acts of the Special Court in Dutch Territory, as it was not viewed as an instrument of international law *binding* upon the Netherlands.

123 In a letter dated 29 March 2006 to the Netherlands, the President of the Special Court wrote: "it has become apparent to me that security and issues related to the stability in the region would make it impossible for Charles Taylor, the accused in Case No. SCSL-2003-03-I, to be tried in Freetown, by the Special Court for Sierra Leone." See "Annex 1 to the Letter of 31 March 2006 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council", UN SC doc. S/2006/207.

124 This request was object of an "Urgent Defence Motion by the Accused Charles Taylor, Against Change of Venue" that was however dismissed by the Appeals Chamber on 29 May 2006. In its Decision the Appeals Chamber held that at that stage of proceedings "matters related to the venue of the Taylor trial are exclusively within the administrative and diplomatic mandate of the President. Prior to a decision being made, any questions relating to the president's activities concerning the venue of the Taylor trial should be directed to the Office of the President and not to the Trial or Appeals chambers." See *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-AR72, Decision on Urgent Defence Motion against Change of Venue, 29 May 2006, para. 8.

125 See "Annex II to the Letter of 31 March 2006 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council", UN SC doc. S/2006/207.

Only a binding Chapter VII resolution would disqualify the Dutch jurisdiction over Charles Taylor.

In its resolution adopted on 16 June 2006, the UNSC acting under Chapter VII, decided that the "government of the Netherlands shall facilitate the implementation of the decision of the Special Court to conduct the trial of former president Taylor in the Netherlands, in particular by allowing the detention and the trial in the Netherlands of former President Taylor by the Special Court. The UNSC also decided that the Special Court "shall retain exclusive jurisdiction over former President Taylor during his transfer to and presence in the Netherlands in respect of matters within the Statute of the Special Court, and that the Netherlands shall not exercise its jurisdiction over former President Taylor."[126]

To implement the transfer process a Memorandum of Understanding was signed by the Special Court with the International Criminal Court on 13 April 2006,[127] that sets out the conditions under which the premises of the ICC are lent to the ICC. In addition a Headquarters agreement was also signed with the Government of the Netherlands, on 19 June 2006, formalizing the conditions under which the Special Court is allowed to conduct the trial of former President Taylor in the Netherlands.[128] That same day Special Court accused Charles Taylor was transferred to the Netherlands where he is held in custody at the ICC Detention Unit awaiting his trial.

126 UN SC resolution 1688 (2006), 16 June 2006.

127 See "Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone", 13 April 2006 in ICC-Pres/03-01-06.

128 See "Headquarters Agreement between the Kingdom of the Netherlands and the Special Court for Sierra Leone", 19 June 2006, in *Tractatenblad van het Koninkrijk der Nederlanden*, 6(2006) Nr.1.

Chapter 12

From East Timor to Timor-Leste: A Demonstration of the Limits of International Law in the Pursuit of Justice

Richard Burchill

I. Introduction

When the Rome Statute of the International Criminal Court entered into force on 1 July 2002 the Secretary-General of the United Nations (SG) stated it was a historic occasion as the Statute reaffirmed 'the centrality of the role of law in international relations' and espoused 'the promise of a world in which the perpetrators of genocide, crimes against humanity and war crimes are prosecuted when individual States are unable or unwilling to bring them to justice.' Finally, according to the SG, it also provided 'the world a potential deterrent to future atrocities.'[1] While the SG was perhaps being overly optimistic, his views reflect recent developments in the creation of a system of international criminal justice. The adoption of the Rome Statute, the creation of the ad hoc tribunals for the former-Yugoslavia and Rwanda, various domestic efforts to remove impunity and the actions of the international community in places such as Sierra Leone, Cambodia, and Kosovo, have all contributed to the view that those responsible for serious violations of international law will be brought to justice.

It is also possible to add East Timor/Timor-Leste[2] to this list of examples in support of the developments in international criminal justice as the events which unfolded in the territory during 1999 shocked the conscience of mankind for their senseless brutality and brought about a range of international responses that were initially intended to ensure those responsible were brought to justice. However, the situation in East Timor in 1999 and the efforts taken to prosecute those responsible also show the limitations of any advances in international criminal law. Despite the existence of clear evidence of serious violation s of international human rights and humanitarian law, along with the specific identification of those individuals who are criminally responsible, very little has been done to bring certain individuals to jus-

1 'There must be no relenting in fight against impunity, says Secretary-General as International Criminal Court Rome Statute comes into force', UN Press Release SG/SM/8293 1 July 2002, available at http://www.un.org/News/Press/docs/2002/sgsm8293.doc.htm.

2 The state of Timor-Leste was declared on 20 May 2002. In this paper the territory will be designated East Timor prior to the date and Timor-Leste after this date. Where the discussion involves events in the territory both prior and after the date of independence East Timor/Timor-Leste will be used.

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tice. In particular individuals located in Indonesia, including political and military leaders, who have been identified as bearing responsibility for the death and destruction that was brought upon the territory in 1999 remain at liberty. The international response to the violence in 1999 brought about internationalized or hybrid criminal tribunal which can be seen as an innovative tool in the fight against impunity. At the same time the context within which the internationalized tribunal operated made clear that, depending upon the circumstances at the time, impunity still prevails.

The fight against impunity for those responsible for international crimes is a complex process and despite the rhetoric on the importance of ensuring justice, it is far from an absolute process. The pursuit of justice in international criminal law, understood mainly as the removal of impunity for those responsible, has to compete with a range of other paths in the resolution of conflicts. The use of law and judicial processes is not always the most effective way of dealing with post-conflict situations. Sometimes it is deemed necessary to bypass the use of legal prosecutions as it is felt the pursuit of prosecution will potentially create more conflict and prevent any true long-term resolution. Also the pursuit of justice does not occur in a vacuum and the realities of the surrounding circumstances and prevailing interest in the international system will have a major influence. It is easy to say that prosecutions should be pursued when there are serious violations of international human rights and humanitarian law. But the pursuit of justice involves a range of often competing priorities that may result in prosecution being sidelined in favour of other means of dealing with the past and paving the way for the future.

As with most areas of international law there exist a number of potentially contradictory forces at work in the pursuit of justice. In the field of international criminal justice former United States President Bill Clinton articulated the contradictions well when he stated 'There must be peace for justice to prevail but there must be justice when peace prevails.'[3] The problem is how can you achieve peace and overlook the demands of justice? Or if peace is achieved what is the point of pursuing justice if that is only going to upset the peace? The events surrounding East Timor demonstrate the interplay of these contradictions and furthermore show that the final outcome is likely to be dictated more about ensuring peaceful relations among states over the demands of justice for individuals. The events and the international reaction shows clearly that impunity has yet to be defeated in the international system, something any proponent of international criminal justice should pause and reflect on before articulating any claims of the development of international law in favour of justice.

At the same time, one could perhaps argue that East Timor/Timor-Leste is an anomaly, an exception to the general trend. But then this would lead to more worrying conclusions about the ability of international law to be a force for justice as its application to the territory Timor always seems to involve exceptions to what are perceived to be dominant principles guiding international behaviour. The past and present history of East Timor/Timor-Leste tells us a lot about the history of international law and relations and the ways in which the interests of the powerful prevail, even in the face of grave injustices. Peter Carey has commented that with East

3 Quoted in David Scheffer, 'International judicial intervention', *Foreign Policy*, Spring 1996, p. 42.

Timor 'the very name has now become synonymous with ethnocide, Third World colonialism and the crushing of a people in the interests of *realpolitik*.'[4] This statement came before the events of 1999 but unfortunately it remains equally pertinent today, demonstrating the limits of international law to bring about change that favours the interests of individual human beings over the interests of powerful and influential states.

This contribution will examine the events taking place in 1999 and the response of the international community in the pursuit of international criminal justice. The response to the violations of international law in 1999 is part of a long pattern of indifference shown by the international system to events in East Timor/Timor-Leste involving behaviour that runs contrary to accepted international legal principles. This contribution begins with a brief examination of the history of East Timor up to 1999, highlighting the various instances where it is felt international law failed to address the severe injustices brought upon the territory. The discussion will then move to the events of 1999 and the responses which followed, concentrating on the apparent unwillingness of the UN and key states to address the issue of impunity with regard to those in the Indonesian military and government who have been found to be directly responsible for a catalogue of serious violations of international criminal law. Throughout the paper it will be kept in mind that there exists a basic tension in the international system between the fundamental concepts of state sovereignty and the pursuit of communal goals such as justice and human rights protection.[5] But instead of just accepting this tension as inevitable, questions will be raised about the level of commitment there is in the so-called fight against impunity. Particular focus will be given to the role of the UN in this process as it not only represents the conscience of the international system it also has a role of ensuring universal standards are met even when political interests are held to be more important than the pursuit of justice.

II. Historical Background

The history of East Timor and its position in the world has, for the most part, been sculpted by other states, a trend which continues to the present period of independence. Throughout this history the ability of international law to restrain the self-interested behaviour of outsiders and support the wishes and desires of the people of East Timor/Timor-Leste has been severely limited. From its position in the Far East spice trade up to its eventual independence the fortunes and misfortunes of the territory have been heavily dependent upon the prevailing attitudes and actions of outside actors, whose behaviour has not been marked by any discernible principled beliefs or adherence to legal standards.

The territory was colonised by the Portuguese and the Dutch in the early 1500s with the initial exploitation of the trade in sandalwood which was a desired commod-

4 Peter Carey, 'The forging of a nation: East Timor' in Carey and G. Carter Bentley, eds. *East Timor at the Crossroads: The Forging of a Nation* (London: Cassell, 1995) p. 1.

5 See Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford: Oxford University Press, 2003); Simon Chesterman, 'Rough justice: establishing the rule of the law in post-conflict territories' 20 *Ohio State Journal on Dispute Resolution* (2005) p. 69.

ity from the island. The 1859 Treaty of Lisbon settled the colonial control over the island of Timor giving the Dutch the Western part and the Portuguese the East. The geographical position of the territory has meant that concerns over international security in the region have had a direct impact on the territory. During the Second World War, the territory was seen as strategically important due to its proximity to Australia, making it a prime location for stopping any Japanese advance. After the Japanese attack on Pearl Harbour, Dutch and Australian troops occupied East Timor as part of pre-emptive move against the Japanese. During World War II Portugal had declared neutrality which extended to any colonial territories under its control. The neutral status of Portugal meant that its territory was not to be used by the belligerents in the conflict, something which was ignored by the Allies with the arrival of the Dutch and Australian troops. In response the Japanese used the presence of the Allied force as a pretext for an invasion in February 1942. The Japanese occupied the territory until September 1945 and the occupation regime was brutal as the people of East Timor paid the price for what the Japanese considered to be acts in support of the Allies. Approximately 50 – 60,000 Timorese had lost their lives as a result of the Japanese occupation and there was widespread destruction of villages.[6] The contribution of the East Timorese to the Allied war effort has only received cursory acknowledgment.[7]

At the conclusion of WW II the European colonial powers assumed they would regain control of their overseas territories, while the territories in question, emboldened by the rhetoric of self-determination emanating from the newly created UN, pursued independence. In the case of Indonesia, the newly independent state consisted of the former territories of the Dutch East Indies and did not include East Timor which remained under Portuguese control. In 1960 the government of Indonesia stated in the UN General Assembly (GA)

We are declaring the right of the Indonesian people to be sovereign and independent within all the territory formerly covered by the Netherlands East Indies. We do not make any claim to any other part of the Indonesian archipelago. Indonesia explicitly does not make any claim at all to territory such as that in Borneo or Timor that lies within the Indonesian archipelago, but was not part of the Netherlands Indies.'[8]

For East Timor the continuation of Portuguese meant the continued exploitation of the land for cash crops and the use of compulsory labour from the indigenous population, no real change from the three hundred years of colonial rule that preceded the war.[9] Portugal was not well known for its colonial policies and there was little effort at developing any of its overseas territories and throughout the colonial period there was small-scale but sustained resistance to the Portuguese.[10] Given the remoteness of East Timor the territory was certainly low on the list of priorities for

6 Carey in *East Timor at the Crossroads*, p. 4; John Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (London: Zed Books, 1991) p. 14.

7 See John Pilger, *Distant Voices* (London, Vintage 1994) pp. 237-238.

8 U.N. GAOR, 15th Sess., (888th plen. mtg.) 431, at 451, U.N. Doc. A/PV.888 (1960).

9 Taylor, *Indonesia's Forgotten War*, p. 14

10 On the colonial period see Taylor, *Indonesia's Forgotten War*, chapter 1; Franco Nogueira, *The United Nations and Portugal: A Study of Anti-Colonialism* (London: Sidgwick and Jackson, 1963).

Portugal. Portugal had declared its overseas possessions to be provinces and therefore not colonies, an attempt to reject the obligations that were emerging in the international system concerning decolonisation.[11] In the 1960s local groups in East Timor began agitating more vociferously for the end of colonial rule and in 1974 a new government came to power in Portugal and began the process of decolonisation.[12]

As the decolonisation process got under way in East Timor a variety of political factions formed. The leading groups to emerge included FRETILIN, which advocated independence for East Timor; UDT, which at first preferred continued association with Portugal with a gradual move to independence but later changed its position and aligned with a third group APODETI, which favoured integration with Indonesia. As tensions among these groups increased through 1974 and 1975 a split emerged between FRETILIN and a UDT/APODETI coalition. In 1975 a civil war broke out with FRETILIN eventually overpowering the UDT/APODETI coalition. A FRETILIN led government declared independence for the Democratic Republic of East Timor on 28 November and the new state reportedly received recognition from 15 states at the time.[13]

Early on in the independence movement Indonesia continued to express the view that it supported self-determination for East Timor and had no intentions of intervening.[14] José Ramos-Horta, current Foreign Minister of Timor-Leste, has written about his meetings in 1974 with the then Indonesian Minister of Foreign Affairs, Adam Malik where he was given reassurances that Indonesia would support the FRETILIN efforts. Malik provided a letter that was later transmitted to the East Timorese population that stated:

> The Government of Indonesia until now still adheres to the following principles:
> I. The independence of every country is the right of every nation, with no exception for the people of Timor.
> II. The Government as well as the people of Indonesia have no intention to increase or to expand their territory, or to occupy other territories other than what is stipulated in their Constitution.
> III. ... whoever will govern in Timor in the future after independence, can be assured that the Government of Indonesia will always strive to maintain good relations, friendship, and cooperation for the benefit of both countries.[15]

However, the emergence of FRETILIN as the leading political faction in the territory created a good deal of concern for Indonesia and its leading ally, the USA. It was felt that FRETILIN had communist tendencies and Indonesia, which had just

11 Generally see Nogueira, *The United Nations and Portugal*.

12 Taylor, *Indonesia's Forgotten War*, 21-23.

13 Roger Clark 'The "decolonization" of East Timor and the United Nations norms on self-determination and aggression' 7 *Yale Journal of World Public Order* (1980) p. 8, note 29.

14 See statements in Taylor, *Indonesia's Forgotten War*, 20-21. There is also evidence of Indonesian interest in the territory at this time, Roger Clark, 'East Timor, Indonesia, and the international community' 14 *Temple International and Comparative Law Journal* (2000) p. 79.

15 José Ramos-Horta, *Funu: The Unfinished Saga of East Timor* (Lawrenceville: The Red Sea Press, 1987) pp. 42-43.

undertaken a massive purge of communists, was unsettled by the prospect of a communist territory on its border. This position was supported by the USA who was still feeling the sting of its losses in Viet Nam and continued to have strategic interests in the region. While the political agenda of FRETILIN did not adhere to any sort of strict communist doctrine, its attention to social aspects and community based programmes led to its classification as such.[16] In this environment the existence of regime that was felt to have communist inclinations could not be tolerated, regardless of any principles of self-determination or decolonisation.

As events unfolded in the territory it soon became clear that Indonesia was not going to adhere to the principles it stated before the GA and in the Malik letter. Early in 1975 Indonesia undertook a military exercise which is believed to have been a simulation for an attack on East Timor and preparations were being made in West Timor for supporting an invasion of the eastern part of the territory.[17] Other states made clear their support for Indonesia if an invasion of East Timor became necessary. The Indonesian President had met the Australian Prime Minister in September 1974 and reportedly secured Australia's acceptance of East Timor becoming part of Indonesia.[18] The UK had expressed the view that East Timor was not capable of self-determination and that integration with Indonesia was to be supported. If a conflict was to emerge then it was important, in the words of a British diplomat to 'keep our heads down and avoid siding against the Indonesian Government.'[19] In August 1975 the US ambassador to Jakarta expressed the view that an Indonesian invasion of East Timor was to be quick and effective, but was not to be undertaken with US equipment.[20] Further complicity of the US in Indonesia's plans to invade East Timor has come to light from declassified memos that detail the conversations between US President Gerald Ford, Secretary of State Henry Kissinger and Indonesian President Suharto who were meeting in Indonesia just before the invasion in December 1975. At this meeting Suharto called on the USA to understand that it had become necessary to take 'drastic action' in order to 'establish peace and order' in East Timor. The response of the US leaders was 'we understand the problem and the intentions you have', but requested that Indonesia hold off on any action until they had returned home to better manage the situation.[21]

On 7 December 1975, as Ford and Kissinger flew out from Jakarta, Indonesian troops moved into East Timor in a clear violation of international legal rules on the use of force and the denial of self-determination. The invasion of East Timor involved a massive show of force and was brutal in its conduct with no regard to the relevant laws of war regulating the conduct of hostilities. The Indonesian troops

16 On the political doctrine see Ramos-Horta, *Funu*, pp. 35-38.

17 Taylor, *Indonesia's Forgotten War*, p. 40.

18 Pilger, *Distant Voices*, p. 247.

19 Taylor, *Indonesia's Forgotten War*, p. 55.

20 Taylor, *Indonesia's Forgotten War*, p. 55.

21 Embassy Jakarta Telegram 1579 to Secretary State, 6 December 1975 [Text of Ford-Kissinger-Suharto Discussion]. Source: Gerald R. Ford Library, Kissinger-Scowcroft Temporary Parallel File, Box A3, Country File, Far East-Indonesia, State Department Telegrams 4/1/75-9/22/76 paras. 39-51. Available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/#doc4.

have been described as acting 'in the most savage fashion' with the people of East Timor 'subjected to systematic killing, gratuitous violence and primitive plunder.' There were reports of widespread killings and group executions along with destruction of property, looting and massive displacements of the population:[22] Eye-witness accounts spoke of mass executions conducted by the Indonesian forces where crowds of bystanders were ordered to watch and count out each killing as it took place.[23]

Following the invasion the UN Security Council (SC) issued Resolution 384 that expressed concern over the violence and loss of human life in East Timor and described the Indonesian intervention as 'deplorable'[24] but not a threat to international peace and security, nor a violation of the UN Charter. The resolution called upon all states to respect the territorial integrity and the right of self-determination for East Timor and called upon Indonesia to withdraw 'without delay'. The SC did not call for any action to be taken except for the SG to send a special representative to the territory to report on how the resolution was being acted upon. The special representative reported back to the SC that a full report was not possible as Indonesia prevented him from travelling to all parts of the territory. The SC did not take any action in response to this report merely repeating in a new resolution the terms of Resolution 384.[25]

Despite the clear illegality of Indonesia's actions in the invasion and occupation, accompanied by widespread violence, the SC took no further action. The lack of action taken by the SC demonstrated the priority given to political interests over international legal principles and the influence Indonesia had over the permanent members of the SC. Even in 1975 it was possible to argue the existence of customary international legal rules providing that peoples under colonial rule had a right to exercise self-determination, that those colonial peoples had the right to freely determine their political status free from any outside interference, and that it was unacceptable to use force in denying self-determination or for the acquisition of territory.[26]

Despite this, the body entrusted with the maintenance of international peace and security felt it was better not to confront Indonesia than support the legal rights of the East Timorese. On 17 July 1976, Indonesia enacted a law incorporating East Timor as a part of the national territory of Indonesia. The lack of response from the SC on this matter confirmed the acceptance of the illegal acquisition of territory through the use of force.

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22 Taylor, *Indonesia's Forgotten War*, pp. 68-70.

23 Reported in Pilger, *Distant Voices*, p. 253.

24 SC Resolution 384 (1975) (21 December 1975) adopted unanimously.

25 SC Resolution 389 (1976) (22 April 1976). With this resolution two of Indonesia's major allies at the time, the USA and Japan, abstained, an indication of their desire that matter was no longer worth discussing.

26 As represented by GA Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960); GA Resolution 2625 (XXV) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (24 October 1970) and confirmed by the ICJ in Advisory Opinion *Legal Consequences for States of the Continued Presence of South African in Namibia*, ICJ Reports (1971) 16 and *Western Sahara Case* ICJ Reports (1975) 12.

The GA also took issue with the Indonesian invasion and called on the SC to take 'urgent action' to protect the territorial integrity and right of self-determination for East Timor,[27] something the SC clearly failed to do. In Resolution 31/53 the GA reaffirmed the right of East Timor to self-determination and the legitimacy of its struggle against Indonesia. The GA also rejected the claim of incorporation of the territory by Indonesia, calling for a full withdrawal from the territory by Indonesia and again calling on the SC to take the necessary steps for the effective implementation of the resolutions. The GA remained seized of the matter for a number of years continually reiterating the illegitimacy of Indonesia's actions and calling on the SC to take action. But over time the resolutions became shorter in terms of operative statements and merely repeated past statements. At each subsequent vote in the GA the resolutions attracted less support from the membership.[28]

In 1982, the GA adopted its final resolution on the matter for a number of years as it called upon the parties involved to work towards some sort of resolution to the matter.[29] The political support for Indonesia from the US and others worked to overcome a clear violation of international law in support of the realities of the political interest involved.[30] Eventually East Timor fell off the UN agenda and Indonesia was able to exercise control over the territory as it saw fit without any sustained condemnation from states or the UN.

During the period of occupation Indonesia's ability to avoid any responsibility for wide scale violations of international human rights and humanitarian law continued. Following the 1975 invasion Indonesia was not able to immediately take control of the entire territory and FRETILIN resistance units continued to operate. This in turn brought severe military reprisals against the resistance movement and repressive rule against the indigenous society. For example, Indonesia engaged in widespread bombing campaigns which forced population movements, ruined crops and prevented the farming of the law, adding to famine conditions. As part of its fight against the Timorese resistance the Indonesian army made use of a process called 'encirclement'.

This involved Indonesian troops literally physically encircling areas known to be FRETILIN controlled and systematically the circle would be closed. In this process Timorese were forced to walk in front of the Indonesian troops as human shields, crops and buildings were destroyed in a scorched earth policy and the population would either be killed outright or relocated to camps to endure further suffering.[31]

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27 GA Resolution 3485 (XXX) (12 December 1975), para. 6.

28 The voting pattern was as follows – GA Resolution 3485 (XXX) of 12 December 1975, 72 for, 10 against, 43 abstentions; GA Resolution 31/53 of 1 December 1976, 68 for, 20 against, 49 abstentions; GA Resolution 32/34 of 28 November 1977, 67 for, 26 against, 47 abstentions; GA Resolution 33/39 of 13 December 1978, 59 for, 31 against, 44 abstentions; GA Resolution 34/40 of 21 November 1979, 62 for, 31 against, 45 abstentions; GA Resolution 35/27 of 11 November 1980, 58 for, 35 against, 46 abstentions; GA Resolution 36/50 of 24 November 1981, 54 for, 42 against, 46 abstentions; GA Resolution 37/30 of 23 November 1982, 50 for, 46 against, 50 abstentions.

29 GA Resolution 37/30 (23 November 1982).

30 The various positions of Australia, the USA and UK are discussed in Pilger, *Distant Voices*, pp. 244-251.

31 For details see Taylor, *Indonesia's Forgotten War*, chapters 6-9.

The international community's response to these events was muted. The influence of Indonesia in forcing international opinion in its favour was evidenced by the UN Human Rights Commission's decision to drop the situation in East Timor from its agenda in 1985.[32]

Even though there continued to be widespread violations of international human rights and humanitarian law by Indonesia in East Timor little attention was given to the matter until the early 1990s. In November 1991 around 270 people were killed by Indonesian troops at the Santa Cruz cemetery when they were attempting to pay respects to an individual killed a few weeks earlier.[33] This event was filmed by television crews and shown around the world. It was followed up with Indonesia rounding up supposedly suspected criminals throughout the territory and allegedly executing them, along with Timorese students in Jakarta being attacked by police when they attempted to enter UN offices. Given the high profile nature of these attacks some reaction was necessary. Australia described the event as an 'aberration' and 'not an act of state policy.'[34]

The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities spoke out against the actions and called on Indonesia to ensure those responsible were brought to justice.[35] Indonesia did carry out an investigation into the incident and ten members of the military were found guilty of violating the military code on ethics and discipline, in other words, a failure to obey orders. For their crimes the ten were sentenced to between eight and eighteen months in prison.[36] There does not appear to have been any indictments for murder or any other serious crimes. On the other hand, a number of individuals who were involved in the demonstration at Santa Cruz were also tried and convicted for their participation in the protest receiving prison sentences of five to six years.[37] These events put the situation in East Timor back on the agenda of the UN human rights bodies but no concerted action was taken by other UN bodies.

The inability of the international community to hold Indonesia responsible for the violations of human rights and humanitarian law during this period is not surprising given the weak nature of the international legal regime in the face of strong political interests. Indonesia was not a signatory to any of the major international human rights treaties which prevented any of the monitoring bodies to comment on the circumstances. The UN Charter bodies gave the situation some attention but their impact was minimal as little attention was given to the matter outside of a few reports and the occasional statement or resolution.

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32 Taylor, *Indonesia's Forgotten War*, 178.

33 Reports vary on the number killed with Indonesian sources claiming about 19 persons and other reports stating at least 270 with several hundred individuals also disappeared, see Commission on Human Rights, Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, on his mission to Indonesia and East Timor from 3 to 13 July 1994 UN Doc. E/CN.4/1995/61/Add.1 (1 November 1994), paras. 21-22.

34 Pilger, *Distant Voices*, p. 312.

35 Resolution 1992/20, Situation in East Timor, (27 August 1992).

36 Commission on Human Rights, *Report of the Secretary-General: Situation in East Timor*, UN Doc. E/CN.4/1993/49 (10 February 1993), Annex I.

37 Commission on Human Rights, *Report of the Secretary-General: Situation in East Timor*, UN Doc. E/CN.4/1993/49 (10 February 1993), Annex II.

East Timor continued to be included on lists of non-self governing territories and Portugal continued to be named as the administrator in UN documents. But this had no practical impact as Indonesia considered the territory to be an integral part of the state, a practical reality which was pretty much conceded. And during the Cold War period the application of international law was premised more on ensuring the maintenance of state interests in terms of political and economic security than any principled belief in protecting individuals from the brutality of state power.

As the 1990s progressed things began to change. The legality of Indonesia's occupation of East Timor was an issue before the International Court of Justice in 1994 as Portugal attempted to the challenge the validity of the Timor Gap treaty entered into by Indonesia and Australia regarding the off shore territory of East Timor. In 1979 Australia agreed to enter into negotiations with Indonesia over the Timor Gap, an act contrary to international law as it meant Australia recognised Indonesia's attainment of territory by the illegal use of force. It is worth noting that when Australian government officials were challenged on their actions in recognising Indonesia's claim over East Timor, one response was 'that the world was a pretty unfair place.'[38] The final treaties were signed in 1989 and 1992 with Australia explaining it had to recognise the de facto control of Indonesia over the territory of East Timor in order for it to exercise its own sovereign rights concerning the use and exploitation of natural resources.

At the same time, Australia tried to contend that signing treaties with Indonesia that directly concerned the territory of East Timor did not mean Australia recognised the means used to bring about control over the territory.[39] This is a very specious argument which simply defies any sort of logic. By entering into the treaties with Indonesia Australia made a clear statement about Indonesia's control over the territory and Australia's acceptance of the situation. By saying the means by which the occupation was effectuated would not be recognised was of small consolation for the people of East Timor who continued to live in a repressive environment.

Portugal objected to the validity of the treaties concerning the Timor Gap on the basis that it remained the administering power over the territory of East Timor, meaning Australia was not able to enter into negotiations with Indonesia but must negotiate with Portugal on matters concerning the territory. Portugal's application to the ICJ held that Australia had failed to respect the obligations and duties of Portugal as the administering power as well as failing to respect the right of East Timor to self-determination, an *erga omnes* obligation in international law. Portugal contended that due to the *erga omnes* character of the right to self-determination Australia had a responsibility to respect this right by not recognising Indonesia's control over the territory.

The ICJ dismissed the application on the basis that any discussion of the treaties concerning the Timor Gap had to involve Indonesia, which was not a party to the Court. The Court agreed that the right to self-determination did possess the character of *erga omnes* and that East Timor remained entitled to the exercise of self-determination. The Court explained, relying heavily on the decision in *Monetary*

38 Quoted in Pilger, *Distant voices*, p. 311.

39 Case Concerning East Timor, *Portugal v. Australia*, ICJ Reports (1995), p. 97.

Gold[40] that it could not enter into any discussions that may impact upon the interests of a state that was not a party to the proceedings. Therefore in the absence of Indonesia's presence before the Court the matter would not be discussed. Despite the *erga omnes* character of the right to self-determination and its attendant duties, the Court placed greater importance on the procedural issue of consent to jurisdiction that favoured the individual interests of state.

In taking this approach the Court adhered to a statist conception of international law giving greater priority to the sovereign interests of states, over the rights due to a people that had been illegally denied. The Court went further in its preference to states interests by also declaring that Australia had a right to make determinations about its own territory and somehow this took priority over the illegal occupation of East Timor. It appeared that the Court was again giving greater priority to the interests of Australia and Indonesia over any principles of self-determination or prohibitions on the illegal acquisition of territory through force that may have existed.[41]

The Court's reasoning was highly flawed and demonstrated the tendency of international institutions to favour the interests of Indonesia over international legal principles. By recognising the *erga omnes* character of self-determination the Court opened the way for discussing Australia's behaviour with regard to East Timor, as it alone was responsible for its actions. Indonesia not being a party to the proceedings had nothing to do with Australia's own responsibilities under international law. It is true that any discussion of Australia's actions would require making a legal determination with regard to Indonesia's position in East Timor, but this would be a determination of international legal principles of a general nature, something the ICJ should be entitled to do.

The ICJ's decision essentially confirmed Indonesia's control over the territory and meant that the highest judicial body of the UN was unwilling to engage in any question which may have touched upon the illegal behaviour of Indonesia. Australia also came off well since it faced no consequences for its own illegal acts. The Court made it clear that when a matter of international law involves particular states that hold certain positions in the world, realism prevails over legal principles. Following the invasion of East Timor in 1975 the Australian Ambassador to Indonesia explained that there was a choice to be made between

a moral stance based on condemnation of Indonesia for the invasion of East Timor and on the assertion of the inalienable right of the people of East Timor to self-determination on the one hand, and a pragmatic and realistic acceptance of the longer-term inevitabilities of the situation on the other. It is a choice between what might be described as Wilsonian idealism or Kissingerian realism. The former is more proper and principled but the longer-term national interest may well be served

40 Case of the Monetary Gold Removed from Rome in 1943 (*Italy v. France, United Kingdom, United States*), ICJ Reports (1954), p. 32.

41 For more on this case see, Richard Burchill, 'The ICJ decision in The Case Concerning East Timor: the illegal use of force validated?' 2 *Journal of Armed Conflict Law* (1997), p. 1; Iain Scobbie and Catorina Drew, 'Self -determination undetermined: the Case of East Timor' 9 *Leiden Journal of International Law* (1996) p. 185; Gerry Simpson, 'Judging the East Timor dispute: self-determination at the International Court of Justice' 17 *Hastings International and Comparative Law Review* (1994), p. 323.

by the latter.[42]

Australia chose for 'Kissingerian realism' to serve the national interest and the ICJ pretty much agreed, taking a pragmatic approach to the reality that had evolved. What was missing was any sort of principled concern by international law and international institutions for the people of East Timor.

III. Violent Responses to a Second Chance at Independence

From 1983 the SG continued in attempts to facilitate negotiations between Indonesia and Portugal in order to resolve the matter of East Timor. In this process the people of East Timor were marginalised as the SG's office refused to recognise the representatives of the East Timorese people on the basis that the UN resolutions on the matter only mentioned Indonesia and Portugal as parties to the dispute.[43] These talks made little progress until the late 1990s brought about a shift in the political climate in the region. As the 1990s progressed Indonesia became less stable primarily due to economic difficulties internally and regionally. This had a knock on impact for President Suharto's ruling regime whose legitimacy was under threat from a number of domestic forces. Internationally, Indonesia's credibility among its allies was waning. With the end of the Cold War Indonesia's strategic importance lessened and continuing controversies over arms supplies and repressive internal policies made states such as the USA, the UK and Australia, less willing to unquestionably back Indonesia's position.[44]

All of these factors meant that Indonesia's position in East Timor could no longer be explained away as an unfortunate, but necessary, by-product in the quest for international security. When the UN provided a quick response to Iraq's aggression over Kuwait and condemned the illegal use of force to acquire territory as being contrary to the UN Charter it became legitimate to once again ask 'But what about East Timor?'

When Suharto's regime came to an end in 1998 the new government, led by B.J. Habibie, made a unilateral decision to enter into substantive discussions about the future within the framework of the SG's office. This decision to negotiate on East Timor created problems internally as the Indonesian army was not consulted on the matter. This is a key issue as it was the military that had controlled and determined the fate of East Timor since the 1975 invasion. The lack of consultation with the military on the future of the territory was seen as a contributing factor to the brutality that eventually followed their withdrawal from the territory.[45]

In June 1998 Indonesia put forth a proposal that provided for an autonomous status for East Timor within the Indonesian state. This may not sound like much but given that Indonesia is at the same time a highly diverse state with a multitude of

42 Taylor, *Indonesia's Forgotten War*, p. 168.

43 Taylor, *Indonesia's Forgotten War*, p. 178.

44 See Paul Dibb, 'Indonesia: The key to South-East Asia's security' 77 *International Affairs* (2001), p. 829.

45 Geoffrey Robertson, *Crimes against humanity: the struggle for global justice* (London: Penguin, 2002), pp. 459-60; Herbert Bowman, 'Letting the big fish get away: the United Nations justice effort in East Timor' 18 *Emory International Law Review* (2004), p. 376.

ethnic groups and an extremely centralised state, any recognition of a special status for a particular territory would be a major development in the domestic constitutional structure. On 5 May 1999 a final agreement was reached between Indonesia, Portugal and the UN for holding a referendum on the future status of the territory.

In the agreement the UN was given the responsibility for organising a consultation process and the eventual referendum whereby the Timorese would decide whether or not to accept the proposed autonomy plan put forth by Indonesia or choose for independence by rejecting the plan. If the autonomy proposal was to be accepted Indonesia would change its constitution to reflect the new status of East Timor within Indonesia. If the proposal was rejected, Indonesia would agree to terminate all constitutional links with the territory, Portugal would no longer lay claim to the territory as a colony and the UN would take over responsibility for the territory in order to assist its move to full independence.

Even thought the UN was given full responsibility for carrying out the consultation and referendum process, the 5 May agreement include a provision whereby Indonesia was given the responsibility 'for maintaining peace and security in East Timor in order to ensure that the popular consultation is carried out in a fair and peaceful way in an atmosphere free of intimidation, violence or interference from any side.'[46] The decision to place responsibility for security with Indonesia was contrary to UN practice but in the circumstances it was necessary as it was a condition Indonesia insisted upon for allowing the referendum to go ahead.

Indonesia viewed its invasion and annexation of East Timor as a legitimate act. Therefore any process which allowed the territory to make a choice about its future had to be firmly based within domestic policies. It was not a large step to invite the UN to assist in the consultation process and vote, as the UN's presence could be justified on the basis of sovereign consent. But on the issue of maintaining peace and security, the presence of foreign troops, in the form of a UN force, would be very difficult to accord with the domestic position on the status of East Timor.[47] If Indonesia allowed for a UN force, and not the army, to provide security during the consultation and referendum this would have been an admission that its occupation of East Timor was not wholly legitimate and difficult to explain to the domestic constituency. Therefore it was necessary to present a front that made the whole process appear to be under Indonesia's control.

That said it remains a mystery as to why the UN would agree entirely to Indonesia being responsible for security in the territory. The UN, as an organisation, had never officially accepted the annexation of East Timor as part of Indonesia which means it did not have to accept Indonesia's demands on this matter. At a more practical level it is difficult to understand how the UN would allow a state that had violated the terms of Charter and been responsible for widespread violations of human right and humanitarian law in the territory for over twenty years to provide security for a soci-

46 Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, 5 May 1999, UN Doc. A/53/951, Annex I, Article 3.

47 See comments by the Portuguese Ambassador Fernando d'Oliveira Neves in Nassrine Azimi and Chang Li Lin, eds. *The United Nations Transitional Administration in East Timor (UNTAET): debriefing and lessons. Report of the 2002 Tokyo Conference* (Martinus Nijhoff, Leiden, 2003), p. 245.

ety it had been violently trying to repress in circumstances where that society would possibly be choosing to reject Indonesian rule.

The UN's apparent confidence in Indonesia to provide security for the territory would ultimately be the organisation's ultimate failure as once the violence started very little could be done by the UN to bring it under control. The provisions of the 5 May agreement demonstrate how hard it is to learn from history. Prior to 1975 Indonesia has explicitly stated it had no designs on East Timor but then invaded and occupied the territory illegally. In 1999 Indonesia assured the UN that it would maintain peace and security for a territory that clearly wanted to break free from its rule and for some reason the UN believed these assurances.

Following the conclusion of the 5 May agreement the United Nations Assistance Mission in East Timor (UNAMET) began its work in preparing for the referendum. At an early stage, the SC reiterated Indonesia's commitments and responsibility for maintaining peace and security in the territory and for cooperating with the UN in the referendum process.[48] However, problems arose early on as evidenced by the periodic reports provided by the SG. In the SG's Report of 22 May 1999 it was apparent that there were significant problems on the ground involving political violence, intimidations and killings done by armed militias opposing the independence movement.

There was also evidence that the militia groups had the support of the Indonesian army.[49] The SG's report provided a clear description of the environment – 'Truckloads of pro-integration militia are able to roam about freely in the towns and to set up checkpoints along the roads without any intervention from the army or the police.'[50] In the report the SG called on Indonesia to meet its responsibilities including 'the bringing of armed civilian groups under strict control and the prompt arrest and prosecution of those who incite or threaten to use violence'.[51]

Within a month there was already a significant level of violence being perpetrated by pro-integration groups and evidence of support from Indonesia. The SG's early call for those responsible to be arrested and prosecuted would be repeated as the violence escalated, but would also have a very hollow resonance to it in a short period of time. The SC took note of the SG's report of 22 May in Resolution 1246 of 11 June 1999. In this resolution the SC expressed its concern that the situation in the territory had become 'tense and volatile' and stressed 'once again the responsibility of the Government of Indonesia to maintain peace and security in East Timor'.[52]

In the Resolution the SC condemned all acts of violence regardless of the source and called on all parties to cease their violent acts and for steps to be taken to 'ensure a secure environment devoid of violence or other forms of intimidation.'[53] In addressing the issue of the violence the SC failed to make any specific mention of Indonesia's role in supporting the pro-integration militia which the SG had identi-

48 SC Resolution 1236 (7 May 1999), paras. 5-6.

49 Report of the Secretary-General, Question of East Timor, UN Doc. S/1999/595 (22 May 1999), para. 23.

50 SG Report 595/1999, para. 23.

51 SG Report 595/1999, para. 32.

52 SC Resolution 1246 (11 June 1999), para. 9.

53 SC Resolution 1246 (11 June 1999), para. 11.

fied as being one of the main causes of the violence. Instead, there was reference for all parties involved to do what they could to end the violence along with a pointed reference to the 'fruitful cooperation of Indonesia.'[54]

The SG's next report in June 1999 made it clear that the violence was escalating and security was becoming a major problem impeding the consultation process. The report also made clear Indonesia's direct involvement in the instances of violence being carried out. It was reported that 'In many areas, pro-integration militias, believed by many observers to be operating with the acquiescence of elements of the army, carry out acts of violence against the population and exercise an intimidating influence over it.'[55]

This was accompanied by widespread displacements of the population which the SG directly referred to as violations of international humanitarian and human rights law.[56] It was clear that Indonesia was doing little to curb the activities of the pro-integration groups as the SG expressed concern that Indonesia was describing the pro-integration militias known to be responsible for the violence as 'civil defence forces.'[57] At this time UN personnel were also being targeted by the pro-integration militia as UNAMET staff came under attack.[58]

One would think that direct attacks on UN staff would be sufficient for the UN to take more decisive action in demanding Indonesia's compliance, but this was not to be.[59] The SG's next report on the situation came in July 1999. In it the SG states there is a need to address the ongoing violence as it has 'led to the displacement of many East Timorese and denied them basic security and freedom, with the clear intention of influencing political choice.'[60] At the same time there is explicit mention of the cooperation of Indonesia and the reassurances given by Indonesia that the militia groups would be reined in.[61] In spite of the clear evidence that the pro-integration forces were not being reined in, the SC did not seem to take much notice and did not act to address the situation. Instead of addressing the ongoing issue of the violence being supported by Indonesia, as evidenced by the SG's reports, the SC instead placed its attention on the future of the territory following the vote. In Resolution 1262, adopted on 27 August 1999, immediately prior to the referendum, there is no mention about the violence that had taken place up to this time or of Indonesia's responsibility for maintaining security.

The ignorance of the SC is shocking given the SG's reports and the evidence they contained concerning Indonesia's role in the violence, which included direct

54 SC Resolution 1246 (11 June 1999) preamble, indent 6.

55 Report of the Secretary-General, Question of East Timor, UN Doc. S/1999/705 (22 June 1999), para. 14.

56 SG Report 1999/705, paras. 8 and 14.

57 SG Report 1999/705, paras. 15-16.

58 See Statement by the President of the Security Council 29 June 1999 UN Doc. S/PRST/1999/20.

59 UNAMET originally consisted of only fifty military liaison officers to be in contact with the Indonesian army, SC Resolution 1246, para. 3. It was later increased to 300, SC Resolution 1262 (27 August 1999), para. 1(c).

60 Report of the Secretary-General, Question of East Timor, UN Doc. S/1999/803 (20 July 1999), para. 14.

61 SG Report 1999/803, paras. 11-13.

attacks on UN personnel. Despite the rhetorical assurances the Indonesian government was giving to the UN, the army was clearly taking a different line. In July 1999, the Dili commander of the Indonesian armed forces told the Australian *Sunday* television programme: 'I would like to convey the following: if the pro-independents do win [the referendum] ... all will be destroyed. ... It will be worse than 23 years ago.'[62] It has also been reported that the UN had obtained documentation prior to the August vote that made clear Indonesia's intentions on how to deal with the territory.[63] The absence of any substantial action or statement by the SC on the security issue and Indonesia's responsibilities clearly demonstrated the SC did not want to face the prospect of having to confront Indonesia on its inability to meet the obligations of the 5 May agreement.

The violence subsisted enough for the ballot to be held on 30 August 1999 with a 96% turnout and a result of 78.5% of the population rejecting the autonomy arrangement offered by Indonesia, signalling a clear preference for independence. The result of the ballot was released on 3 September and wide scale violence erupted as pro-integration groups and the Indonesian army undertook a massive effort to literally destroy the entire territory and to punish the people of East Timor for choosing independence. At a very early stage the SC was aware of the problems which followed the vote as its own special mission reported in September 1999 that it was clear that the Indonesian military and police were complicit in the violence, despite the official line coming out of Jakarta.[64] UNAMET reported on 11 September that the violence was 'nothing less than a systematic implementation of a "scorched earth" policy in East Timor, under the direction of the Indonesian military', involving massive displacements of the population with people fleeing the terror or being forcibly removed.[65] The report gave further details of the actions being taken to terrorise the population –

> In Dili it would appear that virtually every home or building has been systematically looted of its contents, and a large proportion of them have been burned. The central business district has been entirely gutted. Militias and TNI [Indonesian Army] soldiers have been observed over the past few days loading trucks with equipment and supplies taken from these homes, and the dock in Kupang, West Timor, is said to be bulging with kitchen appliances for sale.[66]

62 Quoted in Noam Chomsky, *A new generation draws the line: Kosovo, East Timor and the standards of the West* (London: Verso, 2000), p. 73.

63 Jarat Chopra, the former head of UNTAET has written that the UN had received documents detailing the orders given to the Indonesian military and militia forces, see 'The UN's kingdom of East Timor' 42 Survival (2000) p. 27. But some questions have been raised about the authenticity of these documents, see Geoffrey Robinson, 'East Timor 1999: Crimes Against Humanity' Report Commissioned by the United Nations Office of the High Commissioner for Human Rights, pp. 72-76, available at http://www.ictj.org/en/news/features/846.html.

64 Report of the Security Mission to Jakarta and Dili, 8-12 September 1999, UN Doc. S/1999/976 (14 September 1999), paras. 14-15.

65 Report of the SC Mission to Jakarta and Dili 8-12 September 1999 S/1999/976 (14 September 1999) Annex, paras. 4-6.

66 Report of the SC Mission to Jakarta and Dili 8-12 September 1999 S/1999/976 (14 September 1999), Annex, para. 3.

A UN observer mission reported in December 1999 that there were 1,093 extrajudicial killings in the period between January and November 1999.[67] The Report of the International Commission of Inquiry on East Timor concluded

> that there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian Army (TNI) and the militias in the violations.[68]

Indonesia's own human rights commission also issued a report on the violence that provided evidence of mass murder, torture, enforced disappearances, rape, a scorched earth policy, forced movement and evacuations and the damage and elimination of evidence. It also concluded that these acts were undertaken by the Indonesian military or by groups that had its direct support.[69]

There is no ambiguity about the nature and scale of what went on. The crimes mentioned above constituted a clear pattern of gross violations of international human rights and humanitarian law as well as containing elements of crimes against humanity. Responsibility for the violence also appears to have been very clear as the reports cited above all placed blame with the Indonesian Government and military. Indonesia attempted to distance itself from any sort of responsibility, as explained in the report from the SC's mission to the territory –

> This destruction has not been conducted by frustrated and insecure civilians. That is the myth which the Indonesian authorities are striving to convey. The evidence for a direct link between the militia and the military is beyond any dispute and has been overwhelmingly documented.[70]

Indonesia's own human rights commission reported:

> The involvement of the civilian and military apparatuses including the police cooperated with the pro-integration militia groups in crimes against humanity. This represented abuse of power and authority and resulted in the involvement of military institutions as well as civil agencies.[71]

This report lists over fifty civilian and military personnel that were responsible for

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67 Report of Joint Mission of Special Rapporteurs on Human Rights, Situation of Human Rights in East Timor, UN Doc. A/54/660 (10 December 1999) para. 37.

68 Report of the International Commission of Inquiry on East Timor, UN Doc. A/54/726 and S/2000/59 (31 January 2000) para. 123.

69 Report of the Indonesian Commission for Investigation of Violations of Human Rights in East Timor (KPP-HAM) (31 January 2000) chapter VI, available at http://www.jsmp.minihub.org/Resources/2000/KPP%20Ham%20(e).him.

70 SC Mission to Jakarta and Dili 8-12 September 1999, Annex, para. 9.

71 KPP-Ham Report, para. 191.

the violence. It also stated that General Wiranto, commander of the Indonesian army 'must bear responsibility' for the crimes against humanity in East Timor which took place due to the failure of Indonesia to provide security as agreed in the 5 May agreement.[72]

As the violence escalated after the results of the referendum were released pressure was put on Indonesia to accept the deployment of a peacekeeping force. Initially Indonesia refused and it was only after the threat of withdrawal of international aide from the US and other states, as well as a suspension of activities by the International Monetary Fund did Indonesia finally agree to a UN force.[73] While the SC does usually attempt to gain the cooperation and agreement by all parties concerned before deploying a peacekeeping force it is not a necessary requirement when it is determined that a situation constitutes a threat to international peace and security.[74]

Again it is difficult to understand why at this stage the SC held back taking any action until it had consent from Indonesia. Given that East Timor had remained on the UN list of non-self-governing territories and that Indonesia's actions there were contrary to various resolutions on decolonisation and the administration of non-self governing territories, the SC would have been justified in taking action to maintain peace and security in the territory without Indonesia's consent.

Once Indonesian agreement on the peacekeeping force had been achieved the SC adopted Resolution 1264 on 15 September 1999 declaring the situation in East Timor to be a threat to international peace and security and took action under Chapter VII of the Charter and authorising the peacekeeping force. In the Resolution the SC states that the multinational force is being deployed 'pursuant to the request of the Government of Indonesia'.[75] The composition and mandate for the force was heavily proscribed by Indonesia in order to make the presence of the force more palatable to the domestic constituency.

The SC continued to speak of Indonesia's responsibility for maintaining peace and security in the region but at the same time empowered the force to undertake what was essentially a peace-enforcement mission through the use of 'all necessary measures to fulfil [its] mandate'.[76] The peacekeeping force arrived at the end of September 1999 and by the time of the SG's report of January 2000 the violence in the region had subsided with the bulk of problems being restricted to the border

72 KPP-Ham Report, paras. 191-193.

73 International Monetary Fund, 'The Situation in Indonesia and the IMF, A Comment By William Murray An IMF Spokesman September 16, 1999' http://www.imf.org/external/np/vc/1999/091699.htm; 'US Military Cuts Indonesian Ties' BBC News Online 9 September 1999 http://news.bbc.co.uk/1/hi/world/americas/443347.stm; 'UK Backs Wider Arms Ban' BBC New Online, 12 September 1999 http://news.bbc.co.uk/1/hi/uk_politics/444548.stm.

74 When the SC determines a situation constitutes a threat to international peace and security, the domestic jurisdiction provisions of Article 2 (7) of the UN Charter do not apply, see Nigel White, *Keeping the Peace*, 2nd ed. (Manchester: Manchester University Press, 1997), p. 56.

75 SC Resolution 1264 (15 September 1999), para. 3.

76 SC Resolution 1264, para. 3. See Suzannah Linton, 'Rising from the ashes: the creation of a viable criminal justice system in East Timor' 25 *Melbourne Law Review* (2001), pp. 130-131.

region with West Timor with occasional confrontations between UN forces and staff and the Indonesia military forces and militia.[77]

With some semblance of control now being exercised by the UN two major issues had to be addressed – the rebuilding of a completely destroyed territory that was now lacking basic physical infrastructure and personnel, along with the question of what to do with those responsible for the violence carried out in 1999. The challenge facing the UN was massive and the main goal of the UN's administration of the territory was to prepare East Timor for independence. In this process ensuring those responsible for the violence were brought to justice had to compete with other pressing concerns and the limits created by the few resources that existed in the territory. As the SG explained in early 2000 'fundamental and urgent policy decisions must be made in a multitude of areas. At the same time, there are urgent humanitarian needs and public services requirements.'[78] From the start it was clear that the realities of rebuilding the territory into a viable state would determine the extent to which those responsible for the violence in 1999 would be pursued.

Following the destruction undertaken by pro-integration groups there was no public infrastructure to speak of in East Timor and this was accompanied by a vacuum of administrative authority, police and justice machinery.[79]. As stated above the issue of criminal responsibility was just one of many important matters facing the UN but at the same time the prosecution of those who are responsible for serious and grave violations of international human rights and humanitarian law had been declared by the UN organs to be a major priority for the international system.

As early as May 1999 the SG expressed the view that in order to achieve an appropriate environment for the consultation and vote it was necessary to bring armed groups under control which included the arrest and prosecution of those responsible for criminal acts. [80] In SC Resolution 1264 of 15 September 1999 the first operative paragraph 'demands' that those responsible for the violence be brought to justice. But, as will be discussed below, the avenues chosen for dealing with those responsible for the violence had to compete with other priorities to the extent that the removal of impunity became a low priority.

Indonesia's invasion and occupation of East Timor in 1975 raised little international interest but there were signs that the world in 1999 was a much different place. Following the response to events in the former Yugoslavia and Rwanda, along with the adoption of the ICC statute in 1998, it appeared that widespread abuses of international human rights and humanitarian law would not go unnoticed and would be acted upon. But the question of what to do with those responsible for the violence in East Timor was complicated by the political situation in the region and the position of Indonesia in international affairs. The UN found itself in an awkward position when it became the administrating power for East Timor. There was widespread shock at the violence which had occurred in 1999 and loud demands that something be done about it. The dilemma facing the UN was that any action to bring to justice

77 Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2000/53 (26 January 2000), paras. 18-23.

78 SG Report 2000/53, para. 71.

79 SG Report 2000/53, para. 3.

80 SG Report 595/1999, para. 32.

those responsible for the violence would mean directly confronting Indonesia and potentially jeopardising East Timor's move to full independence.

IV. Efforts toward Ensuring Justice and Overcoming Impunity

In the violence both before and after the vote it is estimated that 1,400 people died, 80% of the territory's infrastructure had been destroyed and over 400,000 people had been forcibly displaced. In response to these events there were calls for the creation of an international tribunal to bring to justice those responsible. The International Commission of Inquiry on East Timor which was established by the SG upon the request from the UN Commission on Human Rights, delivered its final report on 31 January 2000, calling for the creation of an international independent investigation and prosecution body in order to identify the persons responsible for the crimes committed and to prosecute those guilty of serious human rights violations.[81]

It also called for the creation of an international human rights tribunal to receive complaints and try those accused of serious violations of international human rights and humanitarian law 'regardless of the nationality of the individual or where that person was when the violations were committed.'[82] The Commission also recognised the international nature of the problem along with the UN's responsibilities for dealing with the matter. It explained

> The actions violating human rights and international humanitarian law in East Timor were directed against a decision of the United Nations Security Council acting under Chapter VII of the Charter and were contrary to agreements reached by Indonesia with the United Nations to carry out that Security Council decision. Under Article 25 of the Charter, Member States agree to accept and carry out the decisions of the Security Council. The organized opposition in East Timor to the Security Council decision requires specific international attention and response. The United Nations, as an organization, has a vested interest in participating in the entire process of investigation, establishing responsibility and punishing those responsible and in promoting reconciliation. Effectively dealing with this issue will be important for ensuring that future Security Council decisions are respected.[83]

The SG only partially endorsed this report, saying the recommendations 'merit careful consideration', there was not call for any action upon the recommendations. In conveying the report to the SC the SG placed a good deal of faith in undertakings given by Indonesia that those involved in the violence within Indonesia's jurisdiction would be dealt with and that there would be no impunity for those responsible.[84]

The joint mission of the Special Rapporteurs on Human Rights explained its

81 Report of the International Commission of Inquiry on East Timor, para. 152.

82 Report of the International Commission of Inquiry on East Timor, para. 153.

83 Report of the International Commission of Inquiry on East Timor, para. 147.

84 See Identical Letters Dated 31 January 2000 From the Secretary-General addressed to the president of the General Assembly, the president of the Security Council and the Chairperson of the commission on Human Rights, UN Doc. A/54/726; S/2000/59 (31 January 2000).

view in December 1999:

> The question of the full documentation of the crimes and human rights violations and the definitive establishment of the scope and level of TNI responsibility will need to be answered by a sustained investigative process. The East Timorese judicial system, which is still needs to be created and tested, could not hope to cope with a project of this scale. ... The record of impunity for human rights crimes committed by Indonesia's armed forces in East Timor over almost a quarter of a century cannot instil confidence in their ability to ensure a proper accounting. Nor, given the formal and informal influence wielded by the armed forces in Indonesia's political structure, can there, ..., be confidence that the new Government, ..., will be able to render that accounting.[85]

From this the report concluded that if Indonesia did not undertake investigations into the violence within a matter of months, the SC should consider the establishment of an international tribunal. For the creation of such a tribunal, the report also explained that the consent of Indonesia would be preferable but not a prerequisite.[86] Despite these calls for an international tribunal no direct action was taken by the SC for the creation of one. Indonesia had made clear its unwillingness to cooperate with any international tribunal that attempted to prosecute its citizens, which appears to have swayed opinion on the matter.[87] There was also a feeling of 'tribunal fatigue' setting in among the UN institutions as the ICTY and ICTR continued to demand high levels of resources. So an alternative arrangement had to be found.

Following the completion of the peacekeeping mission, the SC authorised the creation of the United Nations Transitional Administration in East Timor (UNTAET) which was given responsibility 'for the administration of East Timor' and was 'empowered to exercise all legislative and executive authority, including the administration of justice.'[88]

In the resolution the SC also demanded that those responsible for the violence in East Timor during 1999 to be brought to justice.[89]. This demand is not targeted at any particular party and the resolution also reaffirms respect for the sovereignty of Indonesia.[90] In Resolution 1338 the SC expressed the need 'for measures to address shortcomings in the administration of justice in East Timor, particularly with a view to bringing to justice those responsible for serious crimes in 1999'[91] but no particular action is suggested.

For the purposes of pursuing prosecution for international crimes an internationalized or hybrid tribunal that combined domestic and international elements was pursued.[92] Within the East Timor criminal justice system there would be spe-

85 Report of Joint Mission of Special Rapporteurs on Human Rights, para. 73.

86 Report of Joint Mission of Special Rapporteurs on Human Rights, para. 74(6).

87 Bowman, Letting the big fish get away, p. 381.

88 SC Resolution 1272 (25 October 1999), para. 1.

89 SC Resolution 1272, para. 16.

90 SC Resolution 1272, preamble.

91 SC Resolution 1338 (31 January 2001), para. 8.

92 On hybrid or internationalized criminal courts generally, see Cesare Romano, André

cific institutions made up of international and East Timorese personnel that would have jurisdiction over what would be called 'serious crimes'. UNTAET Regulation 2000/11 of March 2000 set out the composition of the courts for the territory consisting of eight district courts and one court of appeal. The Regulation provided for 'Exclusive Jurisdiction for Serious Crimes' in Section 10 and this entrusted the District Court of Dili with the creation of Special Panels with exclusive jurisdiction over the serious criminal offences of genocide, war crimes, crimes against humanity, murder, sexual offences, and torture.

The provisions concerning war crimes, war crimes and crimes against humanity were taken verbatim from the Statute of the International Criminal Court. With respect to murder, sexual offences and torture, the jurisdiction of the Special Panels was limited to crimes committed between 1 January 1999 and 25 October 1999.[93] For the remainder of the crimes over which the Panels had exclusive jurisdiction it was possible to deal with events prior to 1999,[94] but there was some confusion over this point with the Timorese authorities suggesting the jurisdiction of the Special Panels was limited to the events of 1999.[95] Regulation 2000/11 also established similar panels within the Court of Appeal to deal with any appeals from the decisions of the Special Panels.[96]

Regulation 2000/15 set out further details on the jurisdiction and workings of the Special Panels. The Panels were given universal jurisdiction over the serious crimes to the extent that the victim or perpetrator was an East Timorese citizen or the crime was carried out on East Timor territory.[97] In the regulation individual criminal responsibility for serious crimes not only applied to those who directly committed the crime but also applied to any individual who

> (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> (c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.[98]

This would provide the Special Panel with jurisdiction over political and military leaders who may not have been actively engaged in the violence themselves, but had

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Nollkaemper and Jann Kleffner, eds. *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford, OUP, 2004); Laura Dickinson, 'The promise of hybrid courts' 97 *American Journal of International Law* (2003), p. 295.

93 UNTAET Regulation 2000/11, paras. 10.1-10.2. All UNTAET regulations are available at http://www.un.org/peace/etimor/UntaetN.htm.

94 UNTAET Regulation 2000/15, para. 2.4.

95 Judicial System Monitoring Programme (JSMP), *The Future of the Serious Crimes Unit* (2004) pp. 3-4, available at http://www.jsmp.minihub.org/reports.htm.

96 UNTAET Regulation 2000/11, para. 15.5.

97 UNTAET Regulation 2000/15, para. 2.2.

98 UNTAET Regulation 2000/15, para. 14. 3)

ordered or failed to restrain those persons that were. The Regulation also removed immunity for any head of state or other members of a government who may be criminally responsible for a serious crime within the Panel's jurisdiction.[99] It was explicitly stated in the Regulation creating the Special Panels that this would not preclude the exercise of jurisdiction by any international tribunal subsequently created to deal with crimes committed in the territory.[100]

The Special Panels were complemented by the creation of the office of Deputy General Prosecutor for Serious Crimes which has 'exclusive' authority for the investigation and prosecution of serious crimes as defined in Regulations 2000/11 and 2000/15.[101] To assist the Deputy Prosecutor there is the Serious Crimes Unit which was staffed mainly with UN personnel.[102]

A Memorandum of Understanding between Indonesia and UNTAET was signed on 6 April 200 with the purpose of ensuring cooperation in exchange of evidence, requests for witnesses, making arrests, or ensuring the appropriate transfer of suspects when needed in the investigation and prosecution of serious crimes. In the MOU there is a reaffirmation of the commitment to 'hold accountable the perpetrators of serious violations of international humanitarian and human rights law in East Timor.'[103]

On paper the Special Panels had all of the necessary tools for ensuring all individuals responsible for the violence would face investigation and possible prosecution. The MOU with Indonesia appeared to have eliminated the most pressing issue of reaching individuals within Indonesia. However the obstacles facing the Special Panels in pursuing those responsible were immense. There were problems of staffing, not only had the legal profession in the territory been decimated with very few qualified persons remaining in the territory, it was also difficult to get the necessary international personnel to sit on the Special Panels and Court of Appeal.

The Panels did not reach full compliment of international staff until July 2003 and the Court of Appeal was not in existence between 2001 and 2003 due to a lack of qualified members.[104] This shortcoming of the Special Panels not only had a detrimental impact upon the effectiveness of bringing to justice those responsible for serious crimes, it also brought into question the administration of justice and the rights of the defendants.[105]

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99 UNTAET Regulation 2000/15, para. 15.2.

100 UNTAET Regulation 2000/11, para. 10.4.

101 UNTAET Regulation 2000/16, para. 14.3.

102 Information about the SCU may be found at http://ist-socrates.berkeley.edu/~warcrime/Serious%20Crimes%20Unit%20Files/default.html.

103 Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, 5/6 April 2005, preamble, indent 5.

104 Sylvia de Bertodano, 'East Timor – justice denied' 2 *Journal of International Criminal Justice* (2004), p. 910.

105 *Justice for Timor-Leste: The Way Forward* (1 April 2004) Joint Report of Amnesty International and the Judicial System Monitoring Programme (JSMP), pp. 14-19, AI Index: ASA 21/006/2004, available at *http://web.amnesty.org/library/index/engasa210062004*; Suzanne Katzenstien, 'Hybrid Tribunals: Searching for Justice in East Timor', 16 *Harvard Human Rights Journal* (2003), pp. 252-253.

For the most part the early efforts of the SCU and Special Panels only involved indictments for lesser crimes involving low ranking Timorese figures that were present in the territory. It has been commented that the prosecutor's office and the Serious Crimes Unit had no coherent strategy for pursuing prosecutions resulting in 'a random and disorganized system' where the question over whether or not prosecution was pursued was 'the result of an accident of geography.'[106] Over time the indictments increased and began to address more serious crimes involving higher level individuals.[107] The Serious Crimes Unit filed ninety five indictments with the Special Panels involving 391 individuals, 339 of whom remained outside the jurisdiction of the Panels.

The early difficulties faced in the prosecution of serious crimes were evident in the first decision[108] of the Special Panels to deal with international criminal law in the case of *Public Prosecutor against Joni Marques and nine others* (the *Los Palos* trial). This case was also significant for the fact that it was the first time provisions on international crimes from the Statute of the International Criminal Court, as set out in Regulation 2000/15, were put before a judicial authority.

The judgment was delivered on 11 December 2001 and is an extremely long document covering several hundred pages. However, this length was not due to any in-depth treatment of international legal issues as the judgment replicates the evidence and arguments given during the trial. The constant reference to various aspects of international criminal law jurisprudence does not involve any substantial independent commentary or analysis by the Panel.[109] As the personnel and resource situation improved so did the functioning of the Special Panels but perhaps too late to ensure the overall credibility of the hybrid model.[110]

A major controversy arose in the conduct of the serious crimes trials when in 2003 the Court of Appeal produced a decision concerning the issue of applicable subsidiary law in the territory. UNTAET Regulation 1999/1 deals with the issue of applicable law with Section 3 stating that until a fully functioning domestic legislature is in place 'the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2'. Section 2 says that in the exercise of public functions the authorities are to observe international human rights standards.

Section 3.2 then lists six particular Indonesian laws that are deemed not to comply with Section 2 and are therefore declared void and Section 3.3 provides for the abolition of the death penalty, which applied to the territory by virtue of Indonesian law. Section 3.1 is not entirely specific as to what the applicable law in East Timor was prior to 25 October 1999. However, the listing of the Indonesian laws in Sections 3.2 and 3.3 along with the de facto, even though illegal, occupation

106 Sylvia de Bertodano, 'East Timor: Trials and Tribulations' in Romano, Nollkaemper, and Kleffner, eds. *Internationalized Criminal Courts*, p. 83.

107 de Bertodano, 'East Timor – justice denied', p. 911.

108 Versions of the indictments and decisions of the Special Panels can be found at the Judicial System Monitoring Programme (JSMP), http://www.jsmp.minihub.org.

109 See the discussion by Sylvia de Bertodano, 'Current Developments in Internationalized Courts' 1 *Journal of International Criminal Justice* (2003), p. 232.

110 See de Bertodano, 'East Timor: Trials and Tribulations', p. 89.

and control over the territory by Indonesia meant Indonesian law had been applied in the territory since 1975. The practical conclusion would therefore be that the applicable law for the territory would be Indonesian law as this was the law in place prior to 25 October 1999.

From the outset of the work of the Special Panels this appeared to be the situation until the Court of Appeal judgment in the case of *Prosecutor v Armando dos Santos*.[111] Before the Special Panels dos Santos was acquitted of all counts of crimes against humanity. The prosecution lodged an appeal with the Court of Appeal and the first issue to be explored by the court was the question of what subsidiary law should be applicable to the circumstances.

The court explained that even though judicial proceedings up to this time had understood the law applicable prior 25 October 1999 as Indonesian law, there were, in the court's view, 'no valid legal arguments legitimising that interpretation'.[112] To the contrary the court put forth the argument that since Indonesia's occupation was contrary to international law the applicable law could not be Indonesian, but Portuguese. In support of this view the court referred to the fact that the United Nations never officially recognised Indonesia's occupation de jure and felt that because of this, UNTAET, as a UN body, could have never intended for the applicable law to be Indonesian.[113]

This decision created a great deal of disarray and controversy within the judicial system as it essentially invalidated all of the previous decisions of the Special Panels. The views of the Court of Appeal also brought a strong measure of dissent from within the judicial system. Following the Court of Appeal decision in *dos Santos* the Special Panels in *Prosecutor v Domingos Mendonca*[114] provided a detailed response explaining that the Court of Appeal had gotten the matter completely wrong. The Panel cited numerous examples of the transitional administration explicitly referring to Indonesia law as the law in force prior to 25 October 1999.[115]

The Panel also explained that the argument relied upon by the Court of Appeal that Indonesia's occupation was illegal therefore Portuguese law is to be applied did not stand because the Portuguese occupation of East Timor, as a colonial possession, was also a violation of international law and recognised as such by the UN.[116] On this basis the Special Panel stated that it would not be bound by the decision of the Court of Appeal even though it was the superior body in the judicial framework. The Court of Appeal reversed its position in 2004 and reverted back to the view that Indonesian law is the applicable law prior to 25 October 1999, a decision made necessary by the passing of Law No. 10/2003 by the Timorese parliament which stated that the applicable law was to be understood as Indonesian law.[117]

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111 Case No. 16/2001, Special Panel Decision 9 September 2002, Court of Appeal Decision 15 July 2003, available at http://www.jsmp.minihub.org/judgmentspdf/courtofappeal/Ct_of_App-dos_Santos_English22703.pdf.

112 Court of Appeal, *Prosecutor v Armando dos Santos*, p. 3.

113 Court of Appeal, *Prosecutor v Armando dos Santos*, p. 4.

114 Case No. 18a/2001, 24 July 2003.

115 *Prosecutor v Domingos Mendonca*, pp. 11-12.

116 *Prosecutor v Domingos Mendonca*, pp. 13-14.

117 *Prosecutor v Paulino de Jesus*, case no. 6/2002, Court of Appeal Decision 4 November

This string of cases also raised another problematic issue with the hybrid system concerning the prosecution of crimes against humanity. In the *dos Santos* decision the Court of Appeal held that there could be no prosecution on the basis of Regulation 2000/15 which entered into force in June, 2000, because the acts upon which the indictment was based occurred prior to this date. The Court explained that under section 31 of the constitution of Timor-Leste, no individual can be tried and convicted based on a criminal law which was not in force at the time the actions were carried out.[118] The Court of Appeal then went on to base its decision on applicable Portuguese law with no discussion of international customary law and its applicability. This decision was troublesome for Regulation 2000/15 itself provided in section 12.1 that no person would be criminally responsible for actions taken, unless at the time of its commission it was a crime under international law. The relevance of international law was completely overlooked by the Court of Appeal which is extremely problematic for the effectiveness of a hybrid system.

A fundamental aspect of the hybrid model is that international law is brought into the domestic sphere and applied to the domestic circumstances. But if the bodies created in a hybrid model ignore international law then it is clear that the hybrid model has failed in its most basic of responsibilities. However, as with the Court of Appeal's position on the applicable law, the view that Regulation 2000/15 was not valid was eventually overturned. In the *de Jesus* decision the Court of Appeal reversed itself on this matter and held that Regulation 2000/15 could be applied on the basis that the crimes listed in Regulation 2000/15 are widely recognised as being indicative of customary international law which means there is no issue of retroactive application of the criminal law involved. The Special Panels made the relevance of customary international law clear in the decision of *Deputy Prosecutor for Serious Crimes v Francisco Pedro*[119] where the accused was prosecuted for crimes against humanity and other inhumane acts as set out in Regulation 2000/15.

The Panel made widespread, and it is submitted appropriate, use of various international instruments and decisions. The decision states that even though the acts of the accused were committed prior to the coming into force of the Regulation, this was irrelevant because the crime against humanity of murder had a clear basis in customary international law which in turn is part of the legal system for Timor-Leste through Section 9(1) of the Constitution.[120]

It would be difficult to criticise the jurisprudence of the Special Panels due to the fact that the system faced a number of obstacles that were beyond its control. At the same time the weaknesses of the Special Panels can be attributed to the failings of the UN in the implementation of the hybrid model. The point of a hybrid system is to provide international support for domestic prosecution of serious violations of international law. It is considered to be an effective way of dealing with atrocities as the benefits of international and domestic approaches to prosecution are brought

2004. There is no English language transcript of the judgment, for an analysis see JSMP, 'The Paulino de Jesus Decisions' JSMP Report April 2005, p. 16, available at http://www.jsmp.minihub.org/Reports/jsmpreports.

118 Court of Appeal, *Prosecutor v Armando dos Santos*, p. 14.

119 Case No. 1/2001, decision of 14 April 2005.

120 *Deputy Prosecutor for Serious Crimes v Francisco Pedro*, paras. 11-12.

together in a single system.

In pursuing a hybrid approach it is imperative upon the international side to provide the necessary support and backing to ensure the adherence to international standards. In the Timor situation it was clear that the international support was lacking as the UN failed to ensure there was adequate and experienced international personnel involved in the prosecution of serious crimes. The problem was slowly rectified but if from the outset the hybrid model does not consist of international personnel with appropriate experience and knowledge or if the trials process lacks the necessary resources, the hybrid approach will do more damage than good in the development of a system for international criminal justice.

The biggest test for the Special Panels came in February 2003, when the Prosecutor-General filed indictments with the Special Panel for eight high ranking Indonesians, both civilian and military for crimes against humanity, including murder, extermination, enforced disappearance, torture and deportations. The list included General Wiranto, the former Indonesia Minister of Defence and Commander of the Armed Forces, who was charged based on superior responsibility. Wiranto had not faced any legal action in Indonesia, despite being named in the report from the Indonesian human rights commission and had in fact been a candidate for Presidential when the indictment was released. The indictment of such a high profile individual such as Wiranto was going to have serious political ramifications, but if the international system is serious about the removal of immunity the status of an individual should be less important than the crimes they are accused of.

However, in this situation it quickly became clear that the political status of the individual was more important than ensuring prosecution. Following the indictments the UN immediately distanced itself from the process claiming that the organisation had no involvement as the indictments had been issued by the Timor-Leste authorities and that the UN 'merely provides advisory assistance to the East Timorese'.[121] At the same time the President of Timor-Leste criticised the UN for issuing the indictments without consulting him as it was felt that such actions would jeopardize relations with Indonesia.[122] But the Prime Minister accused the UN of not living up to its responsibilities with regard to the prosecution of serious crimes.[123] More significantly, Indonesia responded by saying it would 'simply ignore the indictments.[124]

The Wiranto indictment demonstrated the limitations of internationalized tribunals. The hybrid approach to the Special Panels was supposed to provide international backing to a domestic judicial effort. The international element was deemed necessary to provide resources and an element of legitimacy to the process, as well

121 Daily Press Briefing by the Office of the Spokesperson for the Secretary-General 25 February 2003, available at http://www.un.org/News/briefings/docs/2003/db022503.doc.htm . The SG's statement that the UN 'merely' provides advisory assistance is highly disingenuous as UN staff made up most of the personnel in the SCU and the prosecutor's office.

122 'Gusmao calls indictment of Wiranto a "mistake"' JSMP News Reports (1 March 2003) available at http://www.jsmp.minihub.org/News/News/01_03_03-2etnewsjr01mar03.htm.

123 Bowman, 'Letting the big fish get away', p. 397.

124 Statement from Indonesian foreign minister, Hasan Wirajuda, quoted in 'Indicted General unfit for presidential bid' Human Rights Watch News (22 April 2004) available at http://hrw.org/english/docs/2004/04/22/indone8481.htm.

as demonstrating the backing of the international system for the process. The finger pointing which followed the Wiranto indictment demonstrated how things can go from bad to worse when the various political actors involved in an internationalized tribunal all differ as to what should be done and no one is willing to stand up and take responsibility.

The attempt of the UN to distance itself from the indictment was inexcusable as the SCU and the Deputy Prosecutor's office were both made up primarily of UN personnel. Regardless of this fact it is extremely disturbing that an organisation which speaks strongly about the removal of impunity should try to detach itself from efforts to ensure those responsible for serious violations of international criminal law are brought to justice. The UN's behaviour in the Wiranto indictment demonstrated that there was very little international support for prosecution of the crimes committed in East Timor. The domestic responses demonstrated the varying views that existed on the utility of prosecutions when they impede upon political sensitivities. Indonesia's response clearly summed up the circumstances surrounding the Special Panels and their inability to reach any individual in Indonesian jurisdiction.

The limitations of the Special Panels were exacerbated by the allowance to Indonesia to hold its own trials. Even though Indonesia had declared a willingness to take the necessary action and provide cooperation for bringing to justice those responsible for crimes committed in East Timor, it was slow to act and again it took a great deal of international influence for anything to happen. The joint report from the UN rapporteurs on human rights had stated in December 1999 that Indonesia should begin to take action within months and if not then the UN should take its own action.[125] The SG, in his letter accompanying the Report of the International Commission of Inquiry on East Timor spoke of the assurances received from Indonesia that action would be taken to ensure those responsible for the violence were prosecuted.[126]

The Indonesian Parliament approved Law 26/2000 in November 2000 for the creation of an ad hoc human rights tribunal. In April 2001 President Wahid of Indonesia enacted Presidential Decree 53/2001 bringing the law into force. The ad hoc tribunal that eventually came into creation had both a heavily circumscribed mandate and very little in the way of resources or general political support. The jurisdiction of the tribunal was limited to events occurring between April and September 1999 and then only in three of East Timor's thirteen administrative units. The Indonesian Attorney General limited the scope of the tribunal even further by announcing that attention would be given to only five specific instances.[127] The indictments named only eighteen individuals, most of whom were low ranking military or civilian personnel. The Indonesian Human Rights Commission had explicitly named over fifty individuals responsible for violations of serious crimes, including a number of senior post holders, but little of this information was ever acted upon.

125 Report of Joint Mission of Special Rapporteurs on Human Rights, para. 74.6.

126 Identical Letters Dated 31 January 2000 From the Secretary-General addressed to the president of the General Assembly, the president of the Security Council and the Chairperson of the commission on Human Rights, UN Doc A/54/726; S/2000/59 (31 January 2000).

127 *Justice for Timor-Leste: the way forward*, pp. 26-27.

The staff of the tribunal consisted of inexperienced judges and prosecutors. The careers of individual judges and prosecutors in Indonesia depend heavily upon the extent to which orders are followed, giving little hope for any rigorous application of the law or any effort to ensure commanders were held responsible for their own actions and for the actions of those under their authority. Analysis of the trials before the tribunal has concluded that the 'militarization' of the courts and prosecutor's office ensured the trials would not be pursued with any vigour.[128] The conduct of the trials was also a shambles. During the hearings high ranking members of the Indonesian military had a prominent presence in the courtroom, as did pro-integration militia members. The trials were disrupted by the outbursts of these groups and judges and prosecutors were clearly intimidated by their presence.[129] Even more disturbing was the treatment of victims/witnesses who were not provided with any measure of security as their names were publicly announced and a so-called safe house apparently had its purpose advertised on the door.[130]

When the indictments for the tribunal were issued they failed to fully grasp the gravity of the crimes in question. They were purposely narrowed to help minimise the culpability of those indicted and to remove any reference to the involvement of the Indonesian government in the violence.[131] Of the eighteen individuals indicted, six were found guilty of crimes against humanity and received prison sentences ranging from three to ten years.

Under Indonesian law, the minimum sentence for crimes against humanity is ten years.[132] The ineffectiveness of the tribunal and the process surrounding it was demonstrated by the case of Major General Adam Damiri who was the highest ranking military officer indicted. During the trial the General was often absent as he was still undertaking his official duties which at the time involved the military response to the situation in the Aceh province. At the trial the prosecution demanded that the court find him innocent on the basis that none of the charges against him had been proven.[133] The court did find the general guilty but only sentenced to him to three years imprisonment.[134]

All of those found guilty remained free pending their appeals with many of them continuing in active military service, as with Damiri mentioned above, or even more worryingly, the militia leader Eurico Gutteres[135] who was sentenced to ten years in prison for his crimes was known to be establishing pro-Indonesian militia groups in Papua, another province that has not accepted Indonesian control and has been subjected to harsh governmental measures. In the end, however, it was Gutteres who was the only individual of the original eighteen (and also the only

128 David Cohen, 'Intended to fail: The trials before the ad hoc Human Rights Court in Jakarta', International Center for Transition Justice Occasional Paper Series August 2003, pp. 47-52, available at http://www.ictj.org/images/content/0/9/098.pdf .

129 Cohen, 'Intended to fail', pp. 56-57.

130 Cohen, 'Intended to fail', p. 55; *Justice for Timor-Leste: the way forward*, pp. 41-42.

131 *Justice for Timor-Leste: the way forward*, pp. 33-36.

132 Law 26/2000, Chapter VII.

133 Cohen, 'Intended to fail', pp. 25-28; *Justice for Timor-Leste: the way forward*, p. 48.

134 For more see de Bertodano, 'East Timor – justice denied', pp. 924-925.

135 Also spelt Eurico Guterres.

native Timorese) convicted to have his sentence of ten years imprisonment upheld; all of the others have had their convictions overturned.[136]

By 2003 it was clear that individuals within Indonesian jurisdiction responsible for serious violations of international humanitarian and human rights law were not going to be brought to justice.[137] And it was also clear that the Special Panels would be unable to reach those outside the territory of East Timor/Timor-Leste. At this stage the UN should have stepped in based on the principle and practice of complementarity. Article 17 of the Rome Statute states that crimes are to be dealt with at the state level, first and foremost, and when a state is either unable or unwilling to deal with the matter, some sort of international action is to be taken.

Complementarity recognises the need for states to address violations of international criminal in the first instance but ensures there is some sort of international fall back so that impunity is not allowed to prevail. Both Indonesia and Timor-Leste were given the opportunity in the first instance to prosecute and bring to trial those suspected of violating international criminal law. With Timor-Leste it not possible to bring within the jurisdiction of the Special Panels many of those named in the indictments as they were not present in the territory and could not be reached in Indonesia, therefore it has been unable to prosecute those responsible. With Indonesia there was a clear unwillingness to prosecute. There were public statements from the UN expressing dissatisfaction with the ad hoc human rights tribunal and emphasising the need for Indonesia to meet the obligations set out in SC resolutions concerning the prosecution of those responsible for the violence.[138] But it was clear that no substantive action was going to be taken for ensuring effective prosecutions.

In Resolution 1543 of 14 May 2004 the SC called for an end to all investigations concerning serious crimes by the SCU by November 2004 and for all trials before the Special Panels to be finished by 20 May 2005.[139] In the very same paragraph that the SC brings to a halt the pursuit of those responsible for violations of serious crimes it also reaffirmed the 'need to fight against impunity and the importance for the international community to lend its support in this regard'. The winding up the Special Panels was a serious blow to addressing the matter of the serious crimes committed and bringing to justice those responsible for the violence.

The decision to stop the Special Panels must have been politically motivated as

136 For information see http://www.trial-ch.org/trialwatch/profiles/en/context/p243.html.

137 Indonesia has not even tried to pretend to care about the process. Former President Megawati Sukarnoputri gave a speech in 2001 stating that the Army should carry out its duties and responsibilities without worrying about human rights, see 'Megawati to troops: don't worry about rights abuses', Agence France-Presse, (29 December 2001) quoted in 'Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of U.N. Action' Human Rights Watch Background Briefing (20 December 2002), available at http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm.

138 'Secretary-General shocked by light sentences handed down in Indonesian court case', UN Press Release SG/SM/7793 (4 May 2001) in the statement the SG called on Indonesia to comply with the terms of the SC Resolution 1319 of 20 September 2000 which stressed that those responsible for the violence 'must be' brought to justice, para. 2.

139 SC Resolution 1543 (14 May 2004), para. 8.

it would be difficult to say the Panel has achieved its goals given that over three hundred individuals who have been indicted for serious crimes remain beyond the jurisdiction of the Timor-Leste courts.[140] The hypocrisy of the UN's views in Resolution 1543 is clear for all to see. The ordering of the close of the trials and what is essentially the withdrawal of international support means those that are responsible will not be brought to justice, for it the UN is no longer willing to assist it is difficult to see who else in the international community would provide the support spoken of in Resolution 1543. The idea behind an internationalized tribunal is that the international element will provide the support necessary to fill the gaps that the domestic element is unable to effectively deal with. In this situation international support was needed to ensure that those responsible and indicted by the Special Panels were brought before the Panels for trial or that an alternative involving Indonesia effectively dealt with the matter.

Internationalized tribunals represent 'innovative thinking' in circumstances requiring 'quick decisions and tough compromises in the face of severe political and economic constraints.'[141] The use of an internationalized tribunal was probably that best that could be hoped for in the circumstances surrounding East Timor as the will and the resources for an international body were lacking and there was a good deal of emphasis on providing the Timorese with an active role in dealing with matters impacting their society. However, if the internationalized or hybrid model is something that is going to be pursued in the future, it is imperative that the international side holds up its end. In this regard it is necessary to make a stand in favour of the principles of international criminal justice.

Otherwise the development of international criminal law will continue to be plagued with accusations as a system of 'selective justice'. In the East Timor/Timor-Leste situation the main issue facing any attempt at prosecution was the fact that, for the most part, those accused remain outside the territory. The domestic institutions were not in a position to do anything about this situation but the international element, in the form of the UN certainly was, but the UN failed to act in a manner consistent with its own statements and resolutions concerning the prosecution of those responsible for serious crimes.

It has been expressed that the UN made sure the internationalized tribunal was not effective in bringing to justice Indonesian suspects as it might lead to the public outing of the complicity of the international community and particular influential states in the injustices brought upon Timor-Leste.[142] It would be a sad day for the UN if this view is the least bit accurate, but at the same time it does appear the UN is more willing to concede to state interests than upholding any sort of justice in favour of human interests.

An internationalised tribunal in East Timor, or any other territory, is realistically only going to be able to exercise jurisdiction over individuals that are immediately present in the territory. This means that hybrid tribunals will be effective in

140 Judicial System Monitoring Programme, *Overview of Timor Leste Justice Sector 2005* (January 2006), p. 30, available at http://www.jsmp.minihub.org/reports.htm.

141 Laura Dickinson, 'Transitional justice in Afghanistan: the promise of mixed tribunals', 31 *Denver Journal of International Law and* Policy (2002), p. 27.

142 For these views see Katzenstein, 'Hybrid Tribunals', pp. 274-275.

civil war situations but not when individuals from another state have been involved as they will be able to return to that state and remain outside the reach of the internationalised tribunal, unless there is significant international support and pressure for bringing those responsible before a court. The international element of an internationalized tribunal is of crucial importance in conflicts involving more than one state and in particular, when accusations of criminal violations apply to senior government figures of another state.

If there is going to be an initial move of support for the use of prosecution when there has been serious violations of international human rights and humanitarian law the institutions entrusted with this task need to be given the necessary support to undertake the duties they have been entrusted with. It is prudent to argue that if trials are to be pursued they 'should only be conducted upon practicable and sustainable bases; to start and then to fail would in many ways be far worse than not to start at all so far as the message it would send out'.[143] The lack of support given by the UN institutions to the internationalized tribunal has done damage to the development of international criminal justice at it serves to undermines any effort to eliminate impunity in the international system.

The mandate of the Special Panels provided for universal jurisdiction in principle but there were the practical issues of how to bring the accused within the reach of the Panels. When the Special Panels were created the UN was the administrator of the territory and with this came a large degree of responsibility for the effective functioning of the Panels.[144] This placed an obligation upon the UN to ensure that measures were taken to support the effective functioning of the Panels. One cannot argue that it was up to the Timorese institutions to somehow bring the accused within its jurisdiction. For the first couple of years of the Panels, there was no other governmental authority in the territory and immediately following the proclamation of independence the new state had neither the clout nor the resources to obtain the accused.

In dealing with the issue of serious violations of international human rights and humanitarian law the UN gave greater support to the international political interests of the states involved over any principled stance for ensuring impunity is removed. A former Deputy Special Representative of the Secretary-General for East Timor has explained that 'political imperatives, such as reconciliation with Indonesia and the militia leadership, caused major problems in meeting Security Council-mandated prosecution of serious crimes committed during 1999' and that 'Indonesia was also clearly unwilling to co-operate actively in this area and was not sufficiently pressed by influential governments to do so, ...'[145] Given the limitations on the Special Panels from the outset both in terms of resources and the political will backing its work a very limited picture of the crimes committed will result, focussing mainly on low level crimes committed by subordinate East Timorese.[146]

143 Hilaire McCoubrey, 'The armed conflict in Bosnia and proposed war crimes trial', 11 *International Relations* (1993), p. 433.

144 Suzannah Linton, Cambodia, East Timor and Sierra Leone: experiments in international justice', 12 *Criminal Law Forum* (2001), p. 242.

145 Azimi and Lin, *Report of the 2002 Tokyo Conference*, p. 36.

146 Linton, 'Experiments in International Justice', p. 216.

It cannot be said that justice has been done or, more cynically, it could be commented that there has been very little effort by the UN in the pursuit of justice. Commentators have said the UN will attempt to say 'we gave the tribunal a good shot', but it was less interested in ensuring justice is done for the victims of the violence.[147] The initial positive attraction to internationalized tribunals has given way to the political realities for what happens when the international system fails to hold up its end in the pursuit of justice.

V. Any Chance for Justice?

While efforts at ensuring there is criminal responsibility for the violence in 1999 have floundered a considerable amount of attention has been directed towards truth and reconciliation commissions as a way of dealing with the past. But even in this context there is significant tension between the pursuit of human values and interests and the concerns of states. For the process of reconciliation in a society that has been so deeply scarred by violence a truth commission serves a very useful purpose. Legal procedures are designed to punish for wrongdoing, the truth and reconciliation process is directed towards dealing with the tensions that exist in a society that has suffered through long periods of violence among factions and to try and ensure the future development of society is more inclusive.

There is a balance to be struck in a post-conflict situation in pursuing prosecution for those accused of serious crimes and using a reconciliation process for lesser crimes.[148] At the time of the creation of the Special Panels there was also the creation of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR).[149] The Commission was established to complement the work of the Special Panels as a form of 'justice-supportive machinery', it was not conceived of as a replacement for the prosecution of serious crimes.[150] CAVR's mandate focused on dealing with human rights violations that were committed during the Indonesian occupation from 1975, including the events of 1999 and to assist with the process of reintegrating former militia members involved in the violence of 1999 back into Timorese society.

The final report from CAVR was issued to the President and Parliament of

147 Statement of Christian Raheim of the JSMP, quoted in Katzenstien, 'Hybrid Tribunals', p. 272. A former prosecutor for the UN in East Timor has concluded that the UN has perpetrated an injustice on the East Timorese people for the creation of a justice system that can only reach low level East Timorese and not the Indonesian commanders who responsible for what went on, see Bowman, 'Letting the big fish get away', p. 373.

148 Carsten Stahn, 'Accommodating individual criminal responsibility and national reconciliation: the UN Truth Commission for East Timor', 95 *American Journal of International Law* (2001), p. 956.

149 Established by UNTAET Regulation 2001/10. For discussion see Beth Lyons, 'Getting untrapped, struggling for truths: the Commission for Reception, Truth and Reconciliation (CAVR) in East Timor' in Romano, Nollkaemper, and Kleffner, eds. *Internationalized Criminal Courts*, p. 99.

150 Stahn, 'Accommodating individual criminal responsibility and national reconciliation', 954. The mandate of the Commission provided that where appropriate, human rights violations could be sent to the Prosecutor's office, UNTAET Regulation 2001/10, para. 3.1.e.

Timor-Leste in October and November 2005 respectively and then delivered to the SG on 20 January 2006. The report was not meant for public release but was eventually leaked amidst accusations that the Timor-Leste President was trying to suppress it in order to maintain good relations with Indonesia. The report is long and detailed in its coverage of events from 1975 to 1999 and addresses a broad range of violations which have occurred and where possible those who were responsible, either directly or through a superior position.[151] The report does not hold back in its forthrightness and all sides involved in the violence are put under close scrutiny.

In delivering the report to the UN President Gusmao emphasised the need to look forward and made no mention of prosecutions for serious crimes or any other action to be taken following the report. Indonesia's response was that the report was 'a war of numbers and data about things that never happened' and that 'there is no need to look into the past because that does not help.'[152] The CAVR report has not made it past the SG even though it specifically recommends that it be released to a range of UN bodies including the SC for consideration.[153] The events surrounding the release of the CAVR report and the reactions of the main actors involved suggest that even this sort of route to truth and reconciliation is not favoured as it appears to provide too much truth.

A further measure along the truth and reconciliation lines has come with the creation of the Commission of Truth and Friendship established by the governments of Indonesia and Timor-Leste in December 2004. Given that the CAVR process was well established and the institutions for prosecution of serious crimes were in place it is difficult to understand why the two governments felt the need to establish a further body. However, looking at the terms of the agreement the two states' intentions become clear.

The expressed purpose of this Commission is to 'seek truth and promote friendship as a new and unique approach rather than the prosecutorial process.'[154] In the mandate the CTF approach is described as a move to 'to bring .definitive closure' to the issues of the past and 'to establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999.'[155] In the pursuit of truth there is a clear rejection of the use of legal prosecution; it is explained

> True justice can be served with truth and acknowledgement of responsibility. The prosecutorial system of justice can certainly achieve one objective, which is to punish the perpetrators; but it might not necessarily lead to the truth and promote reconciliation.[156]

151 A copy of the Report is available at http://www.ictj.org/en/news/features/846.html.

152 BBC Online, 'Indonesian East Timor 'abuse' listed' (21 January 2006) available at http://news.bbc.co.uk/1/hi/world/asia-pacific/4630122.stm.

153 JSMP Letter to UN Secretary-General about CAVR and COE Reports (24 March 2006) available at http://www.jsmp.minihub.org/News/2006/March/240306_Letter%20to%20UN_eng.htm.

154 Terms of reference for the Commission of Truth and Friendship established by The Republic of Indonesia and The Democratic Republic of Timor-Leste, preamble, para. 10, available at http://www.ctf-ri-tl.org/terms_of_reference.

155 Terms of reference for the Commission of Truth and Friendship, preamble, paras. 9, 12.

156 Terms of Reference for the Commission of Truth and Friendship, preamble, para 10.

In the terms of reference for the Commission there is an explicit rejection of the creation of further judicial body which can be taken as an official position of the two states on this matter.[157] The mandate of the CTF emphasises its role in finding the truth and recommending ways for reconciliation, its only outcomes will be the issuing of a report.[158]

There are a number of problems with the term of reference for the CTF as it makes no distinction between the levels of crime carried out. It will pursue a one size fits all approach ignoring the serous nature of some of the crimes that were committed.[159] It also appears to be based on the belief that the final report, when it is issued, will be the end of the story on responsibility for serous crimes, in other words it is explicitly pursuing the protection of impunity through the façade of 'the truth'.[160]

It has been reported that the CTF has failed to obtain widespread, popular support in Timor-Leste.[161] As something that is clearly driven by national elites it is clear that the CTF is being used purely for the political interests of the state leaders. Its ability to contribute to transitional development as well as its conformity with international law is seriously in doubt.[162]

Truth and reconciliation processes are important contributors to post-conflict situations but they cannot be a sham and manipulated in order to dismiss what has occurred. Furthermore, they cannot act as a replacement for criminal responsibility, and when it comes to serious international crimes, responsibility and prosecution is sometimes necessary.[163] The CTF is not designed to offer any sort of reconciliation process, it is primarily an effort of the government elites to bring to an end any discussion of the events of 1999. The outright rejection of the use of prosecutions by the two states is a worrying development in the future of international criminal justice as it marks a retrograde step for the removal of impunity.

Non-governmental groups have continued to demand the creation of an international tribunal for dealing with the event of 1999.[164] The SG decided in early 2005

157 Terms of Reference for the Commission of Truth and Friendship, principles, para. 13 (e).

158 Terms of Reference for the Commission of Truth and Friendship, mandate, para. 14.

159 Report of the Commission of Experts to review the prosecution of serious violations of human rights in Timor-Leste (then East Timor) in 1999, UN Doc. S/2005/458 (15 July 2005), para. 334.

160 Report of Commission of Experts, para. 20.

161 'Timor-Leste: Security Council inaction on justice for Timor-Leste leaves fight against impunity in limbo' Amnesty International News Service No. 228 (19 August 2005).

162 It has been reported that there is dissatisfaction with the reconciliation process as the people of Timor-Leste still expect prosecution in certain cases, see Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights on technical cooperation in the field of human rights in Timor-Leste UN Doc. E/CN.4/2005/115 (22 March 2005), para. 42.

163 See Robert Cryer, 'Post-conflict accountability: a matter of judgement, practice or principle?' in Nigel White and Dirk Klaasen, eds. *The UN, human rights and post-conflict situations* (Manchester, Manchester University Press, 2005), pp. 267-289.

164 'Timorese Truth Commission Report reveals shocking brutality, calls for end to impunity' ICTJ Press Release (20 January 2006) http://www.ictj.org/en/news/press/release/773.html; 'NGOs call on the UN to move to resolve the question of justice for Timor-Leste' Amnesty International News Service No. 163 (28 June 2004) http://web.amnesty.org/

to establish a Commission of Experts to evaluate the progress made by the human rights courts in Indonesia and the Special Panels in Timor-Leste in dealing with the perpetrators of the violence in 1999. In making this decision the SG recalled the SC's 'conviction that those responsible for grave violations of international humanitarian law and human rights in East Timor in 1999 should be brought to justice.'[165] Prior to establishing the COE the SC had made the point to both Indonesia and Timor-Leste that the issue of serious crimes and their prosecution 'was a concern not only for the two countries, but also for the wider international community.'[166]

The mandate of the COE included the providing of recommendations for further measures or mechanisms to ensure 'that those responsible are held accountable, justice is secured for the victims and the people of Timor-Leste, and reconciliation is promoted.'[167] The COE was appointed in February 2005 and had completed its report by May, and this forwarded to the SC on 24 June 2005. In the report the COE explains that the serious crime process in Timor-Leste and the ad hoc courts in Indonesia have not 'achieved full accountability of those who bear the greatest responsibility for serious violations of human rights committed in East Timor in 1999,'[168] A major factor identified by the COE for the shortcomings of the serious crimes process in Timor was the inability to bring suspects before the Special Panels as the majority are based in Indonesia.[169]

The COE report makes a number of recommendations with regard to the prosecution of those responsible for serious crimes. Its first recommendation is the continuance of the Special Panels and the SCU with UN support. It is asserted that this would ensure that investigations, indictments and prosecutions where possible are carried out and completed.[170] For Indonesia the report recommends that the activities of the ad hoc tribunals are re-examined, major steps are taken at reforming the criminal justice system to comply with international standards, and for Indonesia to carry out the prosecution of all those accused of serious crimes, including the retrial of those already indicted.[171]

If these recommendations are not acted up then the COE recommends the establishment of an international criminal tribunal for Timor-Leste to be created by the SC under Chapter VII powers or that the SC initiates proceedings before the ICC.[172] The report also recommends that states make use of universal jurisdiction in

library/index/ENGASA210232004; 'U.N. Security Council must ensure justice' Human Rights Watch Press Release (28 June 2005) http://hrw.org/english/docs/2005/06/28/eastti11231.htm.

165 See Letter dated 11 January 2005 from the Secretary-General addressed to the President of the Security Council UN Doc. S/2005/96 (18 February 2005).

166 Progress Report of the Secretary-General on the United Nations Mission of support in East Timor, UN Doc. S/2005/99 (18 February 2005), para. 7.

167 Report of the Commission of Experts, para. 14.

168 Report of the Commission of Experts, paras. 10 and 19.

169 Report of the Commission of Experts, para. 13.

170 Report of the Commission of Experts, paras. 21-23.

171 Report of the Commission of Experts, paras. 24-28.

172 Report of the Commission of Experts, paras. 29-30.

order to prosecute those responsible.[173] The recommendations of the Commission of Experts place the onus for action clearly on the UN, through the SG monitoring actions taken by Indonesia and Timor-Leste as well as the SC taking action where necessary to ensure the principles of international criminal justice are upheld. However, the SC has not given any consideration to the report at the time of writing (March 2006). And, based on comments from the President of Timor-Leste it is unlikely there will be any pressure from that state for an international tribunal.[174]

VI. The End of Impunity? – Or Long Live Impunity (for Some)

The Nuremberg and Tokyo tribunals marked a major step in international law by establishing individual criminal responsibility for crimes that shocked the conscience of the international system. The intervening Cold War limited the ability of international law to address issues such as massive violations of international humanitarian and human rights law, ensuring impunity prevailed. The 1990s appeared to have marked a major shift in international law away from the dominance exerted by the self-interest of states towards a more principled approach that tried to ensure international law worked to serve the interests of justice for humanity.

A major step in this progression was the development of a system of international criminal justice. During the violence that tore apart the former –Yugoslavia the SC declared that certain international crimes constituted a threat to international peace and security and that it was necessary for the UN system to take effective measures to bring those responsible to justice.[175] In terms of the measures to be taken specific mention is given to the use of prosecution by a tribunal. Similar views were expressed in response to the events in Rwanda[176] demonstrating the belief that prosecution before an international tribunal is a necessary to address serious violations of international human rights and humanitarian law.[177] These ad hoc bodies were followed by the adoption in 1998 of the Rome Statute of the International Criminal Court. The Rome Statute states in no uncertain terms that 'the most serious crimes of concern to the international community as a whole must not go unpunished.'[178]

To this end the ICC stands as evidence of the international system's determination 'to put an end to impunity for the perpetrators of these [serious crimes] and thus contribute to the prevention of such crimes'[179] by removing impunity and engaging in prosecution. Schabas explains the creation of the ICC marked a milestone in international affairs emanating from a 'hesitant commitment' to human rights in the

173 Report of the Commission of Experts, para. 31.

174 Speaking recently of the work of the SCU the President stated that that office only had an interest in 'arresting any militias who dared to cross the borderline' and not in the process of reconciliation, see http://www.un.org/News/Press/docs/2006/sc8615.doc.htm, statement by President Xanana Gusmao. It has also been reported that the President has on other occasions publicly rejected the creation of an international tribunal, see Katzenstien, 'Hybrid Tribunals' ,p. 246, note 6.

175 SC Resolution 827 (25 May 1993), preamble.

176 SC Resolution 955 (14 November 1994).

177 Cryer, 'Post-conflict accountability' ,p. 276.

178 Rome Statute, preamble, indent 4.

179 Rome Statute, preamble indent 5.

1940s to 'a point where individual criminal liability is established for those responsible for serious violations of human rights'.[180]

Based on the trends considered above Cryer believes there is 'a faltering, but notable move to criminalisation.'[181] The way in which the events that occurred in East Timor in 1999 have been dealt with it is possible to say there has been a notable falter in the move towards criminalisation. As de Bertodano has noted, the Timor situation shows that 'The rule appears to be that trials of atrocities can only take place provided they do not rock the political boat.'[182]

The UN's dealing with the situation in Timor-Leste demonstrates the very real obstacles that remain in place in the pursuit of international criminal justice as impunity will continue to prevail depending on the prevailing political circumstances at any given time. While it is possible to identify a range of developments that have shifted the focus of international law away from preserving the interests of states to a body of law that attempts to address the needs and desires of individuals based on considerations of justice, international law remains heavily circumscribed by states and its use (or not) will reflect those interests. This will hold true even when the UN is involved as it is limited to a large degree by the political will of its members, and in particular circumstances the views of certain states will prevail.

Perhaps the most disturbing aspect of the lack of action taken to prosecute those responsible for serious violations is that, with regard to East Timor/Timor-Leste, we have heard this story a number of times before. The reaction of the UN and the international system to the illegal invasion and occupation in 1975 was muted due to the position Indonesia held with regard to security in the region. The 1995 Decision of the ICJ on the Timor Gap adopted a strict statist interpretation of procedural international law precluding any discussion of supposed principles of international law that are supposedly applicable to all states.

In dealing with the events in 1999 the UN and leading states in the international system made a good deal of noise about the need to uphold international legal principles related to international criminal justice but at the same time have shown a great deal of deference to the interests of Indonesia. The development of a system for international criminal justice will have to continually face the challenge posed by the primary role played by the state and the influence state interests have over the adherence to legal principles. This unfortunate conclusion means that impunity will continue to prevail when the pursuit of international law will upset political interests.

Even though developments in international law are determined by states a good deal of responsibility for the lack of application of international legal principles with regard to East Timor/Timor-Leste falls with the UN. The UN administration of East Timor was as a subsidiary organ of the UN which means that the law that was passed during this time was UN law, derived from the organisation and based on UN principles.[183] But this then means making a determination as to which UN principles

180 William Schabas, *An introduction to the International Criminal Court*, 2nd ed. (Cambridge: Cambridge University Press, 2004), p. 25.

181 Cryer, 'Post-conflict accountability', p. 288.

182 de Bertodano, 'East Timor – justice denied', p. 915.

183 See Matthias Ruffert, 'The administration of Kosovo and East Timor by the international community' 50 *International and Comparative Law Quarterly* (2001), pp. 622-623.

are applicable as the UN enshrines state sovereignty as well as support for communal efforts based on normative principles dealing with human interests.

The tensions between these competing interests are particularly clear in the UN's dealing with East Timor/Timor-Leste. In the face of massive and widespread violations of human rights and humanitarian law, where responsibility is well known and beyond doubt, the UN has chosen not to react with any real conviction out of respect for the interests of Indonesia. The UN's reticence has undoubtedly been the result of SC inaction as the views of others appear to differ significantly. The International Commission of Enquiry concluded 'It is fundamental for the future social and political stability of East Timor, that the truth be established and those responsible for the crimes committed be brought to justice.'[184] In its report the Commission of Enquiry also explained

> The United Nations, as an organization, has a vested interest in participating in the entire process of investigation, establishing responsibility and punishing those responsible and in promoting reconciliation. Effectively dealing with this issue will be important for ensuring that future Security Council decisions are respected.[185]

While the universal enforcement of international criminal law is something to be desired, the nature of the international system means it will not always be possible, or in some cases, even desirable to pursue this line. In these circumstances it appears the SC feels the pursuit of those responsible for the violence would somehow be counter productive to future developments. But at the same time the future credibility of the UN as a force for upholding the conscience of the international community has been jeopardised. The SG can no longer speak about the fight against impunity as a grand objective of the international system, it is clear it is a selective objective.

Such a conclusion may be disagreeable to many, but the reality of the international system is that the fight against impunity still has a long way to go. The UN and the international community pretty much ignored Indonesia's illegal invasion and occupation of East Timor in 1975 and now it is hoping the matters relating to 1999 will just go away as well. The ICJ in the case involving the Timor Gap Treaty suggested that the passage of time creates acceptable situations or at the very least international statements of condemnation lose their conviction over time in the face of actual state behaviour. It will be a strong blow to the development of an effective system for international criminal justice if the same occurs with regard to the crimes committed in East Timor.

As Robertson comments 'International criminal law is a sham if its worst offenders are rehabilitated by no more than the effluxion of time.'[186] At the time of writing it appears that the UN will no longer take any further measures with regard to the prosecution of serious crimes in Timor-Leste. In Resolution 1573 of 2004 the SC spoke of its concern 'that it may not be possible for the Serious Crimes Unit to fully respond to the desire for justice of those affected by the violence in 1999'[187] and

184 Report of the International Commission of Inquiry on East Timor, para. 155.

185 Report of the International Commission of Inquiry on East Timor, para. 147.

186 Roberston, *Crimes against humanity*, p. 458.

187 SC Resolution 1573 (15 November 2004), preamble.

reaffirmed the need to fight impunity, but then determined the final date for the completion of serious crime trials.[188] In the resolution the SC takes note of the SG's intention to look at what could be done with regard to prosecutions but there is no request for the SC to report on measures taken in this regard.[189]

The credibility of UN will suffer due to positions such as the one expressed in this resolution. To reaffirm the need to fight impunity but then shut down the tribunals trying to deal with the matter and provide no further support for the cause being pursued clearly reflects the hypocrisy of the UN when it comes to trials and tribulations of East Timor/Timor-Leste and the role of international law in the pursuit of justice.

VII. Conclusion

In September 2000, when speaking in Indonesia, the SG congratulated that country on its 'courage in seeking to come to terms with the past.' More telling, and perhaps more disturbing, was his recognition of Indonesia's position in the world, he explained 'As the world's fourth most populous country; as its largest Muslim-majority State; and as its largest nation of islands, straddling major shipping lanes, you carry great political weight and strategic importance. And you have used that position wisely.'[190] For the SG to give explicit recognition to Indonesia's political position in the world in a positive way at a time when the atrocities of 1999 were coming into full light is very disconcerting. The SG's expressed views confirm de Bertodano's conclusions on the UN's reaction to the events in East Timor:

> The unpalatable truth remains that even in this new era of international criminal justice, the law seems to be applied only to those who are defeated, disgraced or politically unimportant. Those in positions of international political influence are still able not only to escape justice, but to continue to hold power. For all of the rhetoric about ending impunity for the perpetrators of atrocities wherever and whoever they may be, when faced with the opportunity to take decisive action in East Timor, the international community has chosen to turn away.[191]

In this paper the view has been that justice for East Timor/Timor-Leste has not been realised due the fact that Indonesian political, military and militia leaders responsible for the violence of 1999 are unlikely ever to be prosecuted. It is asserted that this is merely a continuation of business as usual when it comes to the application of international law to the territory. The view upon which the critique of the UN's action has been based is, admittedly, an aspirational view as to possibilities of international law for delivering justice based on human and not state interests.

Even though international criminal law has come of age in many respects, its

188 SC Resolution 1573, para. 6.

189 SC Resolution 1573, paras. 6-7.

190 Unity in diversity, Indonesia's motto, sums up `our common humanity', says Secretary-General in Jakarta address, UN Press Release SG/SM?7303 (15 February 2000).

191 de Bertodano, 'East Timor – justice denied', p. 926.

actual enforcement begins with politics[192] and politics will continue to determine the extent to which it is ever applied. It is easy to presume that those responsible for atrocities will be brought to justice in all cases, but this would also have to presume some sort of global rule of law that applies to all political actors; a very false presumption to make.[193] As Chomsky explains, one would need to have 'a remarkable level of "international ignorance"' to believe that considerations of justice, human rights and accountability take prominence over power politics.[194]

In theory the adoption of a hybrid model for an internationalized criminal tribunal provides an effective way of minimizing the impact of politics in the pursuit of international justice and the end of impunity. The hybrid approach is grounded in the domestic setting, letting those who are directly involved with the society in question to play a major role in dealing with the aftermath of violations of serious crimes. This gives a strong element of legitimacy to the prosecution of crimes as it is clearly based in the society where the events occurred. At the same time, it is well known that a purely domestic approach may lead to selectivity or a diminution of standards. To this end the international element of the hybrid model ensures that accepted international standards are applied and adhered to.

This places a major obligation upon the international community to take the necessary action when needed to ensure that the rhetoric about international justice is translated into reality. In the Timor situation it is clear that the domestic and the international aspects of the hybrid model did not come together to form an effective method for dealing with the serious crimes that took place in the territory. Both elements became caught up in political considerations which at the end of the day were deemed to be more important than the pursuit of justice and removal of impunity.

To this end it is useful to conclude with a brief exposition of what the political leaders of Timor-Leste feel about the situation. The current President of Timor-Leste has spoken of the independence achieved in 1999 as the only consideration of justice that matters.[195] The Foreign Minister has explained

> It's great for the human rights activists to be heroic in Geneva and New York where they don't have to live with the consequences of their heroism. They say we don't care about the victims? We care – the president and I have lost relatives, friends and comrades over the years. We know the cost of war, the value of peace and the necessity of reconciliation.[196]

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192 William Burke-White, 'A community of courts: towards a system of international criminal law enforcement' 24 *Michigan Journal of International Law* (2002), p. 97; Stefanie Frease, 'Playing hide and seek with international justice: what went wrong in Indonesia and East Timor' 10 *ILSA Journal of International and Comparative Law* (2004), p. 283.

193 Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Oxford: Polity, 2002), p. 223.

194 Noam Chomsky, *A new generation draws the line: Kosovo, East Timor and the standards of the west* (London: Verso, 2000), p. 59.

195 Security Council 5351st Meeting UN Doc. SC/8615 23 January 2006 http://www.un.org/News/Press/docs/2006/sc8615.doc.htm, statement by President Xanana Gusmao.

196 Quoted in Jeff Kingston, 'The Search for Truth Divides East Timor' *International Herald Tribune* 21 December 2005, available at http://www.iht.com/articles/2005/12/20/opinion/edkingston.php.

In closing this author will concede that his own idealism as to how the world should be does not easily fit with how the world really is. Perhaps the events in East Timor/Timor-Leste are less about the limits of international law but instructive of the realities international law must face in trying to make the world a better place.

Chapter 13

Bosnia's War Crimes Chamber and the Challenges of an Opening and Closure

Avril McDonald

I. Introduction

On 9 March 2005, almost 12 years following the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY or Tribunal), a War Crimes Chamber (WCC) was inaugurated in Sarajevo.[1] During the opening ceremony, the ICTY Chief Prosecutor Carla Del Ponte stated: 'Bosnia and Herzegovina, finally, has received a legal forum at the state level to deal with war crimes, including the cases to be referred from the ICTY.'[2] Her use of the word 'received',[3] and her participation at the ceremony, along with that of the ICTY President Theodor Meron and the then High Representative Paddy Ashdown, underscored the fact that this ostensibly domestic court was created by outside agencies. The initiative to create it came from the ICTY and the Office of the High Representative (OHR) and not from the national authorities.[4] Still, it is the view of the OHR that: 'The concept underlying the WCC initiative is that accountability for gross violations of human rights that took place during the conflict remains the responsibility of the people of Bosnia.'[5]

1 'Bosnia inaugurates War Crimes Court to aid UN's Hague Tribunal', Bloomberg, 10 March 2005, http://www.bloomberg.com/apps/news?pid=10000085&sid=aIjhUtYDLs7k&refer=europe; Daria Sito-Sucić, 'Bosnia to open own war crimes court', Reuters, 6 March 2005, http://www.balkanpeace.org/hed/archive/mar05/hed6938.shtml; 'War crimes court opens in Bosnia', BBC News, 9 March 2005, http://news.bbc.co.uk/2/hi/europe/4331887.stm; 'Bosnia's War Crimes Court starts work', Deutsche Welle, 9 March 2005, http://www.worldpress.org/feed.cfm?http://www.dw-world.de/dw/article/0,1564,1513218,00.html.

2 Address of the Prosecutor at the Inauguration of the War Crimes Chamber of the Court of BiH, Sarajevo, ICTY Press release CDP/P.I.S./944, The Hague, 9 March 2005, http://www.un.org/icty/latest-e/index.htm.

3 See Info sheet: Partnership and Transition between the ICTY and National Courts, http://www.un.org/icty/pressreal/2005/infosheet/htm.

4 The War Crimes Chamber is a 'joint initiative of the Office of the High Representative and the International Criminal Tribunal for the Former Yugoslavia'. 'Security Council briefed on establishment of a war crimes chamber within state court of Bosnia and Herzegovina', Security Council 4837th Meeting, UN Press Release SC/7888, 10 August 2003, http://www.pict.pcti.org/news_archive03/03Oct/ICTY_100803.htm.

5 'Office of the High Representative,'War Crimes Chamber Project: Project Implementation Plan – Registry Progress Report,' 20 October 2004, www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf, p. 4.

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 ISBN 978 90 04 16308 9. pp. 297-328.

Paddy Ashdown pronounced the War Crimes Chamber 'a major step forward to full statehood' for Bosnia,[6] meaning that it presents a test for the country's ability to squarely face its recent history and to try its own war criminals, in a way that accords with international standards.

A. The ICTY's primary jurisdiction

Since its establishment by the UN Security Council (SC) in 1993[7] the ICTY has had primacy[8] with regard to the prosecution of crimes committed in the former Yugoslavia during the 1991-1995 armed conflicts.[9] Created at a time when the conflict in Bosnia and Herzegovina was still ongoing and serious violations of international humanitarian law were being widely reported,[10] and there was no possibility of prosecuting those violations at the national level, the ICTY was envisaged as the principal mechanism for putting an end to such violations and taking effective measures to bring to justice those persons responsible for them, thereby contributing to the restoration and maintenance of peace in the region.[11] For security reasons, it was situated outside the region at The Hague. Its primacy means that it can decide whom within its jurisdiction to prosecute, and national courts must defer to it in this respect.

The Tribunal has had significant, if limited, success in its mission to try per-

6 'War crimes court opens in Bosnia', BBC News, 9 March 2005, http://news.bbc.co.uk/2/hi/europe/4331887.stm.

7 By Security Council Resolution 827 (1993), adopted by the UN Security Council on 25 May 1993.

8 Art. 9(2) of the ICTY Statute provides: 'The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.'

9 Following the declarations of independence by Slovenia and Croatia on 25 June 1991, the conflicts on the territory of the former Yugoslavia began in Slovenia with a ten day 'war' between the newly independent Slovenia and the armed forces of the Federal Republic of Yugoslavia (FRY), the JNA, which began on 27 June 1991. The conflict between Croatia and the FRY began in July 1991 and continued through December of that year. The war in Bosnia commenced in early 1992 and ended with the 1995 Dayton Agreement. For a good account of the road to war and the conflicts themselves see Laura Silber and Allan Little, *The Death of Yugoslavia* (London, Penguin Books/BBC Books 1995).

10 See *War Crimes in Bosnia and Herzegovina*, Helsinki Watch (New York, Human Rights Watch August 1992); *War Crimes in Bosnia and Herzegovina*, volume II, Helsinki Watch (New York, Human Rights Watch, April 1993).

11 The preamble of SC resolution 827 expressed the Council's determination 'to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them', its conviction that 'in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace' and its belief that 'the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.' *supra* n. 7.

sons who committed serious violations of international humanitarian law during the conflicts. Significant, because it has indicted and successfully prosecuted a number of senior military and civilian commanders and showed that it could be done, even if a number of leaders remain at large,[12] and other died before their trials ended[13] or could begin.[14] Moreover, it has developed a major body of jurisprudence. Limited, because its 161 indictments and 47 convictions (as of July 2006)[15] should be considered in the context of the approximately 15,000 persons who are thought to have committed war crimes during the Balkan Wars.[16]

B. The ICTY's concurrent jurisdiction

The ICTY operates on the basis of concurrency with national courts, meaning all national courts and not only those of the former Yugoslav states, and was created with the expectation that national courts would share the burden of prosecuting suspected war criminals.[17] Morris and Scharf write:

> There was no indication that the Security Council intended to create an international tribunal with exclusive jurisdiction over the crimes in question. As a practical matter, it would be practically impossible for the International Tribunal to prosecute all of the perpetrators of the reported atrocities in the former Yugoslavia or even those responsible for the most serious violations. Thus, the Secretary-General's report recommended conferring concurrent jurisdiction on the International Tribunal to complement rather than supersede the jurisdiction conferred on all States for the crimes under international law covered by the Statute. Furthermore, States should be encouraged to search for, prosecute and punish any persons responsible for war

12 As of July 2006, the following accused persons remained at large: Radovan Karadžić, Ratko Mladić, Stojan Zupljanin, Vlastimir Djordjević, Goran Hadžić and Zdravko Tolimir.

13 The trial of former Yugoslav President Slobodan Milošević, which began on February 2002, ended abruptly with his death from natural causes on 11 March 2006. 'Slobodan Milosevic Found Dead in his Cell at the Detention Unit', ICTY Press Release CC/MOW/1050ef, The Hague, 11 March 2006, http://www.un.org/icty/latest-e/index.htm. The trial of Milan Kovacević began just three weeks before his death on 1 August 1998 of a heart attack. *Prosecutor* v. *Milan Kovacević*, Order Terminating the Proceedings Against Milan Kovacevic, 24 August 1998, http://www.un.org/icty/kovacevic/trialc2/order-e/80824MS2.htm. Slavko Dokmanović committed suicide in his cell on 28 June 1998 before his trial could be completed. See *Prosecutor* v. *Mile Mrksić, Miroslav Radić, Veselin Sljivancanin, Slavko Dokmanović*, Order Terminating Proceedings Against Slavko Dokmanović, 15 July 1998, http://www.un.org/icty/dokmanovic/trialc2/order-e/80715MS2.htm.

14 The trial of General Djordje Djukić had not yet commenced before his death from natural causes on 18 May 1996. See http://www.un.org/icty/glance/dukic.htm.

15 See Key figures of ICTY cases, http://www.un.org/icty/glance-e/index.htm (17 July 2006).

16 See 'War Crimes Court in talks to hand cases over to Bosnia', AFP, 14 January 2003.

17 Article 9(1) of the ICTY Statute provides: 'The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.'

> crimes found within their territory in accordance with the obligations incumbent upon most States as parties to the Geneva Conventions.[18]

While states outside the region are legally empowered to search for and prosecute persons who committed crimes against humanity, war crimes and genocide during the Balkan Wars, pursuant to Article 9(1) of the ICTY Statute and, in relation to grave breaches, pursuant to the Geneva Conventions[19] and Additional Protocol I, they have shown only very limited willingness to do so.[20]

It is clear that, given the ICTY's limited capacity and imminent closure, if there is to be any chance of widespread accountability for the crimes that were committed in Bosnia and the other former Yugoslav states, the impunity gap will have to be filled by the states of the region. But those states – whose judicial systems were as recently as 2004 described by Human Rights Watch as unfit to handle cases[21] – have only in

18 Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 1 (Irvington-on-Hudson, NY, Transnational Publishers, Inc. 1995) p. 124. See also S/25704, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993, paras. 64-64.

19 Arts. 49 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; 50 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949;, 129 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, and 146 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Although the Geneva Conventions are regarded as customary, and it is widely considered that states have an obligation under the Conventions and not merely a right to search for and prosecute persons on their territory who are suspected of committing grave breaches of the Conventions, the International Committee of the Red Cross in its study of Customary International Humanitarian Law found that the obligation to provide for universal jurisdiction for grave breaches is not customary. Instead, the content of the customary rule viz. grave breaches (Rule 157) is that 'States have the right to vest universal jurisdiction in their national courts over war crimes'. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume 1, Rules (Cambridge, Cambridge University Press 2005) p. 604. The commentary to the rule states that: 'The right of States to exercise universal jurisdiction in their national courts for war crimes is supported extensively by national legislation. There have also been a number of cases of suspected war criminals being tried by national courts on the basis of universal jurisdiction.' There was evidently insufficient practice, however, to suggest that states prosecute on the basis of universal jurisdiction out of any sense of obligation. That view would seem to be supported by the practice of states since the establishment of the ICTY, despite the fact that almost all states are parties to the Geneva Conventions and therefore are conventionally bound to prosecute.

20 With some notable exceptions, only some of which were successful. See, for example, the Danish case of *The Director of Public Prosecutions* v. *T*, Sentence passed by the Eastern High Court (3rd Division) on 22 November 1994, noted in Correspondents' Reports, 1 *Yearbook of International Humanitarian Law* (1998) p. 431; the Swiss case of *In Re. G*, First Division Military Tribunal, Lausanne, 18 April 1997, noted in Correspondents' Reports, 1 *Yearbook of International Humanitarian Law* (1998) pp. 512-513; the German cases of *Sokolović*, Higher Regional Court of Dusseldorf, Judgement of 29 November 1999 and *Jorgić*, Federal Supreme Court, Judgement of 30 April 1999, both noted in 2 *Yearbook of International Humanitarian Law* (1999) pp. 366 to 369.

21 Human Rights Watch concluded in 2004 that, 'as a rule, the ordinary national courts

the past few years show any enthusiasm at all for prosecuting war criminals. Serbia and Croatia, as fully sovereign states, cannot be compelled to undertake prosecutions, although they can be persuaded and both have shown improvements in this respect. In 2003 Serbia established a war crimes chamber within the District Court of Belgrade,[22] and in Croatia all county courts are mandated to hear war crimes cases.[23] But it is clear that the state with the greatest interest in and motivation for prosecuting war crimes is Bosnia, a country that remains a ward of the international community.

Before 2005 there were some war crimes cases in Bosnia but not many. After the war ended, the big fear was ethnically-biased prosecutions. Able to impose its will on Bosnia,[24] if not on Serbia or Croatia, in the mid 1990s the international community established a mechanism to enable trials to proceed but subject to the oversight of the Tribunal. The so-called 'Rules of the Road' scheme set out in the Rome Agreement of 18 February 1996[25] was a direct response to the prospect of ethnically motivated prosecutions.[26]

According to the procedure set out in the Rome Agreement, the ICTY Office of the Prosecutor (OTP) was to channel cases to the Bosnian authorities for prosecution before that country's cantonal and district courts. A team within the ICTY OTP was charged with reviewing all case files relating to crimes committed in Bosnia, and only once a case was given the green light by the Rules of the Road team could an arrest warrant be issued by the national authorities.

The ICTY reviewed a total of 1,419 cases against 4,985 persons between 1996 and 2004 and approved prosecutions against 848 persons on war crimes charges.[27] On 27

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of Bosnia and Herzegovina (particularly in Republika Srpska, one of the two "entities" in Bosnia and Herzegovina), Croatia, and Serbia and Montenegro are not currently equipped to hear war crimes cases – which are often politically and emotionally charged, as well as legally complex – in a fair manner. Key obstacles include: bias on the part of judges and prosecutors, poor case preparation by prosecutors, inadequate cooperation from the police in the conduct of investigations, poor cooperation between the states on judicial matters, and ineffective witness protection mechanisms.' 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro', Human Rights Watch October 2004, Vol. 16, No. 7(D), p. 2, http://hrw.org/reports/2004/icty1004/icty1004.pdf.

22 See ibid., p. 6.

23 Ibid., p. 7.

24 Pursuant to the Framework Agreement, the International Community created the Office of the High Representative (Art. 1, Annex 10) to implement the civilian aspects of the agreement. The High Representative has far-reaching powers, including the ability to fire state officials and to introduce legislation.

25 The Rome Agreement provides that 'persons other than those already indicted by the International Criminal Tribunal for the Former Yugoslavia may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal'. Para. 5, http://www.ohr.int/print/?content_id=6093.

26 See Janet Manuell and Alekandar Kontić, 'Transitional Justice: the Prosecution of War Crimes in Bosnia and Herzegovina under the 'Rules of the Road', 5 *Yearbook of International Humanitarian Law* (2002) pp. 331 at 333.

27 See Info sheet: Partnership and Transition between the ICTY and National Courts, http://www.un.org/icty/pressreal/2005/infosheet/htm.

August 2004 the ICTY OTP informed the Bosnian presidency that as of 1 October 2004 it would no longer review war crimes cases, passing the responsibility for initiating investigations and prosecutions to the Bosnian prosecutor.

Despite the approval by the ICTY of hundreds of cases for prosecution in Bosnia, few of the cases given the green light were prosecuted. Human Rights Watch reported in 2004 that 'hundreds of individuals whose prosecution has been approved by the ICTY pursuant to the "Rules of the Road" procedure apparently remain at liberty in those parts of Bosnia and Herzegovina in which the ethnic group to which they belong is the majority, either because the suspects have not been indicted or because the police have failed to arrest those who are indicted'.[28] Two years later, the situation had hardly improved. HRW reported that, because of grave deficiencies relating to the functioning of the legal profession and the judiciary, 'the justice system has had a limited impact on putting an end to the widespread impunity in Bosnia for war crimes'.[29]

The failure of Bosnia, in spite of the establishment of the Rules of the Road scheme, to get to grips with prosecutions of war crimes means that thousands of criminals remain at large, some in high positions, coming into contact with their victims every day. There can never be any sense of closure on the part of the victims, and there could not be closure of the ICTY, unless a serious and sustained effort was made by Bosnia to prosecute war crimes.

This paper focuses on the establishment and work of the Bosnian War Crimes Chamber, looking at its institutional and legal aspects, its relationship with the ICTY, and the types of cases it is dealing with.

Part two examines the ICTY completion strategy and what it means both for the ICTY itself and Bosnia, then turns to look at the process leading to the establishment of the Bosnian War Crimes Chamber. Part three analyses the main features of the WCC, including its jurisdiction. Part four examines the relationship between the WCC and the ICTY, which can be seen as an example of complementarity in action between international and national criminal courts with concurrent jurisdiction. Through the operation of the War Crimes Chamber and by prosecution of war criminals before its other domestic courts, Bosnia is seeking to fill what has become known as the impunity gap. Part five looks more closely at the types of cases that the Chamber is hearing. Finally, part six offers some conclusions.

II. The ICTY's Completion Strategy and the Process Leading to the Establishment of the War Crimes Chamber

The ICTY's completion strategy was first unveiled in late 2001 and elaborated on further during 2002 and 2003.[30] Pursuant to this strategy, the Tribunal envisaged

28 Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro, Human Rights Watch October 2004, Vol. 16, No. 7(D), p. 13, http://hrw.org/reports/2004/icty1004/icty1004.pdf.

29 See Bosnia and Herzegovina, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, February 2006, p. 4.

30 See 'Address by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Carla Del Ponte, to the UN Security Council', Press Release of the Office of the Prosecutor, GR/P.I.S/642-e, The Hague, 27 November 2001; 'Registrars of ICTY and

completing all of its investigations by the end of 2004 and wrapping up all first instance cases by the end of 2008 and all proceedings (including appellate) by the end of 2010.[31]

Under the completion strategy, the Tribunal should concentrate on the cases involving the most serious offences or the most senior defendants who have been indicted, and undertake a variety of procedural amendments designed to expedite those proceedings. It could defer other cases to national courts, that is, both cases of persons who had been investigated and indicted by the ICTY and cases of persons who had been investigated but not indicted.[32] But there had to be a national court able and willing to try these cases, and as a suitable one did not already exist, it had to be created.

The plan for the court took shape during meetings of the OHR-ICTY Working Group on Development of BiH Capacity for War-Crimes Trials in The Hague on 15 January[33] and from 20-21 February 2003. Joint conclusions adopted upon the completion of the February meeting indicated that a specialised three-panel chamber within the Court of Bosnia and Herzegovina (BiH) would be the most appropriate forum before which to try the most sensitive war crimes cases:

> The Chamber will be an institution of Bosnia and Herzegovina operating under the laws of the state. Nevertheless, for an initial period there should be a temporary international component in its judiciary and court management.

ICTR sign statement on co-operation', Press Release of the Registry, TK/ICTR/621-e, The Hague, 21 September 2001; 'Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN General Assembly', Press Release of the President, JD/P.I.S/640-e, The Hague, 27 November 2001; 'Address by his Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council', The Hague, 26 July 2002; 'Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN General Assembly', Press Release of the President, The Hague, 29 October 2002, JdH/P.I.S./707-e; 'Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, Press Release of the President, The Hague, 30 October 2002.

31 The deadlines were later revised. In his statement to the UN SC of 7 June 2006, the ICTY's President confirmed his earlier prediction that trials would run into 2009: 'the estimate of all trials finishing by that date may hold provided that the multi-accused trials run smoothly; the cases referred to the former Yugoslavia are not deferred back to the International Tribunal; the new amendment to Rule 73bis is effectively implemented such that indictments are more focused; and the six remaining high level fugitives are transferred to the jurisdiction of the International Tribunal very soon'. The amendment to Rule 73bis allows the judges, in order to shorten the trials, to direct the prosecutor to remove counts of the indictment or do so themselves. Statement by the Tribunal President Judge Fausto Pocar to the Security Council, 7 June 2006, http://www.un.org/icty/pressreal/2006/p1084e-annex.htm.

32 See *Prosecutor* v. *Gojko Janković*, Decision on Rule 11*bis* Referral, Appeals Chamber, 15 November 2005, para. 32.

33 Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions, OHR/PIS/723-e, The Hague, 15 January 2003, http://www.un.org/icty/latest-e/index.htm.

> The Prosecutor's Office of BiH must include a War Crimes Department with a temporary international component. In addition, due to problems remaining in BiH, there must be effective support for the investigation of war crimes and the apprehension of suspects.[34]

The Joint Conclusions indicated exactly the types of cases over which the Chamber should exercise jurisdiction:

> The specialised War Crimes Chamber within the Court of BiH will have jurisdiction over three types of war crimes: those cases deferred by ICTY in accordance with Rule 11 bis of the Rules of Procedure and Evidence (approximately 15 accused); those cases deferred by the ICTY Prosecutor's office, for which Indictments have not yet been issued (approximately 45 suspects); and those "Rules of the Road" cases before domestic courts, which due to their sensitivity should be tried at the State Court level.[35]

The Joint Conclusions also stipulated the creation of a witness protection program, adequate protection for the judges and security in general, and state-level detention facilities. Underlining the role of the ICTY and OHR as the main architects of the War Crimes Chamber and driving force behind national prosecutions, they concluded: 'Both the OHR and the ICTY recognise that an effective war crimes trial capability within BiH is an essential part of the establishment of the rule of law and fundamental to the reconciliation process, creating necessary conditions to secure a lasting peace in BiH.'[36]

The completion strategy was endorsed and strongly encouraged by the international community, in particular, the UN SC.[37] The Council recognised in Resolution 1503 of 28 August 2003 that an 'essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and the early functioning of a special chamber within the State Court of Bosnia and Herzegovina and the subsequent referral by the International Tribunal of cases of lower- or intermediate-rank accused'.

A series of decisions passed by the High Representative and adopted by the BiH Assembly culminated in the establishment of a Section for War Crimes within the Court of BiH,[38] a Special Department for War Crimes within the Prosecutor's

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34 'OHR-ICTY Working Group on Development of BiH Capacity for War-Crimes Trials Successfully Completed', OHR/P.I.S./731e, The Hague, 21 February 2003, http://www.un.org/icty/latest-e/index.htm.

35 Ibid.

36 Ibid.

37 Statement by the President of the Security Council, 23 July 2002, http://daccessdds.un.org/doc/UNDOC/GEN/N02/491/47/PDF/N0249147.pdf?OpenElement.

38 Law On Court Of Bosnia And Herzegovina, Official Gazette of Bosnia and Herzegovina 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04; Law on Amendments to the Law on the Court of BiH, Official Gazette of Bosnia and Herzegovina 4/04; Law on Amendments to the Law on the Court of BiH, Official Gazette" of Bosnia and Herzegovina 35/04; Law on Amendments to the Law on the Court of BiH, Official Gazette of Bosnia and Herzegovina 61/04.

Office of BiH[39] with an international deputy prosecutor,[40] and a Registry[41] headed by an International Registrar (Michael Johnson, former ICTY Chief of Prosecutions).

An Implementation Task Force of the War Crimes Chamber, consisting of the main international and national agencies involved in the Chamber's establishment, was established and held its first meeting in November 2003.[42] The creation of the Chamber required not only the preparation of an adequate physical space but also the drafting of the legal framework.

Following the adoption of a new Criminal Code[43] and Criminal Procedure Code[44] on 1 March 2003, legislation was passed to enable the War Crimes Chamber to become operational in early 2005. The BiH Parliamentary House of Peoples passed a set of amendments pertaining to the processing of war crimes before domestic courts, including a measure that separates the War Crimes Department from the Department of Organized Crime, Economic Crimes and Corruption and

39 Decision Enacting the Law on Amendments to the Law on Prosecutor's Office of Bosnia and Herzegovina. Enacted by the High Representative on 24 January 2003 and entered into force immediately. The Law, which formed an integral part of the Decision, entered into force on 1 February 2003, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29093; Decision Enacting the Law Re-amending the Law on the Prosecutor's Office of BiH. Enacted by the High Representative on 28 October 2003 and entered into force immediately. The law, which formed an integral part of the decision, entered into force on 29 October 2003, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=31102.

40 Decisions Enacting the Law on the Federation Prosecutor's Office of the Federation of Bosnia and Herzegovina, 21 August 2002, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=27804; Decision of the High Representative on Appointment of an International Prosecutor as Deputy Chief Prosecutor and Head of the Special Department of the Prosecutor's Office of BIH, 15 January 2004, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=31588.

41 Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia And Herzegovina. Signed by the Presidency of Bosnia and Herzegovina and the High Representative on 1 December 2004; Decision of the High Representative on Appointment of the International Registrar to the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of BiH, 22 December 2004, http://www.ohr.int/decisions/war-crimes-decs/default.asp?content_id=33830.

42 See OSCE, Mission to Bosnia and Herzegovina, Rule of Law, Supporting a strong, independent judiciary, http://www.oscebih.org/human_rights/rule_of_law.asp?d=1.

43 Decision Enacting the Criminal Code of Bosnia and Herzegovina, 24 January 2003, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29095; Criminal Code of Bosnia and Herzegovina, entered into force on 1 March 2003, published in Official Gazette of Bosnia and Herzegovina Nos. 3/03, 32/03, 37/03, http://www.ohr.int/decisions/judicialrdec/doc/HiRep-dec-101-law-crim-code-bih.doc.

44 Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina, 24 January 2003, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29094. Criminal Procedure Code, entered into force on 1 March 2003, http://www.ohr.int/decisions/judicialrdec/doc/HiRep-dec-100-law-cpc-bih.doc.

the Department for Other Criminal Acts under the jurisdiction of the BiH court.[45] The aim was to facilitate the transfer of cases from the ICTY to the War Crimes Chamber.

III. Other Legal Changes Necessary for the Functioning of the War Crimes Chamber

A. Amendments of ICTY Rules

Setting in place the legal machinery to create the court and to enable it to function as envisaged required changes to the law not only at the national level but also at the ICTY. On June 2004 the ICTY's judges amended Rule 11*bis* of the Rules of Procedure and Evidence, introducing a new section (iii) to provide a legal basis for the referral of cases from the ICTY to national courts. Under the amended rule, cases where an indictment has been issued may be referred by an ICTY referral bench (consisting of three judges) to a state: (i) in whose territory the crime was committed, (ii) where the accused was arrested, or (iii) having jurisdiction and being willing and adequately prepared to accept such a case.

The referral bench may make such a referral *proprio motu* or at the request of the prosecutor (para. B); it does not give an accused or any state *locus standi* to request a referral. In making such a referral, pursuant to paragraph C, the referral bench shall consider the gravity of the crimes charged and the level of responsibility of the accused (intermediate or lower-rank accused[46]). The state concerned must be able to offer the accused a fair trial in accordance with international standards of human rights and due process,[47] although no procedure is set out for monitoring or assessing the fairness of trials at the national level.

The adoption of Rule 11*bis* necessitated a legislative response at the national level, and therefore Bosnia adopted the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by the ICTY in Proceedings Before the Courts of Bosnia and Herzegovina.[48]

B. The creation of the Special Department for War Crimes

The War Crimes Chamber is the centrepiece of an elaborate prosecutorial and judicial machinery that has been created in Bosnia to prosecute and try war crimes. A law was passed creating a Special Department for War Crimes within the Prosecutor's

45 'Bosnian upper chamber passes laws paving way for domestic war crimes trials,' 21 October 2004, BBC Monitoring European; Amnesty International Report 2005, http://web.amnesty.org/report2005/bih-summary-eng.

46 See Info sheet: Partnership and Transition between the ICTY and National Courts, http://www.un.org/icty/pressreal/2005/infosheet/htm.

47 Ibid.

48 Published in Official Gazette of Bosnia and Herzegovina 61/04.

Office of BiH.[49] This department operates independently of the WCC,[50] but its proper functioning is obviously crucial to the success or failure of the Chamber.

As of early 2006, the Special Department for War Crimes (SDWC) within the Prosecutor's Office consisted of five international prosecutors and one international acting prosecutor, and eight local prosecutors, including the deputy prosecutor. They were divided into five regional prosecutions teams, and a sixth team devoted to investigating the Srebrenica massacre. Each team was assigned an international prosecutor and a local prosecutor, with the latter being in charge of the team. The Srebrenica team had one international and three local prosecutors.

All were based in Sarajevo.[51] The plan was to replace the international prosecutors with local ones by December 2007, although in 2006 Human Rights Watch reported that plans were afoot to try to hire more international prosecutors to deal with the existing case load.[52]

The prosecutors can pursue cases referred by an ICTY Referral Bench pursuant to Rule 11 *bis*, cases referred from the ICTY of persons who have been investigated but not indicted, Rules of the Road cases or any other cases. But concerns were raised that the personnel shortfall at the Special Department meant that the prosecutors were barely be able to cope with the existing workload that had been referred from the ICTY never mind prosecute any new cases.[53]

C. The War Crimes Unit of the Bosnian State Investigation and Protection Agency

The prosecutors within the SDWC work closely with the War Crimes Unit of the Bosnian State Investigation and Protection Agency (SIPA), which is the national authority with exclusive jurisdiction to investigate war crimes. On 12 October 2005 the SDWC and SIPA signed a Memorandum of Understanding to regulate their cooperation.[54] *Inter alia* it provided that SIPA's War Crimes Unit (WCU) will provide investigative support to the SDWC. Human Rights Watch reported that as of February 2006, there were seven SIPA WCU personnel working for the SDWC but that, personnel wise, the WCU was actually working at only half of its projected capacity and severely lacked equipment (it lacked a dedicated fax machine and had only one car for the entire unit). SIPA's WCU provides investigative support not only to the SDWC but also to prosecutors at the Cantonal and District Court levels.[55]

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49 The Law on Prosecutor's Office of Bosnia and Herzegovina creates 'within the Prosecutor's Office a Special Department for War Crimes and a Special Department for Organized Crime, Economic Crime and Corruption' (Art. 3(3)). Pursuant to this law, international prosecutors may be appointed during a five year transitional period (Art. 18(a)). See also Law on Amendments to the Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 61/04.

50 See Bosnia and Herzegovina, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, February 2006, p. 8.

51 Ibid.

52 Ibid., p. 12.

53 Ibid., p. 11.

54 Ibid., p. 13.

55 Ibid.

IV. Main Features of the Court

A. Structure and resources

The War Crimes Chamber is not a completely discrete, stand alone, institution but is part of the Court of Bosnia and Herzergovina, itself created by resolution of the High Representative and by amendments to the already existing Law on Court of Bosnia and Herzegovina.[56] The Court of BiH consists of a plenum[57] and three divisions: the Criminal Division (consisting of at least five judges, sitting in panels of three); the Administrative Division;[58] and the Appellate Division (consisting of at least five judges sitting in panels of five).[59]

The criminal and the appellate divisions each consist of three sections: Section I for War Crimes, Section II for Organized Crime, Economic Crime and Corruption and Section III for all other crimes under the jurisdiction of the Court.[60] Section I of the appellate division shall hear appeals from section I of the criminal division.[61]

The War Crimes Chamber thus operates at two levels: the trial level, where it consists of panels of three judges within section I of the Criminal Division of the Court of BiH, and the appeals level, where it consists of panels of three judges within Section I of the Appeals Division of the Court of BiH. At the outset, the panels were weighed in favour of international judges, constituting two of the three at the trial and appeals levels.[62] Over a five year transitional period the balance will change to two national and one international judge and, finally, to all national judges in 2009.[63] Including international judges was considered a way to inspire more confidence in the Chamber's impartiality. With a view to increasing the confidence of Bosnian Serbs in the court, the Republika Srpska was involved in the judicial nominations and selection process for the State Court.

The administration of the recruitment and selection of the international judges is the responsibility of the Registry,[64] a discrete part of the Court of Bosnia and

56 Law on Amendments to the Law on the Court of BiH, Official Gazette of Bosnia and Herzegovina 4/04; Law on Amendments to the Law on the Court of BiH, Official Gazette of Bosnia and Herzegovina 35/04; Law on Amendments to the Law on the Court of BiH, Official Gazette of Bosnia and Herzegovina, 61/04.

57 Art. 19(1) and (2) Law on Court of Bosnia and Herzegovina. The plenum consists of all the members of the Court. Art. 22(1) Law on Court of Bosnia and Herzegovina. *Inter alia*, it is responsible for drawing up and adopting rules of procedure of Section III of the Criminal and Appellate Divisions and of the Administrative Division.

58 Art. 23(1) Law on Court of Bosnia and Herzegovina.

59 Art. 23(2) Law on Court of Bosnia and Herzegovina.

60 Art. 24 Law on Court of Bosnia and Herzegovina.

61 Art. 26 Law on Court of Bosnia and Herzegovina.

62 Pursuant to Art. 65 Law on Court of Bosnia and Herzegovina.

63 For a discussion of the transitional period see War Crimes Chamber Project, Project Implementation Plan, Registry Progress Report, 20 October 2004, pp. 8-9, http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf.

64 Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department

Herzegovina. According to Article 65 of the Law on Court of Bosnia and Herzegovina: 'During a transitional period, an international Registrar shall be appointed as Chief Registrar for Section I and Section II, responsible for the administration and provision of support services to Section I and Section II of the Criminal and Appellate Divisions. The transitional period shall not last more than five years.' In fact, by 2006 the international registrar had departed.

The War Crimes Chamber has a staff of about 100, with seven prosecutors and eleven judges.[65] There is a 'significant international presence currently within the WCC and those institutions involved with it' which 'includes international judges and prosecutors, defense counsel, experts in witness protection and support, as well as other officials engaged in providing substantive and administrative support'.[66] The presence of a substantial number of international personnel is expected to continue after the transition period ends.

The question arises whether the fact of its creation by international agencies and the representation of a considerable number of internationals among its personnel makes the court less of a national court and more of a hybrid, internationalised, court. The ICTY Referral Bench in the *Stanković* referral decision rejected the contention of the defendant that the War Crimes Chamber is not a national court: 'The inclusion of some non-nationals among the judges of the State Court does not make that court any less a "national court" of Bosnia and Herzegovina.'[67]

However, it later went on to mention that the State Court of BiH 'takes on an international dimension within the Criminal Division'.[68] The languages of the court are, however, the local languages of Bosnian, Serbian and Croatian, and no national personal are required to be fluent in anything other than a local language.[69] International personnel are allowed to use the English language, and simultaneous interpretation is provided.[70]

A new physical structure had to be built to house the Chamber, as well as the Prosecutor's Office and the Special Detention Facility. The latter has been designed to meet and is run in conformity with international standards of detention.

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for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, 2004, Art. 2(2).

65 Angela M. Banks, 'Carla Del Ponte: Her Retrospective of Four Years in The Hague', 6 *International Law Forum* (2004) pp. 37 at 40.

66 See Bosnia and Herzegovina, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, February 2006, p. 7.

67 *Prosecutor* v. *Radovan Stanković*, Case No. IT-96-23/2-PT, Referral Bench, Decision on referral of case under Rule 11 *bis*, 17 May 2005, para. 26. See also Human Rights Watch: '[A]lthough it presently contains a significant international component, the WCC is essentially a domestic institution operating under national law.' See Bosnia and Herzegovina, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, February 2006, p. 2.

68 *Prosecutor* v. *Radovan Stanković*, ibid., para. 28.

69 War Crimes Chamber Project, Project Implementation Plan, Registry Progress Report, 20 October 2004, p. 9, http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf.

70 War Crimes Chamber Project, Project Implementation Plan, Registry Progress Report, 20 October 2004, p. 12, http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf.

By 2006 it was planned to have six courtrooms available for trial. 'Once all courtrooms are operational, it is expected that the State Court will have the capacity to run approximately twelve trials simultaneously in both the War Crimes and Organized Crime Chambers.'[71]

The work of Sections I and II of the Criminal and Appellate Divisions of the Court of BiH, the Special Departments of the Prosecutor's Office of BiH and the Registry is subject to continuous oversight by an Oversight Committee composed of international and national experts in criminal justice.[72]

One of the Chamber's greatest potential weaknesses is that it does not have any secure source of funding and relies on international donations. The War Crimes Chamber Project – which is part of the OHR and which was instrumental in getting the Court off the ground – projected that the total project cost, excluding current domestic judicial costs, would be 24,496,100 euros for the first two years of operation and 50,338,100 euros for the full project-planning period, that is, until 2009. Finding this money has proven difficult.

At a donors' conference held in October 2003, 15.7 million euros were pledged for the first two years of the Chamber's existence (comparable to the budget of the Special Court for Sierra Leone).[73] Half of the money came from the US, the rest mainly from European nations. At a second donors' conference in March 2006, the Court hoped to raise $43 million but only received pledges of $8 million,[74] an ominous sign.

Unless concrete pledges of financial assistance are forthcoming, the proper functioning of the Chamber and the whole project will be put in jeopardy. Understandably, donors are fatigued, given the plethora of national and international criminal courts needing financial support. But the War Crimes Chamber seems to represent a good investment, and is essential if the ICTY is to be allowed to make a graceful exit and Bosnia is allowed the chance to assume its responsibility. For a fraction of the cost of the ICTY, the Chamber hopes to try a great many more cases. As Human Rights Watch has pointed out, the WCC 'currently functions on approximately 6 percent of the funds considered essential for the operation of the ICTY'.[75]

Although the State Court is a permanent body, the Prosecutor does not intend

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71 See Bosnia and Herzegovina, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, February 2006, p. 7.

72 Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, 2004, Art. 3(2.7).

73 'Donors Raise 15.7 Million Euros for War Crimes Chamber of BiH Court', OHR/ICTY, 30 October 30 2003, http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=31088. See Info sheet: Partnership and Transition between the ICTY and National Courts, http://www.un.org/icty/pressreal/2005/infosheet/htm.

74 Nerma Jelacić, 'Donor's must not turn their backs on justice: International community's poor show in Brussels could turn Bosnian war crimes justice into a Greek tragedy', Justice Report, Balkan Investigative Reporting Network, Issue No. 06, 7 April 2006.

75 See Bosnia and Herzegovina, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, February 2006, p. 2.

pursuing war crimes prosecutions in connection with the 1992-1995 war indefinitely. The expectation is that all war crimes trials will conclude within ten years.[76] This will, of course, depend on the necessary support being forthcoming. If it is not, the trials could cease well before then.

The success of the Chamber as a force for greater understanding and reconciliation depends on it being able to effectively communicate with the outside world. Accordingly, a Public Information and Outreach Section has been created to interface with the national and international media, international organisations and the population of Bosnia, most especially the victims of crimes. The section will strive to bring the work of the Chamber to the attention of a wide audience, including schools, religious institutions and local government agencies.

B. Jurisdiction

i. Temporal jurisdiction

The new BiH Criminal Code (replacing the Criminal Code of the Socialist Federal Republic of Yugoslavia) entered into force only on 1 March 2003, but, as amended in 2004, its Article 4a provides for the possibility of trial and punishment of someone who has committed crimes which were criminal according to the general principles of international law at the time they were committed.[77] Article 9 of the Law on Amendments to the Law on Court of Bosnia and Herzegovina introduced a new paragraph 2, stating: 'The Court shall have jurisdiction for crimes defined in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brcko District which occurred prior to entry into the Criminal Code of Bosnia and Herzegovina when those crimes include elements of international or inter-Entity crime as defined in the Criminal Code of Bosnia and Herzegovina.'

Almost all of the crimes contained in Chapter Seventeen of the Criminal Code (crimes against humanity and values protected by international law) were considered as crimes under international treaty and customary law at the time the crimes in Bosnia were committed. They were also already crimes under national law, being for the most part criminalised in Chapter Sixteen (criminal acts against humanity and international law) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY).

Even though the crime against humanity was not included in the Criminal Code of the SFRY and appeared for the first time in the 2003 Criminal Code, it was nevertheless considered a crime under international customary law at the time of the war in Bosnia. Thus, the Chamber has jurisdiction over any international crimes that

76 'Bosnia state judiciary faces funding crisis as donations dwindle', BBC Monitoring Europe, 4 June 2006.

77 Art. 4a provides:

> Article 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of international law.

Law on Amendment to the Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, Official Gazette 61/04, http://www.sudbih.gov.ba/files/docs/zakoni/en/izmjene_krivicnog_zakona_61_04_-_eng.doc.

were crimes at the time they were committed, giving it jurisdiction over all of the crimes interdicted in the 2003 Criminal Code.

Statutory limitations are no bar, because even if they applied to the crimes that the Chamber is adjudicating – which they do not[78] – they run at a maximum of 35 years in Bosnia,[79] a period which the war falls comfortably within.

ii. Material jurisdiction

The Law on Court of Bosnia and Herzegovina provides that the Court of Bosnia and Herzegovina has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina,[80] as well as over criminal offences proscribed in the Laws of the Federation of BiH, the Republika Srpska and the Brcko District of BiH in certain circumstances.[81] This includes crimes against humanity, genocide and war crimes,[82] as defined in the Criminal Code.

The crimes which are most relevant in the context of the war in Bosnia are set out in Chapter Seventeen (Crimes against Humanity and Values protected by international law) of the Criminal Code.

The definition of genocide in Article 171 of the Criminal Code tracks that of Article II of the Genocide Convention, and so does not pose any obvious difficulty. Even if other groups – political or cultural – are excluded, the genocide carried out in Bosnia falls within the Genocide Convention's definition because the group targeted (Bosnian Muslims) can be regarded as a religious or ethnic group, so is captured by the definition.

The definition of crimes against humanity in Article 172 is broader than that in the ICTY Statute, instead tracking that of Article 7 of the ICC Statute. Its c*hapeau* contains the same elements: the need for a widespread or systematic attack, against a civilian population, with knowledge of the attack. The enumerated crimes also follow to the letter the list in Article 7 of the Rome Statute. This definition of crimes against humanity would thus seem to be sufficiently wide to capture all of the types of the crime against humanity that were committed in Bosnia during the 1992-1995 war.

Both Article 173, concerning war crimes against civilians, and Article 174, on war crimes against the wounded and sick, apply to cases of war, armed conflict and occu-

78 Art. 19 (Criminal Offences not subject to the Statute of Limitations) of the Criminal Code provides that: 'Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations.'

79 See Art. 14 (Period Set by Statute of Limitation Regarding the Institution of Criminal Prosecution).

80 Art. 13(1) Law on Court of Bosnia and Herzegovina.

81 Ibid., Art. 13(2).

82 As stipulated in Chapter Seventeen, Crimes against humanity and values protected by international law, including Art. 171 (genocide), Art. 172 (crimes against humanity), Art. 173, war crimes against civilians; Art. 174 (war crimes against the sick and wounded); Art. 175 (war crimes against prisoners of war); Art. 176 (organising a group of people and instigating the perpetration of genocide, crimes against humanity and war crimes), etc.

pation, without distinguishing between international and non-international conflict. This contrasts with the ICC Statute, for example, where war crimes committed in international and non-international armed conflicts are dealt with separately,[83] basically reflecting the importation into international criminal law of the conventional norms.

Article 173 refers to war crimes against the civilian population. Paragraph 1(a), interdicting attacks against the civilian population or which harm the civilian population, and (b), interdicting attacks without selecting a target, make the crime dependant on damage or harm caused.[84] Article 173 thus narrows the crimes in a way not required by Geneva law.

Article 173(1) also criminalises killings, torture and inhuman treatment, medical experimentation (c), dislocation or forced displacement or forced conversion to another nationality or religion, sexual violence (e), starvation, forced labour, pillaging, destruction and confiscation of property (f). Paragraph 3 criminalises the settlement by an occupier of its own population in the occupied territory. The definition of torture as a war crime (173(1)(c) and as a crime against humanity (172(2)(e) does not require the perpetrator to be a state official. However, the crime of torture as set out in Article 190 does require it to be committed by a person acting in an official capacity.

Articles 174 and 175 criminalise only very few provisions of the lengthy First, Second and Third Geneva Conventions in Bosnian law. Article 174 prohibits with regard to wounded, sick, shipwrecked persons, medical personnel or clergy only (a) murder, torture and inhuman treatment and (b) causing great suffering or serious injury to bodily integrity or health, as well as (c) unlawful or arbitrary destruction or large scale appropriation of material and means of medical transports and stocks which is not justified by military necessity. Article 175 criminalises with regard to prisoners of war (a) murder, torture and inhuman treatment, (b) causing great suffering or serious injury to bodily integrity or health, and (c) forcing a POW to serve in the armed forces of the enemy or deprivation of his right to a fair and impartial trial.

Article 176 of the Criminal Code interdicts the offence of organising a group of people and instigating the perpetration of genocide, crimes against humanity and war crimes. Article 176 distinguishes between two levels of culpability: (1) whoever organises a group of people for the purpose of perpetrating a criminal offence referred to in Articles 171, 172, 173, 174 or 175 shall be punished by imprisonment for a term not less than ten years or long-term imprisonment, while (2) whoever becomes a member of a group of people referred to in paragraph 1 of this Article shall be punished by imprisonment for a term between one and ten years.

Article 177 covers the killing or wounding of an enemy who has laid down his arms or lawfully surrendered. In paragraph 2, the Criminal Code recognises an aggravated form of the offence, where it is perpetrated in a particularly cruel and

83 Cf. Art. 8(2)(a) and (b) with Art. 8(2)(c) and (e).

84 Subparagraph (a) interdicts 'attacks on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health, while subparagraph (b) makes punishable 'attacks without selecting a target, by which civilian population is harmed.

insidious way, by increasing the statutory penalty of one to ten years to not less than ten years or long-term imprisonment. The unlawful act of giving an order that there shall be no quarter is criminalised in paragraph 3. Article 178 proscribes a penalty of between six months and five years for marauders of the dead and wounded on the battlefield. The sentence is increased to between one and ten years if the offence has been perpetrated in a cruel manner.

Article 179 incorporates international rules violating the laws and practices of warfare, that is, Hague law, into Bosnian criminal law. It covers the use of poison gas or lethal weapons with the aim of causing unnecessary suffering (2(a)); the ruthless demolition of cities, settlements or villages or devastation or ravaging not justified by military needs (2(b)); attack or bombarding by any means of undefended cities, villages, residences or buildings (2(c)); confiscation, destruction or deliberate damaging of establishments devoted to religious, charitable or educational purposes, science and art; historical monuments and scientific and artistic work (2(d)); and plundering and looting of public and private property (2(e)).

The range of war crimes covered in the Criminal Code is reasonably comprehensive, taking the ICC Statute as a benchmark. However, not all ICC war crimes are included in the Criminal Code. Notable omissions are attacks against humanitarian or peacekeeping personnel (Art. 8(2)(b)(iii) ICC Statute); making improper use of the flag of truce or military insignia of the enemy or the UN, as well as the red cross or red crescent emblems, resulting in death or serious personal injury (Art. 8(2)(b)(vii)); employing weapons of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of IHL, provided that they are already the subject of a comprehensive ban (Art. 8(2)(b)(xx)); using civilians as human shields to try to render certain areas immune from attack (Art. 8(2)(b)(xxiii)); the taking of hostages (Art. 8(2)(a)(viii)); the conscription or use of children in hostilities (Art. 8(2)(b)(xxvi)); and the commission of outrages against human dignity, in particular humiliating and degrading treatment (Art. 8(2)(b)(xxi)).

The Criminal Code also includes other crimes for which persons who committed violations of international humanitarian law during the war in Bosnia could be prosecuted, particularly, Articles 183 (Destruction of Cultural, Historical and Religious Monuments), 184 (Misuse of International Emblems), 190 (Torture and Other Cruel, Inhuman or Degrading Treatment), 191 (Taking of Hostages), and 192 (Endangering Internationally Protected Persons).

iii. Personal jurisdiction

Almost all of the crimes prescribed in Articles 173 to 179 are judged on the basis of individual criminal, including superior, responsibility. Article 180 of the Criminal Code mirrors Article 7 of the ICTY Statute. It states that

> A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in [Articles 171-179, excluding Article 176] ... of this Code, shall be personally responsible for the criminal offence. The official position of any accused person, whether as Head of State or Government or as a responsible Government official person, shall

not relieve such person of criminal responsibility nor mitigate punishment.'

The omission of Article 176, the offence of organising a group of people and instigating the perpetration of genocide, crimes against humanity and war crimes, seems strange. Even an offence of organising others to commit crimes is committed on the basis of individual criminal responsibility.

Paragraph 3 enshrines the principle of superior responsibility: 'The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.' As with the ICTY and ICTR, if not the ICC, superior orders is not a defence but a mitigating factor (para. 4).

Bosnian criminal law does not apply to children, that is, those under the age of 14 years at the time of perpetration of the crime (Art. 8 Criminal Code). However, Bosnian criminal legislation shall be applied to juveniles, that is, by implication, those over the age of 14 years at the time of commission of the crime (Art. 9).

iv. Territorial jursdiction

The Bosnia War Crimes Chamber has jurisdiction over the crimes committed in Bosnia based on the territoriality principle, as recognised in Article 11 of the Criminal Code, which states: 'The criminal legislation of Bosnia and Herzegovina shall apply to anyone who perpetrates criminal offences within its territory.' Thus, the Chamber is able to judge anyone who, regardless of his or her nationality, committed any of the crimes stipulated in the Criminal Code, including war crimes, crimes against humanity and genocide.

C. Rights of the accused

Persons appearing as defendants before the War Crimes Chamber enjoy the usual rights of accused persons, which are set out in the Criminal Procedure Code in Part One, Chapter One (Basic Principles).

Accused persons enjoy the presumption of innocence and *in dubio pro reo* (Art. 3(1)) until their guilt is established by a final verdict. The principle of *ne bis in idem* applies (Art. 4). Once deprived of his liberty, an accused person must be informed, in a language he understands, about the reasons for his arrest, that he is not bound to make a statement, that he is entitled to a defence attorney of his own choosing, and that his family or someone else designated by him must be informed of his apprehension (Art. 5).

An accused person or a suspect must be informed during his first interview about the offence he is charged with or suspected of committing and the grounds for the suspicion against him (Art. 6(1)). He must be allowed to make a statement (Art. 6(2)) although he shall not be bound to present his defence and has the right to remain silent (Article 6(3)). An accused person has the right to a defence, which he is entitled to present himself or through the assistance of an attorney of his own

choosing (Art. 7(1)).

Where the accused does not have a defence counsel, he shall be appointed with one (Art. 7(2)). Legal aid is available to those who cannot fund their own defence. An accused shall have adequate time to prepare his defence (Art. 7(3)). The accused has the right to be brought before the court in the soonest possible time and to be tried without delay (Art. 13(1)). The Court is bound to conduct the proceedings without delay and to prevent the abuse of the rights of any participant in the criminal proceeding (Art. 13(2)).

The duration of custody must be reduced to the shortest necessary time (Art. 13(3)). Both exculpatory as well as inculpatory evidence must be studied by the Court, the Prosecutor and the other parties to the proceedings (Art. 14). The Criminal Procedure Code does not, however, recognise the right of an accused to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as granted in Article 6(3)(d) of the European Convention on Human Rights. The failure to incorporate subparagraph d of the European Convention into Bosnian law leaves open the possibility for violations of an accused's right to a fair trial (see below Part 4.4).

As far as pre-trial detention is concerned, prior to a recent amendment, Article 135 of the Bosnian Criminal Procedure Code provided that pre-trial custody of an accused could last no longer than one month following the date of deprivation of liberty (para. 1). This period could be extended by the decision of a panel for a further two months (para. 2). An extension by a further three months was possible where the proceeding was ongoing for a criminal offence for which a prison sentence of ten years or more could be pronounced (para. 3).

This maximum pre-trial detention of six months has now been extended by Article 1 of Law on Amendments to the Criminal Procedure Code.[85] It provides that Article 135 of the Criminal Procedure Code shall be amended to add a new paragraph 4, which doubles the total period of pre-trial detention allowed, from six to 12 months.

Once the indictment has been confirmed, custody may be ordered, extended or terminated (Article 137(1)). The period of custody may last no longer than one year, and an accused shall be released if by then no first instance verdict has been pronounced. Paragraph (2) of Article 137 (Custody after the Confirmation of the Indictment) of the Code has been amended to read:

> After the confirmation of an indictment and before the first instance verdict is pronounced, the custody may not last longer than:
> a) one year in the case of a criminal offense for which a punishment of imprisonment for a term up to five years is prescribed;
> b) one year and six months in the case of a criminal offense for which a punishment of imprisonment for a term up to ten years is prescribed;
> c) two years in the case of a criminal offense for which a punishment of impris-

85 Decision Enacting the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina, OHR, 19 June 2006, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=37429.

onment for a term exceeding ten years may be imposed, but not long-term imprisonment;

d) three years in the case of a criminal offense for which a punishment of long-term imprisonment is prescribed.'

A new paragraph 3 reads: 'If, during the period referred to in Paragraph 2 of this Article, no first instance verdict is pronounced, the custody shall be terminated and the accused released.

Even if these periods seem long, and not entirely consequent with the Court's duty to try the proceedings in the shortest time necessary (Art. 13(3)), they are much shorter than the pre-trial and trial detention periods at the ICTY and ICTR.

The defence is supported through the Criminal Defense Support Section, which is an independent body, providing legal and logistical advice and support to defence counsel appearing before the War Crimes Chamber.

D. The Protection of Witnesses

The participation of victims in trials before the WCC is mainly limited to that of being witnesses. They do not have any recognised rights of participation as parties in trials. The court's Victim and Witness Management Section coordinates activities relating to victims.

Neither the Criminal Code nor the Criminal Procedure Code contain provisions equivalent to those of the ICTY Statute and Rules, which explicitly set out the right of witnesses to protection and the various types of protection available.[86] However, Article 267 of the Criminal Procedure Code (Protection of Witnesses from Insults, Threats and Attacks) provides that

(1) The judge or the presiding judge is obligated to protect the witness from insults, threats and attacks;

(2) The judge or the presiding judge shall warn or fine a participant in the proceedings or any other person who insults, threatens or jeopardizes the safety of the witness before the Court. In the case of the fine, provisions of Article 242, Paragraph 1 of this Code shall be applied;

(3) In the case of a serious threat to a witness, the judge or the presiding judge shall inform the Prosecutor for the purpose of undertaking criminal prosecution;

(4) At the petition of the parties or the defense attorney, the judge or the presiding judge shall order the police to undertake measures necessary to protect the witness.

86 Art. 22 of the ICTY Statute provides: 'The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.' The Rules of Procedure and Evidence elaborate in great detail on Article 22, by providing for the establishment of the Victims and Witnesses Unit (Rule 34), for detailed measures for the protection of victims and witnesses (Rule 75), and by setting out special evidentiary rules in cases of sexual assault (Rule 96), *inter alia*.

Article 264(3) of the Criminal Procedure Code provides that in relation to chapter seventeen crimes, the consent of the victim may not be used in favour of the defence.

The main applicable law regulating the protection of witnesses before the WCC is the Law on Protection of Witnesses under Threat and Vulnerable Witnesses.[87] Under this law, the WCC can go even further than the ICTY to protect witnesses, arguably sometimes to the detriment of the accused.

Article 3 of the legislation defines the persons protected by it: 'A witness under threat is a witness whose personal security or the security of his family is endangered through his participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his testimony' (para. 1). 'A vulnerable witness is a witness who has been severely physically or mentally traumatized by the events of the offence or otherwise suffers from a serious mental condition rendering him unusually sensitive, and a child and a juvenile' (para. 3).

The Chamber may order one or more witness protection measures as it considers necessary (Art. 4). The duty to inform witnesses as to the available measures falls on the Chamber, the prosecutor and other bodies participating in the proceedings. Article 5 (Informing witnesses) provides: 'The Court, the Prosecutor and other bodies participating in the proceedings shall, ex officio, advise a witness who may be under threat or a vulnerable witness of the witness protection measures available under this Law.'

Various types of measures are available to the Chamber to protect the witness and ensure that he or she is not traumatised by testifying. Article 6 (Access to psychological and social assistance and professional help) provides that: 'During the investigation, the Prosecutor, and after the indictment has been issued, the Court, shall ensure that the body responsible for issues of social care is aware of the involvement of the vulnerable witness in the proceedings and shall enable the assistance of this body as well as psychological support to the witness, including the presence of appropriate professionals at examination or hearings.'

During the trial, the Chamber may hear witnesses under threat and vulnerable witnesses at the earliest possible time, and in a different order than that stipulated by the Court of BiH (Art. 7). The Chamber also has the possibility to control the proceedings and to protect a witness from being subjected to harassment and confusion during examination (Art. 8(1)). It can order, ex officio or upon the motion of the parties, the removal of an accused from the courtroom, 'where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly' (Art. 10(1)), although the accused can still follow the proceedings remotely (Art. 10(2)).

In exceptional circumstances, the Chamber can hear a vulnerable witness by directly questioning him or her on behalf of the parties (Art. 8(2)). The Chamber can also avail of technical measures to protect a vulnerable witness, such as ordering that

87 Decision Enacting the Law on Protection of Witnesses under Threat and Vulnerable Witnesses. Enacted by the High Representative on 24 January 2004 and entered into force immediately, http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29116; Law on Protection of Witnesses under Threat and Vulnerable Witnesses. Enacted pursuant to the above decision and entered into force on 1 March 2003, http://www.ohr.int/decisions/judicialrdec/doc/HiRep-dec-102-law-witness-protection-bih.doc.

a witness testify from a remote location (Art. 9).

The Court can consider the need to provide for the protection of a witness under threat who would expose himself or his family to great personal danger and the protection of a vulnerable witness who would expose himself to significant emotional distress by appearing at the main trial in determining whether the records on testimony given during the investigative phase may be read or used as evidence at the main trial (Art. 11).

These measures that the Chamber can take do not present any problems as far as the right of the accused to a fair trial is concerned. However, certain measures concerning confidentiality of witnesses and information raise concerns. Article 13(1) allows, in exceptional circumstances, for the personal details of a witness to remain confidential (including from the accused), for a period of up to 30 years!

The law also allows for the convening of witness protection hearings, '[i]n exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony ...' (Art. 14).

Either the presiding judge or the judge of the Panel, the prosecutor, or the suspect or the accused or his defence attorney can request a witness protection hearing (Art. 15(1)). The granting of a witness protection hearing basically means that he or she becomes a protected witness whose testimony remains completely secret, except to the panel of judges that hears it. He or she is not obliged to answer any questions that would reveal his or her, or his or her family's identity (Art. 19).

Such a witness is completely anonymous to the accused and his defence lawyer, who is therefore not in a position to challenge the evidence. This would seem to constitute a basic violation of the right to a fair trial. Article 6 of the European Convention on Human Rights states in paragraph 3 that everyone charged with a criminal offence has the right '(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'[88] Bosnia, a member of the Council of Europe, is a State Party to this Convention.[89]

The European Court has justified the use of anonymous witnesses where anonymity was necessary to protect their lives, security and liberty, but this was in a case where an accused's defence lawyer was present during the witness's questioning by the investigating judge and was able to question the witness himself.[90] It has stated that a conviction should never be solely or decisively based on anonymous testimony.[91]

88 The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, reprinted in Ian Brownlie and Guy S. Goodwin-Gill, *Basic Documents on Human Rights*, Fourth edn. (Oxford, Oxford University Press, 2002), p. 399.

89 Bosnia joined the Council of Europe on 24 April 2002. It signed the European Convention the same day. On 12 July, it ratified the Convention, which entered into force the same day.

90 *Doorson* v. *Netherlands*, App. 20524/92, Judgement of 26 March 1996, 22 EHRR (1996), 330.

91 *Saidi* v. *France*, Judgement of 20 September 1993, Series A, No. 261-C; 17 EHRR (1994), 251.

Fortunately, the Law on the Court of Bosnia specifically states in Article 23 that the Court shall not base a conviction solely on evidence provided according to Articles 11 or 14 through 22 of this Law, that is, including evidence given anonymously, which goes some way towards limiting the potential for violation of the accused's right to a fair trial.

Article 13(2), following the ICTY Rules, allows the Chamber to preserve a witness's anonymity through the use of a screen and voice and image distortion. However, the Chamber has also gone much further in deciding to hold two entire trials (that of Radovan Stanković and Nedjo Samardzić) *in camera*, a decision which raised widespread criticism, including from the outgoing international Registrar, Michael Johnson.[92]

A closed trial is not only a violation of the accused's right to a fair and public trial[93] – and a fair trial depends on it being public – it also denies the public the right to witness the trial. Even allowing for the sensitive nature of much of the evidence in these trials, a vulnerable witness's identity or sensitivities can be protected without closing trials or relying on anonymous witnesses.

E. Penalties

The crimes of genocide, crimes against humanity or war crimes against civilians, the wounded or sick or POWs are punishable by 'ten years or long-term imprisonment'.

According to Article 42(1) of the Criminal Code: 'Imprisonment may not be shorter than thirty days or longer than twenty years.' However, paragraph 2 provides: 'For the gravest forms of serious criminal offences perpetrated with intent, imprisonment for a term of twenty to forty-five years may be exceptionally prescribed (long-term imprisonment).' The provision does not specify what are the gravest forms of serious criminal offences, although they must include the above-mentioned, as these crimes are already recognised as having a different status than ordinary crimes, insofar as they may be prosecuted even if they were not already recognised in statutory law, being recognised as crimes according to well established principles of international law (Article 4(a)).

Furthermore, Article 19 recognises that such crimes are different than ordinary crimes, not being subject to any statutory limitations. Finally, it is clear from Chapter Seventeen dealing with international crimes that these are considered to be exceptionally serious crimes, as genocide, crimes against humanity and war crimes all attract a sentence of not less than ten years or long-term imprisonment.

Paragraph 3 states that: 'Long-term imprisonment may never be prescribed as the sole principal punishment for a particular, criminal offence.' Paragraph 4 stipulates that 'long-term punishment cannot be imposed on a perpetrator who has not reached twenty-one years of age at the time of perpetrating the criminal offence.'

The possibility exists for commutation of a sentence of long-term imprison-

92 Nidzara Ahmetasević, Interview: Michael Johnson, Registrar of the Court of BiH: 'The Court of BiH has performed well but it still needs help', Justice Report, Balkan Investigative Reporting Network, Issue No. 03, 17 March 2006.

93 Art. 6(1) European Convention on Human Rights.

ment. After three-fifths of the sentence has been served, amnesty[94] or pardon[95] may be granted (Art. 42(7)).

The other sentencing possibility that exists for the War Crimes Chamber is the imposition of fines, pursuant to Article 46. Fines imposed and collected belong to the budget of Bosnia (para. 9), however, and are not payable to victims.

V. The Relationship between the ICTY and the War Crimes Chamber

The relationship between the War Crimes Chamber and the ICTY is one of active complementarity. The ICTY has primacy and its pick of the cases. But the complementary role of the WCC is essential to tackling the impunity gap. The Chamber does not directly apply international law as a source of law.[96] However, it can accept facts that have already been established in ICTY cases. Moreover, War Crimes Chamber judges can and do cite ICTY jurisprudence in their decisions.[97]

Transactions between the institutions occur on two main levels: (1) in the area of deferrals, and (2) in the area of cooperation.

A. Deferrals by the ICTY

Under resolution 1503 the SC endorsed the ICTY's completion strategy of concentrating on the 'trials of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction' and transferring those cases involving persons with lesser responsibility to competent national jurisdictions.

As of the end of July 2006, the ICTY had transferred seven persons back to

94 According to Art. 118 of the Criminal Code: '(1) By an amnesty, to the persons covered by it, a release from criminal prosecution, complete or partial release from the execution of punishment, substitution of the imposed punishment by a less severe one, deletion of the conviction, or cancellation of legal consequences incident to conviction is given. (2) An amnesty for the criminal offences prescribed under this Code, may be granted by the Parliamentary Assembly of Bosnia and Herzegovina by virtue of a law.'

95 According to Art. 119 of the Criminal Code: '(1) By means of a pardon, to the specifically designated persons, complete or partial release from the execution of punishment, substitution of the imposed punishment by a less severe one, deletion of the conviction, or annulment or shortening the duration of the security measures of prohibition to carry out a certain occupation, activity or duty, or a certain legal consequences incident to conviction is given. (2) A pardon for the criminal offences determined under the criminal legislation of Bosnia and Herzegovina may be granted by the decisions of the Presidency of Bosnia and Herzegovina pursuant to a special law.'

96 Although the State Court is competent to: 'take a final and legally binding position on the implementation of Laws of Bosnia and Herzegovina and international treaties on request by any court of the Entities or any court of the Brcko District of Bosnia and Herzegovina entrusted to implement the Law of Bosnia and Herzegovina'. Art. 13(3)(a).

97 For example, in the *Prosecutor* v. *Abduladhim Maktuf*, Case No. K-127/04, Verdict of 1 July 2005.

Bosnia[98] and two to Croatia.[99]

i. The legal basis of the deferral

A number of accused persons whose cases the prosecutor has sought to transfer to the WCC have challenged their transfer.

In the *Stanković* case,[100] the accused, a former Bosnian Serb solider from the town of Foča in central Bosnia, who was accused of heinous sexual crimes against girls and women, including rape and sexual enslavement, challenged the legal basis for the transfer of cases by the ICTY to the WCC. He argued that there was no legal basis in the Statute for such a transfer, and on appeal, that the Tribunal possessed no implied powers to do so.

The Appeals Chamber rejected the challenge. It found that while there was nothing in the Statute that explicitly authorised such transfer and the SC had itself declined to amend the Statute for this purpose,

> the explicit language of the Statute is neither an exclusive nor an exhaustive index of the Tribunal's powers. It is axiomatic under Article 9 of the Statute that it was never the intention of those who drafted the Statute that the Tribunal try all those accused of committing war crimes or crimes against humanity in the Region. The Tribunal was granted primacy – but explicitly not exclusive – jurisdiction over such crimes. In this regard, it is clear that alternative national jurisdictions have consistently been contemplated for the "transfer" of accused.[101]

Moreover,

> even if the explicit authority to conduct such transfers from the Tribunal to national jurisdictions is not given to the Tribunal by the Statute itself, the interpretation of Article 9 of the Statute noted previously giving implicit authority to do so has been backed by the Security Council resolutions. The Appeals Chamber recalls that the Tribunal is bound by the resolutions concerning the Tribunal that the Council

98 *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2), 11*bis* hearing on 4 March 2005. Decision rendered on 17 May 2005, appeal rendered on 1 September 2005. Case referred to Bosnia and Herzegovina; *Prosecutor v. Zeljko Mejakić, Momcilo Gruban, Dusan Knežević and Dusan Fustar* (Case No. IT-02-65), 11*bis* hearing on 20 July 2005. Appeal rendered on 7 April 2006. Case referred to Bosnia and Herzegovina. Transferred on 9 May 2006; *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2), 11*bis* decision on 22 July 2005, case referred to Bosnia and Herzegovina. Appeal rendered on 15 November 2005. Case referred to Bosnia and Herzegovina. Transferred on 8 December 2005; *Prosecutor v. Pasko Ljubicić* (Case No. IT-00-41), 11*bis* decision rendered on 12 April 2006. Appeal judgement rendered 4 July 2006 affirming referral to Bosnia and Herzegovina. Awaiting transfer.

99 *Prosecutor v. Rahim Ademi and Mirko Norac* (Case No. IT-04-78), 11*bis* decision of 14 September 2005, case referred to Croatia on 1 November 2005.

100 *Prosecutor* v. *Radovan Stanković*, Case No. IT-96-23/2-I, Second Amended Indictment, 3 March 2003.

101 *Prosecutor* v. *Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005, para. 14.

> passes under its Chapter VII authority.[102]

Here the Appeals Chamber referred to SC resolutions 1503 (2003) and 1534 (2004). According to the Appeals Chamber, these resolutions were a recognition by the SC of the Tribunal's implicit authority to refer cases to national courts under its Statute.

> The Security Council plainly contemplated the transfer of cases out of the Tribunal's jurisdiction and agreed with the Tribunal that referrals would advance its judicial function. It is true that the Council did not amend the Statute accordingly, but that was not required. The Council accepted that the Tribunal was authorized to do so and thus confirmed the legal authority behind the Tribunal's referral process, but it left it up to the Tribunal to work out the logistics for doing so, such as through amendment of its Rules.[103]

The Appeals Chamber decision seems legally sound. The Security Council could have, yet declined to, amend the ICTY Statute to explicitly allow for referrals, yet it clearly contemplated and approved of them, as evidenced in resolutions 1503 and 1534. Therefore, by implication, it left it up to the ICTY to find the legal means to regulate referrals.

The ICTY has duly found such a means. In any event, what is at issue here is merely a minor procedural technicality concerning the legal means to regulate transfer; there is no substantive issue regarding the jurisdiction of the receiving state. Bosnia clearly has jurisdiction over the accused based on the territoriality principle, as noted above. Stanković, who was alleged to have committed crimes on Bosnian territory, could hardly contest that country's right to try him, that is, he could hardly challenge the jurisdiction of the court which he found himself before on the basis of its competence to hear the case.

Stanković also challenged his referral on the basis that the Referral Bench had not properly informed itself that he would get a fair trial in Bosnia, whereas Rule 11*bis* provides that an accused may only be transferred where the referral bench is satisfied that he will get a fair trial. His challenge was based more on the process by which the referral bench, in his opinion, had examined the matter, contending that it was not sufficiently vigorous. In particular, he claimed that the WCC did not provide sufficient means for legal aid for the defence.

The ICTY Appeals Chamber said that the WCC met all conditions for conducting fair war crimes trials. However, the Appeals Chamber observed that the Referral Bench, referring to the Bosnian Criminal Procedure Code, noted that it provided for the right to defence counsel of one's choosing and required that an accused have time to prepare his defence. It also satisfied itself that where the accused could not bear the cost of his own defence, due to financial circumstances, the state would bear it.[104]

It also rejected his contention that the Referral Bench had not considered

102 Ibid., para. 15.

103 Ibid., para. 16.

104 Ibid., para. 22.

whether the accused would be able to access all the materials available that are necessary for the preparation of his defence, stating that: 'The Referral Bench also ordered the Prosecutor to hand over "all other appropriate evidentiary materials" consistent with Rule 11bis(D)(iii). Because the BiH CPC gives defence counsel the right to inspect all files and evidence against him after an indictment has been issued, the Appellant will have access to these materials.'[105]

It also rejected his contention that the Referral Bench committed an error of law when it failed to address the difficulty he might face in calling witnesses from outside BiH. It noted that Bosnia has ratified the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, which will facilitate cooperation with Croatia and Serbia and Montenegro, which have also ratified it.

As far as other states are concerned,[106] the Appeals Chamber noted that the Trial Chamber had considered SC Resolution 1503 which, pursuant to Chapter VII of the UN Chapter, obliges 'the international community to assist national jurisdictions ... in improving their capacity to prosecute cases transferred to the ICTY', 'an instruction that implicitly includes cooperation with respect to witnesses'.[107] Further, it noted that 'the authorities in Bosnia and Herzegovina have taken substantial steps to promote the obtaining of witnesses and evidence'.[108]

The accused's other grounds of appeals, including the risk he raised of inadequate conditions of detention, particularly post-conviction if convicted, and the risk of torture or degrading treatment were also dismissed. The Appeals Chamber rejected the Prosecutor's contention that it should not even consider the matter as it would violate the presumption of innocence, saying that questions of conditions of detention touch upon the fairness of a jurisdiction's criminal justice system and, as such, fall squarely within the Referral Bench's mandate.[109]

It also rejected the appellant's contention that the Referral Bench had not considered the matter, pointing out that it had satisfied itself that detainee and prisoner treatment is appropriately regulated by statute.

As to Stanković's final ground of appeal, that the Referral Bench did not satisfy itself that Bosnia and Herzegovina is willing and adequately prepared to accept a transferred case, the Chamber noted that, while as a strictly textual matter, Rule 11 *bis*(A) did not require that a jurisdiction be willing and adequately prepared to accept a transferred case if it was the territory where the crime was committed or of which the accused is a national, 'unquestionably a jurisdiction's willingness and capacity to accept a referred case is an explicit prerequisite for any referral to a domestic jurisdiction, as the Tribunal has no power to order a State to accept a transferred case. Thus, the "willing and adequately prepared" prong of Rule 11bis(A)(iii) is implicit also in the Rule 11bis(B) analysis.'[110]

It rejected the appellant's assertion that the Referral Bench had not inquired into the law that the national jurisdiction would apply, noting that it had devoted

105 Ibid., para. 23.
106 Ibid., para. 34.
107 Ibid., para. 26.
108 Ibid., para. 26.
109 Ibid., para. 34.
110 Ibid., para. 40.

eight pages of its judgement to examining the applicable law. It concluded that it would mainly be the Criminal Code of the SFRY, but that the BiH Criminal Code or international law applied to other acts. In any event, 'the Referral Bench was satisfied that "there are appropriate provisions to address each of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure".'[111]

Having lost his appeal, Radovan Stanković became the first person to be handed over by the ICTY to the WCC on 29 September 2005.[112]

B. Cooperation between the WCC and the ICTY

The cooperation between the WCC and the ICTY is extensive and includes the referral of ICTY cases to the WCC, the sharing of documents, evidence, knowledge, expertise and advice with the local courts.[113] Cooperation between the two courts will be particularly necessary in relation to Rule 11 *bis* cases, and between the ICTY OTP and the SDWC. These are two way relationships; requests can be made by the WCC and the SDWC to the OTP and vice versa.

VI. Conclusions

It is said that one door never closes but another one opens. The pending closure of the ICTY in The Hague created the motivation for and conditions conducive to the opening of Bosnia's War Crimes Chamber. One can ask whether reform of the Bosnian judicial system should not have come sooner. As Carla Del Ponte, the ICTY's Chief Prosecutor, pointed out in her speech marking the inauguration of the War Crimes Chamber on 9 March 2005: 'Concurrent jurisdiction of the ICTY and national courts unfortunately did not work as expected and a lot of time was wasted, much of the evidence lost with the witnesses passing away and becoming increasingly reluctant to testify.'[114] One can also ask why some of the billion dollars plus that has been spent on the ICTY[115] could not have been invested in rebuilding the Bosnian judiciary.

It now faces prosecuting many more cases, with a lot less money. The important thing, however, is that Bosnia now has this opportunity to confront its own demons and to set in place a sustainable structure that will help it along the road to full statehood.

Assessing the potential of the Chamber, Human Rights Watch has stated:

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111 Ibid., para. 41.

112 See 'UN transfers first war crimes suspect to Balkans court', AFP, 29 September 2005; 'Bosnian Serb first to face national war crimes court', Reuters, 29 September 2005.

113 Angela M. Banks, 'Carla Del Ponte: Her Retrospective of Four Years in The Hague', 6 *International Law Forum* (2004), pp. 37 at 40.

114 'Address of the Prosecutor at the Inauguration of the War Crimes Chamber of the Court of BIH, Sarajevo, 9 March 2005, ICTY Press Release, *supra* n. 2.

115 The total amount that has been spent on the ICTY can be reviewed at http://www.un.org/icty/glance-e/index.htm.

> The WCC, because of its placement within the domestic justice system and its strong commitment to taking ownership over the accountability process, offers tremendous potential to make an impact on the rebuilding of the rule of law in Bosnia. Its location in Sarajevo makes the WCC more accessible to the local population than the ICTY. Furthermore, the WCC cases may resonate more profoundly with victims in Bosnia ... In addition, international involvement at the initial stages of the WCC's development can contribute significantly to enhancing the short- and long-term capacity of professionals and institutions in Bosnia to conduct fair and effective war crimes trials.[116]

The creation of the War Crimes Chamber is significant as it is the first legal forum at the state level in Bosnia with the competence to judge war crimes, including those referred from the ICTY. Even if the Court was the brainchild of outsiders, Bosnia's commitment to the project indicates a relative maturation of the Bosnia political and legal systems and growing confidence in the institutions of state.

The Chamber's creation marks the first time since the end of World War II that the authority to prosecute war crimes has been passed from an international to a national jurisdiction.[117] It seems fitting that this should be the case. With the Bosnian conflicts, war came home to a Europe thought to have exorcised its demons.

The Nuremberg Tribunal had to be established in part because no national court (in Germany, France, the UK or the US) could have been able to try the Nazis fairly, in accordance with due process of law. Likewise, the establishment of the ICTY was a response to the inability of Bosnia or any of the states of the region to dispense justice fairly and impartially. Even if the war had not been ongoing, the courts of the region could have not been trusted to avoid ethnic bias.

The failure of the courts of the region to prosecute serious violations of international law in the decade following the Balkan Wars attest to the wisdom of establishing an international tribunal. But despite the good work of international tribunals, for justice to become real and meaningful to people it has to be brought home to them. One way of doing this is to bring it literally closer to the people, by institutionalising international norms at the local level through the conduct of national trials for international crimes.

The passing of the baton from the ICTY to Bosnia is a recognition that the time has come for Bosnia to face up to its own past and to take full ownership and control of a major attribute of state sovereignty: the right to dispense criminal justice over those accused of the most serious crimes.

What makes the War Crimes Chamber particularly interesting and unusual is the provision made for it to have a transitional period, so that the court could benefit from international experience and expertise at the outset while moving towards full integration into the national judiciary.

The inclusion of international staff in the short term seems like a sensible solu-

116 Bosnia and Herzegovina, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Human Rights Watch, February 2006, p. 2.

117 Following the establishment of the Nuremberg and Tokyo Tribunals at the end of WWII, Control Council Law No. 10 was established to hear the cases of lesser criminals that were not heard by the IMT and IMTFE.

tion. Although the Chamber would be more truly domestic if it had only Bosnian staff, it would have been a lot to expect a purely national court to take on such a considerable burden without some outside assistance.

Without the presence of internationals, it would have been hard for the Chamber to be seen as truly impartial at the outset. The presence of foreign prosecutors and judges in particular give the impression of impartiality, an essential commodity if the Chamber is to win the trust and confidence of all ethnic and religious groups among the Bosnian population. Foreign prosecutors and judges may also be more familiar with international crimes and jurisprudence and with applying international standards of due process. During the transition period, Bosnian judges, prosecutors and support staff can receive training from their foreign colleagues. Thus, better prepared, Bosnians can take full ownership over the Chamber by 2009.

If this scheme works successfully, it should go some considerable way towards strengthening the national judiciary and creating a sustainable basis for prosecution. But in order for the transition to go smoothly, and more importantly, in order for Bosnia to be able to sustain this court, it must put in place the necessary national support structures. Signs were not looking good in 2006 when, as the international registrar Michael Johnson prepared to leave, it was not clear which institutions would absorb his function, such as preparing a budget and fundraising.[118] The Chamber will have to work to ensure that any good will built up during the transition period is retained once the Chamber reverts to all Bosnian judges and prosecutors. After that, WCC cases will continue to be monitored by the OSCE,[119] and where a trial is considered not to be fair, it could be deferred back to The Hague. Even after the completion of the transitional period, the international community will likely have to remain involved in the Chamber in different capacities for some time.

When the Chamber becomes all Bosnian, it will still need the support of the international community, particularly financial, to survive. The success of the project will depend on the sustained interest and support of its staff, the Bosnian government and judiciary and, in particular, its international funders. The international community has invested so much in Bosnia that it would be a shame, with so much at stake, to skimp on the dimes at this stage.

Other than funding, the WCC faces some other potential problems. It lacks the muscle of the ICTY. It has no powers to force the other states in the region, or the entities within BiH to cooperate with it. It has to rely on the local police force to arrest accused persons and enforce orders, etc. This could certainly be a problem in relation to indicted persons who are in the RS. To date, the RS has not arrested a single person who has been indicted by the ICTY, although, more encouragingly, in December 2004 the RS arrested eight persons indicted by the Bosnian authorities.[120]

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118 Nidzara Ahmetasević, Interview: Michael Johnson, Registrar of the Court of BiH: 'The Court of BiH has performed well but it still needs help', Justice Report, Balkan Investigative Reporting Network, Issue No. 03, 17 March 2006.

119 The OSCE, under an agreement announced on 19 May 2005, will act as a trial monitor for the cases referred back to Bosnia by the ICTY. Nerma Jelacić, 'Bosnian Court prepares for first Hague cases', Tribunal Update No. 407, 20 May 2005. Institute for War and Peace Reporting, http://www.iwpr.net/index.pl?/archive/tri/tri_407_2.eng.txt.

120 Steve Woehrel, *Bosnia and Herzegovina; Issues for U.S. Policy,* CRS (Congressional Research Service) Report for Congress, 10 February 2005, p. 11.

Moreover, the RS is lately showing more signs of a willingness to face up to crimes committed by Bosnian Serbs.

Recent experience has shown that there are many ways to try a war criminal. There have been permanent and *ad hoc* international criminal courts, there are internationalised national courts and purely national courts. Each of them is in some ways unique, as each has been a particular response, at a particular moment in time, to a particular situation. It is therefore not a question of making a comparative choice between the various options on the table, but of finding ways of tackling impunity that suit the particularities of each different situation.

Even a single post-conflict situation, such as Bosnia, can be approached in more than one way, by prosecuting war criminals at the international as well as the national level. There is also room for non-judicial approaches, such as Truth and Reconciliation Commissions, which Bosnia might yet resort to. It is question of finding what is possible, politically, legally and socially.

The complexity and scale of wartime criminality means that it cannot comprehensively be dealt with by means of a single approach. No single body could be created that would address all requirements, and none would have the capacity. The limitations of even a goliath of international justice such as the ICTY are obvious. With all the resources at its disposal, it has managed to hold relatively few people accountable. The War Crimes Chamber will likewise only be able to hold only some of the many who have committed crimes accountable, although perhaps more than the ICTY.

With most of the focus now on the WCC, which will after all prosecute only a relatively small number of accused persons, it will still fall to the cantonal and district courts to pick up the shortfall. Yet very little has been invested in bringing these courts and their personnel up to the required standards for prosecuting and judging international crimes. As Amnesty International pointed out in a report on the WCC, 'the plans do not address the specific shortcomings of the criminal justice system in the country [Bosnia]'.[121]

It is clear that any serious attempt to deal with mass impunity, such as that in Bosnia, requires sustained efforts at many levels. Bosnia got a head start on prosecutions of its most senior criminals with the establishment of the ICTY. If the closure of the ICTY was always an inevitability, from its imminent demise a serious attempt at national prosecution in Bosnia has been born.

Even if the War Crimes Chamber is a court of convenience, set up to allow the ICTY a way to smooth its exit, Bosnia should take full advantage of this opening occasioned by the ICTY's closure. Bosnia now has the chance to implant into its national system a court that can go a long way in helping to build confidence in judicial integrity and the rule of law through its suppression of the most serious international crimes.

121 Amnesty International Press Release, 'Bosnia and Herzegovina: Justice cannot be achieved on the cheap', AI Index: EUR 63/021/2003, 12 November 2003.

Part II

Legal and Institutional Basis of the ICC

Section 5

Organs of the International Criminal Court

Chapter 14

The Judges of the International Criminal Court and the Organization of Their Work

Hirad Abtahi

I. Introduction

According to article 34 of the Rome Statute of the International Criminal Court ("Statute"):

> The Court shall be composed of the following organs:
> (a) The Presidency;
> (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
> (c) The Office of the Prosecutor;
> (d) The Registry.

Article 36 of the Statute ("Qualification, nomination and election of judges of the Court") further provides that the Appeals, Trial and Pre-Trial divisions shall be comprised of 18 judges altogether.[1]

A particular institutional feature of the Court is the distinction – as organs – between the eighteen judges assigned to the above-mentioned three divisions on the one hand and, on the other hand, three of those same eighteen judges who are elected – by their peers – for three years to the Presidency, an organ of the Court comprised of the President, First and Second Vice-Presidents.[2] This study will therefore present the organisation of the work of the judges by focusing on the judges assigned to the above-mentioned divisions, and not on the Presidency, except where reference to the Presidency is relevant.[3]

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1 Subject to article 36(2) which foresees the possibility for the Presidency to propose, on behalf of the Court, an increase in the number of judges to States Parties.

2 Article 38 of the Statute and rule 4 of the Rules of Procedure and Evidence ("Rules").

3 The Presidency is responsible for a wide range of administrative, external relations and legal/judicial issues, which are often intertwined. The administrative functions include, *inter alia*, managerial oversight of the Registry, such as the provision of input into administrative policies relating to the overall functioning of the Court, e.g., staff regulations and information security. In addition, being responsible for the proper administration of the Court, except for the Office of the Prosecutor, the Presidency coordinates and seeks consensus with the Prosecutor on all matters of mutual concern through the "Coordination Council" which, in accordance with regulation 3 of the Regulations of the Court ("Regulations") is comprised of the President, the Prosecutor and the Registrar. The external relations and judicial functions of the Presidency include a wide range

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Shortly after the first elections of the judges in 2003, the first judicial proceedings of the Court commenced in 2004-2005, with the Pre-Trial Chambers holding hearings and issuing decisions on, *inter alia*, forensic examinations in relation to unique investigative opportunities and victims to participate in proceedings.[4] Rather than placing the emphasis on the judicial proceedings, this study aims to provide an insight into the organisation of the judges' work in the first years of the Court, that is, the qualifications and election of the judges (II), the election of the Presidency and the assignment of judges to divisions (III), the divisions and Chambers (IV) and the plenary sessions (V).

II. Qualifications and Election of Judges

According to article 36(6)(a) of the Statute, the judges are elected by secret ballot at a meeting of the Assembly of the States Parties ("ASP") convened under article 112. Article 36 further sets out the criteria for the elections. Firstly, pursuant to article 36(3):

> (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
> (b) Every candidate for election to the Court shall:
> (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings [known as List A];[5] or
> (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court [known as List B];[6]
> (c) Every candidate for election to the Court shall have an excellent knowledge of

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of responsibilities and activities, such as negotiation and conclusion of agreements on behalf of the Court (Part 9 of the Statute, Chapter 11 of the Rules and Chapter 7 of the Regulations); the enforcement of sentences, and of fines, forfeiture orders and reparation orders (Part 10 of the Statute, Chapter 12 of the Rules, Chapter 7 of the Regulations); approving standard forms and templates for use during the proceedings before the Court (regulation 23) e.g., Standard Application Forms for Participation and Reparation, as well as important texts, such as the Regulations of the Registry (rule 14). The Presidency also promotes public awareness and understanding of the Court; see Election of the Presidency of the Court, The Hague, 11 March 2006, at http://www.icc-cpi.int/press/pressreleases/131.html; see also Insight on the ICC, Issue 5 July 2005, p. 11, at http://www.wfm.org/index.php?module=uploads&func=download &filed=208 (01/05/2006).

4 Report on the activities of the Court, 16 September 2005, para. 37, at: http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf (01/05/2006).

5 Article 36(5), which also provides that "A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists".

6 Article 36(5).

> and be fluent in at least one of the working languages of the Court.

Secondly, according to article 36(8)(a):
The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

> (i) The representation of the principal legal systems of the world;
> (ii) Equitable geographical representation;[7] and
> (iii) A fair representation of female and male judges.

Furthermore, article 36(9)a) provides that the term of office of the judges shall be nine years subject to articles 37(2) ("Judicial vacancies") and 36(9)(b) and (c):

> (b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.
> (c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

Pursuant to the recommendation of the ASP Bureau, the ASP also decided that the terms of office of the judges shall begin on 11 March 2003 following the date of their election.[8] It was based on the above-mentioned provisions that the ASP, during its first resumed session in New York on 3-7 February 2003, elected the first 18 judges.[9] Each one of them made a solemn undertaking pursuant to article 45 ("Solemn undertaking") and rule 5 ("Solemn undertaking under article 45").[10]

On 26 and 27 January 2006, pursuant to article 36(9)(c), the ASP proceeded with the election of judges for a term of office of nine years, during the resumed session of its fourth session, held at United Nations Headquarters, New York.[11] On 26 January 2006, six judges were elected for a nine year term. Five of those elected were the among the original six judges with a three year term, while the sixth judge, Ekaterina Trendafilova, was newly elected.[12] It is noteworthy that on 10 March 2006,

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7 With regard to article 36(8)(a)(ii), it should be noted that the ASP has followed the United Nations General Assembly Regional Groups, which consist of the following: (i) African States ("Africa"); (ii) Asian States ("Asia"); (iii) Eastern European States ("EE"); (iv) Latin American and Caribbean States ("GRULAC"), and (v) Western European and others States ("WEOG").

8 See Assembly of States Parties, *First Session (resumed)*, 3-7 February 2003, at http://www.un.org/law/icc/asp/aspfra.htm (01/05/2006). Also, see regulation 9(1) ("Term of office") of the Regulations of the Court ("Regulations").

9 The Judges – Biographical Notes, at http://www.icc-cpi.int/chambers/judges.html (01/05/2006).

10 Swearing-in ceremony, The Hague, 11 March 2003, at http://www.icc-cpi.int/press/press-releases/50.html (01/05/2006).

11 The Judges – Biographical Notes, at http://www.icc-cpi.int/chambers/judges.html (01/05/2006).

12 Solemn Undertaking of the ICC Judges Elected in January 2006, The Hague, 10 March

all six judges – that is, including the five who had been re-elected – made a solemn undertaking at the seat of the Court.[13]

III. The Election of the Presidency and the Assignment of Judges to Divisions

Article 39(1) of the Statute ("Chambers") provides that, after the election of the judges, the Court organises itself into (i) the Appeals Division (composed of the President and four other judges); (ii) the Trial Division (not less than six judges); and (iii) the Pre-Trial Division (not less than six judges). Article 39(1) further specifies that while the assignment shall be effected in such a way that each division shall contain an appropriate combination of judges belonging to List A and List B, "the Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience".

Furthermore, rule 4(1) ("Plenary sessions") provides that:

> The judges shall meet in plenary session not later than two months after their election. At that first session, after having made their solemn undertaking, in conformity with rule 5, the judges shall:
> (a) Elect the President and Vice-Presidents;[14]
> (b) Assign judges to divisions.[15]

On this basis, by 2006, two plenary sessions had been dedicated to this subject. On 11 March 2003, following their first elections, the judges elected the first Presidency of the Court and proceeded with the assignments to the divisions.[16] The table below, which follows the precedence established in regulation 10 ("Precedence") recapitulates the outcome of this process.

2006, at http://www.icc-cpi.int/press/pressreleases/130.html (01/05/2006).

13 Solemn Undertaking of the ICC Judges Elected in January 2006, The Hague, 10 March 2006, at http://www.icc-cpi.int/press/pressreleases/130.html (01/05/2006).

14 Article 38(1) ("Presidency") provides that the President and Vice-Presidents shall be elected by an absolute majority of the judges, and "They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once."

15 It should also be noted that, pursuant to article 39(4) "Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case."

16 Plenary Sessions, at http://www.icc-cpi.int/chambers/plenary.html (01/05/2006).

Judge	Geographical representation	List	Mandate	Division
Philippe Kirsch, President	WEOG (Canada)	B	6 years	Appeals
Akua Kuenyehia, First Vice-President	Africa (Ghana)	B	3 years	Pre-Trial
Elizabeth Odio Benito, Second Vice-President	GRULAC (Costa Rica)	A	9 years	Trial
Karl Hudson-Phillips	GRULAC (Trinidad and Tobago)	A	9 years	Trial
Claude Jorda	WEOG (France)	A	6 years	Pre-Trial
Georghios Pikis	Asia (Cyprus)	A	6 years	Appeals
Tuiloma Neroni Slade	Asia (Samoa)	A	3 years	Pre-Trial
Navi Pillay	Africa (South Africa)	B	6 years	Appeals
Sang-Hyun Song	Asia (Republic of Korea)	A	3 years	Appeals
Hans-Peter Kaul	WEOG (Germany)	B	3 years	Pre-Trial
Mauro Politi	WEOG (Italy)	B	6 years	Pre-Trial
Maureen Clark	WEOG (Ireland)	A	9 years	Trial
René Blattmann	GRULAC (Bolivia)	B	6 years	Trial
Erkki Kourula	WEOG (Finland)	B	3 years	Appeals
Fatoumata Diarra	Africa (Mali)	A	9 years	Pre-Trial
Anita Ušacka	EE (Latvia)	B	3 years	Trial
Adrian Fulford	WEOG (United Kingdom)	A	9 years	Trial
Sylvia Steiner	GRULAC (Brazil)	A	9 years	Pre-Trial

It is noteworthy that the judges constituting the Presidency each belong to one of the three divisions foreseen under article 34(b). Furthermore, the Pre-Trial and Trial Divisions are composed of seven and six judges, respectively.

Three years later, in the plenary session of 11 March 2006 that followed the January 2006 elections of the judges and coincided with the end of the three year term of the members of the first Presidency, the judges proceeded with the election of the new Presidency, as well as the assignment of the judges to the three divisions.[17] Judges Kirsch and Kuenyehia were re-elected President and First Vice-President, while Judge Blattmann was elected Second Vice-President. The assignment of the judges to divisions remained unchanged apart from Judge Trendafilova who was assigned to the Pre-Trial Division.[18]

17 Plenary Sessions, at http://www.icc-cpi.int/chambers/plenary.html (01/05/2006).

18 Election of the Presidency of the Court, The Hague, 11 March 2006, at http://www.icc-cpi.int/press/pressreleases/131.html (01/05/2006).

Judge	Geographical representation	List	Mandate (as of)	Division
Philippe Kirsch, President	WEOG (Canada)	B	6 years (2003)	Appeals
Akua Kuenyehia, First Vice-President	Africa (Ghana)	B	9 years (2006)	Pre-Trial
René Blattmann, Second Vice-President	GRULAC (Bolivia)	B	6 years (2003)	Trial
Karl Hudson-Phillips	GRULAC (Trinidad and Tobago)	A	9 years (2003)	Trial
Claude Jorda	WEOG (France)	A	6 years (2003)	Pre-Trial
Georghios Pikis	Asia (Cyprus)	A	6 years (2003)	Appeals
Elizabeth Odio Benito	GRULAC (Costa Rica)	A	9 years (2003)	Trial
Navi Pillay	Africa (South Africa)	B	6 years (2003)	Appeals
Sang-Hyun Song	Asia (Republic of Korea)	A	9 years (2006)	Appeals
Hans-Peter Kaul	WEOG (Germany)	B	9 years (2006)	Pre-Trial
Mauro Politi	WEOG (Italy)	B	6 years (2003)	Pre-Trial
Maureen Clark	WEOG (Ireland)	A	9 years (2003)	Trial
Erkki Kourula	WEOG (Finland)	B	9 years (2006)	Appeals
Fatoumata Diarra	Africa (Mali)	A	9 years (2003)	Pre-Trial
Anita Ušacka	EE (Latvia)	B	9 years (2006)	Trial
Adrian Fulford	WEOG (United Kingdom)	A	9 years (2003)	Trial
Sylvia Steiner	GRULAC (Brazil)	A	9 years (2003)	Pre-Trial
Ekaterina Trendafilova	EE (Bulgaria)	A	9 years (2006)	Pre-Trial

This time too, each of the three divisions had a judge in the Presidency and the number of judges in the Pre-Trial, Trial and Appeals Divisions remained identical.

IV. Divisions and Chambers

According to article 39(2)(a) ("Chambers"), "The judicial functions of the Court shall be carried out in each division by Chambers". Additionally, article 39(1) provides, *inter alia*, that:

> The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

This section will briefly review the organisation of the work within each of the three divisions, with a particular emphasis on the Pre-Trial Division, due to the timing of this study.

A. Pre-Trial Division

i. President of the Pre-Trial Division and duty roster

Regulation 14 ("President of the Division") is a novelty in that it deals with each division from an administrative viewpoint, by providing that:

> The judges of each Division shall elect a President of the Division from amongst their members to oversee the administration of the Division. The President of the Division shall carry out this function for a period of one year.

Judge Kaul was elected twice, consecutively, as President of the Pre-Trial Division in 2004 and 2005.[19]

Under regulations 17 and 18, the Presidency is responsible for establishing and maintaining a duty roster of judges of the Pre-Trial Division and a duty roster of Legal Officers of the Chambers. In this regard, regulation 17 ("Duty judge") provides:

> 1. The Presidency shall establish a duty roster of judges of the Pre-Trial Division. Each judge shall be on duty for a period of 14 days.
> 2. The duty judge shall be responsible for dealing with requests or applications:
> (a) Where the request or application is submitted outside normal Registry hours, if the duty judge is satisfied that it is urgent; or
> (b) Where the request or application is submitted during normal Registry hours and the Pre-Trial Chamber or Chamber referred to in regulation 46, sub-regulation 3, is unavailable, provided that the duty judge is satisfied that the matter is urgent and that it is appropriate for him or her to deal with it.
> 3. The duty roster of judges of the Pre-Trial Division shall be maintained by the Presidency and made available to the Registry.

To facilitate the work of the duty judge, regulation 18 ("Duty Legal Officers of the Chambers") provides:

> 1. The Presidency shall establish a duty roster of legal officers of the Chambers. Each legal officer shall be on duty for a period of 14 days.
> 2. The duty legal officer of the Chambers shall be responsible for assisting the duty judge.
> 3. The duty roster of legal officers of the Chambers shall be maintained by the Presidency and made available to the Registry.

The duty roster has been in place since 2004, following the adoption of the Regulations.

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19 Report on the activities of the Court, 16 September 2005, para. 33, at: http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf (01/05/2006).

ii. Constitution of Pre-Trial Chambers and assignment of situations

On 23 June 2004, pursuant to regulation 46(1) ("Pre-Trial Chamber"),[20] and taking into account article 39(2)(c),[21] the Presidency constituted the following three Pre-Trial Chambers with all seven judges of the Pre-trial Division:
– Pre-Trial Chamber I: Judge Kuenyehia, Judge Jorda and Judge Steiner;
– Pre-Trial Chamber II: Judge Slade, Judge Politi and Judge Diarra; and
– Pre-Trial Chamber III: Judge Slade, Judge Kaul and Judge Steiner.[22]

All three Pre-Trial Chambers reflect – in their composition – the requirements set-out in article 39(1) as well as, to the extent possible, article 36(3) and 36(8).

On 14 March 2006, following the outcome of the 2006 elections and article 39(3)(a) (according to which the judges of the Pre-Trial Division shall serve in that division for three years),[23] the Presidency issued a new decision constituting the following Pre-Trial Chambers:
– Pre-Trial Chamber I: Judge Kuenyehia, Judge Jorda and Judge Steiner
– Pre-Trial Chamber II: Judge Politi, Judge Diarra and Judge Trendafilova; and
– Pre-Trial Chamber III: Judge Kaul, Judge Steiner and Judge Trendafilova.[24]

The Presidency is also responsible for the assignment of situations to Pre-Trial Chambers, which it does pursuant to regulations 46(2) ("Pre-Trial Chamber"),[25] and 45 ("Information provided by the Prosecutor").[26] On this basis, the Presidency has proceeded with the following assignments:
– On 5 July 2004, the situations in the Democratic Republic of Congo ("DRC") and in Uganda were assigned to Pre-Trial Chambers I and II respectively;
– On 19 January 2005, the situation in the Central African Republic was assigned

20 Regulation 46(1) provides: "The Presidency shall constitute permanent Pre-Trial Chambers with fixed compositions."

21 Article 39(2)(c) provides that "Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires."

22 The Presidency Decision Constituting Pre-Trial Chambers, The Hague, 23 June 2004, at http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Decision_on_the_Constitution_of_PTC.pdf (01/05/2006).

23 According to article 39(3)(a) "Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned."

24 The Presidency Decision Constituting Pre-Trial Chambers, The Hague, 14 March 2006, at http://www.icc-cpi.int/library/organs/presidency/ICC-CPI-01-06.pdf (01/05/2006).

25 According to regulation 46(2): "The Presidency shall assign a situation to a Pre-Trial Chamber as soon as the Prosecutor has informed the Presidency in accordance with regulation 45 [...]".

26 According to regulation 45: "The Prosecutor shall inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party under article 14 or by the Security Council under article 13, sub-paragraph (b); and shall provide the Presidency with any other information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber, including, in particular, the intention of the Prosecutor to submit a request under article 15, paragraph 3".

to Pre-Trial Chamber III; and
– On 21 April 2005, the situation in Darfur, Sudan was assigned to Pre-Trial Chamber I.[27]

iii. Presiding judge and single judge

Following the constitution of the Pre-Trial Chambers and the assignment of the situations, each Pre-Trial Chamber elected its Presiding Judge pursuant to regulation 13(2) ("Presiding Judges") which provides:

> The judges of each Trial Chamber and of each Pre-Trial Chamber shall elect from amongst their members a Presiding Judge who shall carry out the functions conferred upon him or her by the Statute, Rules or otherwise.

Thus, in September 2004, Pre-Trial Chamber I elected Judge Jorda as Presiding Judge.[28] With regard to Pre-Trial Chamber II, Judge Slade was elected to this position in September 2004,[29] and was replaced by Judge Politi in March 2006,[30] following the change of composition in that Chamber in 2006. With regard to Pre-Trial Chamber III and the situation in the Central African Republic, Judge Steiner was elected Presiding Judge in February 2005,[31] and re-elected to the same position in March 2006,[32] following the change of composition in that Chamber.

In addition, it should be added that according to article 39(2)(b)(iii) of the Statute:

> The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.

This information is supplemented by rule 7 ("Single judge under article 39, paragraph 2(b)(iii)"), which provides:

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27 http://www.icc- cpi.int/library/cases/icc-02-05-1-english.pdf (01/05/2006).

28 Election of the Presiding Judge of Pre-Trial Chamber I, at http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Election_of_the_Presiding_Judge_of_Pre-Trial_Chamber_I.pdf (01/05/2006) and reclassified it as public pursuant to Decision ICC-01/04-01/06-42) in March 2006, Election of the Presiding Judge of Pre-Trial Chamber I, at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-11_tEnglish.pdf (01/05/2006).

29 Election of the Presiding Judge of Pre-Trial Chamber II, at http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Election_of_the_Presiding_Judge_of_Pre-Trial_Chamber_II.pdf (01/05/2006).

30 Election of the Presiding Judge of Pre-Trial Chamber II, at http://www.icc-cpi.int/library/cases/ICC-02-04-21_English.pdf (01/05/2006).

31 Election of the Presiding Judge of Pre-Trial Chamber III, at http://www.icc-cpi.int/library/organs/chambers/ICC_01-05_2.pdf (01/05/2006).

32 Election of the Presiding Judge of Pre-Trial Chamber II, at http://www.icc-cpi.int/library/cases/ICC-01-05-4_English.pdf (01/05/2006).

1. Whenever the Pre-Trial Chamber designates a judge as a single judge in accordance with article 39, paragraph 2 (b) (iii), it shall do so on the basis of objective pre-established criteria.
2. The designated judge shall make the appropriate decisions on those questions on which decision by the full Chamber is not expressly provided for in the Statute or the Rules.
3. The Pre-Trial Chamber, on its own motion or, if appropriate, at the request of a party, may decide that the functions of the single judge be exercised by the full Chamber.

Finally, regulation 47 ("Single judge") in turn provides:

1. The designation of a single judge in accordance with article 39, paragraph 2 (b) (iii), and rule 7 shall be based on criteria agreed upon by the Pre-Trial Chamber, including seniority of age and criminal trial experience. Other criteria may include consideration of the issues involved and the circumstances of the proceedings before the Chamber, as well as the distribution of work within the Chamber and the proper management and efficiency in the handling of cases.
2. The single judge designated by the Pre-Trial Chamber shall, as far as possible, act for the duration of a case. The Pre-Trial Chamber may designate more than one single judge when the efficient management of the workload of the Chamber so requires.

Concerning the single judge, the practice has varied. Thus, in November 2004, Pre-Trial Chamber II designated Judge Slade as single judge, without indicating any specific time-limit.[33] On the other hand, Pre-Trial Chamber I has, in the same situation – but also for a specific case within that situation – designated a judge as single judge for a specific time-period. Thus, in July 2005, it elected Judges Kuenyehia and Steiner as single judges for the situations in Darfur, Sudan[34] and in the DRC,[35] respectively. In 2006, Judge Steiner was designated – in February – single judge for the situation in the DRC from 25 February to 09 March 2006,[36] and then again in April, from 18 April to 21 May 2006.[37] In March 2006, in the period surrounding the transfer of Thomas Lubanga Dyilo to the Detention Centre of the Court, Judge Steiner was designated single judge for that case, initially from 15 to 22 March 2006,[38] and then

33 Designation of a Single Judge of Pre-Trial Chamber II, at http://www.icc-cpi.int/library/cases/ICC-02-04-PTChamber_II.pdf (01/05/2006).

34 Decision on the Designation of a Single Judge, at http://www.icc-cpi.int/library/cases/ICC-02-05-3_English.pdf (01/05/2006).

35 Decision on the Designation of a Single Judge, at http://www.icc-cpi.int/library/cases/ICC-01-04-60_En.pdf (01/05/2006).

36 Décision portant désignation d'un juge unique, at http://www.icc-cpi.int/library/cases/ICC-01-04-117_French.pdf (01/05/2006).

37 Décision portant désignation d'un judge unique, http://www.icc-cpi.int/library/cases/ICC-01-04-138_French.pdf (01/05/2006).

38 Decision designating a Single Judge, at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-33_tEnglish.pdf (01/05/2006).

without a time-limit, in particular for the purpose of rule 121(2)(b) ("proceedings before the confirmation hearing").[39]

B. Trial Division

In 2005 and 2006, Judge Odio Benito was the Acting President of the Trial Division.[40]

The elections of January 2006 did not affect the three year term assignment of the judges in 2003 to the Trial-Division and the same six judges continued to remain in that division.

According to article 39(2) of the Statute, the judicial functions of the Trial Chamber shall be carried-out by three judges of the Trial Division. In April 2006, there were no Trial Chambers constituted, as the situations and cases were at the Pre-Trial stage.[41]

Of interest to this study is the novelty – in 1998 – foreseen by article 74(1), according to which:

> All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

In connection to this provision, regulation 16 ("Alternate judges") provides:

> Subject to the provisions of article 39 and pursuant to article 74, paragraph 1, alternate judges may be designated by the Presidency, on a case-by case basis, first taking into account the availability of judges from the Trial Division and thereafter.

In April 2006, since there was no trial yet, these provisions were not applied.

C. Appeals Division

Judge Pikis was the first President of the Appeals Division.[42]

According to article 39(2)(b)(i) of the Statute, "The Appeals Chamber shall be composed of all the judges of the Appeals Division", which, pursuant to article 39(1),

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39 Décision désignant un juge unique dans l'affaire le Procureur c/ Thomas Lubanga Dyilo, at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-51_French.pdf (01/05/2006).

40 Report on the activities of the Court, 16 September 2005, para. 33, at: http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf (01/05/2006).

41 It should however be noted that, according to rule 130 ("Constitution of the Trial Chamber"), "When the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber".

42 Report on the activities of the Court, 16 September 2005, para. 33, at: http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf (01/05/2006).

includes the President of the Court and four other judges. This makes it unnecessary for the Presidency to constitute Appeals Chambers. In addition, article 39(3)(b) provides that "Judges assigned to the Appeals Division shall serve in that division for their entire term of office."[43]

As in the case of the Trial Division, the assignment of the judges to the Appeals Division remained unchanged after the January 2006 elections.

In March 2006, the Appeals Chamber decided that Judge Pillay would be the Presiding Judge in the appeal of Thomas Lubanga Dyilo of 24 March 2006.[44] In April 2006, it was decided that Judge Pikis would preside over another appeal within the DRC Situation.[45]

V. Plenary Sessions

By April 2006, the judges had met seven times in plenary sessions, in accordance with rule 4 which, *inter alia*, provides:

> 2. The judges shall meet [...] in plenary session at least once a year to exercise their functions under the Statute, the Rules and the Regulations and, if necessary, in special plenary sessions convened by the President on his or her own motion or at the request of one half of the judges.
> 3. The quorum for each plenary session shall be two-thirds of the judges.
> 4. Unless otherwise provided in the Statute or the Rules, the decisions of the plenary sessions shall be taken by the majority of the judges present. In the event of an equality of votes, the President, or the judge acting in the place of the President, shall have a casting vote.

The drafting of the Regulations was one of the main focuses of the judges in the 2003-2004 plenary sessions. Indeed, pursuant to rule 4(5): "The Regulations shall be adopted as soon as possible in plenary sessions". More specifically, article 52 ("Regulations of the Court") of the Statute provides:

> 1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

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43 However, due to this unique coincidence between the Appeals Division and the Appeals Chamber, regulation 12 ("Service within the Appeals Chamber") provides "In the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, the Presidency shall, in the interests of the administration of justice, attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division, subject to article 39, paragraph 1. Under no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case; nor shall a judge who has participated in the appeal phase of a case be eligible to sit on the pre-trial or trial phase of that case."

44 Decision on the Presiding Judge of the Appeals Chamber, at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-59_English.pdf (01/05/2006).

45 Decision on the Presiding Judge of the Appeals C hamber, at http://www.icc-cpi.int/library/cases/ICC-01-04-142_English.pdf (01/05/2006).

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

The Regulations were adopted by the judges on 26 May 2004, during their fifth plenary session. On 17 June 2004, they were circulated among the States Parties for their comments and they remained in force since there were no objections from a majority of States Parties within the following six months, in accordance with Article 52.[46]

The Regulations are organised into nine chapters and 126 regulations, they address issues such as the composition and administration of the Court, proceedings before the Court, Counsel and legal assistance, victims' participation and reparations, detention matters, cooperation and enforcement, disciplinary measures and the Code of Judicial Ethics. The latter was drawn up by the Presidency in accordance with regulation 126 and was approved – as a separate text – by the judges on 9 March 2005, during their sixth plenary session.[47]

One of the important provisions of the Regulations relevant to this study is regulation 4 which sets out an Advisory Committee on Legal Text:

4. The Advisory Committee shall consider and report on proposals for amendments to the Rules, Elements of Crimes and these Regulations. Subject to subregulation 5, it shall submit a written report in both working languages of the Court setting out its recommendations on such proposals to a plenary session. A copy thereof shall be provided to the Prosecutor and the Registrar.
   The Advisory Committee shall also consider and report on any matter referred to it by the Presidency.
5. When a proposal for an amendment to the Rules or to the Elements of Crimes is presented by the Prosecutor, the Advisory Committee shall transmit its report to the Prosecutor.
6. The Presidency may, as appropriate, designate one person, who may be assisted by others, to provide administrative and legal support to the Advisory Committee.
7. The Advisory Committee shall adopt its own rules of procedure.

46 See Regulations of the International Criminal Court published on the ICC website, The Hague, 23 June 2004, at http://www.icc-cpi.int/press/pressreleases/27.html (01/05/2006).

47 The Official Journal of the International Criminal Court, at http://www.icc-cpi.int/about/Official_Journal.html (01/05/2006).

Pursuant to regulation 4(1)(a), Judges Kaul, Fulford and Kourula were elected to the Advisory Committee from the Pre-Trial, Trial and Appeals Divisions, respectively.[48]

48 Report on the activities of the Court, 16 September 2005, para. 36, at: http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf. Regulation 4(1) provides that the Advisory Committee shall be comprised of: "(a) Three judges, one from each Division, elected from amongst the members of the Division, who shall be members of the Advisory Committee for a period of three years; (b) One representative from the Office of the Prosecutor; (c) One representative from the Registry; and (d) One representative of counsel included in the list of counsel". Furthermore, regulation 4(2) provides that "The Advisory Committee shall elect a judge as chairperson for a period of three years who shall be eligible for re-election once. The Advisory Committee shall meet at least twice a year and at any time at the request of the Presidency." In addition, regulation 4(3) reads "The Chairperson of the Advisory Committee may, as appropriate, invite other interested groups or persons to present their views if considered relevant for the work of the Advisory Committee. The Chairperson may also seek the advice of experts.

Chapter 15

The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?

Jan Wouters, Sten Verhoeven, and Bruno Demeyere

Introduction

Of the four organs provided for in article 34 of the Rome Statute of the International Criminal Court ("the Rome Statute"), the "Office of the Prosecutor" has so far been without any doubt the most visible one. Since June 2003, Mr. Luis Moreno-Ocampo from Argentina acts as the first Prosecutor of the International Criminal Court ("the Court") and, in the perception of many around the world, is the Court's public face. Less than three years have separated his stepping into his Office and the initial appearance of the first accused, Thomas Lubanga Dyilo, on March 20, 2006, before a Pre-Trial Chamber.

Two months earlier, the Office of the Prosecutor had lodged an application for the issuance of a warrant of arrest against this person. Less than two years after the referral of the Darfur situation to the Court and after extensive investigations, the Prosecutor presented, in February 2007, an application for the issuance of summons to appear against two individuals. Not only the Court's quick coming into existence after the adoption of the Rome Statute in 1998, but also this fast pace of events, have surprised friends and foes.

In the present contribution, the Office of the Prosecutor will be approached from the institutional point of view, an angle which will be informed, wherever possible and relevant, by the practice which has put the Court's provisions to the test so far. Especially, the central focus will be to assess to what extent the Prosecutor, proclaimed to be independent in principle, can be said to be truly independent, and whether that independence can, has and should be matched by some form of accountability. Thus, an attempt will be made to focus on the Prosecutor's position from a balance of powers perspective. Is it truly so that no external source – outside the Office of the Prosecutor – can influence in any way whatsoever what the Prosecutor has to, or cannot, do?

At the time of concluding this contribution, the Prosecutor had opened investigations into three "situations": the Democratic Republic of Congo, Uganda and Darfur (Sudan). In a fourth situation – the Central African Republic, a State Party which referred its own situation to the Court – no publicly available decision had been taken whether or not the Prosecutor would initiate an investigation. The Prosecutor does not hide the fact that he is looking into other possible situations, but remains very careful not to go too quick, as will be dealt with below.

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 ISBN 978 90 04 16308 9. pp. 345-386.

So far, not a single case has reached the trials[1] – let alone appeals – phase, and in order to remain within the prescribed limits, the present contribution will not deal with the Prosecutor's role (and independence) during the trial phase. Hence, this contribution does not purport to provide a final and comprehensive account of the Office of the Prosecutor as a Court organ. Rather, some topics have been selected in order to appraise the Office of the Prosecutor's institutional position.

Section I attempts to provide a concise "black letter law" overview of the provisions which regulate the Office of the Prosecutor *lex lata* in both its composition and prescribed modes of functioning. Taking a distance from these more easily discernable provisions, Sections II and III put things into a broader perspective. Thus, Section II tackles the question which has haunted the Office of the Prosecutor even before it came into existence as a separate organ of the Court, notably whether the Prosecutor's independence and power result in its being accountable to no one, creating the fear of a Pandora's box. Along the same lines, Section III assesses the issue of prosecutorial policy and discretion in the specific context of the Court. After these two "macro" questions, some snapshots from a "micro", more technico-legal point of view will be taken, and this in a chronological order of a case's coming into existence.

Thus, Section IV deals with the preliminary examinations, whereby the Prosecutor collects information in order to assess whether a case can be made to start an investigation into a situation. Section V looks into the investigations and pre-trial phase.

Both Sections IV and V will equally try to shed some light on the question how both the Rome Statute and some of the documents adopted by the Office of the Prosecutor limit or encourage the Prosecutor's independence in proceeding with his work in some of the many phases that one has to go through before a suspect can be charged with a specific crime: international criminal justice is not a quick business, nor should it be, and the Prosecutor's work in the various phases is obviously under intense scrutiny, not only of other Court organs, but also, and perhaps even more importantly, of world public opinion.

Ultimately, some concluding observations will be made, both in order to look back on the first experiences so far and in order to look forward to the interesting times ahead – times which will determine in a couple of years from now with what degree of enthusiasm State Parties look upon the Court and the work it has accomplished.

Section I. The Office of the Prosecutor and its international civil servants

In this Section, a brief overview will be given of the relevant "black letter law" provisions setting out the general principles regulating the Office of the Prosecutor's staff members and their employment conditions. As an initial remark, it is important to note that, in the Rome Statute, some articles apply to both the Prosecutor and some or all of the Court's organs. This is, for example, the case for article 44 (appointment

1 It must be mentioned, however, that the path has been cleared for initiating the first trial, given the Pre-Trial Chamber's 29 January 2007 decision to confirm the charges in the case of *Prosecutor v. Thomas Lubanga Dyilo*. See Doc. No. ICC-01/04-01/06.

of staff and, specifically, investigators). Through the latter's referral to article 36 para. 8 of the Rome Statute, the staff employed at the Office of the Prosecutor will need to represent the world's *"principal legal systems"*, have an *"equitable geographical representation"* and contain a *"fair representation"* of male and female staff members. Similarly, article 42 para. 2 of the Rome Statute prescribes that *"[t]he Prosecutor and the Deputy Prosecutors shall be of different nationalities."*

Whereas articles 45, 46 and 47 contain rules on the "solemn undertaking" by the (Deputy) Prosecutor and on disciplinary sanction mechanisms, the Rome Statute understandably remains, as far as the working conditions at the Prosecutor's Office are concerned, at the level of general principles. The real bread and butter rules which guide the everyday life of the Office of the Prosecutor's staff members holding a fixed-term appointment[2] can be found in the 2005 Staff Rules.[3]

This lengthy document contains detailed rules – applicable to all such staff members of the Court, not exclusively of the Office of the Prosecutor – on a wide range of issues. Obviously, all staff members are international civil servants. The said Staff Rules regulate, *inter alia*, their "duties, obligations and privileges" (Chapter I), "Salaries and related allowances" (Chapter III), "Appointment and promotion" (Chapter IV), "Annual and Special Leave" (Chapter V), "Social Security" (Chapter VI) and "Disciplinary Measures" (Chapter X).

From an institutional point of view, the most important provision on the Office of the Prosecutor is laid down in article 42 of the Rome Statute. Para. 4 thereof establishes a secret ballot procedure for electing the Prosecutor by the Assembly of States Parties. Just like the judges, both the Prosecutor and his Deputy Prosecutors cannot be re-elected, except if the initial appointment was for three years or less.

Thus, while the appointment of an individual as the Prosecutor or his staff remains an exclusively state-centric process, the Statute ensures these individuals' independence at the personal level, for there is no incentive for them to try to rally further support from States after their election. This independence needs to be conceived as one where the Prosecutor does not see any reason to favour one situation over another, or to specifically target one situation over another: he is sure of the time he will be there and will only be assessed afterwards on the merits of his work (not) done.

Below, "independence" will be analyzed in quite a different sense, i.e. to what extent the Prosecutor can *work* independently while proceeding with his activities which are intended to build up a case against a particular individual. At this stage, the principal issue to be emphasized is the central institutional feature of the Prosecutor. Indeed, as a basic principle, the Office of the Prosecutor's independence is affirmed (article 42, para. 1 of the Rome Statute): *"A member of the Office shall not seek or act on instructions from any external source."* This aspect will be dealt with in greater detail in Section II.

Regarding the type of individuals which could be considered eligible for the role

2 Separate rules exist for staff members holding a short-term appointment.

3 Staff rules of the International Criminal Court, ICC-ASP/4/3, available via http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-3_English.pdf. This 2005 document elaborates upon the 2003 Staff Regulations , available via http://www.icc-cpi.int/library/about/officialjournal/Staff_Regulations_120704-EN.pdf.

of (Deputy) Prosecutor, article 42, para. 3 provides for the following requirements:

> *The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. (...)"* Additionally, they *"shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.*

Turning from principles to practice, article 42, para. 1 sets out the Office of the Prosecutor's basic function, i.e. its responsibility *"for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court."* Contrary to article 12 of the International Law Commission's Draft Statute, article 42 of the Rome Statute affirms the Prosecutor's administrative independence from the Registry:[4]

> *The Prosecutor shall have full authority over the management and administration of the Office, including the staff facilities and other resources thereof.*

This is a considerable departure from the previous practice at both the ICTY and ICTR, where the Registry has sometimes been alleged to have slowed down the recruitment and staffing process.[5] This aspect of the Prosecutor's independence "at home" shall be dealt with below (Section II, f), though it can be highlighted already at this point that, for its daily functioning, the Office of the Prosecutor has indicated it has been able to rely on the support provided by the Registry and that its own achievements would not have been possible without the latter.[6]

Apart from the Rome Statute and the Staff Rules, the Office of the Prosecutor is regulated by Rules 9, 10 and 11 of the Court's Rules of Procedure and Evidence, which deal with the "Operation of the Office of the Prosecutor", "Retention of information and evidence" and the "Delegation of the Prosecutor's functions", respectively.[7]

Underlying many of these rules – often tremendously important for the daily functioning of the Office of the Prosecutor – is a much broader debate, which was settled by States before one even started identifying persons suitable to fulfil the role of (Deputy) Prosecutor, namely whether it would be wise to make this organ accountable while independent. This question, of huge importance both in terms of the philosophy underlying the Court and in terms of the procedural life the individuals staffing it are leading, will be addressed in the next section.

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4 See John R.W.D. Jones, "The Office of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. I, 270.

5 See John R.W.D. Jones, "The Office of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. I, 273.

6 Opening Remarks of the Prosecutor at the Fifth Session of the Assembly of State Parties, 23 November 2006, page 6.

7 See Medard Rwelamira, "The Office of the Prosecutor", in by Roy S. Lee (ed), *The International Criminal Court : Elements of Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, 259 at 262.

Section II. The Office of the Prosecutor: An unaccountable organ?

A. Situating the debate

As is generally known, the creation of an independent Prosecutor as an organ of the Court was the subject of considerable controversy and heated debate at the Rome Conference and before. Indeed, the International Law Commission's Draft Statute, which formed the starting point of the Rome Statute, did not provide for the institution of a Prosecutor with *proprio motu* powers: the initiative would have to come from another entity than the Prosecutor. The reason lies in the fact that, at the time, the international community was not yet ready for such an organ with independent powers. Hence, the Draft only provided for the referral of situations by States parties or by the Security Council.[8] This has been termed one of the main inadequacies of the initial Draft Statute.[9]

During the Rome Conference, the institution of an independent prosecutor, with the competence to initiate himself investigations that could lead to a prosecution, was strongly advocated by NGO's and the so-called group of like-minded States. According to them, the absence of *proprio motu* powers of the Prosecutor would negatively impact on the Court since it risked becoming a lame duck if the green light to initiate investigation would need to come exclusively from the States Parties and the Security Council, both of which are political actors which sometimes compromise the need for prosecuting human rights abusers with other values or interests, which *de facto* may lead to impunity.

In light of the near-total absence of State complaints in the framework of human rights treaties, it was feared that States would be reluctant to refer situations to the Court. Furthermore, the possibility of a veto by one of its permanent members endangered referrals by the Security Council. This could not only threaten the referral of situations in which such permanent members are involved, but probably also the referral of a situation in which allies or client States would be accused of committing crimes within the jurisdictional scope of the Court. In short, the argument was that the absence of the said *proprio motu* powers would risk to render the yet to be established Court an institution having no cases in the docket.

While these fears have been proven partially unfounded in practice – so far, the Court has received three State referrals and one referral by the Security Council and the Prosecutor has not yet used his *proprio motu* powers – the said powers of the Prosecutor proved a useful tool in obtaining a State referral in the situation of the Democratic Republic of Congo. Indeed, it was only after the Prosecutor indicated that he would use his *proprio motu* powers that the Democratic Republic of Congo referred the situation to the Court. The Prosecutor himself has mentioned in a policy document dealing with the matter that he *"will use this power with responsibility and*

8 Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty-sixth session, 2 May – 22 July 1994, GA, official records, forty-ninth session, supplement No 10 (A/49/10), paras. 42-91, 29-161.

9 William Schabas, 'First Prosecutions at the International Criminal Court', 27 *Human Rights Law Journal*, April 2006, 28.

firmness, ensuring strict compliance with the Statute."[10]

Opponents of an independent Prosecutor cited the danger of a politically unaccountable actor and of politicized trials in which the Prosecutor would be inappropriately targeting nationals of a State for political reasons. It is well-known that especially the United States has been vehemently opposed against any widespread powers of the Prosecutor. Thus, for example, John Bolton – at the time US Under-Secretary for Arms Control and International Security – wrote:

> *Requiring the United States to be bound by this treaty, with its unaccountable Prosecutor and its unchecked judicial power, is clearly inconsistent with American standards of constitutionalism. (...) Never before has the United States been asked to place any of that power outside the complete control of our national government without our consent.*[11]

For sure, a Prosecutor which is accountable to no political organ at all, indeed risks having negative consequences for the protection of international peace and security and for the Court itself. For example, a Prosecutor desirous to prosecute war crimes committed during a civil war which is being settled by negotiations by the parties to the conflict, can undermine the peace and security in that country or of the international community and hence usurp the power of the Security Council.

Furthermore, if a Prosecutor were ever to wage a personal vendetta against individuals of a particular country, this would seriously undermine the credibility and legitimacy of the Court. As a result of these arguments and fears, Germany and Argentina made a proposal during the Rome Conference that intended to take into account the legitimate concerns of both sides. One thing is clear, though: if the Court would be perceived to be politically biased, it would immediately loose its greatest asset, namely its moral authority.[12]

B. The compromise reached

In the end, building upon the German and Argentine proposal, the drafters of the Rome Statute opted for an independent Prosecutor with *proprio motu* powers to initiate an investigation, but – in order to allay fears of opponents[13] – with considerable checks to this power by the Court itself, by States and by the Security Council. To be fully correct, it must be stressed that – strictly speaking – the Prosecutor cannot initiate investigations under the Rome Statute. However, pursuant to article 15 (1) of the Rome Statute, he can investigate *"on the basis of information in crimes within*

10 Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications, September 2003, page 4, available via www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

11 John R. Bolton, "The United States and the International Criminal Court", Remarks to the Federalist Society (Nov. 14, 2002), available via www.state.gov/t/us/rm/15158.htm.

12 Allison Marston Danner, "Navigating law and politics: the Prosecutor of the International Criminal Court and the Independent Counsel", 55 *Stanford Law Review*, 2002 – 2003, 1655.

13 See Sylvia A. Fernandez de Gurmendi, "The Role of the International Prosecutor", in Roy S. Lee (ed), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, 181.

the jurisdiction of the Court", which is a very low threshold. It turns down to the fact that the Prosecutor can receive such "information" by watching the news or from any other source.[14]

Notwithstanding the nuanced solution reached, the opponents of the Court continue to assert that the Prosecutor and his Office are unaccountable. Therefore, considerable attention in this contribution will be devoted to examine which mechanisms within the Rome Statute place a check on the powers of the Prosecutor and if it indeed can be concluded that the Prosecutor is unaccountable.

C. Accountable and with limited powers while independent?

As previously mentioned, Article 42 of the Rome Statute generally declares that the Prosecutor and his Office are an independent organ of the Court and that they may not seek or act on instructions from any external source. This duty to remain independent is specified in three fields. Firstly, Article 15 of the Rome Statute gives the Prosecutor the power to independently start up an investigation after having received information from any source without any State or Security Council referral. This phase will be dealt with in Section II.d.

Secondly, the Prosecutor and his staff independently determine *how* to conduct investigations, and which events or individuals to focus the investigation on, and in which way the case will be presented during the whole trial phase. This phase will be dealt with in Section II.e. Thirdly, as mentioned, the Prosecutor is independent in the organization of the structure of his Office.[15] This feature will be dealt with in Section II.f.

All these features of the Office of the Prosecutor's independence necessarily entail a form of discretion – what, how, who etc. – which will however be more or less tempered depending on the possible negative consequences that could be engendered by the reaction of others against the exercise of discretionary powers and, most importantly, by the many actors the Office of the Prosecutor needs to face – as allies, opponents, or overseers – even before being able to make his case against a particular suspect. The most important checks placed on the Prosecutor's work are related to the initiation of an investigation *proprio motu*.

The Prosecutor and his Office will have the discretion to weed through the numerous complaints and information received and select only the situations for which there are reasonable grounds to initiate an investigation. In this respect, the Prosecutor can request any additional information as he sees fit.[16] However, this discretion of screening the received information seems to be limited by objective criteria. First, the Prosecutor has to examine if the information leads to the conclusion that there exist a reasonable ground that the Court has jurisdiction over the alleged conduct.

Secondly, the Prosecutor has to asses whether the case will be admissible pursu-

14 See John R.W.D. Jones, "The Office of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. I, 270.

15 Article 42 (2), ICC Statute.

16 Article 15 (2), ICC Statute.

ant to article 17 of the Rome Statute. Even if these two conditions are fulfilled, the Prosecutor can still decline to initiate an investigation if this would not be in the interests of justice taking into account the seriousness of the crime and the interest of the victims.[17] Quite importantly, in an Annex to the "Paper on some policy issues before the Office of the Prosecutor: Referrals and Communications",[18] the latter itself has provided more information as to the methodology that will be used on how information received will be handled in terms of the decision whether or not to initiate investigations.

At this stage, the main criterion – whether or not there is a "reasonable basis to proceed" – is applied conversely depending on the issue whether there has been a referral (by a State Party or by the Security Council) or a communication (by any other source): in the first case, article 53 of the Rome Statute stipulates that the Prosecutor shall initiate an investigation, unless there is no such reasonable basis to proceed. In the latter case, the Prosecutor will only need to initiate an investigation in case he has determined that there is such a basis to proceed.

D. Independent when and after there are reasonable grounds to initiate an investigation? Yes, but ...

If the Prosecutor, after having assessed the information, concludes that a reasonable ground to initiate an investigation exists, his powers are curbed by the Pre-Trial Chamber, the Security Council and States. Each of them will be discussed in the following paragraphs.

(a) *The Pre-Trial Chamber* has to grant a request to commence investigations, a request which will solely be granted if the Prosecutor convinces the Pre-Trial Chamber that there is a reasonable basis to proceed and that the case appears to fall within the jurisdiction of the Court.[19] The reasonable basis test concerns evidentiary matters and does not judge on the appropriateness of the request of initiation of the investigation.[20] In particular, the Pre-Trial Chamber has to examine if the material submitted by the Prosecutor is sufficiently strong to merit an investigation.

However, if the Prosecutor has shown the necessary professionalism and demonstrates that an investigation strategy has been adopted for the particular case or situation, he will pass the reasonable basis test, if material supporting the application has been filed. Furthermore, the Pre-Trial Chamber has to assess that a crime appears to be committed within the jurisdiction of the Court. Jurisdiction includes all jurisdictional requirements and not only the subject-matter.

On the other hand, the Pre-Trial Chamber will allow the start of the investigation if there appears to be jurisdiction and will hence not look into the matter of jurisdiction too deeply. Consequently, when all jurisdictional requirements seem to be fulfilled, the Pre-Trial Chamber should authorize the start of the investigation.

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17 Article 53 (1), ICC Statute.

18 Available via http://www.icc-cpi.int/otp/otp_docs.html.

19 Article 15 (4), ICC Statute.

20 M. Bergsmo and J. Pejić, "Article 15" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, 370.

In practice, for every single situation, this basically means that the Prosecutor is far from independent : he needs to obtain permission before being allowed to go out in the field to initiate investigations. Both the Rome Statute and the judges of a Pre-Trial Chamber can curb him into his initiatives.

(b) Secondly, the *Security Council, a highly political organ by nature*, can always decide to defer a situation from the investigation and prosecution of the Court for a renewable period of twelve months by adopting a Chapter VII resolution.[21] The deferral can involve cases where the Prosecutor has only reached the stage of investigations, but also cases in which an accused is brought before the Trial Chamber and even the Appeals Chamber. However, the deferral does not affect the preliminary examination of a situation. As a result, the Prosecutor can request information from States, UN organs and other entities notwithstanding a deferral by the Security Council.

Furthermore, the situation or case can solely be deferred in cases of a threat to or breach of international peace and security, although frequently these situations and cases will come in the purview of the Court. Moreover, the Security Council has a broad margin of discretion to determine what constitutes a threat to and a breach of the international peace and security.[22] Consequently, the Security Council has a large power to intervene with the proper functioning of the Court and will hamper a Prosecutor who is misusing (or, appropriately using, but stepping on some sensitive toes) his power to investigate and prosecute.

On the other hand, a Chapter VII resolution requires 9 votes in favour including no negative votes of permanent members. This entails that a single State in theory cannot take the Security Council hostage to pursue its agenda. In reality, the Security Council has rather sparsely used this power to shield peacekeepers of States not party to the Statute of the Court.[23]

Similarly, the Security Council can refer a situation to the Prosecutor, as has been the case with Security Council Resolution 1593 in regard of the situation in Darfur (Sudan): [24] here, the Security Council can put a situation in the investigative spotlight, no matter what other ongoing investigation the Office of the Prosecutor's staff was involved in.

Here, the Prosecutor's independence in selecting the situations which will feature in his agenda will be curbed in the opposite sense : if the Security Council agrees upon the referral, the Prosecutor will have to dedicate resources and staff to look into the referred situation, although in the end he remains independent in determining whether the situation fulfils the criteria of Article 53 of the Rome Statute: the Security Council referral obliges the Prosecutor to look into it, but it is up to the Prosecutor to seek whether the statutory test of "reasonable basis to proceed" has been fulfilled.

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21 Art. 16 ICC Statute.

22 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Rep.* 1970.

23 Security Council Resolution 1422 (2002) and Security Council resolution 1487 (2003). In 2004, when the issue arose again, the United States was in a very weak position in the wake of the Abu Ghraib prison abuse scandal, leading to its withdrawing the proposal.

24 S.C. Res. 1593, U.N. SCOR, 60th Sess., 5158th mtg., U.N. Doc. S/RES/1593 (March 31, 2005).

Two options are subsequently on the table: in case the Prosecutor determines that there is such a basis, the Pre-Trial Chamber has *no authority to review this affirmative decision. In case, however, the Prosecutor is of the opinion that there is no reasonable basis to proceed, pursuant to Article 53 (3) (a) the Pre-Trial Chamber needs to review that decision, and may request the Prosecutor to reconsider the latter.*

(c) Thirdly, the *proprio motu* power of the Prosecutor is limited by *States* and by the complementarity principle, determining a case's admissibility, a factor for which the Prosecutor has so far been highly attentive. In his December 2006 address to the Security Council, for example, the Prosecutor has stressed he has *"given careful attention to the issue of admissibility"*, thus being explicitly attentive to conceptualizing the Court as one of "last resort".[25]

When the Prosecutor initiates a *proprio motu* investigation and receives the authorization of the Pre-Trial Chamber, he has to inform States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.[26] The notification shall contain information about the acts that may constitute crimes under the Rome Statute. The information provided needs to be relevant for the purposes of establishing that a particular State has jurisdiction over the situation.[27]

Hence, not only State Parties, but also other States which normally would have jurisdiction (e.g. on the basis of the nationality principle) should be informed and can request the deferral to their national jurisdiction if they request so one month after the receipt of the notification.[28]

The Prosecutor will have to defer to the State investigating or having investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States, unless the Pre-Trial Chamber, on the application of the Prosecutor, decides otherwise. The issue of assessing a State's unability or unwillingness to prosecute, is fraught with procedural and substantive hurdles, whereby the Office of the Prosecutor has anything but the last word and the power to decide.[29] While by no means an official document, an "Informal expert paper" on "The principle of complementarity in practice" deals with some of the challenges which this both legally and factually complex issue entails. [30]

Along the same lines, the same question can be asked as to what happens with States which are not investigating, but start investigations after the receipt of the notification? Can they request the deferral? It is submitted that they can due to the primacy the Rome Statute places on prosecutions by States.[31] A State requesting

25 Statement of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), especially pages 1 and 2.

26 Article 18 (1) ICC Statute.

27 Rule 52 ICC Rules of Evidence and Procedure.

28 Article 18 (2) ICC Statute.

29 See Megan A. Fairlie, 'Establishing admissibility at the International Criminal Court: does the buck stop with the Prosecutor, full stop?', 39 *The International Lawyer*, 2005, 817.

30 Available via http://www.icc-cpi.int/library/organs/otp/complementarity.pdf.

31 D.D. Ntanda Nsereko, "Article 18", in O. Triffterer (ed.), *Commentary on the Rome Statute*

the deferral must provide the necessary information on its investigations and the Prosecutor has the opportunity to ask for additional information.[32]

A dispute between the Prosecutor and the requesting State will be settled by the Pre-Trial Chamber. Since the Prosecutor normally has to respect the request of a State, generally, the *onus probandi* will be on him.[33] In particular, he will have to proof that the State in question is unable or unwilling to investigate or prosecute the situation concerned. An appeal against the Pre-Trial Chamber decision is possible[34] and, in any event, the Prosecutor can review the deferral after six month or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

The Prosecutor can then request the Pre-Trial Chamber for authorization to continue his investigations.[35] Furthermore, the Prosecutor may seek, on an exceptional basis, authority from the Pre-Trial Chamber to pursue the necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.[36]

Consequently, the independence of the Prosecutor in the field of *proprio motu* powers to initiate an investigation is significantly curbed by the need for authorization by the Pre-Trial Chamber, the possibility of a deferral by the Security Council and the request of States Parties and non-Parties investigating or having investigating their nationals to defer a situation to their national jurisdiction. As a result, there exist ample opportunities to hinder and stop investigations which are considered political and irresponsible – or simply undesired.

Finally, regarding the Prosecutor's independence as to whether or not to start investigations into a specific situation, his independence is – ironic as this may seem – curbed whenever a State proceeds to a "self-referral" – a situation which was not envisaged during the Rome Conference – of its own situation. However, nothing in the wording of Article 53 of the Rome Statute prevents a State from referring its own situation to the International Criminal Court. Without going into the difficulties a self-referral might cause,[37] the main consequence is that a State can put its situation for whatever reason on the agenda of the Prosecutor.[38]

For example, the self-referral of Uganda to the Court was partially motivated

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of the International Criminal Court, Observers' Notes, Article by Article, Baden-Baden, Nomos, 1999, 400.

32 Rule 53 ICC Rules of Evidence and Procedure.

33 See also the already mentioned Expert Consultation Paper on the Principle of Complementarity in practice, para. 53-58 concerning the shifting and facilitating satisfaction of the burdon of proof, available at http://www.icc-cpi.int/library/organs/otp/complementarity.pdf.

34 Article 18 (4). ICC Statute.

35 Article 18 (3) ICC Statute and Rule 54 ICC Rules of Procedure and Evidence.

36 Article 18 (6) ICC Statute.

37 See: M.M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', 5 *International Criminal Law Review*, 2005, 83-119.

38 W.A. Schabas, "First Prosecutions at the International Criminal Court", 27 *Human Rights Law Journa*l, April 2006, 32

by the objective to bring the conflict with the Lord's Resistance Army under the attention of the international community.[39] If the Prosecutor indeed comes to the conclusion that the situation fulfils the criteria of Article 53, he will have to start an investigation since otherwise the State making the self-referral is in the possibility to request the Pre-Trial Chamber to consider the negative decision of the Prosecutor (*infra*). Hence, this feature means an additional constraint on the Prosecutor's independence, as some States may use the mechanism to transpose their own domestic problems on the international plane.

E. Independent while carrying out investigations : for sure, but ...

With regard to the discretion in conducting investigations and prosecutions, the independence of the Prosecutor is broader than in the stage where he is merely assessing whether or not to initiate investigations, but again not unchecked. Both the Security Council and States can intervene in the Office of the Prosecutor's work at this stage. The experience of the first half of 2006 – notably the case-law – has shown that a third actor, notably a Pre-Trial Chamber and potentially even victims, can considerably limit the Prosecutor's scope of manoeuvring during this stage. As for the latter aspect, the practice of the coming months needs to indicate how it all works out.

Firstly, the *Security Council* can try to steer the Prosecutor (not) to look into particular events in case of referral of a situation pursuant to Article 13 (b) of the Rome Statute. The main technical-legal issue here is the extent to which the Prosecutor could review a Resolution's content in that it may not attempt to modify the Court's jurisdictional regime.

While it may not be politically wise to do so, it would be interesting to see a Prosecutor decide that a referral Resolution's particular paragraph contravenes the Rome Statute and, for this reason, cannot be taken into account. An example of such an attempt by the Security Council to constrain the Prosecutor's discretion can be found in the Council's exclusion, in its referral Resolution of the Darfur situation to the Court, of having peacekeepers being subject to investigation and prosecution.[40]

Although it is in reality not likely that peacekeepers will commit a crime serious enough to merit the attention of the Court, this possibility cannot be altogether excluded. Regrettable as this may be, the exclusion of certain categories of persons from the scope of investigations and prosecutions by the Court seems to be in line with the broad powers the Security Council enjoys under Chapter VII of the UN Charter, powers which are not affected by Article 13 (b) of the Rome Statute.

As a result, the independence of the Prosecutor in conducting investigations and prosecutions will be checked, since he will not be in the possibility to investigate and prosecute certain conduct of certain perpetrators. *Ab initio*, he is allowed to go out in the field but ordered to remain blind for certain actors.

Secondly, *States* have the capacity to limit investigations and prosecutions based on politically motivated claims. In general, the Prosecutor is not allowed to con-

39 P. Akhavan, 'The Lord's Resistance Army Case : Uganda's Submission of the First State Referral to the International Criminal Court', 99 *AJIL*, 2005, 410.

40 Operative Paragraph 6, Security Council Resolution 1593 (2005).

duct investigations on a State's territory without that States consent.[41] Basically, with some limited exceptions outlined below, the Prosecutor is quite powerless in case a State refuses to grant such access. It is not altogether unthinkable that a State provides such access, but intends to exclude certain actors from the investigation.

Although States Parties are under a general obligation to cooperate with the Court and hence the Prosecutor,[42] a request by the Prosecutor will have to be performed under the procedures of national legislations, which can limit the presence and powers of the Prosecutor or his representatives; indeed, while States are obliged to adopt the necessary procedures under their national laws to be able to meet the requests of the Court,[43] States retain the liberty to determine the nature of these procedures under domestic law.

Consequently, States can limit not only the discretionary powers during investigations of the Prosecutor by adopting laws which limit the functions of the Prosecutor,[44] but can also, through the national laws they adopt, attempt to control the way in which the investigations in the field are conducted, thus potentially attempting to render it quite difficult for the Prosecutor to obtain certain pieces of evidence that would otherwise be available to him.

Furthermore, although the Rome Statute establishes that the Prosecutor is equally entitled to conduct investigations on the territory of a State not a party to the Rome Statute, outside the scope of Article 12, para. 3 of the Rome Statue, the Prosecutor can only conduct his investigations in agreement with the State in question whether by the conclusion of an *ad hoc* arrangement, an agreement or any other appropriate basis in case of a State referral. In real-life terms : a "no" is and remains a "no". The matter is different when the situation has been referred by the Security Council since in such instance, the cooperation will be on the basis of the Security Council resolution.[45]

Moreover, under the Statute, States can deny the access to documents relating to national security. The Rome Statute provides for a detailed procedure to establish whether some evidence might endanger the national security of a State, and is therefore designed to ensure as far as possible that the State remains involved and on top of the proceedings in this regard.[46] Consequently, a State can easily stonewall the investigation of the Prosecutor if the State deems that his investigations are politically motivated or simply unwanted. However, ultimately, Article 72 (7 (b) of the Rome Statute allows the Court in certain circumstances to order, despite all resistance, the disclosure of certain pieces of information.

Unfortunately, there are no adequate remedies against a refusal of a State to cooperate. Indeed, contrary to the *ad hoc* tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR), both of which have been established pursuant to a

41 Article 54 (2) ICC Statute and Article 87, ICC Statute.

42 Article 86 ICC Statute.

43 Article 88 ICC Statute.

44 M. Bergsmo and P. Kruger, "Article 54", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, 721.

45 Article 87 (5) ICC Statute.

46 Article 72 ICC Statute.

Resolution adopted under Chapter VII of the UN Charter, the Rome Statute is a classic international treaty, whereby consent remains the core of the matter, except in cases of a Security Council referral.

Thus, with regard to State parties, the Court is limited in making a finding of non-compliance and reporting the matter to the Assembly of State Parties or the Security Council in case of a Security Council referral.[47] In this respect, it has to be noted that in the referral of the situation in Darfur by the Security Council, it has obliged Sudan and all other parties to cooperate with the Court and even urged non State parties to fully collaborate.[48] With regard to States not party, they are not obliged to enter into *ad hoc* agreements and the sole reaction of the Court can potentially be to refer the matter to the Security Council, which *can* take measures against the non-complying State under Chapter VII.[49] As it has become blatantly clear, all this is fraught with uncertainty for the Prosecutor, given the many procedural hurdles along the way.

Despite this general reliance on State cooperation during the investigations phase, the Pre-Trial Chamber can authorize the Prosecutor in limited exceptions to conduct an investigational act without the cooperation of a State Party if it is satisfied that this State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation.[50] In order to get this far, the Prosecutor will have to address the Pre-Trial Chamber in a written request for authorization. The Pre-Trial Chamber will then whenever possible inform and invite the State Party to hear its views on the matter and can organize a hearing. An authorization will have to be motivated and based on the reasons set forth in article 57, para. 3 (d) of the Rome Statute.[51]

In this respect, the Pre-Trial Chamber will first have to be satisfied that no authority or any component of the State's judicial system is able to fulfill the request for cooperation. Furthermore, it must be established that there does not exist any other authority or official of any kind which is capable to execute the request. Consequently, such cases will only occur when there is for example a total collapse of State authority.[52] But in these situations, the Prosecutor will possibly be unable to perform the investigation since the local situation would be too dangerous, unless he can count on the assistance of the international community.

But even if the Prosecutor can count on international assistance, for example peacekeepers, the situation could be too dangerous to conduct a full-scale investigation, as has been demonstrated by the situation in Darfur, where despite the presence of peacekeepers from the African Union, the Office of the Prosecutor is not conducting investigations *in situ*, but outside Darfur.

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47 Article 87 (7) ICC Statute.

48 Operative Paragraph 2 Security Council Resolution 1592 (2005).

49 G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. II, 1168.

50 Article 57 (3) (d) ICC Statute.

51 Rule 115 ICC Rules of Procedure and Evidence.

52 F. Guariglia and K. Harris, "Article 57", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, 751; A.M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutional Discretion at the International Criminal Court", 97 *AJIL* 2003, 529.

As a third actor, a *Pre-Trial Chamber* and potentially *victims* can also proof to be a constraint on the Prosecutor's scope of action, as some case-law of the first half of 2006 have indicated. The debate centers around the philosophical divide between interventionist judges who are of the opinion that they must guide the prosecution, on the one hand, and judges constraining themselves to a much more passive role, on the other hand.[53]

The issue of victim participation during the investigations phase has proved to be extremely contentious.[54] Actually, in January 2006, it has been the first issue really shaking up the Court, as a Pre-Trial Chamber has allowed individuals claiming to be victims to participate in the proceedings during the investigations phase, even when no charges have been filed against a specific accused and even when it is actually not yet clear at all that such charges will be filed.[55]

As the Prosecutor's attempt to appeal this decision has been rejected on July 13, 2006 by the Appeals Chamber, this issue is not only the first major defeat of the Office of the Prosecutor during its judicial activities, but also results in the situation that the Prosecutor's space to decide what to investigate or not, could be seriously hampered by victims' requests.

Whereas the consequences of this decision still need to be appraised in the subsequent practice, it needs to be mentioned that the Prosecutor has consistently argued on this issue that such victim participation – as granted by the Pre-Trial Chamber – during the investigations phase could endanger the Prosecutor's independence and objectivity.[56]

If it turns out to be true, as the Prosecutor has argued[57] and as indeed seems to flow – at least in part – from the Decision, that a very wide pool of individuals can claim to be a victim and thus seek access to the proceeding, then this Decision might lead to the ironic result that it will be the victims – one of the proceedings' intended beneficiaries – that become the Prosecutor's opposing actor in ensuring an efficient while fair way of proceeding. In the long run, this Pre-Trial Chamber's decision may very well turn out have inserted another impediment to the Prosecutor's work where no one was expecting it.

For sure, the judicial decisions may have been inspired by a desire from the bench not to let the Prosecutor do the investigations in a way that goes unchecked by those on the ground who have experienced the situation.

Now that "situation victims" have been allowed to step forward, at a stage when the Prosecutor has not yet identified specific "cases" which he desires to prosecute, the Prosecutor will need to deal with multiple pieces of information, some of which

53 W. Schabas, 'First Prosecutions at the International Criminal Court', 27 *Human Rights Law Journal*, April 2006, 39.

54 J. de Hemptinne and F. Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings', 4 *Journal of International Criminal Justice*, 2006, 342.

55 Situation in the Democratic Republic of Congo, ICC-01/04-101. Decision on the Applications for Participation in the Proceedings of VPRS 1. VPRS 2. VPRS 3. VPRS 4. VPRS 5 and VPRS 6. 17 January 2006.

56 See for example ICC – 01 / 04, 6 February 2006, available via www.icc-cpi.int/library/cases/ICC-01-04-111_English.pdf.

57 para. 18 of ICC – 01 / 04.

may not be relevant as far as the prosecution is concerned. In any event, during the investigations stage, the Prosecutor will not be able to act in a isolated manner at all.

F. Independent at home? The Prosecutor's power to organize his office

With regard to the third limb of independence, the power to organize his office, the Prosecutor has a very wide margin of discretion. In particular, he is responsible for the organization of the office, the use of staff members and gratis personnel, recruitment, authorization of official travel, retention and security of information and physical evidence and application of all equipment of the Office.

Of course, the Prosecutor is not totally unlimited since he has to respect the financial regulations and the staff regulations, which have been adopted by the Assembly of States Parties and discussed above, which also provides for management oversight to the Prosecutor.[58]

Does the risk exist that the Assembly of State Parties, through budgetary tools, would hinder the Prosecutor's management of his office? By making cuts in the budget allocated to the Prosecutor and his Office, the Assembly of State Parties could indeed impact on the investigation and prosecution of cases since such investigations are very costly.

However, were such budget cuts to hinder the management of the Office of the Prosecutor by the Prosecutor, such conduct might violate Article 42 of the Rome Statute, which establishes that the Prosecutor has full authority over the management of his Office. In this regard, Article 112, para. 5 of the Rome Statute provides that the Prosecutor or one of his representatives may participate in the meeting of the Assembly of State Parties and its Bureau when appropriate.

Financial predictability is indeed key to the Office of the Prosecutor's being able to plan ahead and to move forward on certain issues. The Prosecutor's independent room for organizing his own Office is a vital component for a successful functioning of the institution that has fortunately been strongly inscribed into the Rome Statute.

G. The Prosecutor's independence : an assessment

In conclusion, the independence of the Prosecutor has been proclaimed in principle, but can be constrained to quite some degree in practice by the Pre-Trial Chamber, States (even not party to the Rome Statute) and the Security Council. For sure, if they do not do this the Prosecutor maintains his independence.

Even when they do, their power sometimes goes no further than being in a position to oblige the Prosecutor to reconsider his decision without having any power to substitute for the Prosecutor's office if the latter persists in its decision. Thus, independence remains the guiding principle, and will inherently be a concept with fluctuating contours in practice, depending on every single situation and whether or not the Pre-Trial Chamber, States or the Security Council decide to intervene.

The aforementioned multiple checks and balances remove the criticism of a

58 Article 112 (2) ICC Statute.

renegade Prosecutor which is accountable to no one. In this respect, it is not surprising that until now the Prosecutor has not yet used his *proprio motu* power to initiate an investigation (to the contrary even: the Prosecutor has refused to proceed to the investigation stage following communications received relating to the situation in Venezuela and Iraq), but has relied on State referrals and a Security Council referral. The only situation which the Prosecutor explicitly seems to contemplate is Côte d'Ivoire.[59]

State referrals will certainly make the investigations more easily since a referring State will most likely – though not certainly once it comes down to sensitive investigation – be cooperative in the field of investigations. Indeed, State self-referrals risk being *de facto* subject to the understanding that they are not a blanket cheque for the Prosecutor to investigate anything, in that as long as the conduct of the State is not the matter of the investigation, the Prosecutor can count on the support of the referring State, which is most probably more than glad to have others pay for the investigation against forces it is fighting internally anyway.

For example, the referral by Uganda aims primarily to investigate and prosecute the conduct of the leadership of the Lord's Resistance Army. Although this rebel group certainly has committed crimes within the scope of the Rome Statute, some conduct of the Ugandan military could equally be the subject of criminal investigations and proceedings before the Court. If this would be the case, it is very likely that Uganda would not be as cooperative as with investigations into the conduct of the Lord's Resistance Army.

For instance, although President Museveni declared to cooperate with the Court if members of the Ugandan army would be involved in crimes within the jurisdiction of the Court and to hand them over to the Court, he finely added that in any case Uganda would prosecute the alleged offenders itself.[60] It is this duality – leadership of the Lord's Resistance Army before the Court and leaders of the Ugandan Army before national courts – that has given rise to criticism.

Consequently, in like situations, State self-referrals could endanger the legitimacy of the Court in the eyes of victims. While this does not mean that the Prosecutor will be applying different standards, it may nevertheless lead to a situation in which he finds it far less easy to investigate certain types of perpetrators. What is legally possible will thus not necessarily be practically feasible. However, it is also important that the Court starts its activities smoothly in order to demonstrate that it indeed is the right body to deal with the type of international crimes it has been established for.

In the long term, however, the Prosecutor should not mainly rely on State referral, but use his *proprio motu* power, even if this entails entering into conflict with the States concerned: it is in the use of the *proprio motu* powers that his real force in selecting situations resides, taking into account the checks by the Pre-Trial Chamber.

Obviously, this is a long-term process, requiring the Prosecutor to increase his Office's legitimacy before actually resorting to using these powers. In any event, any use

59 Opening Remarks of the Prosecutor at the Fifth Session of the Assembly of State Parties, 23 November 2006, pages 5 and 6.

60 Quoted in P. Akhavan, The Lord's Resistance Army Case : Uganda's Submission of the First State Referral to the International Criminal Court, 99 *AJIL*, 2005, 411.

of his *proprio motu* power that would outrightly conflict with a State, cannot be done by the Prosecutor acting as a lone cowboy : widespread and serious diplomatic backing will be essential in order to avoid committing political and institutional suicide.

This type of delicate debates bring us to the question of whether and to what extent, even though being fully entitled to do so, the Prosecutor can or should decide not to exercise his powers in a particular case. The next section attempts to shed some light on this.

Section III: Prosecutorial policy and discretion

The Court is a body with limited resources and hence it will not be able to deal with all cases which are referred to it or, eventually, which are initiated by the *proprio motu* powers of the Prosecutor. A comprehensive analysis of the issue of prosecutorial discretion, in all its relevant dimensions and complexities, goes far beyond the present contribution.[61]

A. Who prosecutes?

In this respect, the Rome Statute emphasises that the main prosecution responsibility lies with the States Parties.[62] As a result, the complementarity principle is one of the cardinal stones in the edifice of the Court. Consequently, the Prosecutor – together with the Pre-Trial Chamber the decision maker on the matter of initiating an investigation – will have to weed through the information received and through referrals in order to select the cases which merit the time and resources of the Court. In this regard, a policy document was adopted.[63]

The main issue this policy document addresses is the complementarity principle and its consequences for the Prosecutor and his office. In general, the Prosecutor will only investigate a situation where there is a clear case of failure to take national action, due to the unwillingness of the State or due to the inability of the State to investigate or prosecute itself. Consequently, a major strategy of the Prosecutor and his Office will be to make States Parties aware that crimes within the purview of the jurisdiction of the Court are committed on their territory or by their nationals abroad and to induce them to take action themselves.

This is an important feature: in line with the complementarity principle, the Prosecutor has hereby confirmed that he will encourage States to start cases themselves before their own national criminal justice system. This is explicitly based on the recognition that States will generally have the best access to evidence and witnesses.[64]

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61 See, among others, Allison Marston Danner, 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court', 97 *AJIL*, 2003, 510 and Daniel D. Ntanda Nsereko, 'Prosecutorial discretion before national courts and international tribunals', *Journal of International Criminal Justice*, March 2005, 124.

62 Preamble, § 6 ICC Statute; Article 17 ICC Statute.

63 "Paper on some policy issues before the Office of the Prosecutor", available at: http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

64 P. 5 of the "Paper on some policy issues before the Office of the Prosecutor".

However, even if it is clear that a particular State is manifestly unwilling or unable to investigate and prosecute, it will not be evident that the Prosecutor will initiate the investigation.

The Office of the Prosecutor does not have an own police force and will hence have to rely on the will of States or on the support of the international community to conduct investigations *in situ*. If he and his Office have to operate in an environment of violence without the support of national police forces or of peace keeping forces, the safety of the staff and the witnesses, and the findings of the investigation cannot be protected. Consequently, the Prosecutor will have to be a diplomat as well in order to foster support for his cause with international organisations and States.

B. Who is prosecuted?

Another policy question for the Prosecutor is who to prosecute. Indeed, even if the Prosecutor is selective in choosing a situation which merits the attention of the Court, the Prosecutor will often be faced with a large group of potential witnesses, victims and perpetrators.

For example, the situation in the Democratic Republic of Congo, even only in the Ituri region, was characterised by a widespread and systematic crimes which fall within the ambit of the Rome Statute. Furthermore, in the situation in Darfur, the Prosecutor received a list of 50 names of persons which were allegedly responsible for the crimes in Darfur.[65] Obviously, far from all of these can be prosecuted, be it only for logistical reasons. In the case of Uganda, only a handful of persons of the Lord's Resistance Army will be prosecuted.[66]

In short: who to prosecute and how to deal with the alleged perpetrators who will not stand trial before the Court (the so-called impunity gap)? The policy of the Prosecutor will be one of targeting the *main* leaders and the *main* criminals: "the *leaders* who bear most responsibility for the crimes"(emphasis added).[67] Hereby, the Prosecutor confirms what has been the Court's aim from the very beginning: it has been established not to target small, but "big fish".

On some occasions, starting investigations and prosecutions of low-level perpetrators will potentially be useful to establish the criminal responsibility of high-level offenders : one builds up the case against the major leader. Still, although it remains to be seen how this will work out in practice, it would seem like the Prosecutor shall not first try the "small fish".

Doing the latter, however, has not been altogether excluded in the Prosecutor's

65 Available at: http://www.icc-cpi.int/pressrelease_details&id=101&l=en.html.

66 At this moment there are arrest warrants for Joseph Kony, decision available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf; Vincent Otti, decision available at: http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-54_English.pdf; Raska Lukwiya, decision available at: http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-55_English.pdf; Okot Odhiambo, decision available at: http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-56_English.pdf and Dominic Ongwen, decision available at: http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-57_English.pdf.

67 For a discussion of the terminology used and of its potential ambiguities, see William Schabas, "First Prosecutions at the International Criminal Court", 27 *Human Rights Law Journal*, April 2006, 26-27.

own – non-binding – policy paper: indeed, as *"a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes"*. Thus, exceptions to the "general rule" remain possible and the Prosecutor's independence allows him to single out others than those bearing greatest responsibility.[68]

Dealing with the impunity gap, however, will not be that easy, as the Prosecutor warns in this Policy Document. Still, article 53 of the Rome Statute empowers him to decline to investigate or prosecute when this would be detrimental to the "interests of justice".

Alternative means (than criminal investigation in front of the Court) for resolving the situation will be necessary, whether by encouraging and facilitating national prosecutions (not only by the territorial or national States, but also by other States on the basis of universal jurisdiction) by strengthening or rebuilding national justice systems, by providing international assistance to those systems or by some other means. For example, as indicated, the Prosecutor may very well decide to defer to a national criminal justice system "in the interests of justice",[69] though the Prosecutor's decision to defer to such a system is reviewable by a Pre-Trial Chamber.[70]

Such deferral can for example occur when there are politically viable and legally acceptable alternative justice mechanisms and amnesty-granting programs. Due to the fact that the Rome Statute has not defined this concept of "interests of justice", the Rome Statute has not taken any explicit position as to any of the so-called "transitional justice" mechanisms.

In light of the experience in Uganda in the spring of 2006, where the negotiations between the rebel movements and the government seem to hinge on a trade-off between withdrawing the arrest warrants and signing up for peace, this may prove to be a fundamental flaw in the Rome Statute, fatally leading the Prosecutor to have to take position in politically sensitive areas without clear legal guidelines, thereby risking a deferral of the situation by the Security Council pursuant to Article 16 of the Statute. It is cautiously and with many conditions submitted that, if that is indeed in the interests of justice, the Rome Statute does not foreclose the use of amnesties for example.[71]

The issue of the Court's relationship with transitional justice mechanisms goes far beyond the scope of the present contribution.[72] While there is no easy solution to

68 Paper on some policy issues before the Office of the Prosecutor, September 2003, page 7, available via http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

69 Rome Statute, art. 53 (2)(c).

70 However, the concept "interests of justice" has not been defined in the Rome Statute. Though it would seem to be a broad concept, the decision may not be invoked upon "arbitrary grounds" and such discretion must be exercised "in a reasonable manner". See Thomas Hethe Clark, 4 *Washington University Global Studies Law Review*, 2005, 397.

71 See, for an overview of the many conditions preceding this statement, as well as a number of examples and hypothesis, Thomas Hethe Clark, 4 *Washington University Global Studies Law Review*, 2005, 407 and following.

72 For an excellent introduction to the issues, see Darryl Robinson, 'Serving the interests of justice : amnesties, truth commissions and the international criminal court', *European Journal of International Law*, June 2003, 481.

the problem, it can be hoped that the prosecution of the main leaders of the crimes will encourage national authorities to initiate investigations and prosecutions or that these prosecutions will set an example and have preventive ("deterrent") effect.

As the previous and following remarks show, it is clear that many important decisions of the Office of the Prosecutor can be reviewed by a Pre-Trial Chamber. This statement holds furthermore true for quite a number of stages of the Prosecutor's work. The following section provides some examples of a more technical nature, related to the stages dealt with above, in order to demonstrate how and to what extent the Office of the Prosecutor is independent.

Section IV. The stage of preliminary examinations

A. General duty to start preliminary examinations

Regardless of a State or Security Council referral or the commencement of an investigation based on the *proprio motu* power of the Prosecutor, the first duty of the Prosecutor is to assert if there exists a reasonable basis to start an investigation. This stage of the proceedings, the stage of the preliminary investigations, is explicitly required by Article 15, para. 6 of the Rome Statute and takes place before the actual start of the investigation.

Indeed, Article 15 para. 2 and 3 of the Rome Statute obliges the Prosecutor to analyze the information received before requesting the Pre-Trial Chamber to grant the authorization of the start of an investigation. Furthermore, Article 53 dealing with referrals by States and the Security Council,[73] equally requires the preliminary examination of the information transmitted by the referring State or the Security Council, since the Prosecutor has the right to determine that the referral cannot constitute a sufficient base to start the investigations, which entails a form of preliminary assessment of the information received.

B. Method and parameters

The Prosecutor has developed a policy paper in order to deal with the management of referrals and communications, or information provided by other sources than referring States or the Security Council.[74]

In general, the Office of the Prosecutor takes a more rigorous approach in determining if a communication can serve as a basis for investigations, due to the required authorization by the Pre-Trial Chamber. The Rome Statute remains silent on the required content of the communications. On the one hand, one cannot expect that the provider of the information is able to conduct an extensive inquiry into the conduct in question for the purpose of sending detailed information to the Office of the Prosecutor. On the other hand, communications which are too general and broad will not be of great help for the Prosecutor.

In this respect, article 42 of the Rome Statute obliging the Prosecutor to examine substantiated information seems to indicate that the preferred basis for analysis

73 Article 53 (3) ICC Statute.

74 Available at: http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

is comparatively detailed and credible information. As a result, the main task of the Prosecutor will be to analyze the seriousness of the information,[75] an analysis which will be affected by the detailed and substantive nature of the available information.

Hence, if the provided information does not allow for sufficient guidance to determine that a reasonable basis for starting an investigation exists, the Prosecutor will decide to inform the sender that he will not request the authorization of the Pre-Trial Chamber to commence an investigation. Furthermore, the Prosecutor can equally determine that there is no reasonable basis to start an investigation on the basis of a State or Security Council referral due to the general vagueness of the provided information, although in such cases the referring State and the Security Council will mostly be able to provide for sufficiently detailed information which would allow to examine the seriousness of the information.

The general method and parameters to asses the received information is laid down in Article 15, para. 2 and Article 53, para. 1 of the Rome Statute respectively. Although Article 15 deals with investigations started on the basis of the exercise of the *proprio motu* powers of the prosecutor and Article 53 with investigations on the basis of a State or Security Council referral, the general method established in Article 15 is applicable to Article 53, while the parameters of Article 53 are pertinent to Article 15.[76]

The unclear relationship between these two articles of the Rome Statute has been cleared by the rules of Procedure and Evidence, more in particular Rule 48 – providing that the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation under article 15, para. 3, he will have to consider the criteria set out in article 53, para. 1 – and Rule 104 – thus introducing the method of Article 15 para. 2 in case of State or Security Council referral.

The general method of conducting preliminary examinations is, on the one hand, that one proceeds to requesting additional information and to collect written or oral testimony at the seat of the Court. In all cases of received information, the Prosecutor has to protect the confidentiality of such information and testimony or take any other necessary measures pursuant to his or her duties under the Statute.[77]

The parameters allow the Prosecutor to determine if the commencement of an investigation subsequent to the preliminary investigation is warranted.

In this respect, Article 53, para. 1 of the Rome Statute establishes *three parameters* which the Prosecutor has to take into account: whether the alleged conduct falls within the jurisdiction of the Court; whether the case is or would be admissible; and whether there are substantial reasons to believe that an investigation would serve the interests of justice.

In addition, the Prosecutor will take into account his prosecutorial policy and the likelihood of any effective investigation being possible. When all the requirements have been fulfilled, the Prosecutor will request for authorization of the Pre-Trial Chamber to initiate investigations in case of exercise of *proprio motu* powers or

75 Rule 104 ICC Rules of Procedure and Evidence.

76 G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. II, 1146-1148.

77 Rule 46 ICC Rules of Procedure and Evidence.

will initiate the investigations automatically in case of a State or Security Council referral.

With regard to the *first parameter*, jurisdiction, the totality of the information indicates that a crime within the jurisdiction of the Court has been committed, in the territory of a State Party or by a national of a State Party, after the entry into force of the Rome Statute for the State concerned (the last two limbs of jurisdiction are not relevant in case of a Security Council referral).

The *second parameter* deals with admissibility and aptly refers to Article 17 of the Rome Statute. According to this provision, a case will be inadmissible if the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; the person concerned has already been tried for conduct which is the subject of the complaint; and the case is not of sufficient gravity to justify further action by the Court.

While the first three grounds of inadmissibility, mentioned in article 17 of the Rome Statute, are objectively assessable, the last ground gives the Prosecutor some margin of appreciation. Indeed, the gravity of the case will *inter alia* depend on the crimes committed, the role of the perpetrator and the number of victims. Since the Prosecutor before the starting up of an investigation, will not necessarily have sufficient data to determine the perpetrators, he will frequently look at the crimes committed and the numbers of victims. For instance, concerning the communication of Iraq, the Prosecutor declined to open investigations partially basing his decision on the insufficient gravity of the "case" since the number of victims of particular serious crimes was too low.[78]

It is interesting to note that the seriousness of the crimes and the interest of victims also play a role in determining whether it would not be in the interests of justice to proceed with the investigations. In this regard it has been held that Article 17, para. 1 (d) is in fact related to the last parameter, namely the starting up of an investigation in the interests of justice[79] However, this raises some questions since the refusal to start investigations based solely on Article 53, para. 1 (c) has some consequences which are not attached to the other parameters (*infra*).

Furthermore, although Article 53, para. 1 (b) does not refer to the interest of victims, should the Prosecutor take them into account if he decides not to start investigations based on the insufficient gravity of the crime laid down in Article 17, para. 1 (d) of the Rome Statute? A proposed solution out of this conundrum is to regard the decision not to prosecute on the basis of the gravity of the crime as falling under Article 53, para. 1 (c) of the Rome Statute and hence under the parameter

78 Office of the Prosecutor, "Communication concerning the Situation in Iraq – Response", 9 February 2006, p. 8-9, at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf; It has to be noted that at this stage – before the opening of an investigation – it is rather odd to asses the gravity of the case, since no case will be identifiable yet.

79 G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. II, 1153-1154.

of not being into the interests of justice; as a result, due consideration should be had to the interest of victims and the special consequences attached to a refusal to initiate an investigation based solely on Article 53, para. 1 (c) of the Rome Statute are applicable.[80]

For instance, especially in the case of war crimes, it could be possible that the crimes fall within the jurisdiction of the Court, but that they are not considered to be grave enough to commence an investigation. Would this decision be based upon Article 53, para. 1 (b) or Article 53, para. 1 (c) of the Rome Statute? As such, each could serve as a basis. Another solution could be to consider the insertion of "gravity of the crime" in Article 53, para. 1 (c) as superfluous since it is already contained in Article 53 para. 1 (b).[81] According to this reading the Prosecutor will decline initiating an investigation, although the "case" is of sufficient gravity since taking into account the interests of victims it is not in the interests of justice to proceed with the investigation.

The latter solution seems to be more correct. Indeed, Article 17 determines that the Court – and the Prosecutor is an organ of the Court – *shall* declare a case to be inadmissible if one of the situations of Article 17, para 1 (a)-(d) of the Rome Statute appears. This entails that if the Prosecutor decides that a "case" is not of sufficient gravity because of the gravity of the crimes, he has to declare the case inadmissible pursuant to Article 17, and has to base his decision not to initiate an investigation on the inadmissibility of the "case" and not on the criterion that the investigation will not serve the interests of justice.

C. Procedure for dealing with communications and referrals

The Office of the Prosecutor has adopted provisional regulations laying down how communications and referrals will be dealt with.[82] The very fact of having made public this document shows the degree to which the Office of the Prosecutor seeks to ensure transparency. An explicitly mentioned objective of the document, indeed, is *"for States and civil society to understand (the) methodology and practice"*.

Communications have to go through three phases, while referrals will only be analyzed in two phases, which are identical to the last two phases of the communications procedure.

The Information and Evidence Unit is responsible for receiving, registering, and securing *referrals* and supporting documents received by the Office of the Prosecutor from the Security Council or a State Party and of communications. In case of a referral, the Head of the Information and Evidence Unit will immediately inform the Prosecutor of the referral and will make electronically available the referral and supporting documents to the heads of Jurisdiction, Complementarity and Cooperation Division (JCCD), the Investigation Division and the Prosecution Division.

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80 *Ibid.*, 1153-1154.

81 M. Bergsmo and P. Kruger, "Article 53", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, p. 708-709.

82 These provisional regulations are available at: http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

Next, the Prosecutor will inform the Presidency of the referral. In case where a State Party provides a referral in confidence, the Prosecutor will naturally inform the Presidency on condition of confidentiality, until such time as the referring State Party agrees to disclosure. The receipt of the referral shall be acknowledged by the Head of the Information and Evidence Unit or otherwise as directed by the Prosecutor.

With regard to *communications*, an additional preliminary analytical phase is instituted, namely a review of the communication by the Information and Evidence Unit and JCCD. The Information and Evidence Unit will on a weekly basis, or more frequently as required by the number of communications received or reasons of urgency, prepare reports analysing the communications received. The reports will subsequently be made electronically available to JCCD.

In these reports it will be identified which communications manifestly do not provide any basis for the Office of the Prosecutor to take further action, which communications appear to relate to a situation already under analysis, investigation or prosecution and communications warranting further analysis in order to assess whether further action may be appropriate. The JCCD has to review these reports on communications and confirm or amend the preliminary identifications made by the Information and Evidence Unit.

On the one hand, when the review by the Information and Evidence Unit and the JCCD identifies a communication which relates to a situation already under analysis, investigation, or prosecution, the Information and Evidence Unit will send an acknowledgement, and the JCCD will draw the information to the attention of the relevant staff of the Office of the Prosecutor. On the other hand, when the review identifies a communication as either manifestly not providing any basis for the Office of the Prosecutor to take further action or as warranting further analysis, it shall be included in a report from the JCCD to the Prosecutor and the Executive Committee, with appropriate recommendations.

Furthermore, the report has to be made electronically available to the Investigation Division and the Prosecution Division. Members of the Executive Committee may request clarification or make comments. After hearing any comments, the Prosecutor will determine whether the communication manifestly does not provide any basis for the Office of the Prosecutor to take further action, in which case the Information and Evidence Unit will send an acknowledgement and response and the information will be archived; or whether further analysis is necessary to evaluate the seriousness of the information in the communication, in which case the Information and Evidence Unit shall send an appropriate acknowledgement and the communication will be analysed in a second phase.

In the second phase, or the first phase in case of referrals, the JCCD will assess the jurisdiction of the Court and the admissibility of the situation conducting the analysis on the basis of Article 15 (2) of the Rome Statute and Rule 104, including issues of jurisdiction, admissibility, interests of justice, and credibility and sufficiency of information. In carrying out this analysis the JCCD has to take into account and examine related communications and other readily-available information.

Furthermore, at this stage, the JCCD may consult with the Prosecution Division and the Legal Advisory Section, if it deems this appropriate and the Executive Committee may recommend that the Investigation Division gather information about alleged crimes identified by the referrals or the communications, taking into

account the reports and recommendations from the first phase and the analysis conducted by the JCCD about jurisdiction and admissibility.

Among the measures available to the JCCD in assessing issues of jurisdiction, admissibility and the interests of justice, are the identification of situations to be monitored on an ongoing basis, the contacting of the State or States that would normally exercise jurisdiction, the seeking of additional information about *inter alia* the existence and progress of national proceedings, unless there is reason to believe that such consultations may prejudice the future conduct of an analysis or investigation, the taking of appropriate steps to assess the progress of national proceedings relating to crimes within the jurisdiction of the Court and to seek additional information as appropriate, and establish and maintain contacts with States and organisations for provision of information and co-operation.

In the end, the JCCD will prepare reports summarising its analyses and submit them to the Executive Committee which will cast an advice to the Prosecutor. In this respect, the JCCD may make recommendations for consideration by the Executive Committee, including recommendations that there is no reasonable basis for further analysis, that further analysis and monitoring is required, and that advanced analysis is warranted in a next analysis phase after consultation with the Investigation Division.

Taking into account the reports and recommendations submitted by JCCD and the advice of the Executive Committee, the Prosecutor may on the one hand determine that there is no reasonable basis for further analysis. In such a case, the sender will be promptly informed of the decision and the reasons for the decision and the information shall be archived. Any such decision is provisional and may be reopened in the event that new information is forthcoming. On the other hand, the Prosecutor may determine that further analysis and monitoring relating to jurisdiction and admissibility is required or that advanced analysis in a next phase is warranted.

In the last analysis phase, the phase of advanced analysis and planning, the Prosecutor may authorise or instruct his staff to seek additional information, to receive written or oral testimony at the seat of the Court, to assess the progress of national proceedings relating to crimes within the jurisdiction of the Court, to prepare reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under Article 53 of the Rome Statute, to prepare an investigation plan on the situation or the cases, and to take other appropriate measures to facilitate analysis and prepare for possible investigation.

The JCCD will be responsible for any reports on jurisdiction, admissibility, the interests of justice and any other matter relevant to the determination under Article 53 of the Rome Statute.

If necessary, the JCCD will obtain additional information on the alleged crimes from the Investigation Division and may consult with the Prosecution Division and the Legal Advisory Section. In the event that the Prosecutor directs the preparation of an investigation plan, the Executive Committee shall establish a joint analysis team, comprising members of the JCCD, the Investigation Division, and the Prosecution Division.

The Investigation Division shall lead the joint analysis team and shall be responsible for preparing the investigation plan. The joint analysis team shall consult with the Legal Advisory Section and the JCCD will provide input to the investigation

plan on the topics within its expertise. The Executive Committee can in this regard appoint a staff member to co-ordinate the work if necessary.

Taking into account any reports and recommendations submitted by the JCCD and the joint analysis team, and the advice of the Executive Committee, the Prosecutor may determine that there is not a reasonable basis to proceed with investigation, in which case the sender of the information will be informed, or he may decide to initiate an investigation pursuant to Article 53 or to seek authorisation from the Pre-Trial Chamber under article 15 (3) of the Rome Statute.

D. Duty of notification

As indicated in the description on the procedure of the preliminary examination phase, the Prosecutor has a duty to inform the provider of information that he declines to start up an investigation, a duty flowing from Article 15 (6) of the Rome Statute. However, Article 15 solely deals with the requirements of a *proprio motu* investigation and not with cases of referrals by States or the Security Council. The concrete procedure to be followed in case of referrals is laid down in Rule 105 of the ICC Rules of Procedure and Evidence.[83]

Pursuant to this Rule the Prosecutor has a duty to inform the Security Council and the relevant State in case of a decision not to initiate an investigation, a conclusion that is further corroborated by the possibility of States and the Security Council to launch a request to the Pre-Trial Chamber to review the decision of the Prosecutor,[84] which implies that the decision and its reasons are communicated to them, while having due regard for the protection of the safety, physical and psychological well-being, dignity and privacy of the victims and witnesses.[85]

A second obligation of notification concerns the duty to notify the Pre-Trial Chamber of the decision not to commence an investigation based solely on Article 53, para. 1 (c) of the Rome Statute.[86] In such a case the Pre-Trial Chamber may decide on its own motion to review the decision of the Prosecutor.[87] Consequently, the Pre-Trial Chamber will have to be informed of the decision and the reasons in writing.[88]

E. Remedies against a decision not to initiate an investigation

The decision of the Prosecutor not to initiate an investigation is not the end however, and the analysis of the following sheds some particular light on the Prosecutor's independence. First, the Pre-Trial Chamber can review decisions taken under Article 53 (1) (a) and (b) ICC Statute in case of a State or Security Council referral. Second, it may equally review on its own motion the decision of the Prosecutor not to commence an investigation on the basis that such an investigation would not be in the interests of justice.

83 Rule 105 (1) ICC Rules of Procedure and Evidence.
84 Article 53 (3) (a) ICC Statute.
85 Rule 105 (3) ICC Rules of Procedure and Evidence.
86 Article 53 (1) ICC Statute.
87 Article 53 (3) (b) ICC Statute.
88 Rule 105 ICC Rules of Procedure and Evidence.

Pursuant to Rule 107 of the Rules of Procedure and Evidence, the Security Council and the referring State can within 90 days after the notification of the decision not to prosecute address the Pre-Trial Chamber in writing and motivated to request the review the decision of the Prosecutor. The Pre-Trial Chamber can request the Prosecutor to transmit the necessary information or documents in his possession, or summaries thereof and will take measures to protect these documents and the safety of victims and witnesses and members of their family.

Lastly, it can seek further observations from States or the Security Council. Furthermore, Rule 109 of the ICC Rules of Procedure and Evidence determines that the Pre-Trial Chamber, if it decides to review the decision of the Prosecutor based solely on Article 53 (1) (c) on its own initiative, has to inform the Prosecutor within 180 days following the notification and has to establish a time limit within which the Prosecutor may submit observations and other material.

In the end of the review, the Pre-Trial Chamber will either determine to confirm the decision of the Prosecutor not to initiate investigations or request the Prosecutor to reconsider his decision. The decision of the Pre-Trial Chamber needs a majority of judges, will be clad with reasons and communicated to all who made submissions before the Pre-Trial Chamber.[89]

If the Pre-Trial Chamber adopts the decision to request the Prosecutor to reconsider his decision not to investigate, the Prosecutor will as quickly as possible rethink his decision, notify the Pre-Trial Chamber of his final decision and its reasons and inform everyone who participated in the review.[90] It is important to note that the Prosecutor is at liberty to retain his initial decisions, although it has been argued that a new review under the same conditions may follow.[91]

However, this could lead to an endless possibility of review of the decision of the Prosecutor and could undermine his independence. The issue is slightly different when the decision of the Prosecutor was solely based on the reason that an investigation was not in the interests of justice: the review of the Pre-trial Chamber concluding that this is not the case, will oblige the Prosecutor to initiate the investigations since Article 53 (3) (b) explicitly determines that such a decision of the Prosecutor can only have effect if confirmed by the Pre-Trial Chamber.

Hence, if the Pre-Trial Chamber does not confirm the decision of the Prosecutor, it is of the opinion that it is in the interests of justice to start an investigation and due to the absence of other grounds not to initiate investigations the Prosecutor has no reasons left not to start investigations. Consequently, Rule 110 of the ICC Rules of Procedure and Evidence determines that the Prosecutor in such case *shall* (emphasis added) proceed with the investigation.

While the Pre-Trial Chamber is not required, only allowed, to proceed to review a negative decision of the Prosecutor based on Article 53, para. 1 (c) of the Rome Statute, the fact remains that, if it decides to do so, unclarity pertains as to the relationship between on the one hand the second sentence of Article 53, para. 3 (b),

89 Rule 108 and Rule 110 ICC Rules of Procedure and Evidence.

90 Rule 108 110 ICC Rules of Procedure and Evidence.

91 G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. II, 1157.

stating that the decision of the Prosecutor not to initiate an investigation is only effective after confirmation by the Pre-Trial Chamber, and on the other hand the wording of the first sentence of Article 53, para. 3 (b), laying down that the Pre-Trial Chamber *may* (emphasis added) review on its own initiative.

Although the matter is certainly not settled, it is argued that there is no need to confirm every decision based on Article 53, para 1 (c), but only if the Pre-Trial Chamber wishes to review the decision of the Prosecutor.[92] In this respect, the beginning of the second sentence, of Article 53, para. 3 (b), "In such a case", could easily be interpreted as referring to the situation when the Pre-Trial Chamber has decided to review the decision. In case the Pre-Trial Chamber does not exercise its right to review the decision of the Prosecutor not to initiate an investigation based upon Article 53, para. 1 (c), the decision of the Prosecutor will be final, thus respecting the independent assessment of the Prosecutor.

Finally, it has to be remarked that this review can only be initiated by the Pre-Trial Chamber itself, when applicable, or on the request by a State Party and the Security Council making a referral, and not by other interested persons (for example victims or the providers of information in case of *proprio motu* investigations). Consequently, these persons can only present additional information to the Prosecutor in the hope of convincing him to reconsider or address the Pre-Trial Chamber to review the decision on its own initiative if solely based on Article 53 (1) (c) of the Rome Statute.

Thus, the issue of initiating an investigation again demonstrates the equilibrium between on the one hand the independence of the Prosecutor and on the other hand the accountability of the Prosecutor. The Prosecutor remains independent in his decision not to initiate an investigation, but this decision can come under scrutiny due to requests by States and the Security Council and due to the Pre-Trial Chamber.

Section V: The investigations and the pre-trial phase

When the Prosecutor starts his investigation on the basis of a State referral or on the basis of authorization by the Pre-Trial Chamber in case of *proprio motu* investigations, the Prosecutor is obliged to inform all States which normally could exercise jurisdiction. Those States can request to defer the investigation. Although such a challenge is not possible in case of a Security Council referral, it still can become the subject of challenges relating to the jurisdiction or admissibility of the Court during the investigations. Consequently, in a first section (V.a) these procedures will be discussed. Thereafter the duties (V.b) and powers (V.c) of the Prosecutor while conducting investigations will be examined, before ending by (V.d) the criteria the Prosecutor should apply at the end of the investigation in order to determine if the investigation is sufficient to bring an alleged perpetrator before the Court.

92 Pro: G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. II, 1157-1158; contra: M. Bergsmo and P. Kruger, "Article 53", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, 713.

A. Deferral to national jurisdictions and challenges to the jurisdiction of the Court and the admissibility of the case

At the start of the investigation into a situation in case of authorization by the Pre-trial Chamber or by a State referral, the Prosecutor has to notify all States which in normal circumstances could be deemed to have jurisdiction.[93]

Within one month of the receipt, such a State may request the deferral to the national sphere on the basis that it is investigating or has investigated the situation concerned. In other words, the State alleges that it is or has been able and willing to investigate and prosecute the situation in question and maybe it has even convicted particular perpetrators. Consequently, cases related to the situation investigated would be inadmissible pursuant to Article 17 (1) (a)-(c) of the Rome Statute, or may be so, pursuant to Article 17 (1) (d), given their being considered as not of sufficient gravity to justify further action by the Court. In such case, the Prosecutor is obliged to grant the request and defer the investigations to the national level, unless the Pre-Trial Chamber decides otherwise. In case the Pre-Trial Chamber still defers the situation, this decision can be appealed. Furthermore, the deferral is open to review.

It is important to note that not only State Parties have to be informed, but equally other States, which would normally exercise jurisdiction, based on the information available.[94] This provision goes far, and it can be questioned why States who are not supporting the Court should be capable to intervene directly into the work of the Court without subscribing to the obligations of the Rome Statute. Furthermore, it is not entirely clear what is meant by "normally" exercising jurisdiction. Does this include States which could exercise universal jurisdiction, if this is mandatory and one of the alleged perpetrators is found or resides on there territory?

On the other hand, in the practice of the Court so far, which may be too limited in order to draw sound conclusions, there have been no requests for deferral, notably in the case of the situation in Uganda and the Democratic Republic of Congo , which might indicate that States are reluctant to request such deferral to the national level , although the fact of the self-referral could also have had an impact: it sounds rather strange indeed for a State to first refer a situation to the Court and thereafter to request deferral.

If it occurs, however, the request for deferral is in principle mandatory, obliging the Prosecutor to defer. However, this does not mean that the Prosecutor has to wait until the timeframe of one month has passed to conduct investigations. Indeed, the wording of Article 18 (1) of the Rome Statute clearly states that the Prosecutor has to notify the relevant States when he initiates an investigation, indicating that he in any event may start with the investigation, pending the request for deferral.[95]

When a State requests a deferral it has to make the request in writing and provide information concerning its investigation, while the Prosecutor may request

93 Article 18 (1) ICC Statute.

94 Article 18 (1) ICC Statute.

95 G. Turone, "Powers and Duties of the Prosecutor", in A. Cassese, P. Gaeta and J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, 1163.

additional information from that State.[96]

Thus, in the end, the Prosecutor will have to defer unless he applies to the Pre-Trial Chamber with a request to continue the investigation. The application has to be in writing and reasoned and the information provided by the State to the Prosecutor has to be communicated to the Pre-Trial Chamber. It is very likely that the reasoning will be based on the factors laid down in Article 17 of the Rome Statute and that the application will need to argue why any case arising from the situation would be admissible before the Court. Furthermore, the Prosecutor will have to inform the State making the request of the deferral of his application and summarize the basis of application.[97]

The Pre-Trial Chamber will decide on the procedure to be followed, may take measures for the proper conduct of the procedure and will decide if it will hold a hearing. The Pre-Trial Chamber will consider the application of the Prosecutor, examine the information of the State and decide to authorize the continuation of the investigation in light of the criteria laid down in Article 17 of the Rome Statute.

The motivated decision of the Pre-Trial Chamber will be as expedient as possible communicated to the Prosecutor and the State requesting the deferral.[98]

No matter what decision the Pre-Trial Chamber takes, the Prosecutor can always, even in case of a deferral, seek the authority from the Pre-Trial Chamber in order to take the necessary investigative steps in case of a unique investigation opportunity.[99] This application will be considered *ex parte* and *in camera*.[100]

Moreover, the Prosecutor's deferral to the national jurisdiction is open to review six month after the date of deferral or at any time when there has been a significant change in the circumstances resulting from the State's inability or unwillingness to genuinely conduct investigations or prosecutions.[101]

The procedure mirrors the one of the application not to defer the situation to the national jurisdiction.

Lastly, the Prosecutor has the right to periodically request information of the progress of the investigations and the ensuing prosecutions, which the States concerned shall send without undue delay.[102]

The procedure of Article 18 of the Rome Statute is only applicable to issues of admissibility and cannot be initiated in case of a Security Council referral. However, this does not mean that under the Rome Statute no challenge to the jurisdiction and admissibility is possible at all. Indeed, pursuant to Article 19(1) of the Rome Statute, the Court has in any case the duty to examine if it has jurisdiction and that the case is admissible. This entails that the Court will have to establish that it has jurisdiction and that the case is admissible even in the case of a Security Council Resolution.

Furthermore, an accused or a person for whom an arrest warrant or a summons to appear has been issued, a State which has jurisdiction and is investigating or pros-

96 Rule 53 ICC Rules of Procedure and Evidence.
97 Rule 54 ICC Rules of Procedure and Evidence.
98 Rule 55 ICC Rules of Procedure and Evidence.
99 Article 18 (6) ICC Statute.
100 Rule 57 ICC Rules of Procedure and Evidence.
101 Article 18 (6) ICC Statute.
102 Article 18 (5) ICC Statute.

ecuting and a State of which acceptance of jurisdiction is required, can challenge the admissibility of a case on the grounds of Article 17,[103] even in case of a Security Council referral. These States have to make their challenges at the earliest opportunity.[104]

However, some limitations apply. Firstly, a State which has already challenged a decision of the Pre-Trial Chamber under Article 18 of the Rome Statute can only challenge the admissibility under Article 19 if new significant facts have surfaced or significant changes have occurred.[105] Furthermore, a challenge to the jurisdiction and admissibility can only be made once and this before or at the commencement of the Trial.

Only in exceptional circumstances can the Court grant the leave for a challenge to be brought more than once or after the commencement of the trial. Moreover, challenges at the commencement of the trial or later can only deal with inadmissibility of the Court based on the prior trial of the persons for the crimes alleged.[106]

Apart from the accused or persons for which an arrest warrant or summons to appear has been issued, States who have jurisdiction and are investigating or prosecuting and States whose acceptance of jurisdiction is required, the Prosecutor can seek a ruling of the Court on any issue of jurisdiction and admissibility. A strategic use of this power could seriously limit challenges made by other actors and speed up proceedings. However, when the Prosecutor seeks a ruling, he has to inform the victims and those who have referred the case to the Court.

A request or application made under Article 19 of the Rome Statute has to be in writing and state the reasons for it. When a Chamber receives such a request or application or brings the issues of jurisdiction of admissibility on the forefront itself, it will decide on the procedure to be followed and guard the proper conduct of the procedure. In this respect, it may organize a hearing, but is not obliged to do so.

It can join the request or application to the confirmation or to a trial procedure, if this should not cause unnecessary delay. In case the Chamber opts for this, it will decide the question on jurisdiction and admissibility first. Furthermore, the Court will transmit the request or application received to the Prosecutor and to the accused or the person for which an arrest warrant or a summons to appear has been issued and allow them to make written observations.

When the Prosecutor requests a decision on the jurisdiction or the admissibility, the Registrar will inform the States or the Security Council who have made the referral and the victims who have already communicated with the Court in relation to the case or with their legal representatives and provide them in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the

103 Article 19 (2) ICC Statute.

104 With regard to an accused or person for whom an arrest warrant or a summons to appear has been issued, it has been held that the *ad hoc* defence counsel cannot challenge the jurisdiction or admissibility of the Court when there is no accused or arrest warrant or summons to appear; *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, No. ICC 01/04, 9 November 2005, 4, at http://www.icc-cpi.int/library/cases/ICC-01-04-93_English.pdf.

105 Article 18 (7) ICC Statute.

106 Article 19 (4) ICC Statute.

grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged.

The referring State, the Security Council and the victims or their representatives will have the opportunity to submit written observations. In any event, the question of jurisdiction will be dealt with firstly before examining the questions of admissibility.[107]

Lastly, if the challenge is made prior to the confirmation of the charges the challenge will be decided by the Pre-Trial Chamber; if made after the confirmation a Trial Chamber will look into the matter. If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated.[108]

When a State makes an application under Article 19 of the Rome Statute, the Prosecutor has to suspend the investigation pending the decision of the Chamber, although he can request the Chamber to take some investigative steps, namely to preserve evidence where there is a unique investigation opportunity or a danger that the evidence might get lost, to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge, and to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest in co-operation with the relevant States. Applications relating to these issues shall be heard *ex parte* and *in camera*.[109] The making of an application will however not affect any investigative act taken prior to the application.

When the Chamber decides that the case is inadmissible, the Prosecutor may submit a request for a review of the decision when he is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible.[110] The request has to be filed to the Chamber which made the latest decision on admissibility. The States whose challenge to the admissibility provoked the request of the Prosecutor, will be informed of the request and can make written representations.

If the Prosecutor, in the end, defers an investigation, he may request that the relevant State make available to the Prosecutor information on the proceedings. That information will be qualified as confidential at the request of the State concerned. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

B. The duties of the Prosecutor during an investigation

Article 54 (1) contains and extensively describes the duties of the Prosecutor while investigating.

The *first duty* is to research the objective truth. Subsequently, the Prosecutor has

107 Rule 58 and 59 ICC Rules of Procedure and Evidence.

108 Rule 60 ICC Rules of Procedure and Evidence.

109 Rule 61 *juncto* Rule 57 ICC Rules of Procedure and Evidence.

110 Article 19 (10) ICC Statute.

to extend the investigation to cover all the facts and evidence, provided that they are relevant to the case and investigate incriminating and exonerating circumstances on equal footing. In this respect, the Prosecutor is not solely a party to the trial, but is equally an objective and impartial organ of justice, as is comparable to prosecutors in civil law countries. In this regard the Prosecutor differs from the Prosecutor of the ICTR or the ICTY which are merely regarded as a party to the trial, although they have the duty to reveal exculpatory evidence, but not to research it.

The Prosecutor of the Court has also this duty, but his duties during investigations are going much further. The insertion of this duty can be labelled as a significant improvement since the experience of the *ad hoc* Tribunals has demonstrated that the gathering of exculpatory evidence by the accused was not self-evident due to the lack of co-operation of the authorities, especially in the former Yugoslavia. The institution of a duty for the Prosecutor to search, with the same efforts, for exculpatory evidence, constitutes a clear mandate for the Prosecutor to equally investigate both sides of the case.[111]

The *second duty* of the Prosecutor comprises of the protection of victims and witnesses.[112] The emphasis of this duty clearly lays on the protection of vulnerable persons and the Prosecutor should devote special attention and protection to the interest and personal circumstances of these persons, when they are involved in the investigation as a potential witness, and certainly when the person is a victim of a crime.

Among the personal circumstances listed in Article 54 (1) (b) of the Rome Statute one can find the age, gender, health ... As a result, the Rome Statute imposes particular care on the Prosecutor, whenever appropriate, with respect to the invalid, the elderly, children, and women. Moreover, special care has to be afforded paying due attention to the nature of the crime, namely when the crime involves sexual violence, gender violence or violence against children.

The *third duty* is to respect the rights of persons arising under the Statute. This again emphasises that the Prosecutor is not only a party to the trial but also an impartial officer of justice who has to make sure that he respects the rights granted to every person – especially accused and victims – under the Rome Statute and to oblige his staff to respect the rules of the Rome Statute as well. Although, at first sight, this duty might seem superfluous, a careful respect of the obligations arising out of it will surely enhance the legitimacy and credibility of the Prosecutor and the Court.

C. The powers of the Prosecutor during an investigation

Apart from the duties, Article 54 in its second and third paragraph lists the powers of the Prosecutor during investigations. Some powers are very generally described while others are very specific. For example, the Prosecutor has, according to Article 54 (3)(a) of the Rome Statute, the *power to collect evidence* and Article 54 (3) (b) states

111 M. Bergsmo and P. Kruger, "Article 54", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, 716-718.

112 Article 54(1)(b) ICC Statute.

that he can *request the presence of and question persons being investigated, victims and witnesses*.

The Rules of Procedure elaborate on these two powers in more detail. With regard to the first power, Rule 111 lays down that a record will always be made of any formal statement; the record has to be signed by all the persons present during the questioning and has to indicate time, date and place of questioning. Furthermore, when a suspect is questioned the record has to contain that the suspect has been informed of his rights under Article 55 (2) of the Rome Statute.

Rule 112 establishes that the questioning of a suspect will be audio- or video-recorded according to a detailed procedure laid down in Rule 112. Only for exceptional reasons and after an authorization by the Pre-Trial Chamber, the Prosecutor may choose to follow this procedure of audio- and video-recording in other circumstances as well.

The Prosecutor has the power to *conduct investigations on the territory of a State* in accordance with Part 9 of the Rome Statute or in exceptional circumstances and upon authorization of the Pre-Trial Chamber under Article 57 (3) (d).[113] As stated above, Part 9 relates to international co-operation and judicial assistance.

According to Article 86, State parties have a general duty co-operate fully with the Court in its investigations, or in other words to cooperate with the Prosecutor since he is the organ of the Court tasked with investigations. However, it has also been noted that, despite this general duty to cooperate, the investigative acts of the Prosecutor are subjected to procedural limitations imposed by States parties, which may result in the factual consent of States parties to the investigations of the Prosecutor.

An exception to this can be found in Article 99 (4) of the Rome Statute, which contains, subject to a number of qualifications and conditions, the possibility for the Prosecutor, at the end of the day, to directly execute his request. Furthermore, an important exception resides in Article 57 (3) (d), establishing that a judicial authorization for a direct investigation on the territory of a State party may be granted leaving aside Part 9 of the Rome Statute, when the concerned State is unable to execute the request.

The procedure for this is regulated by Rule 115. The Prosecutor has to submit a written request to the Pre-Trial Chamber for authorization.

The Pre-Trial Chamber will than, whenever possible, inform and invite views from the State Party concerned and take its views into account in arriving at a determination as to whether the request is well founded. The Pre-Trial Chamber may, on its own initiative or at the request of the Prosecutor or the State Party concerned, decide to hold a hearing. If the Pre-Trial Chamber decides that the request of the Prosecutor is founded, it will issue the authorization in the form of an order, stating the reasons based on the criteria set forth in Article 57 (3) (d). The order can also specify the procedure to be followed while collecting the evidence in the territory of the unable State party, but this procedure may of course not hamper the on-site investigation.

Although the general duty of Article 86 to cooperate and the judicial authorization pursuant to Article 57 (3) (d) merely concern State parties, Article 54 (2) allows

113 Article 54(2) ICC Statute.

the Prosecutor to address requests for co-operation to States that are not Party to the Rome Statute. While the latter, as third parties to the Rome Statute, in no way incur any legally binding obligation, it opens up the possibility of concluding an *ad hoc* arrangement with such a non-party State in order to provide judicial assistance. Moreover, Article 54 (3) (c) also mentions the possibility of the Prosecutor to conclude arrangements and allows the Prosecutor to seek co-operation of any State.

Evidentially, as equally mentioned above, non-party States are under no obligation to conclude an *ad hoc* arrangement or to co-operate with the investigations, the only possibility being if they are obliged by a Chapter VII resolution of the Security Council. In this respect, the Security Council can sidestep the whole issue of having to conclude an *ad hoc* agreement by obliging a non-party State whose conduct is subject to a Security Council referral to co-operate with the Court. In the specific situation of Darfur, and further practice is lacking so far, the Security Council, while qualifying the situation as a threat to international peace and security, has been unwilling to extend such obligation to other non- party States.[114]

Another power of the Prosecutor, equally related to the power to investigate, is the *ability to seek co-operation and to enter into agreements*. Article 54 (3) (c) states that the Prosecutor may seek the co-operation of any State or intergovernmental organization and may seek any suitable arrangement with any of them in accordance with its respective competence or mandate.

Article 87 (6) of the Rome Statute further specifies that intergovernmental organizations may be requested to provide information or documents or to provide other forms of cooperation and assistance which may be agreed upon. The agreement can be in the form of a memorandum of understanding or even an exchange of letters.[115]

Besides agreements with States and international governmental organizations, agreements can equally be concluded with specific persons. It has been stated that this wording would also allow the conclusion of an agreement with a suspect as long as this would not be inconsistent with the Rome Statute. What could be possible is that an agreement would be concluded with a minor offender in order to get his help for the prosecution of a major criminal.

However, it is argued that extreme caution should be applied before engaging in any of such agreements. In any event, it is unlikely that the Court would allow an agreement that would shield a major perpetrator from prosecution in exchange of his assistance, since this would be inconsistent with the Court's Statute.[116]

Indeed: Article 53 (2) (c) establishes that the role of the perpetrator has to be taken into account in considering whether a prosecution would be in the interests of justice and in the interest of victims. Consequently, the shielding of a major criminal would contradict this consideration.

Furthermore, in light of the prosecutorial policy which aims to prosecute the major criminals, such an agreement would be very unlikely. Concluding an agree-

114 Operative Paragraph 2 Security Council Resolution 1593 (2005) obligating Sudan and other parties to the conflict to cooperate with the ICC, but at the same time only urging other non-State parties to cooperate.

115 M. Bergsmo and P. Kruger, *l.c.*, 724.

116 G. Turone, *l.c.*, 1169.

ment with an offender promising immunity in exchange for assistance is possible if balanced, well-thought through and, above all, in conformity with international law. A comprehensive analysis of this issue is beyond the scope of this article.

The Prosecutor has also powers to *guarantee the confidentiality of information, the protection of persons and the preservation of evidence*.[117] In particular, the Prosecutor may agree not to disclose documents or information obtained under the condition of confidentiality if the documents and information were given solely for the purpose of generating new evidence. However, if the document or information is likely to have direct probative value and hence is not solely used to generate new evidence the Prosecutor is entitled to take necessary measures to guarantee the confidentiality of the documents or information or request the Pre-Trial Chamber to take such measures.

This power is further specified in Article 72, dealing with protection of national security information and Article 73, addressing third-party information or documents. Some measures which could be taken are obtaining the same evidence in another form, providing summaries or redactions or using *in camera* or *ex parte* hearings.[118] The matter is more concretely regulated in Rule 80 and 81 of the Rules of Procedure and Evidence.

Furthermore, the Prosecutor also has to *protect persons, especially victims and witnesses*. Since the Prosecutor has to protect their interests and personal circumstances, the protection of victims and witnesses should better be qualified as a duty instead of a power. Article 68 (5) of the Rome Statute entitles the Prosecutor to conditionally withhold information if this information when disclosed could endanger the security of a witness whereas Rule 81 entitles the Prosecutor to protect the safety of victims and witnesses by requesting the Chamber to authorize the non-disclosure of their identity limited to the period prior to the commencement of the trial. Apart from the protection of victims and witnesses, situations could arise where other persons, such as the accused or agents or servant of a State need protection.

Lastly, Article 54 (3) (f) allows the Prosecutor *to take necessary measures or request such measures to ensure the preservation of evidence*, an issue which is further addressed by Article 56 (2) (e)-(f) in relation to a specific investigation opportunity, in Article 18 (6) concerning the need to preserve evidence in case of a deferral to a national authority and in Article 19 (8) concerning the need to preserve evidence pending a ruling by the Court on jurisdiction or admissibility.

Furthermore, Article 54 (3) (f) could also become highly relevant in case of a Security Council deferral: when such a deferral occurs the Prosecutor should preserve the evidence gathered since a deferral pursuant to Article 16 is not indefinitive.

The first few years of investigations being carried out by the Office of the Prosecutor, have made it abundantly clear that the security situation on the ground can seriously hamper the Prosecutor's ability to actually move into a certain area and to collect evidence. Thus, turning from the theory to practice can constitute another impediment rendering the Prosecutor's independence limited. Both in theory and practice, it is obvious that the Prosecutor is but one actor – though beyond any doubt

117 Article 54 (3) (e) and (f) ICC Statute.

118 Article 72 (5) ICC Statute.

the main actor – involved in the type of tasks one actually thinks about in relation to all prosecutorial efforts.

D. The decision whether or not to prosecute

At the end of the investigation, the Prosecutor has to decide whether or not to prosecute a suspect. The criteria whether or not to instigate a prosecution are laid down in Article 53 (2) (a)-(c). The Prosecutor will have to conclude that there is not a sufficient basis for a prosecution when there is not a sufficient legal or factual basis to seek a warrant or summons under Article 58; the case is inadmissible under Article 17; or a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims, the age or infirmity of the perpetrator and his or her role in the perpetration of the crime.

As a result, according to Article 53 (2), at the end of the investigation, the Prosecutor has to decide not to prosecute if there are no reasonable grounds to believe that a person has committed a crime over which the Court has jurisdiction, when the reasonable grounds do exist, but the case is inadmissible under Article 17 and when there are reasonable grounds, the case is admissible, but the prosecution would not be in the interests of justice.

He will prosecute if each of the three requirements are fulfilled, namely there are reasonable grounds, the case is admissible and there are no reasons that a prosecution would go against the interests of justice. In that case, the Prosecutor will request the Pre-Trial Chamber to issue an arrest warrant or a summons to appear.

The *criterion of reasonable grounds* revolves around the presence of a *prima facie* case or the existence of reasonable grounds upon the examination of all the evidence collected which point to such facts and circumstances as would justify a reasonable and ordinarily prudent man to believe that a suspect has committed a crime.

The *criteria of inadmissibility* are summed up in Article 17 of the Rome Statute. In this respect it has been argued that the inadmissibility of the case based on its insufficient gravity is better considered as an issue which falls under the criterion of the interests of justice, since Article 53, para. 2 (c) establishes that one of the circumstances to conclude that a prosecution is not in the interests of justice is the gravity of the crime.[119]

Yet, the Pre-Trial Chamber has interpreted Article 17, para. 1 (d) of the Rome Statute in a different way, encompassing three elements: first, the position of the persons, namely the most senior leaders; second, the roles such persons play when the State entities, the organizations or armed groups to which they belong commit systematic or large scale crimes within the jurisdiction of the Court; and third the role played by such state entities, organizations or armed groups in the overall commission of the crimes within the jurisdiction of the Court.[120] Consequently, since the Pre-Trial Chamber seems to focus on the role of the perpetrator in order to asses the

119 *Supra* note 20, p. 367-368.

120 *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutors Application for a Warrant of Arrest, Pre-Trial Chamber I, 10 February 2006, paras. 51-53 at: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf.

gravity of the case, the assessment under Article 53, para. 2 (c) is much wider, and as a result the criterion of interests of justice, is a criterion in its own right.

In any event, Article 53, para. 2 (c) allows some discretion to the Prosecutor, who can refuse to prosecute even if there are reasonable grounds and the case is admissible. The aim of this criterion is to allow using the resources of the Court to prosecute only a limited number of perpetrators, especially the main perpetrators, while leaving the minor offenders to the national jurisdiction.

If the Prosecutor decides not to initiate a prosecution at the end of the investigation, he shall inform the Pre-Trial Chamber in writing and the State party or Security Council in case of referral.[121] Furthermore, he should equally explain the reasons for his decision. It has to be noted that in case of commencement of an investigation *proprio motu* based on information provided to the Office of the Prosecutor, there is no obligation to inform the provider of the information of the decision not to prosecute and of the reasons thereof.

The decision of the Prosecutor not to prosecute can be reviewed by the Pre-Trial Chamber either on request of the State party or the Security Council making the referral. It can also be done on its own initiative, but this solely when the decision is based on the criterion that a prosecution would not be in the interests of justice. The procedure and powers of the Pre-Trial Chamber to review the decision of the Prosecutor in fact mirrors the procedure and powers of the Pre-Trial Chamber in relation to a decision not to initiate an investigation after the preliminary examination.[122] Consequently, what has been stated earlier with regard to a decision not to commence an investigation applies *mutatis mutandis*.

However, *when the Prosecutor decides that there is a reasonable basis to prosecute*, after having substantially completed the investigation, he will request the Pre-Trial Chamber to issue an arrest warrant or a summons to appear by filing the application, described in Article 58, para. 2 of the Rome Statute.

The application shall contain the name of the person and any other relevant identifying information, a specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed, a concise statement of the facts which are alleged to constitute those crimes, a summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes and the reason why the Prosecutor believes that the arrest of the person is necessary.

This application is the only document through which it will become clear that the Prosecutor is starting up an investigation and can be considered as a provisional indictment and the issuance of the Pre-Trial Chamber of the arrest warrant or the summons to appear is a sort of provisional confirmation of an indictment.[123] However, this provisional indictment will be modified and completed and made formal by the Prosecutor in view of the hearing to be held by the Pre-Trial Chamber for the confirmation of the charges on which the Prosecutor intends to seek trial.

The conformation hearing is provided for in Article 61 of the Rome Statute and

121 Article 53 (2) ICC Statute; Rule 106 ICC Rules of Procedure and Evidence.

122 Rule 107-110 Rules of Procedure and Evidence equally apply to a decision not to investigate as to a decision not to prosecute.

123 G. Turone, *l.c.*, 1178.

regulated in Rule 121-126 of the Rules of Procedure and Evidence. The Prosecutor has to provide the Pre-trial Chamber and the accused no later than 30 days before the commencement of the confirmation hearing a document containing a detailed description of the charges together with a list of the evidence, which the Prosecutor intends to present at the hearing for the confirmation.

This is to be considered as the formal indictment, which can however still be modified since the Prosecutor can before the confirmation hearing decide to amend or to remove some charges under the condition that the modified indictment is notified no later than 15 days before the start of the hearing.

Furthermore, the Prosecutor still has some opportunities to perform additional investigations after the provisional indictment of Article 58, para. 2. In particular, the Prosecutor may continue the investigation in order to complete, amend and finalize the charges in view of the confirmation hearing. Moreover, he will conduct further investigations with respect to a particular charge upon request by the Pre-Trial Chamber and upon adjourning the confirmation hearing and may continue the investigation in order to seek additional evidence when the Pre-Trial Chamber declines to confirm a charge and in vie of a subsequent request of confirmation.

Lastly, even after the closure of the confirmation hearing, which happens with the decision of the Pre-Trial Chamber to confirm the charges and the committal of the accused to the trial chamber,[124] the Prosecutor can take supplementary investigations, since the allowance of further changes to the charges after the confirmation hearing necessarily entails the possibility of further investigations. In such a case, the Prosecutor shall make a written request to the Pre-Trial Chamber which will so notify the accused.

Before deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law.[125] Further investigations can also take place during the trial itself, but then only for the purposes of performance of his functions of prosecuting party in the trial.

The preceding paragraphs, adopting a much more technico-legal approach to the matters discussed, have shed some light on the fact that, at every single stage, the Prosecutor, while independent in principle, can in practice find himself entangled in a web of constraining factors, each of which can have an influence on whether or not a particular individual will be brought to trial or, depending on the evidence (not) collected, convicted.

For sure, while the Statute delineates his respective rights and duties, a lot will depend on the way the judges interpret the latter's provisions and whether they accept to defer to the Prosecutor throughout his investigations, or whether they want to keep a tight control over any step he and the members of his Office takes.

Concluding observations

As Justice Louise Arbour rightly pointed out even before the Rome Statute came into existence, *"there is more to fear from an impotent than from an overreach-*

124 Rule 129 ICC Rules of Procedure and Evidence.

125 Rule 128 ICC Rules of Procedure and Evidence.

ing Prosecutor".[126] The experience assembled so far indicates that the Office of the Prosecutor seems to stick scrupulously to the Rome Statute and that, so far, while being fully entitled to do so, the Prosecutor has not yet used the possibility to start looking into a situation based on his *prioprio motu* powers: for sure, the Prosecutor is not going to truly function independently lightly.

His independent functioning will have been carefully thought through and examined. Indeed: in reaction to multiple pieces of information received regarding the situation both in Iraq and in Venezuela, the Prosecutor indicated in February that, for the time being, *"the Statute requirements to seek authorization to initiate an investigation"* into either countries' situation, had not been satisfied. This is but one example which shows that the Prosecutor is not taking on the entire world on his own: embedded in an institutional structure allowing to go it alone, the Prosecutor serves the Court's legitimacy by not doing so at every single occasion.

As the current contribution indicated, The Prosecutor's independence, while affirmed in principle and on paper, needs to take into account, in practice, that some actors and factors can exercise a constraining influence. These factors are, for example, both related to the Rome Statute's provisions and to the practical limitations of a political or security nature. If ever there were fears among States Parties that the Office of the Prosecutor would turn into an uncontrollable agency, the present article has focused on but some of the mechanisms that can result into the Prosecutor having to navigate in between accountability, for sure, and dependence, for being able to do certain things.

Hence, even before having done a single act of investigation, the Prosecutor came into an Office having a very fragile position. So far, the Office's legitimacy has been greatly enhanced due to its cautious way of proceeding. For example, unlike the ICTY in its start-up phase, the Office of the Prosecutor has deliberately not proceeded to investigate relatively minor crimes.

All of this goes a long way to showing that, no matter what assertions to the contrary, the Office of the Prosecutor is very well aware of the fact that it is not operating in a legal vacuum but in a politically very sensitive area, where consensus among certain States Parties can change overnight. A legally correct solution may be politically desirable for the Prosecutor, anxious to preserve the Court's legitimacy, leading to a situation in which the Prosecutor will not exercise his right to use its *propriu motu* powers, in order to ensure the Court's long-term viability is not damaged.[127]

The present contribution has indicated, through a number of examples and with no claim to being exhaustive, that the Office of the Prosecutor's independence is thoroughly subject to the Pre-Trial Chamber's oversight. The Prosecutor cannot and will not become the unaccountable organ some were fearing. There are simply too many checks and balances.

Whether or not this state of affairs should be looked upon favourably, will ulti-

126 Justice Louise Arbour, 'The need for an independent and effective Prosecutor in the Permanent International Criminal Court', 17 *Windsor Yearbook of Access to Justice* (1999), 217.

127 Megan A. Fairlie, 'Establishing admissibility at the International Criminal Court: does the buck stop with the Prosecutor, full stop?', 39 *The International Lawyer* (2005), 842.

mately depend on the way the first Trials proceed : amidst a vast myriad of events, some "cases" will have been singled out against specific individuals. Strange as this may seem at first sight, the fact that individuals will be acquitted by a Trial Chamber may be a factor leading to the conclusion that the Prosecutor has been able to truly function independently.

To the extent that the Prosecutor feels he has been able to obtain all evidence he desired, and has been able to present it to the Court, it shows that prosecutorial discretion remains guaranteed. In the delicate environment the Office of the Prosecutor is operating, the line between success and failure is extremely thin. So far, the Prosecutor has been walking that line successfully. The real test for eating the pudding will be during the Trials phase.

Chapter 16

The Support Work of the Court's Registry

Anna Lachowska

Introduction

When in January 2002, the UN SC decided to establish the Sierra Leone Tribunal by mandating the Secretary-General to sign an Agreement to that effect with the Government of Sierra Leone, the initial setting up work was started by the Registrar (arrived in Freetown in July 2002)[1] then the Prosecutor, (arrived in August 2002)[2] and only thereafter the Judges, nominated in December 2002.[3]

The start-up process for both the *ad hoc* tribunals for the former Yugoslavia and Rwanda established earlier followed a similar pattern.[4] Logically this would appear to be the normal way of doing things, since the Registry of a Court is that essential body that lays the administrative non judicial foundations for the normal functioning of the Court.

Therefore if there is a period when the work of a Registrar is particularly needed it should certainly be the beginning of the setting-up of a Court. This is the period when a myriad of technical questions need to be addressed (for example building management, procurement and logistics support, property control/inventory, and supplies; accounting and budget, personnel and recruiting, electronic data processing equipment such as computers, and information security, communications, including secure phones, mail, telex, fax, internet, and videoconferencing; archives, records management, and library development, etc.), before the Court properly starts its work.

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* The views expressed herein are solely those of the authors and do not necessarily reflect those of the Office of the Prosecutor or those of the United Nations.

1 See First Annual Report of the President of the Special Court for Sierra Leone, period, 2 december 2002,-2 december 2003. Freetown, available at http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf.

2 See David M. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts', 37 *Case Western Reserve Journal of Int'l L.* 1 (2005).

3 See First Annual Report of the President of the Special Court for Sierra Leone, period, 2 december 2002,-2 december 2003. Freetown, available at http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf.

4 See Thomas S. Warrick, Cherif Bassiouni, 'Organization of the International Criminal Court: Administrative and Financial Issues', 25 *Denver Journal of International L. & Policy* 333, at 334, 335 (1997).

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 387-400.

This, however, was not the way the set up work for the ICC was conducted. Indeed the whole process first started with the election of the judges in February 2003, followed by that of the Prosecutor in April 2003 and only then the Registrar of the Court in June 2003.[5] However, based on the precedents with the establishment of the *ad hoc* Tribunals referred to above it does not appear that the Court was lacking in practical examples of doing things "properly", nor does it appear that the States parties to the ICC Statute were anyhow concerned about the apparent "upside down" way, things were done at the ICC.

On the contrary, it appears it was based exactly on the past experience of these two *ad hoc* tribunals that State parties of the ICC Statute decided to do things at the ICC "upside down." In addition, some other innovations were introduced into the structure and exercise of the administrative functions of the Court.

I. The Experience of the *ad hoc* tribunals and how it is reflected in the model Registry of the ICC

Some of these experiences more directly touch upon the relationship between the Registrar, the Judges and the Prosecutor on one side, and the staff of International Criminal Tribunals on the other. In particular the experience of the *ad hoc* tribunals had visible impact on at least three distinct areas: a) the subordinated role of the Registry, b) the need for an independent administrative support work of the Office of the Prosecutor, c) the practice of accepting the so-called *gratis* personnel.

A. Elections of the Registrar and chain of authority for the Registry

One of the areas in which the previous experience of the *ad hoc* tribunals appears to have had an impact is itself the legal status of the Registry as one of the principal organs of the Court.

The well-known *Paschke* Report, the result of a carefully conducted audit and investigation of the International Criminal Tribunal for Rwanda in 1997, has put alight troubling evidence of "mismanagement in almost all areas of the ad hoc Tribunal for Rwanda and frequent violations of the United Nations rules and regulations."[6] In most cases, as the UN audit has shown, however, things went wrong at the ICTR essentially because the mandates of the Registry were not clearly understood by the Registrar.

For example, the Report states that the ICTR

> Registrar acknowledged that both the Chambers and the Office of the Prosecutor have raised questions with him concerning decisions he has taken which impact on their functions. The Rules of Procedure and Evidence provide the President of the Tribunal with authority over the Registrar and provide the Prosecutor with independence of decisions. However, the Registrar argued that the Rules were subsidi-

5 See Report of the International Criminal Court to the Assembly of States Parties, second session, New York, 8-12 September 2003, Doc. ICC-ASP/2/5, 6 August 2003.

6 Report of the Secretary-General on the Activities of the Office of the Internal Oversight Services, UN Doc. A/51/789, Annex), February 6, 1997, para. 7.

> ary to the Statute and therefore could not subject the Registrar to the supervision of another organ of the Tribunal. The Registrar has declined to meet administrative requests from the judges or the Office of the Prosecutor where in his judgement they were insufficiently justified. As currently perceived by him, he can – and does – overrule decisions on substantive administrative matters taken by the judges and the Office of the Prosecutor. According to the Registrar, he has absolute authority when it comes to any matter with administrative or financial implications. Because of this perception, almost no decision can be taken by the other organs of the Tribunal that does not receive his review and agreement or rejection."[7]

Everyone agrees that such assumptions of authority of the ICTR Registrar were obviously an overstatement of the functions of the Registry of an International Court. The *raison d'etre* of any Court's Registry is not to act as an independent body, as if it had nothing to do with the Court itself, rather to service it.

However, the apparent confusion with the mandates of the Registrar at the ICTR might have been explained by two legal factors: First, the mandate of the Registrar to act under authority of the President of the Tribunal was not made clear in the text of the Statutes of the *ad hoc* tribunals, but only in the Rules of Procedure and Evidence, a document approved by the judges.[8] Second, the fact that the Registrar at both *ad hoc* tribunals is appointed by the Secretary-General[9] also helped to enhance somehow the Registrar's self-perceived role, an argument the ICTR Registrar actually presented for his refusal to obey the directions of work of the ICTR President.

During the negotiations of the ICC Statute, countries were mindful of the problems at the ICTR, and decided to make clear in the Statute of the Court the subordinated role of the Registrar *vis-à-vis* the Judges. Firstly, Article 38 (3)(a) was adopted that clearly establishes that the Presidency is responsible for the proper administration of the Court.[10] Article 43(3) further clarifies that the Registrar acts under authority of the President of the Court.

Secondly, to make it clearer the subordinated role of the Registrar, the Statute does not only confer on the Judges the authority to elect the Registrar[11] but also to demit him anytime if and when in the opinion of the Judges, the Registrar has stopped to properly fulfill his functions.[12] And last but not least, the Registrar was the last ICC official to start his duties.

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7 *Paschke* Report, para. 8

8 See Rule 33, RPE of both *ad hoc* tribunals.

9 See Article 17(3) ICTY Statute, and Article 16 (3) ICTR Statute.

10 This is understood with the exception of the Office of the Prosecutor.

11 Article 43(4) provides indeed that "The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties."

12 Article 46 (3) provides indeed that "A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges."

B. The "missing" position of a Deputy Registrar at the ICC Registry

One other area, in which the experience of the *ad hoc* tribunals might have had a negative impact, is the position of Deputy Registrar. Although this is a position envisaged by the ICC Statute, it is not a position considered essential for the work of the Registry of the ICC. First of all he is elected only if the need arises.[13] Second, although his election is recommended by the Registrar, the decision whether this position is really needed is taken only by the Judges.[14]

Third, whereas the term of office of the Registrar is 5 years renewable, that of a Deputy Registrar may be shorter, if an absolute majority of the Judges decides. Fourth, whereas the Registrar is supposed to serve on a full time basis, the Deputy Registrar may be elected on the basis that he will be called upon to serve only as/if required.[15]

This is a clear departure from the practice of the *ad hoc* tribunals. For example, in the practice of the ICTY, where the Registry work is divided in two main areas, (court and non court related) the Deputy Registrar is normally the officer in charge of the court-related servicing work of the Registry comprising the Chambers support Unit, the Court management Unit, Victims and Witness Unit, the Defense Counsel Unit, and the Detention Unit.

Whereas the non-court related work is chaired by the Chief Administrative Officer and comprises sections like general services, human resources, finance and budget, travel, transport, protocol etc.

In the present (as of writing of this chapter – December 2006) organic Structure of the ICC Registry no such position of Deputy Registrar is envisaged,[16] although the sections that normally would come under his responsibility are included. Why then the position of Deputy Registrar has become unnecessary at the ICC? It appears the main reason is efficiency and economy of resources, and again the experience at the ICTR might have prompted this position regarding the Deputy Registrar at the ICC.

In the Paschke Report the UN Office of Internal Oversight found for example

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13 Article 43 (4) provides "If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar."

14 Rule 12(4) of the ICC RPE " If the need for a deputy Registrar arises, the Registrar may make a recommendation to the president to that effect. The President shall convene a plenary session to decide on the matter. If the Court meeting in plenary session decides by an absolute majority that a Deputy Registrar is to be elected, the Registrar shall submit a list of candidates to the Court."

15 Article 43 (5) provides: "The Registrar shall hold office for a term of five years shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required."

16 In the Budget for the first financial period adopted by the Assembly of States Parties, the conviction was expressed that it would not be "absolutely essential to have a deputy Registrar in the first financial period." This situation has remained the same, until now (December 2006). See 'Assembly of State Parties to the Rome Statute of the ICC', Report, First Session, New York, 3-10 September 2002, Official Records. Part III. 'Budget for the First Financial Period', Doc. ICC-ASP/1/3, para. 74.

that

> The difficulties in the Registry were compounded by the absences of the Registrar, who spent more than 150 days on official travel during the period from December 1995 to October 1996. This means more than five months, or half of his time on duty, had been spent traveling. Within a period of one and a half months the Registrar traveled for 32 days.[17] The absence of the Registrar was made more critical by the departure in mid-1996 of the Deputy Registrar, who has not been replaced. It is noteworthy that travel of the Registrar is not being authorized by any higher ranking official.
>
> The Registrar stated that, as the most senior official and head of the Registry, he approves his own travels, usually informing the Office of the Secretary-General about his travels. Because, according to the Rules of Procedure and Evidence, the Registrar shall perform all functions under the authority of the President, it would be appropriate to have the travel of the Registrar approved by the President of the Tribunal.[18]

Although the *Paschke* Report seems to find the departure of the ICTR Deputy Registrar as one of the reasons for the lack of management in the ICTR Registry affairs, the States Parties to the ICC Statute, on the contrary, might have viewed the presence of a deputy Registrar as a reason for the Registrar not doing anything but "traveling" whereas he is supposed to be available on a full time basis at the seat of the Court.

With the mechanisms introduced in the ICC Statute and the Rules of Procedure, the Registrar will need lots of convincing arguments to justify the need for a Deputy Registrar, and even if he succeeds to have one, the Judges still might allow him to serve only occasionally for example if the Registrar becomes sick for an extended period of time, but certainly not for the purpose of replacing him while on "travel".

C. Administrative independence of the Office of the Prosecutor

Various observers and commentators of the work of the ICTY and ICTR have also been astonished to see the Office of the Prosecutor serviced by a distinct body as it is the Registry.[19] What the dangers it entails can be seen again from the *Paschke* Report on the ICTR that found that the Office of the Prosecutor was practically performing as a section of the Registry: "In OIOS discussions with the Deputy Prosecutor, when questions concerning deficiencies in the operations of the Office of the Prosecutor were raised and he was asked what he had done to address them,

17 *Paschke* Report, para. 9.

18 *Paschke* Report, para. 9.

19 See Thomas Patrick, Cherif Bassiouni, 'Organization of the International Criminal Court: Administrative and Financial issues', 25 *Denver Journal of International L. & Policy* 333, at 337 (1997), (noting that: "Another issue with the ICTY and the ICTR is the administrative chain of command. Under the tribunals' statutes, much of the administrative support for the activities of the OTP is handled through the Registry. Thus, those performing certain important tasks for the Prosecutor's office do not report to the Prosecutor, but instead report to the Registrar.")

he repeatedly responded that he did not have the authority to do so. This position effectively abolished the independence of the Prosecutor's Office and reduced it to yet another section of the Registry."[20]

This situation seems to have prompted the drafters to include in the text of the ICC Statute, Article 42 (2) which clearly provides that the "The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof." Further on under Article 44 (1), both the Prosecutor and the Registrar separately from each other "shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators."

D. Legal status of the so-called gratis *personnel*

The last important area in which one can see some substantial changes as compared to the *ad hoc* tribunals is acceptance of *gratis* personnel. A practice that was developed and thought to be an efficient way of improving things at the *ad hoc* tribunals very soon gave way to some concerns by the international community. In particular developing countries soon realized that this was yet another way of circumventing the requirements of geographic balance in the composition of the staff of international organizations. Although the practice was supported by the UN SC, and was an open ended invitation to all countries to contribute their personnel, the end result was that developed countries ended up having a substantial influence on the work of *ad hoc* Tribunals, since these countries can afford paying for their gratis personnel whereas developing countries cannot.[21]

Many of these irregularities were detected by the Office of Oversight in its investigation of the Tribunal for Rwanda. The *Paschke* Report found, for example, that in response to the UN SC call on all member states to support its efforts by offering *gratis* personnel

> various States, including Denmark, the Netherlands, Norway and the United States of America, as well as the European Union, have contributed expert personnel to the Office of the Prosecutor. The Registrar suggested that the use of seconded personnel could be discontinued by 30 June 1997, but the Prosecutor stated that the reliance on seconded personnel could not be discontinued without an adverse effect on continuing investigations. Of the investigators who were working in Kigali, 28 were seconded staff, some of them serving in the vacant senior investigative functions. Often neither the Registry in Arusha nor the Office of the Prosecutor in Kigali was notified in advance of arriving seconded staff. Supervision of their work and attendance was limited. The Registrar stated that United Nations recruitment was under way. Both the Prosecutor and the Registrar believe they should participate in or have full knowledge of all arrangements made with donor Governments.[22]

20 *Paschke* Report, para. 58, see also paras. 39-57.

21 See John Jones, "The Registry and Staff", in *The Rome Statute of the International Criminal Court: A Commentary* (A. Cassese et al., eds.) Oxford University Press, 2002, 275, at 282.

22 *Paschke* Report, para. 51.

Based on these situations the UN General Assembly adopted resolution 51/243 on 15 September 1997, requesting the Secretary-General to phase out expeditiously type II *gratis* personnel.[23] The ICTY, for example, has implemented this resolution by allowing "the underlying agreements with donors of personnel to lapse in the course of 1998, that is, not to extend these agreements upon their 'natural' expiration ...".[24]

Having in mind these negative experiences, the ICC Statute while recognizing the importance of having to rely on *gratis* personnel, impose some limitations intended to avoid abuses: first it required that *gratis* personnel be accepted only on exceptional basis, 2) guidelines were to be adopted by the Assembly of State Parties to regulate the acceptance and conditions of service of such *gratis* personnel.[25]

Justifying the importance and the need to have recourse to such *gratis* personnel, draft guidelines were in the meanwhile prepared by the ICC Registrar and submitted for consideration and adoption by the Assembly of States Parties during its fourth session held from 28 November to 3 December 2005 in The Hague.

The Registry justified the need for such guidelines with the fact that "As investigative and other activities intensify, the Court may soon require specific expertise that is not readily available. The Court's unique mandate and its need to meet the highest standards of due process and the rule of law mean that it will on occasion be faced with situations in which highly qualified personnel have to be obtained quickly on a temporary basis. The Court may have to request States Parties, intergovernmental organizations and nongovernmental organizations to assist in securing this expertise. Such assistance can only be rendered in accordance with guidelines established by the Assembly."[26]

Some of the policy guidelines for recruiting such *gratis* personnel, proposed for consideration of the Assembly of States Parties and reflecting the learned lessons include:

a) G*ratis* personnel are accepted only on an exceptional basis to provide expertise not available within the organ, for very specialized functions for which such expertise is not required on a continuing basis (hereinafter: "specialized functions"), as identified by the respective organ and for a limited and specified period of time;
b) *Gratis* personnel may not be sought or accepted as a substitute for staff to be recruited against posts authorized for the Court's regular and normal functions;
c) the creation of a roster of potential *gratis* personnel, having due regard mutatis mutandis to criteria set forth in Article 36, paragraph 8, of the Statute;
d) nominees are evaluated and selected by the requesting organ of the Court on

23 See UN GA Resolution 52/243 of 15 September 1997.

24 See ICTY Fifth Annual Report , 10 August 1998, para. 259.

25 Article 44(4) provides: "The Court may, in *exceptional circumstances*, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed *in accordance with guidelines* to be established by the Assembly of States Parties." (Emphasis added).

26 See Report on Draft guidelines for the selection and engagement of gratis personnel at the International Criminal Court, Doc. ICC-ASP/4/15, 2 September 2005, para.2.

the basis of the recruitment standards established by the Court under Article 44 of the Statute in terms of qualifications, experience and other relevant factors, taking into account the date of availability of the nominees;

e) The selection criteria set forth in Article 36, paragraph 8, of the Statute must also be applied mutatis mutandis;

f) *Gratis* personnel may not supervise staff members in the exercise of their official duties or be involved in decisions affecting the status, rights, and entitlements of staff members;

g) *Gratis* personnel may only be assigned functions consistent with the conditions for which they were hired;

i) *Gratis* personnel are accepted for an initial period of up to one year. However extension is allowed only if the functions of the *gratis* personnel remain so specialized and temporary that it is still not appropriate for the Court to build up the necessary expertise and recruit staff members accordingly;

j) *Gratis* personnel are not allowed to apply for or be appointed to posts in the Court for a period of six months commencing on the date of the end of their service;

l) The use of *gratis* personnel should be constantly monitored by the Assembly of state parties.[27]

In my view these are acceptable principles that if applied properly will allow the use of *gratis* personnel only in really exceptional temporary cases, and not as a tool for dishonest practice.

II. Structure and functions of the ICC Registry

A. The early work of the ICC Common Services Division

The substantial changes that occurred in the operational principles of international tribunals just reviewed had an impact on the practical aspects of the work of the administrative organs of the Court. This explains the reasons that prompted states to set-up the Court in an upside down fashion, not by starting with the Registrar, but instead first with the Judges and the Prosecutor and last the Registrar.[28]

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27 See Report on Guidelines, sections 2-6.

28 Rule 12 of the Rules of Procedure and Evidence provides, that "as soon as it is elected, the Presidency shall establish a list of candidates who satisfy the criteria laid down in article 4 3, paragraph 3, and shall transmit the list to the Assembly of States Parties with a request for any recommendations.". "Upon receipt of any such recommendations from the Assembly of States Parties, the judges, acting under the terms of article 4 3, paragraph 4, of the Rome Statute, and in accordance with the procedure laid down in paragraphs 2 and 3 of rule 1 2 of the Rules of Procedure and Evidence, shall, as soon as possible , elect the Registrar by an absolute majority by secret ballot, taking into account the abovementioned recommendations of the Assembly of States Parties". By a letter of 15 April 2003, the President of the Court, submitted for recommendation of the Assembly of States Parties a list containing two candidates for the post of Registrar: Mr. Bruno Cathala (France) who was already at the time (for the start up period of the Court since October 2002) the Director of Common Services Division and Registrar *ad interim* of the Court, and Mr. Bert Maan (Netherlands), a President of a District Court in the Netherlands. Both candidates were approved by the

Despite the intended separation between the administrative functions that support the judiciary on one side, and the Office of the Prosecutor on the other, enshrined in the ICC Statute there was a need for an organ that could serve the general administrative interests of all organs of the Court at the start-up period – the Common Services Division.

This organ was heavily involved in a number of operational start-up activities, particularly matters related to internal organization and the installation of infrastructure and systems and was staffed with specialists in the installation of new international organizations. The services offered by this start up division included building management, finance, security, procurement, certain aspects of human resources management (e.g. training), information technology and communications infrastructure, and conference and language services.

Initially, not organizationally part of the Registry, the Division of Common Service reported to the Presidency and later to the Registrar after his election. As the establishment of the Court progressed, certain functions, mainly those that are specifically court-related, were transferred from the Common Services Division to the Office of the Prosecutor or to the Registry, and eventually a decision was taken to have the entire Division as part of the Registry. Consistent with its role of provider of shared administrative services the Common Services Division was granted in the first financial period of the ICC a sub-budget by both the Registrar (on behalf of the Presidency) and the Prosecutor (for the Office of the Prosecutor) to provide the administrative support that each of them required and would have budgeted for.

In the budget for the first financial period this organ consisted of the following organs and had a mandate to deal with the following issues: General Services Section (this includes services like building management, protocol, archive, logistics, and travel); Procurement Section; Personnel Services Section; Budget and Finance Section; Conference and Language Support Section; Information technology and communication services Section; Safety and Security Section; Legal Advisory Services Section, Office of Internal Audit.[29]

Assembly of States Parties and on 22 June 2003, Mr. Bruno Cathala was elected by an absolute majority of the judges as the first ICC Registrar for a period of 5 years renewable. See Docs: ICC/ASP/1/1, 'Interim arrangements for the exercise of authority pending the assumption of office by the Registrar'; ICC/ASP/1/11, 'Note by the Secretariat concerning the election of the Registrar of the International Criminal Court'.

29 For comparison purposes one should note that for the same financial period, the following were the organs budgeted for the installation of the Registry properly: Chambers Legal Support Section; Public Information and Documentation Section; Library and Reference Section; Administrative Unit, and Judicial Services Division (comprising Court Management Section, Victims and Witnesses Unit; Victims Participation and Reparation Unit; Defence Counsel Unit and Detention Unit). Therefore the division operated between the Common Services Division and the Registrar, was the one that at the ICTY exists between the functions of the Deputy Registrar (responsible for court –related functions of the Registry) and those of the Chief Administrative Officer (responsible for the non-court related support functions, such as building management, personnel, protocol and transport, budget and finance).

B. The evolution of the sections and functions of the Registry

In its second report to the Assembly of States Parties, on 6 August 2003, the Court informed that

> In 2003, the International Criminal Court (ICC) became a reality. A fully functioning Court has been built on the foundations laid by the Rome Statute. In recent months and with the appointment of its most senior officials, the Court has widened the nature of its work from mainly operational and administrative set-up operations to work on judicial and prosecutorial questions. Once an aspiration, the ICC has entered a new phase and has become an operational judicial institution.[30]

It can be said that the most important features of the work of the Registry in these first four years of its work was the decisive reaffirmation of the leadership role of the Presidency of the Court over all non-judicial support work of the Registrar.

Indeed throughout the years since its inception, the Presidency of the Court has reiterated that it was under Article 38, "responsible for the proper administration of the Court" and that "the Registrar exercises his responsibilities for the non-judicial aspects of the administration and servicing of the Court pursuant to Article 43, under the authority of the President."[31]

The reference to 'non-judicial' work of the Registrar seemed at times to suggest that there were some other areas of the work of the Registry considered 'judicial', for example the work with victims, or the conclusion of agreements on behalf of the Court that could be considered proper areas of exclusive competence of the Registrar.

For example in the second report on the activities of the Court for the period 2002/03, the Registry made reference to two directions of its work, one being the "provision of effective and efficient administrative and operational support to both the judicial and the prosecutorial pillars, allowing them to carry out their mandates effectively"[32] and a second which was described as 'quasi-judicial' functions mandated by the Statute "in the areas of victims and witnesses, and counsel, including court administration, the organization of counsel, witness protection and support, victim participation and reparation, and detention matters."[33]

Later on these functions were no longer considered 'quasi-judicial', but truly judicial, moreover the Registrar sought to find a third category of functions that were distinct from the so-called judicial functions. In the third Report on the activities of the Court for the period 2003/04, it was stated that "guided by the framework set out in the Rome Statute, the Rules of Procedure and Evidence, and other relevant instruments, the Registry has provided judicial and administrative support services

30 See Report on the Activity of the International Criminal Court, 6 August 2003, Doc. ICC-ASP/2/5, para. 1.

31 See the various 'Reports on the Activities of the International Criminal Court', Docs. ICC-ASP/2/5 6 August 2003; ICC-ASP/3/10, 24 July 2004; ICC-ASP/4/16, 16 September 2005; ICC-ASP/5/15, 17 October 2006.

32 See Doc. ICC-ASP/2/5, paras.34, 35.

33 See Doc. ICC-ASP/2/5, para.36.

to the Presidency and Chambers and to the Office of the Prosecutor, and has fulfilled the specific functions entrusted to the Registry in the area of defence, and victims and witnesses."[34] In the next reporting period 2004/05, 'outreach' was added to the so-called 'specific' functions of the Registrar with the opening of the first Field offices of the Registrar.[35]

However, these reports also show that no matter how many more categories of functions the Registrar will have or find, he will remain in discharging them under authority of the Judges, the Presidency and the President of the Court.

For example in its Report for the second period, the Court acknowledges that cooperation between the organs of the Court has been a priority of the Presidency from the outset and that the organs work together on issues of common interest "while respecting their separate areas of responsibility."

But at the same time it also notes that the Presidency convenes regular meetings with the Registrar on administrative matters and oversees the administrative services provided by the Registry,[36] that it has provided input into a wide variety of administrative policies and issues, which involved close cooperation with the Common Administrative Services Division of the Registry and with the Human Resources Section to devise policies and procedures to ensure that the staffing levels of the Court are suitable, both now and in the future, to enable it to meet its objectives;[37] that "a first Presidential Directive of the Court put in place a system whereby rules, policies or procedures intended for general application may only be established by duly promulgated presidential directives, which implement regulations, resolutions and decisions adopted by the Assembly of States Parties and other significant policy decisions";[38] that "It further made provision for administrative instructions to be promulgated by the Registrar in order to prescribe procedures for the implementation of presidential directives and to regulate the administration of practical and organizational matters of general concern."[39]

In addition while the various reports recognized the existence of an area of specific functions of the Registrar, even in this area the ultimate word is also reserved to the Judges.

In the area of victims participation and reparation for example "the Registry developed a standard application form for participation of victims in proceedings, which has been approved by the Presidency. The Registry has also submitted a standard application form for victim reparations to the Presidency for approval."[40]

The President is also responsible for the negotiation and conclusion of agreements on behalf of the Court. In negotiating and concluding agreements, the Presidency works closely with the Registry, and delegates authority to conclude

34 See Report on the Activities of the International Criminal Court, 24 July 2004, Doc. ICC-ASP/3/10, para. 57.

35 See Report on the Activities of the International Criminal Court, 16 September 2005, Doc. ICC-ASP/4/16, para. 10.

36 Doc ICC-ASP/3/10, para. 7.

37 Doc ICC-ASP/3/10, para. 8.

38 Doc ICC-ASP/3/10, para. 9.

39 Doc ICC-ASP/3/10, para. 9.

40 Doc ICC-ASP/4/16, paras. 69, 29. See also Doc. ICC-ASP/5/15, para.76.

agreements as appropriate.[41]

C. The present structure of the ICC Registry

After the *de jure* merging of the Common Services Division with the Registry[42] and the new functions of the Registry, the following is the structure of the Registry as approved for the 2006/07 financial period:

a) Immediate Office of the Registrar; Office of Internal Audit; Legal Advisory Section; Office of the Controller;
b) *Security and Safety Section* [Field Security Unit, Headquarters Security Unit, Information Security Unit, Operational Support Unit];
c) *Common Administrative Services Division* (comprising a Human Resources Section [Recruitment and Placement Unit, Staff Administration and Monitoring Unit, Training and Development Unit, Health and Welfare Unit]; Information and Communication Technologies Section [Information Services Unit, Operations Unit]; General Services Section [Records Management Unit, Travel Unit, Logistics and Transport Unit, Facilities Management Unit]; Field Operations Section; Budget and Finance Section [Accounts Unit, Disbursements Unit, Payroll Unit, Treasury Unit, Budget Preparation Unit]; Procurement Section);
d) *Division of Court Services* (comprising a Court Management Section [Court Management Office Services, Court Management In-Court Services]; Court Interpretation and Translation Section [Interpretation Services, Translation Services]; Detention Section; Victims and Witnesses Unit);
e) *Public Information and Documentation Section* [Library and Documentation Centre, Public Information Unit];
f) *Division of Victims and Counsel* (comprising Defence Support Section, Victims Participation and Reparation Section, Office of Public Counsel for the Defence, Office of Public Counsel for Victims).[43]

D. The work of the Court Interpretation and Translation Section (an example of how the Registry works)

Within the new Division of Court Services of the Registry an interpretation and translation Section has been set up. It replaces the Conference and Language Support Section, in the Common Services Division established during the start-up period of the Court.[44] In addition it is important to note that the specific needs of the Office of the Prosecutor in translations and interpretations will be dealt with by

41 Doc ICC-ASP/4/16, paras. 31.

42 *De facto* they were already almost the same organ from the inception, since the Director of the ICC Common Services Division, Mr Bruno Cathala, was already at the same time temporary fulfilling the role of Registrar, until his formal election (or confirmation to the post).

43 See Report on the Court Capacity Model, 21 August 2006, Doc. ICC-ASP/5/10, Annex II.

44 See Section II, a) above.

language assistants of the Office of the Prosecutor, following the practice of the *ad hoc* tribunals.

The ICC Statute provides that English and French are the working languages of the Court.[45] Language is an essential instrument of communication without which not only the work of the Court would be impaired vis-à-vis external clients but as the experience of the ICTR has shown languages are essential including for establishing normal working relations within the organs of the Court as an international organization staffed with people coming from different countries.

> The *Paschke* Report noted for example that 'in each of the three organs there were officials and staff fluent in one of the two official languages of the Tribunal but with insufficient or no working knowledge of the other language. This has impaired communication and has led to misunderstandings. In some cases staff members were unable to communicate with their immediate supervisors or to carry out the functions of the post without a translator. While full proficiency in both languages is not a requirement, it would be useful for Professional staff members to have a working knowledge of the second official language.'[46]

In addition to English and French established as working languages of the Court, the importance of the work of the Court, has made States at the Rome Conference, contrary to the practice of the *ad hoc* tribunals, to establish four other official languages of the United Nations as official languages of the Court too: Arabic, Russian, Spanish and Chinese.[47]

i. Use of official languages for *publications* purposes

The Statute provides for two situations in which decisions of the Court are published in all official languages of the Court. One *automatic* situation and another left *at the discretion* of the judges. Thus *all judgements* of the Court should according to Article 50 (1) *automatically* be translated into all the official languages of the Court.

The translation of *all other decisions* into all official languages of the Court is left *at discretion* of the Judges, *depending on whether,* according to certain criteria in the Rules of Procedure and Evidence, the judges consider that *they resolve fundamental issues*:

i) In particular Rule 40(1) of the Rules of Procedure and Evidence provides that "Decisions *on confirmation of charges* under Article 61, paragraph 7, and on *offences against the administration of justice* under Article 70, paragraph 3, shall be published in all the official languages of the Court when the Presidency determines that *they resolve fundamental issues*."
ii) In addition the "Presidency may decide to publish other decisions in all the official languages when such decisions *concern major issues* relating to the interpretation or the implementation of the Statute or concern a major issue of general

45 Rome Statute, Article 50 (2).
46 *Paschke* Report, para. 22.
47 Rome Statute of the ICC, Article 50 (1).

interest."[48]

ii. Use of official languages as *working* languages of the Court

Article 50(2) of the ICC Statute in combination with Rule 41 of the RPE provides for three situations in which official languages of the Court could be used as working languages of the Court: first, on request of either the Prosecutor or the Defence, second on request by any other participant in the proceedings if *the language is understood by a majority of those involved in the case*, and the last situation, based on a *proprio motu* decision of the Presidency if *in its opinion such use can facilitate the efficiency of the proceedings.*

iii. Use of languages *other than the official* languages of the Court

While it is expected that most of the work at least in the early stages, will concern interpretations and translations into the accepted working languages of the Court, the fundamental right of the accused to a fair trial including the right to have *the proceedings in the language that the accused understands*[49], will mean that a myriad of languages might be made working languages of the Court for selected case on an *ad hoc* basis.[50]

Therefore it is essential that the Court is prepared to accept including *gratis* personnel for some of the rare languages in Africa, Asia or Latin America, that the accused or the witnesses might speak, not just the official languages accepted at the Court. This would require both interpretations and translations into those languages, and therefore eventually the setting-up of a special sub-section of non-official languages of the Court.

48 Rule 40(3) RPE of the ICC.

49 Rome Statute of the ICC, Articles 55 (c); 67 (f).

50 Rome Statute of the ICC, Article 50 (3) providing that "At request of any party to a proceeding, or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified."

Section 6

The Court and General Principles of International Law

Chapter 17

Jus Cogens, Obligations *Erga Omnes* and International Criminal Responsibility

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Discussion on the establishment of the International Criminal Court (ICC) led to the necessity of posing some new questions on the position of peremptory norms in international law. By coincidence, nearly at the same time, the International Law Commission (ILC) adopted Draft Articles on state responsibility and started discussion on the responsibility of international organizations, which is important from the perspective of the possible responsibility of the member states for violations of international law by the organization. The decision of the ICJ in the *Arrest Warrant* case, as well as important amendments to Belgian and Spanish criminal legislation reopened a discussion on a universal jurisdiction in international and domestic law. Finally, the invasion of Iraq by the coalition of the willing, interventions in Sierra Leone and Liberia, and other events brought onto the agenda of the Security Council discussions about the possible scope of unilateral or quasi-unilateral action of States directed at the maintainance or restoration of international peace and security.

The present study is devoted to the interrelations and interactions between the three institutions of contemporary international law. We shall discuss four issues: the notion of peremptory norms and its importance for the law of state responsibility, practice of international courts (other than criminal courts) concerning the restriction of criminal responsibility of individuals because of state immunity, aspects of substantive law on responsibility of states and criminal responsibility in the relations between the UN Security Council and ICC, and finally procedural aspects of relations between certain categories of international legal norms (known as obligations *erga omnes*) and universal jurisdiction in international criminal cases.

The Vienna Convention on the Law of Treaties of 1969 introduced the concept of *jus cogens* into international law.[1] According to Art.53, a peremptory norm of international law is defined as a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Further reference can be found in Art.64, dealing with the conflict of an existing norm with the emerging peremptory norm. However, it was clear that the regulation of the Convention is insufficient. Writers criticizing the regulation

1 See W. Czapliński, 'Ius Cogens and the Law of Treaties', in Ch. Tomuschat, J.M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Brill NV [2006], p.83ff.

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invoked two important arguments. Firstly, the concept of *ius cogens* was of contractual nature and it could not find a universal acceptance, unless it was recognized by the international community as a whole, e.g. in the way of the universal application of the 1969 Vienna Convention. The definition proposed in the Convention is insufficient: it defines the rule through its legal effects, it presupposes a very high level of consensus within the international community, it causes important problems as far as the law-making process is concerned.

Secondly, important problems connected with an identification of the catalogue of peremptory norms in international law can be invoked. The criticism is understandable, as up to now there was no judicial practice referring to *jus cogens*,[2] and the concept of peremptory norms was usually limited to the law of international treaties. The reaction of the states during the Vienna codification conference was – so to say – moderately enthusiastic. An important group voted against the adoption of Art.53 of the Vienna Convention, and some of them voted even against the text of the Convention as a whole.

The concept did not meet expectations and hopes of the international community. It was not surprising that attempts were made subsequently in order to enlarge the scope of application of peremptory norms. Firstly, the ICJ started to evaluate certain actions by the States from the perspective of a superior nature of the norms involved, though not defining them as mandatory. Secondly, the codification of the law of state responsibility brought an important new element: international crimes of states. The concept was invented and proposed by R.Ago in his draft article 19. Contrary to *jus cogens*, the international crimes were at least exemplified in the ILC draft on state responsibility in the version proposed by R.Ago. As the draft has been to a certain extent forgotten, let us quote the examples of international crimes proposed by the ILC.

The general definition was formulated in Art.19(2) as an internationally wrongful act resulting from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.

Examples of international crimes are: a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as prohibiting aggression; a serious breach of an international obligation of essential importance for safe-guarding the right of self-determination of peoples, such as the ban on colonial domination; a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being (core human rights – exemplified as ban on slavery, genocide and apartheid); and finally a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment (e.g. the prohibition of massive pollution of the atmosphere or of the seas). The last example of the international crime is beyond any doubt an example of progressive development of international law, and it has never been applied in practice.

2 Norms of diplomatic law (including personal inviolability) and right to self-determination were referred to by the ICJ as vital and fundamental, but not peremptory – cf. Tehran Hostages and East Timor cases, *ICJ Rep*. 1980, at 40-43, and 1995, at ..., respectively.

The concept of the crimes of states was completed by procedural norms. W.Riphagen, who replaced R.Ago as Special Rapporteur of the ILC, discussed the concept of an injured state. He made a distinction between directly and indirectly injured state, defining the latter – in the context of the violation of a multilateral treaty – as "any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto". Even more important is the definition included in Art.40(3) of the 1996 draft: injured State meant all other States, if the internationally wrongful act would constitute an international crime. In that context all the States are entitled to claim reparation (in the wide sense of the expression). However, the draft never précised the rights of the indirectly injured state.

On the procedural plan, the formula proposed in Art.5 transferred Art.60 of the Vienna Convention on the Law of Treaties into the law of state responsibility. However, it is far from accepting an actio popularis as a mean of protection of rights and interests infringed. Perhaps the only indication of the *actio popularis* in international law can be found in the practice of the European Commission and Court of Human Rights, in particular in the proceedings established by the Scandinavian States and the Netherlands against Greece in 1968, and in the Commission's decision in the case No. 788/A 60 (Austria v. Italy) of 11 January 1961.

The latter decision stated that a State bringing a case against another State on the basis of Art.24 of the Convention acts not in order to claim its own rights, but on behalf of the European public order. We must emphasize that in any case the State bringing the claim founded on the European Convention must be a party to the said convention, so that its action is not the *actio popularis* properly speaking. Let us remind that *actio popularis* was finally rejected by the ICJ in the South West Africa case (Second Phase).[3]

The reaction of the international community (both States and international legal writers) was far from general acceptance. Proponents emphasized the importance of moral factor in international law, the expression thereof being the concept of international crime and proposed reactions to that kind of breaches. The most important criticism was connected with the concept of crime, invoking the reference to penal law.

Formerly, the responsibility of states was discussed exclusively in terms of civil responsibility, the concept of punitive damages being in principle excluded (except, perhaps, two arbitral awards in cases: *I'm Alone* and *Lusitania*). Secondly, international law rejected any form of punishment as contrary to the idea of sovereignty. Finally, the concept of international crimes could possibly be contrary to the principle of individualisation of international responsibility.

The Draft Articles on state responsibility elaborated by J.Crawford constituted the next step in the development of the concept of *jus cogens* in international law. Crawford replaced international crimes by grave breaches of obligations under peremptory norms of international law. The Draft defines a serious breach of peremptory norms and specific consequences of the breach of that kind. It does not define the peremptory norms itself nor gives any examples of such norms.

3 ICJ Rep. 1966, 6 ff.

Examples quoted by the ILC in its Commentary[4] refer to the norms invoked by the ILC in its Commentary to what became Art.53 of the Vienna Convention (prohibition of aggression, slavery, genocide, racial discrimination and apartheid), as well as three other norms: ban on torture, fundamental principles of humanitarian law, and self-determination. However, the references to judicial practice in support of those norms are extremely scarce.

According to the ILC, not every violation of a peremptory norm of international law leads automatically to a qualified responsibility.

The violation must be serious, i.e. involving a gross or systematic (i.e. intentional, grave and carried out in an organized and deliberate way) failure by the responsible state to fulfill the obligation imposed by the peremptory norm. In our opinion, every violation of *jus cogens* is serious, as all the peremptory norms are of fundamental importance for the international community.

The solution proposed for the consequences of the breaches of peremptory norms is also questionable. Two consequences were mentioned: all states should cooperate in order to terminate the violations of *jus cogens*, and no State should recognize as lawful situations created by the violation nor render aid to the perpetrator of the act. However, those consequences are not specifically connected with violations of peremptory norms, but they relate in fact to all possible violations of international law.

The ILC Draft proposed also that the consequences mentioned above are without prejudice to any further consequences formulated by the ILC or resulting from general international law. Reference to Draft Art.59 (invoking the rights and obligations under the UN Charter) is not sufficient, as the powers of the UNSC are of political nature and do not relate to state responsibility. I shall come back to that issue below.

The issue of the obligations *erga omnes* constitutes one of the most sensitive problems in international law. The dispute concentrates upon the answer to the question whether the individual states can act on their own in order to restore international legal order. Some authors present the view that notwithstanding collective sanctions (or if competent organs of respective international organizations are unable to take any decision on this point) breaches of fundamental obligations allow all possible measures to be undertaken by states.[5] Other authors suggest that obligations *erga omnes* are owed to the international community as a whole and this community is the only international body to react to violations of these obligations.[6]

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4 Report of the ILC, 53rd session (2001), at 283.

5 M.Mohr, 'The ILC's Distinction between "International Crimes" and "International Delicts" and its Implications', in M.Spinedi, B.Simma (eds.), *UN Codification of State Responsibility* (1987), p.129-131; V.Vadapalas, 'Osushchestvlenye mezhdunarodno-pravovykh sanktsyy', *SEMP* 1988, p.81 (in Russian); J.A.Frowein, 'Collective Enforcement of International Obligations', 47 *ZaöRV* (1987), p.68; R.Hofmann, 'Zur Unterscheidung Verbrechen und delikt im Bereich der Staatenverantwortlichkeit', 45 *ZaöRV* (1985), p.203.

6 G.Gaja, Obligations Erga Omnes, International Crimes and *Jus cogens*: A Tentative Analysis of Three Related Concepts, in J.Weiler, A.Cassese, M.Spinedi (eds.), *International Crimes of States* (1987), p.151; R.Ago, 'Obligations *Erga Omnes* and the International Community', in I.Weiler, A.Cassese, M.Spinedi (eds.), op.cit., p.238; C.Annacker, 'The Legal Regime of the Erga Omnes Obligations in International Law', 46 *AJPIL* (1994), p.160.

Because of the lack of a centralized international law enforcement authority, the rule that every state has the right to define its international legal position remains still in force. Such right would be excluded if a norm expressly derogating it and passing an exclusive competence to the international body (like the UN) could be found. However, no such rule exists in the UN Charter or elsewhere. Although the Charter contains a regulation concerning the reactions to certain forms of violations of international law threatening international peace and security, it does not in any way limit them to the actions by the UN agencies.

Even if it did so, this would not stop the possible reactions by individual member states. One should also remember that actions by the Security Council can be paralyzed by the veto of the permanent members. If particular states were forbidden to react, the perpetrator state could continue to violate international law without any opposition. Such a position is confirmed by international practice. During the last years states or groups of states undertook decentralized sanctions against states having seriously violated international law (against USSR because of the intervention in Afghanistan, Argentine because of the attack on the Falklands/Malvinas; USSR and Poland because of mass violations of human rights in connection with the declared state of emergency in Poland in 1981; Iran because of violations of diplomatic law in connection with the hostages crisis).

All these sanctions were imposed by individual states without any authorization by the Security Council, whose actions were judged insufficient, ineffective or could not be taken for political reasons. The current draft on state responsibility accepts this practice and states in Art.54 that the states other than the injured state which are entitled under Art.48(1) to claim international responsibility can also take lawful countermeasures against the perpetrator, in order to ensure the cessation of the breach and reparation in the interest of the injured state.[7] This solution modified the former position of the ILC according to which countermeasures taken in reaction to violations of the obligations *erga omnes* could be imposed exclusively as collective sanctions. The current approach reflects present day international practice.

This conclusion brings me to the idea that there is a close interrelation between Art.42 and 48. If we consider the traditional approach to the concept of injury in the law of state responsibility, and violations of obligations *erga omnes* then all states have a legal interest in ensuring respect for international law by every state. Every violation of international law means the injury, i.e. an infringement of the right. The present draft articles does not include a distinction between directly and indirectly injured states.

This consequently means that in case of a violation of obligations *erga omnes*, all states are injured within the meaning of Art.42, and all of them can also invoke state responsibility because of the violations of these norms. On the other hand, this would also mean that there are no "states other than the injured state" in the meaning of Art.48(1) of the Draft which could claim responsibility in accordance with para 2

7 The ICJ went further in the advisory opinion on the *Palestinian Wall* stating that it is an obligation of all the States to ensure compliance by Israel with international humanitarian law, and that all the States should counteract the construction of the wall as it constitutes an obstacle to the exercise of the right to self-determination by the Palestinian people (see para. 159 of the opinion). This conclusion remains consistent with the advisory opinion on *Namibia*, ICJ Rep. 1971, p.54.

of the said provision. Taking into account all these observations we must conclude that the present draft does not elucidate the interrelations between the regimes of peremptory norms and obligations erga omnes in contemporary international law.

Substantive regulations were complemented by procedural provisions relating first of all to the possibility of taking countermeasures against the state perpetrator of the delict. In fact the possibility of taking countermeasures was of decisive importance for the classification of certain norms as obligations erga omnes. The Draft empowers the state other than the injured state (that should have been classified as indirectly injured) to invoke the responsibility of another State. According to Draft Art.48, such claims are admissible if the obligations breached are owed to a group of States including the claimant state, or to the international community as a whole. The scope of the claim of an indirectly injured state is limited to the rights: to require a cessation of a wrongful act, to guarantee the non-repetition, and to demand the performance of the obligation in favor of the directly injured state(s).

This does not exclude all other forms of action against the perpetrator, but the acting State should be able to prove that it actually acts on behalf or in the interest of the injured party. According to the Commentary, the Draft deliberately avoided any reference to obligations *erga omnes*, although it deals exactly with that kind of international obligations. It also did not expressly specify any *erga omnes* norm, although it referred to the obligations enumerated in the *Barcelona Traction* judgment (ban on aggression and genocide, fundamental human rights),[8] supplemented by the right to self-determination as formulated in the *East Timor* case, quoted above.

Of course several other arguments could be advanced against the regulation drafted by J.Crawford and accepted by the ILC, and endorsed by the UNGA. It is clear, however, that the ILC draft constitutes an important step in the elaboration of the concept of peremptory norms in international law.

We are coming now to the crucial point of our discussion, namely, to the influence of international criminal law upon the concepts of *jus cogens* and the interrelation between the two sets of rules. We could formulate our reflection also as relationship between international criminal law and general international law on the level of peremptory norms.[9] I shall start our analysis with the presentation of fundamental judicial decisions. The most important ones are: the House of Lords' judgment in the *Pinochet* case, and the ICJ's judgment in the *Arrest Warrant*. Finally, we would like to comment upon the *Al Adsani* decision of the European Court of Human Rights in Strasbourg. We have to emphasize, however, that this list is far

8 ICJ Rep. 1970, at 32.

9 I generally share the conclusions expressed by V.D.Degan, 'Responsibility of states and individuals for international crimes', in Sienho Yee, Wang Tieya (eds.), *International Law in the Post-Cold War World. Essays in Memory of Li Haopei*, (2001), at 205. According to him obligations not to breach fundamental norms prohibiting international crimes are all obligations erga omnes, as they all meet the criterion of customary international law. They also are somehow connected with *jus cogens*. However, I do not fully agree with the opinion on the relationship between obligations *erga omnes* and customary law. Obligations *erga omnes* can result from international treaties, and not only from customary law, although the so-called conventional *erga omnes* obligations can be more difficult to prove, as reactions to violations of conventional obligations are governed by Art.60 of the Vienna Convention on the Law of Treaties.

from being exhaustive. At least two other cases decided recently (2003-2004) by the Inter-American Court of Human Rights were cited by commentators. The *Myrna Mack-Chang* and *Plan de Sanchez Massacre* cases[10] were quoted as examples of an aggravated international criminal responsibility of individuals (highest state officials involved both in the execution of the acts and prolonged cover-up of the facts and obstruction of justice).

According to the learned commentator quoted above, the proceedings before the court showed that the responsibility of states for certain violations of human rights and criminal responsibility of the perpetrators are strictly intertwined and interconnected. On the other hand, the author did not indicate what kind of aggravated responsibility took place under the specific circumstances of the cases reviewed. We do not share his conclusions on that point, and we shall come back to this issue below.

The problem of relationship between criminal responsibility of individuals and some norms of public international law of fundamental importance was discussed by the European Court of Human Rights in *Krenz et al.* case, involving the issue of the order to shoot persons escaping from the former GDR.[11] According to the Court, German judicial decisions involving the punishment of the GDR officials did not violate Art.7 of the ECHR. In the context of the topic of the present paper, the reasoning of the Court is of utmost importance. Even though no criminal proceeding had been initiated against the perpetrators of the killings on the border between the two German States, this was due to the discrepancy between law and practice, to a large extent caused by the applicants themselves.

The lack of punishment did not change the criminal nature of the acts, and it was fair that the democratic State attempted to punish the perpetrators of those serious crimes. The GDR legislation violated the obligation to protect human life as a supreme value, protected under the Constitution and international agreements; the Court referred in that context to Art.6 and 12(2) of the ICCPR. The most important passage of the judgment reads as follows: "The Court considers that a State practice such as the GDR's border-policing policy, which fragrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7.1 of the Convention. That practice, which empties of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including the judicial bodies, cannot be described as "law" within the meaning of Article 7 of the Convention." The decision of the Court was adopted unanimously. It clearly shows that the reference to the right to life as a fundamental human right belonging to the the core of (non-derogable) human rights served as a justification for the recognizing of the legality of German criminal law applied to former GDR state officials.

The judgment of the English House of Lords in the *Pinochet* case is of special interest, as the problem of criminal responsibility of individuals for grave violations

10 A.A.Cançado-Trinidade, 'Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: the Crime of State Revisited', in M.Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Leiden-Boston 2005, p.253 ff.

11 Applications 34044/96, 35532/97 and 44801/98, judgment of 14 February 2001.

of international law was confronted with an issue of personal immunity of heads of state, combined with another problem of (quasi-) universal jurisdiction. Former self-made head of state of Chile, Mr. Pinochet arrived in London for medical treatment in 1998.

He was arrested on the basis of a warrant issued by the Spanish judge Garzon, under charges of mass persecutions, killings and torturing of political opponents. Pinochet appealed against the decision on extradition to the House of Lords that passed three judgments. We do not intend to present the judgments in a whole, concentrating rather on issues of international law invoked by the Lords of Law. First of all, they were not willing to recognize a jurisdiction of British courts to deal with the case (universal one), as they did not find any international practice confirming such an approach. Secondly, while discussing the issue of a double criminality as a premise of extradition, they had to evaluate the position of the ban on torture under British law.

They rejected a possibility that the ban on torture could have been binding in the British legal system on a customary basis, before the ratification on 29 September 1988 and subsequent entry into force of the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[12] Two out of seventeen Lords referred to the ban on torture as a peremptory norm of international law.

If we take into account that the crime of torture was introduced into international law on the basis of the UNGA Resolution 3452(XXX) of 9 December 1975, and subsequently confirmed in the legislative acts: the Torture Convention referred to above, Art.5 of the Statute of the Yugoslavia Tribunal (Resolution 827 of 25 May 1993), Art.7 of the Statute of the ICC (1998),[13] and the previous precedents under domestic law including the *Eichmann* and *Demjaniuk* cases in Israel and USA (1962 and 1985, respectively), one could expect that the House of Lords could have at least considered the prohibition of torture as binding qua customary criminal law in the UK. However, that was not the case.

The matter of classification of torture as an international crime becomes even more complicated if confronted with the position of the House of Lords as to whether the former dictator of Chile should be protected by the head of State immunity. The immunity of the head of State is nearly absolute under international law. The Lords of Law analyzed two acts of domestic law: the State Immunity Act of 1978 and the Diplomatic Privileges Act of 1964 (transposing the 1961 Vienna convention on Diplomatic Relations into the British system). The Lords' opinions can be divided into three groups. According to the first, torturing people does not belong to official functions of the head of State, and as it constitutes a crime against international law, the personal immunity of the President of the State cannot be invoked in such cases.

The judges quoted a number of international instruments establishing the criminal responsibility of State officials notwithstanding their position in the hierarchy of State agencies, starting with Art.7 of the Nuremberg Charter, up to Art.27(1) of the ICC Statute. Second group of views stated that the immunity of the heads of

12 In force from 26 June 1987, 23 *ILM* (1985), p.1027.

13 The two latter provisions declare torture to be a crime against humanity.

State was absolute. Finally, according to the third set of opinions, the granting of immunity to the former President and dictator of Chile would be contrary to the concept of international crimes. All the perpetrators of those crimes should be punished, according to the pronciple of universal jurisdiction. We suggest that the third approach represented by Lords Phillips and Hutton is very coherent, and it mirrors the current development of international law.

Despite the differences in approach, the House of Lords in two substantive judgments concluded that Pinochet should not be granted personal immunity. This conclusion is extremely important. The Lords of Law emphasized that the official function cannot bar criminal responsibility, and that responsibility should be enforced after cessation of the State function. It is disputable however whether the waiver of immunity gives rise to the jurisdiction of international tribunals or domestic courts.

It is interesting to note that the French Cour de cassation in the decision of 13 March 2001 took a totally different approach to the issue of State immunity. It dismissed the prosecution against Libyan leader Khaddaffi charged with murder and terrorist acts, in connection with the bombing of the UTA plane over Niger on 19 September 1989. Regrettably the Court did not analyze issues of international law, limiting itself to stress the absolute nature of the immunity of the head of State.

The decision of the ICJ in the *Arrest Warrant* case (Congo v. Belgium) was the last case invoking issues of immunity against the perpetrator of crimes against humanity (precisely speaking, crime of genocide). The warrant was issued by Belgian judge against former foreign minister of Congo Mr. Yerodia Ndombasi charged with incitement to genocide. Congo opposed the warrant and asked the World Court to force Belgium to withdraw the illegal warrant. In the judgment passed on 14 February 2002 the Hague judges left aside the question of possible universal jurisdiction, concentrating upon the immunity problem. The justification was that the government of Congo had excluded the jurisdiction from its claim, and the Court was not competent to deal with it. As a result, it seems that the Court took the jurisdiction as granted.

The majority recognized full immunity to the benefit of the highest-ranking State officials including the heads of State, prime ministers and foreign ministers. The immunity covers all the acts committed during the performance of official State functions. According to the ICJ, even if some treaties granted jurisdiction with respect to those categories of persons, the practice is not confirmed by decisions of domestic courts or by any other acts. Furthermore, the immunity itself is of customary nature, and no international agreement providing for criminal responsibility can restrict it.

Two dissenting opinions in the case are of great importance for evaluation of the status of international law in the case. In their joint separate opinion, judges Higgins, Kooijmans and Buergenthal expressed their regrets that the Court did not address the issue of universal jurisdiction in a more detailed way, as the existence of jurisdiction was a precondition for the granting of immunity to any person. They emphasized that although there was no evidence that States were entitled to rely on universal jurisdiction over persons not present in their territory, there was no proof to the contrary either.

Many international treaties seemed to provide for such jurisdiction. If that sup-

position was correct, the Belgian warrant as such was not contrary to international law. On the other hand, even if they generally agreed with the majority judgment on the point of State immunity, they also stated that the scope of the immunity claimed by the Congo and granted by the Court was too large. Immunity should be restricted so as to permit to establish the responsibility of high-ranking State officials for international crimes. In particular, there was no need to cancel the warrant, inasmuch as Mr. Yerodia had ceased to perform any official function.

Belgian judge *ad hoc* Ms. Van den Wyngaert opposed the judgment on the merits. According to her lengthy, well-balanced, and scholarly well-reasoned dissenting opinion, Belgium did not violate international law by having circulated the arrest warrant. The Court did not discuss the existence of a customary rule granting jurisdictional immunity to the foreign minister. It had neither proved the existence of State practice nor of *opinio iuris* on that point. In particular, failure by States to prosecute foreigners charged with having committed crimes against international law could not constitute proof of a negative practice, as States often did not initiate proceedings because of extra-legal (e.g. political) reasons. Furthermore, there was a manifest trend in international law – neglected by the Court – towards restricting immunity not only in commercial and private legal cases, but also in cases of serious offences including war crimes and crimes against humanity.

It is surprising that Belgium decided to amend her legislation, limiting the jurisdiction to cases involving to some extent the Belgian state or its nationals. The universal jurisdiction was restricted. On the other hand, other States (including Germany, Austria, Spain, just to mention some examples) expanded the scope of their criminal jurisdiction, in fact granting their courts with the universal jurisdiction.

Finally, we would like to pay attention to the *Al Adsani* judgment of the Strasbourg court. Mr. Al Adsani claimed before an English court reparations for acts of torture inflicted on him by secret service agents of Kuwait. The court of first instance decided that Kuwait could not be granted immunity, as the incriminated acts violated international law. This decision was cancelled by the court of appeals. It stated that the immunity could be waived exclusively because of reasons enumerated in the statute, and not on grounds of violation of international law. Mr. Al Adsani went to the Strasbourg court claiming that the said judgment of the English court violated Art.6 of the European Convention on Human Rights (right to fair process).

The Strasbourg judges declared that the ban on torture acquired the status of peremptory norm in international law; however, the case in question dealt with civil liability and not with criminal responsibility, and allegedly there is no international legal norms expanding the consequences of *jus cogens* upon civil litigation and state immunity. There was consequently no violation of Art.6 of the European Convention. It is really difficult to accept this judgment, unless we do not take *jus cogens* seriously.[14] Let us quote in this context the *Furundzija* decision of the Tribunal for the former Yugoslavia. The Hague judges decided that norms of domestic law, as well as administrative acts, contrary to *jus cogens* should be declared invalid, null and

14 The present author is not convinced about the current status of peremptory norms under international law, and the *Al Adsani* judgment confirms our skepticism. See W.Czapliński, G.Danilenko, 'Conflicts of Norms in International Law', 21 *NethYBIL*(1990), p.4ff

void. The same must be true with respect to all other legal norms.

We would like to conclude that the current practice of international courts does not bring any evidence that violations of peremptory norms of international law by individual persons could constitute a basis for criminal responsibility. Taking *jus cogens* seriously, States should at least attempt to bring those who commit such violations to court. In most cases the violations would be committed by highest-ranking State officials.

A position consistent with the Nuremberg principles, confirmed by the statutes of international criminal courts, requires that the perpetrators of criminal acts should be punished notwithstanding their position in the hierarchy of governmental positions. However, the constant policy of granting immunity to the most important criminals practiced by international courts does not encourage the international community to recognize certain norms as peremptory (as they can be undermined by other norms that beyond any doubt are not mandatory).

Another important point in our discussion is the definition of international crimes under the statutes of international criminal tribunals for the former Yugoslavia, and Rwanda, and the Statute of the International Criminal Court. In fact, this is a crucial problem for the relationship between law of state responsibility, law of criminal responsibility of individuals and the UN law, as the ban on the use of force, prohibition of genocide, and crimes against humanity (or – rightly speaking – two of them: slavery and apartheid) are three possible examples of the peremptory norms of international law that have rarely been put in question by commentators. They are also of crucial importance for the definition of the jurisdiction of the ICC and for determining the powers of the UNSC.

Discussion concerning the definition of aggression as an international crime[15] was one of the most disputable issues during the preparatory works and codification conference in Rome. No consensus on that point was achieved, so that the final clarification on the definition of aggression as a crime against international law subjected to the jurisdiction of the ICC was postponed until 2007. The present status of relations between the UNSC and the ICC involves two questions: limitation of criminal prosecution of certain individuals, and the decisive role of the former in declaring aggression.[16]

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15 Among different authors, we would like to refer here to M.Hummrich, *Der völkerrechtliche Straftatbestand der Aggression*, Baden Baden 2001, passim; J.Trahan, 'Defining "Aggression": why the Preparatory Commission for the International Criminal Court has faced such a Cunundrum', 24 *Loy.LA ICLR* (2002), p.439; R.Kherad, 'La question de la definition du crime d'aggression dans le Statut de Rome', 109 *RGDIP* (2005), p.331; A.Zimmermann, 'The Creation of a Permanent International Criminal Court', 2 *Max Planck YBUNL* (2002), p.198ff ; M.Płachta, Międzynarodowy Trybunał Karny, Kraków 2004, vol.I, p.450 ff.; F.Berman, 'The International Criminal Court and the Use of Force by States', 4 *Singapore JlICL* (2000), p.479

16 On the relations between the UNSC and ICC see e.g. M.Arcari, 'Quelques remarques à propos de l'action du Conseil de Sécurité dans le domaine de la Justice Pénale Internationale', 18 *Anuario de derecho internacional* (2002), p.207 ; S.Heselhaus, 'Resolution 1422(2002) des Sicherheitsrates zur Begrenzung der Tätigkeit des Internationalen Strafgerichtshofs', 62 *ZaöRV* (2002), p.907 ; Z.Deen-Racsmany, 'The ICC, Peacekeepers and Resolution 1422: will the Court Defer to the Council?', 49 *NILR* (2002), p.353; D.Sarooshi, 'Aspects of the Relationship between the International Criminal Court and

According to Art.39 of the UN Charter, the UNSC has the exclusive power to decide whether the threat to international peace and security, violation of international peace and security, or the act of aggression took place. The SC statement qualifying an act as such is an indispensable precondition for the enforcement action.

The Charter did not contain any definition of aggression. Such definition was formulated after many years of unsuccessful attempts in the UNGA Resolution 3314(XXIX). This instrument confirms the powers of the Security Council. The resolution emphasizes the unique competence of the Council to identify the act of aggression, as well as its discretionary power in that field.

The resolution leaves hands free to the UNSC to take a decision on possible aggression. Unfortunately the UNSC can also declare as aggression acts other than those enumerated in the said Resolution. The UNSC is a political organ, and its decisions are binding upon all the States that are under obligation to implement them.

It is important to remind that the UNSC was not very eager to recognize any acts of the Member States as aggression within the meaning of Chapter VII of the UN Charter. Although it referred several times to "aggressive acts" (e.g. in resolutions 387(1976) concerning the activities of South Africa against Angola, 527(1982) on actions of South Africa against Lesotho, 573(1985) on certain attacks of Israel against PLO targets, 667(1990) on actions of Iraq against Kuwait), it never clearly declared any State as aggressor. On the other hand, the Council enlarged the scope of acts constituting a violation or threat to international peace and security.

The notion as interpreted by it covered not only different forms of the use of force (we do not include in that context the acts of self-defense as reaction to armed attack, nor military operations led under auspices of the UN bodies), but also other acts like the mass influx of refugees or even a coup d'Etat directed against a democratically elected president.

On the other hand, we would like to invoke here the decision of the ICTY in the *Čelebići* case of 16 November 1998 stating that "The Government of Bosnia and Herzegovina, for its part, undoubtedly considered itself to be involved in an armed conflict as a result of aggression against the State by Serbia and Montenegro, the Yugoslav Army and the SDS (local Serbian Democratic Party). On 20 June 1992, it proclaimed a state of war, identifying these parties as aggressors". We are far from recognizing such a statement by the government of the State concerned as binding for any international court or the UN Security Council, but the Yugoslavia Tribunal decisively was eager to draw some consequences from the statement.

This picture was clearly visible during the codification conference, as well as in the further activities connected with the drafting of the Statute of the ICC. In particular the permanent members of the UNSC tried to convince the other parties that the prosecution of the acts of aggression should be possible exclusively on the basis of the statement of the Council that aggression was committed.[17] In fact,

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the United Nations', 32 *NethYBIL* (2001), p.27.

17 Cf. M.Płachta, 'Jurysdykcja Międzynarodowego Trybunału Karnego', 4(154) *Studia Prawnicze* 2002, at 27; C.K.Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', *AJIL* 91(1997), at 182.

we could agree with a learned author stating that the formula used in Art.5(1)(d) of the ICC Statute referring to conditions under which the Court could have jurisdiction with respect of the crime of aggression, indicates as well that the said conditions should be classified in accordance with the tasks conferred upon the UNSC by the UN Charter.[18]

Some other options could be proposed as to a possible determination of aggression. According to the Charter, the UNSC bears exclusively the primary responsibility for the international peace and security, but certain powers remain also within other bodies, in particular the UN General Assembly. However, it seems that from the perspective of international criminal justice such a hypothesis does not change too much, as the decision remains in the hands of a political body – from that perspective the decision-making within the UNGA is similar to that within the UNSC.

Another option (proposed during the *travaux preparatoires* by Bosnia and Herzegovina, New Zealand, Romania, and The Netherlands) would be to force the political bodies to refer the issue of possible aggression to the ICJ in order to obtain an advisory opinion. The Statute of the Court should be amended in order to obligate the ICJ to deliver such an opinion. We could also imagine that the power to decide on cases of aggression is left to the ICC.

We have to bear in mind that the determination of aggression by any of the political bodies of the UN is insufficient from the perspective of international criminal justice. Firstly, the act of aggression will be attributed to the specific State, and not to any individual person. Secondly, the Court will be obliged to evaluate the individual conduct of the perpetrators taking into account all the elements and factors of importance from the perspective of the Statute of the ICC, and from the perspective of international criminal law in general. Thirdly, we have to discuss the constitutive elements of the crime of aggression as committed by individuals from the perspective of the principle of legality (*nullum crimen sine lege*).

We have to remember in particular that even if the examples of aggression were enumerated in the Resolution 3314(XXIX), they still leave free space for interpretation. According to Art.4, the UNSC can establish the existence of aggression also in other cases than indicated in Art.3. The freedom of action of the UNSC corresponds with the political nature of that body.

In fact, the present author agrees with the position expressed by Germany during the codification conference that only the most serious acts of aggression (probably corresponding to massive armed attacks enumerated in Art.3 paras a and b of the resolution 3314(XXIX) of 1974) should be considered as giving raise to individual criminal responsibility.[19] It is interesting that the ICJ in Nicaragua held that the sending by a State of armed bands against another State could be treated as aggression only if this act would be of such gravity that it would normally be seen as aggression, and that approach reflects customary law.

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18 F.Berman, op.cit., p.484.

19 "The invasion of or the attack by the armed forces of a State on a territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory or part of the territory of another State; and bombardment or use of any weapon, by the armed forces of a State, against the territory of another State".

On the other hand, not every case of the use of force against the territory or armed forces of another State can be seen as aggression. Let us remind that the ICJ did not condemn the raid of American military helicopters against Iran in order to release the hostages kept in the US Embassy in Tehran, describing the act as mere intrusion (not amounting to armed attack).

Finally, we would like to remind that from the very beginning of the works on codification of individual criminal responsibility it was clear that only the most serious violations of international law should give raise to criminal prosecution under international law. The threat of politicization of the crime of aggression led the participants to the conference to avoid any proposed reference to possible interrelations between the aggression and some other forms of the use of force, e.g. in connection with the implementation of the right to self-determination, freedom and independence.[20]

It is also generally accepted that the decisions of the UNSC are not subjected to any form of judicial control. The ICJ confirmed this stance in the *Lockerbie* case. The facts of the case are well known, and we do not find necessary to present them in a detailed way; the issue at stake has been the alleged violation by the USA and UK of the Montreal Convention on the Safety of Civil Aviation by not using the measures provided for by that act, but instead referring the case to the UNSC and sponsoring a resolution imposing far-reaching economic sanctions against Libya. The Court declared that it was not empowered to review the legality of the UNSC resolution, but it reserved such an option for the future proceeding on the merits of the case.

We can also adopt a totally different position on the issue. There are several cases in which international courts decided to control the legality of certain decisions of the UNSC. However, at least two decisions were passed by *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda. In *Tadić* and *Kanyabashi*, both organs confirmed the legality of the Resolutions of the Security Council establishing both tribunals.

There were serious arguments that the Security Council by adopting those resolutions acted *ultra vires*, and those opinions were not shared by the courts. In the same context we could also refer to advisory opinions of the ICJ in *Certain Expenses of the United Nations* and *Namibia*. In this case, the issue at stake was the evaluation of the legality of certain decisions concerning peace-keeping operations that were put in question by France and the USSR, but finally approved by the World Court. In its advisory opinion the Court stated that although the resolution 2145(XXI) of the UNGA and relating instruments by the UNSC themselves were not subject to judicial review, the Court decided that it should consider objections to the legality of those acts before determining any substantive issues of the case.

Art.119 of the ICC Statute provides for the power of the Court to determine itself the scope of its jurisdiction, expressing the *competence de competence* principle.

20 F.Berman, at 486. On the other hand, however, I have to remind that the definition of aggression was included in Art.14(c) of the Statute of the Iraqui Special Tribunal as:" the abuse of position and the pursuit of policies that may lead to the threat of war or the use of force of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended". The definition is somehow similar to other criminal codes, cf. C.Kress, 'The Iraqi Special Tribunal and the Crime of Aggression', 2 *J I Crim J* (2004), at 348.

If interpreted restrictively, the power of verifying the jurisdiction should cover also the cases mentioned in Art.16 of the Statute. The first case involving Art.16 is connected with Resolution 1422(2002) that granted immunity to the members of armed forces participating in the operations established or authorized by the UNSC who are nationals of the States not parties to the Statute. The ICC had yet no opportunity to discuss the resolution that creates some doubts as to the legality of the act, as it in a way modifies the Statute of the ICC. It is unclear whether the Court could be bound by the resolution of the UNSC under the UN Charter, as the ICC is not party thereto.

If one looks closer at the definitions of crimes included in the Statute of the ICC, one finds some more examples of acts constituting international crimes under international conventions, general international (customary) law, and under the said Statute.[21] Genocide is the most important act criminalized under the statutes of international courts, and simultaneously mentioned in all preparatory works to international instruments invoking *jus cogens*, including in particular the Vienna Convention on the Law of Treaties and the codification of the law of state responsibility.

It is clear (and this approach is shared by learned authors)[22] that the definition of genocide included in Art.6 of the Statute of the ICC corresponds with the definition included in Art.II and IV of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, with one possible modification: in the case of crimes against humanity, the link between those acts and armed conflicts were broken. International courts do not have difficulties in applying the instruments providing for punishment of genocide as an international crime.

We could agree with the classification of genocide as *jus cogens*; however, the judgment of the ICJ in the *Arrest Warrant* case referred to above shows that the Hague judges do not share the opinion of the ILC and commentators as to the peremptory nature of the prohibition of genocide, as it is subordinated to the immunity of the foreign minister. In fact, in a crucial case as to the classification of the act as *jus cogens*, the ICJ decided that the most serious crimes under international law could remain unpunished (as the reference to the possible jurisdiction either of domestic courts or international criminal court is not really convincing).

Three remaining examples of crimes punishable under customary law and the ICC Statute, and corresponding with the norms referred to as peremptory are: ban on slavery, ban on torture, and prohibition of apartheid. There is no doubt as to the specific rules forbidding torture, and even granting the power of prosecuting the perpetrators irrespective the place where the torture was committed nor the nationality of the perpetrator and victim.[23] All the elements of the crime of torture were confirmed in the decisions of the criminal tribunals for Yugoslavia and Rwanda, so that we do not find it necessary to discuss the issue in detailed way. There is no doubt

21 I would like to refer here to an analysis by H.H.Jescheck, 'The General Principles of International Criminal Law set out in Nuremberg, as Mirrored in the ICC Statute', 2 *J I Crim J* (2004), at 38 ff.

22 M.Płachta, op.cit., at 11; W.A.Schabas, *An Introduction to the International Criminal Court*, (2004), at 37; A.Zimmermann, op.cit., at 171-172.

23 I agree on that point with A.Cassese, *International Criminal Law*, (2003), at 119.

that the ban on torture could have acquired a status of *jus cogens*; however, we are still looking for the confirmation of this stance in the jurisprudence of domestic courts.

Commentators refer to some other examples of acts leading possibly to both international state responsibility and individual criminal responsibility.[24] War crimes including in particular killing of protected persons in armed conflict, grave violations of the 1949 Geneva conventions on humanitarian law, euphemistically invoked "unlawful uses of armed forces", terrorism, can be mentioned.[25]

The substantive dimension of those acts are well defined in international instruments of universal and regional application, as well as in international judicial practice and legal writing. However, we do agree with the opinion that even if the acts themselves constitute in the same time delicts by state and individual crimes under international law, the definition of specific elements for the needs of state responsibility and criminal responsibility can be differentiated, and the standard of proof in interstate proceedings is usually lower than the one required by criminal tribunals.

Premises applied by international judicial bodies and criminal courts are different, as their goals are different as well. This was clearly emphasized i.a. by the Trial Chamber of the ICTY in the *Čelebići* decision referred to above.

The judges stated that "The International Tribunal is a criminal judicial body, established to prosecute and punish individuals for violations of international humanitarian law, and not to determine State responsibility for acts of aggression or unlawful intervention. It is, therefore, inappropriate to transpose wholesale into the present context the test enunciated by the ICJ to determine the responsibility of the United States for the actions of the contras in Nicaragua". We could follow the learned authors in stressing other parallels with respect to both categories of responsibility: attribution, fault, remedies and defences.[26] I do not intend, however, to develop those ideas.

Procedural questions is another aspect of mutual interrelations between state responsibility and criminal responsibility of individuals. We suggest that it is possible to establish a certain parallel between the obligations *erga omnes* and universal jurisdiction under international criminal law. There is no direct and full coherence between the acts classified under both notions. However, the universal jurisdiction can be ascertained with respect to individual crimes under the same circumstances as international responsibility of States. It is generally known that the notion of obligations *erga omnes* was introduced into international law by the ICJ judgment in the

24 Cf. V.D. Degan, op.cit., pp.204 and 212ff; A. Nollkaemper, Concurrence between Individual Responsibility and State Responsibility, *ICLQ* 52 (2003), at 617. Among other authors writing on this topic we should mention P.M. Dupuy, 'International Responsibility of the Individual and International Responsibility of the State', [in:] A. Cassese et al. (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p.1085; M. Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datu', 13 *EJIL* (2002), p.895; P.S. Rao, 'International Crimes and State Responsibility', in M. Ragazzi, op.cit., p.63; H. Gros-Espiell, 'International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights,' in M. Ragazzi, op.cit., p.151.

25 However, it seems to me that the scope of possible prosecution of the perpetrators has been widened, and it covers also persons committing their crimes in internal armed conflicts.

26 A. Nolkaemper, ibidem, pp.625ff.

Barcelona Traction case.

Some international legal norms were declared to be of higher rank than others; they were owed to the international community as a whole (in contradiction to the regular bilateral obligations owed towards another State), and all States had a legal interest in their protection. As examples of erga omnes norms, genocide and aggression were mentioned. Some other judicial decisions, including in particular the *Genocide Convention* and *East Timor* cases by the ICJ, the *Prosecutor v. Furundzija* case by the ICTY, also referred to *erga omnes* obligations, invoking the principle of self-determination and the ban on torture. It is interesting, however, that the ICJ in the same judgment (*Barcelona Traction*) stated that the classification of certain norms (in particular those concerning core human rights) as *jus cogens* does not grant *locus standi* to any other State than a [directly] injured one.

In particular, no third States can bring any claims concerning the protection of human rights in any other State. The ICJ rejected therefore the concept of *actio popularis*. On the other hand, Art.48 on State responsibility drafted by the ILC recognizes the right of States other than the injured State to invoke international responsibility and claim the cessation of an illegal act, and to request payment of reparation to the victim. This proposal enunciated in the ILC text suggests as least a kind of *actio popularis*. If we turn to criminal jurisdiction, we must state that the exercise of such jurisdiction *in absentia* can be claimed exclusively in respect of the perpetrators of the most serious crimes, like war crimes, genocide, and torture. Traditionally it is connected with slavery and piracy, but it might be suggested that it could be claimed also in respect of violations of peremptory norms of international law.

I repeat that obligations *erga omnes* mean that responsibility with respect to certain violations of international law can be claimed not only by the State being a direct victim of the act (or using the previous terminology of the ILC – by the directly injured State), but also by other States. This new approach to procedural law of state responsibility is particularly visible with respect to countermeasures. Let us remind that countermeasures cannot amount to use of force in a manner inconsistent with the UN Charter, to violations of fundamental human rights, obligations based on humanitarian law excluding reprisals, and other obligations under peremptory norms. While applying countermeasures, the State concerned should observe rules of diplomatic law concerning the inviolability of diplomats and embassies, as well as should apply procedures concerning the settlement of disputes.

First alinea of Art.50 suggests in a way that the three former obligations constitute obligations under peremptory norms of international law, as completed by the provision concerning "other obligations under peremptory norms". In fact this enumeration corresponds with the proposals suggested by the ILC in different provisions of the Draft and Commentary thereto as to the examples of peremptory norms. This exclusion of diplomatic law out of countermeasures was influenced by international practice, in particular by the judgment of the ICJ in the Tehran Hostages case in which the Court confirmed the self-contained character of diplomatic law.[27] All measures applicable as reaction to violations of diplomatic law must be provided by the system of diplomatic law itself.

The relationship between the most serious individual crimes and *ius cogens* is of

27 *ICJ Rep*. 1980, 40.

a different nature. First of all, *ius cogens* is not clearly defined under contemporary international law. The acts are not identified, that makes the responsibility of States for serious violations of peremptory norms, as envisaged in the ILC Draft, problematic. On the other hand, we have in mind specific requirements connected with the criminal responsibility of individuals, as to the principle of legality, and the letter of the Statute of the ICC still needs to be confirmed by the judicial practice of domestic courts. International criminal law is still developing, and so does the concepts of *jus cogens* and obligations *erga omnes* – the latter can be developed also thanks to the activities of international penal tribunals.

Section 7

Jurisdiction *Ratione Personae*, *Loci* and *Temporis*

Chapter 18

Jurisdiction *Ratione Personae* or the Personal Reach of the Court's Jurisdiction

Christopher L. Blakesley

Introduction and Conceptual Background

The International Criminal Court (hereinafter, ICC) has jurisdiction to prosecute natural persons[1] who have reached the age of eighteen years.[2] States Parties to the Rome Statute reached a compromise codified in Article 12, whereby jurisdiction obtains over crimes committed by a national of a state party or on the territory of a state party.[3] Trials in absentia are prohibited.[4]

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1 The Rome Statute of the International Criminal Court [hereinafter Rome Statute], July 17, 1998, 2187 UNTS 3, *reprinted in* 1 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, UN Doc. A/CONF.183/13 (Vol. I) (2002); *also available* at 37 I.L.M 999 (1998); at articles 1, 12, and 25(1). The ICC's website is *available at*: http://www.icc-cpi.int/about.html. *See also* M. Cherif Bassiouni, The Statute of the International Criminal Court: A Documentary History at 51 (1998); Introduction to International Criminal Law, at 506 (Transnational Pub. 2003); Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium, at 104-107, 113-114, 116-118 (Transnational Pub. 2001);William A. Schabas, An Introduction to the International Criminal Court 68-115 (2nd ed. 2004); M. Cherif Bassiouni, Introduction to International Criminal Law, at 506 (Transnational 2003). *Cf.*, Clive Walker, Dave Whyte, *Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom*, 54 International & Comparative Law Quaterly 651, 684-85(2005).

2 Rome Statute, *supra* note 1, at art. 26; Sadat, The International Criminal Court, *supra* note 1, at 105, noting that this age limitation to *ratione personae* jurisdiction is not designed to indicate any general rule on the age of criminal accountability, which varies widely among the various nations of the world. Sadat, id., at 105-06, referencing the commentary to the Zutphen Intersessional Draft, art. 20[E] n. 92; the Convention on the Rights of the Child, Nov. 20, 1989, G.A.Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at art. 1, U.N. Doc A/44/49 (1989), reprinted in 28 I.L.M. 1456 (1989); and Per Saland, *International Criminal Law Principles,* in The International Criminal Court: The Making of the Rome Statute 189, 201 (Roy S. Lee (ed.), 1999).

3 Rome Statute, *supra* note 1, at article 12; William A. Schabas, An Introduction to the International Criminal Court 75 (2nd ed. 2004). *Cf.* Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches To Attributing Liability To Corporations For Extraterritorial Abuses*, 26 Nw. J. Int'l L. & Bus. 43, 58 (2005).

4 Rome Statute, *supra* note 1, at art 63(1). Sadat, The International Criminal Court, *supra* note 1, at 105, n.6.

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The innovation of the International Military Tribunals at Nuremberg[5] and Tokyo[6] provided the modern impetus for personal accountability for the most serious crimes that can be committed.[7] Moreover, the immortal words of the Nuremberg Tribunal elucidate the point: "crimes against international law are committed by

5 Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; International Military Tribunal, 4 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946, at 195-96, 241-42 (1947) [hereinafter Nuremberg Trials]. *See* Douglas O. Linder, The Nuremberg Trials, in Famous World Trials, Nuremberg Trials 1945-1949, http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergACCOUNT.htm; The International Military Tribunal for the Far East, (colloquially: the Tokyo Tribunal), War Crimes Tribunals, *available at* http://www.facts.com/icof/nazi.htm. *See generally* Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott, and Sharon Williams, The International Legal System: Cases and Materials, at Chapter 16 (5th ed. 2002).

6 The International Military Tribunal for the Far East, (colloquially: the Tokyo Tribunal), in War Crimes Tribunals, at http://www.facts.com/icof/nazi.htm. The Tokyo Tribunal was established by a "Special Proclamation" by General Douglas MacArthur. *See* Charter of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevans 20. *See generally* Christopher L. Blakesley, et al., The International Legal System: Cases and Materials, at Chapter 16 (5th ed. 2002); Yuma Totani, The Tokyo War Crimes Trial: Historiography, Misunderstandings, and Revisions (Ph.D. dissertation, The University of California at Berkeley, 2005); Yuma Totani, in *Symposium Women and War: A Critical Discourse,* 20 Berkeley J. Gender L. & Just. 321, 329 (2005) (discussing how wartime sexual violence was treated as a war crime at the Tokyo Trial).

7 "The paradigm of justice established at Nuremberg and its vocabulary of international law, despite its shortcomings, continue to frame the successor justice debate." Ruti Teitel, Transitional Justice (2001) at 33, 31-39. *See, e.g.,* David Dyzenhaus, Truth, Reconciliation and the Apartheid Legal Order, 2 (1998): "Since the handover of power was negotiated, it was not considered a realistic option to have Nuremberg-type criminal trials where perpetrators, or at least the main perpetrators, of human rights abuses would be punished for their crimes." Belgium has tried people accused of participating in the Rwandan genocide for crimes against humanity. *See* Rwandan Nuns on Trial for Genocide, Cape Times, April 18, 2001 at 4 (noting that "Belgium's eagerness to stage the "Pounds Sterling" 1.4 million trial reflects its failure to prevent the genocide in its former colony"). *See also* N.Y. Times, June 22, 2001 (noting that United States courts are increasingly taking jurisdiction over cases involving overseas crimes of state). Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 Int'l Leg. Persp. 73, 75 (Fall 2001 – Spring 2002). *See also*, Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (1992); Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle & Beyond – Human Rights Clauses in Extradition Treaties*, 90 Journal of Criminal L. & Criminology 1 (2001); Blakesley, *The Modern Blood Feud: Thoughts on the Philosophy of Crimes Against Humanity*, Ch. in II International Humanitarian Law: Origins, Challenges & Prospects (at press, 2002); Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal,* 18 Fletch. For. Wld. Affr's 77 (1994). *See also,* Schwarzenberger, *The Problem of an International Criminal Law, in International Criminal Law* 3, 10, 16 (Mueller & Wise eds. 1965); Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 Cal.L.Rev. 530, 553, 556 (1943) (noting that international law provides for some offenses as criminal, though enforcement is to be undertaken by domestic courts); Diane Orentlicher, *Settling Accounts:The Duty to Prosecute Human Rights Violations of a Prior Regime,*}fi 100 Yale L.Journal 2537 (1991); M. Cherif Bassiouni, *International Criminal Law and Human Rights*, 9 Yale Journal World Public Order 193 (1982); Quincy Wright, *The Outlawry of War and the Law of War,* 47 A.J.I.L. 365 (1953); Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 U. Colo.L.Rev. 449, 455 (1989).

men, not by abstract entities; and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[8] Following the tradition of Nuremberg and Tokyo, the International Criminal Court has jurisdiction over nationals of State Parties who are accused of a crime within the Court's subject matter[9] and temporal jurisdiction.[10] Article 25(1) of the Rome statute, however, rejects jurisdiction over "legal persons."[11]

The Court also has jurisdiction over a natural person of any nationality who commits such a crime within the territory of a State-Party or when the perpetrator is a national of a State-Party.[12] Jurisdiction may also obtain, on an *ad hoc* basis, incident to a declaration by a non-State-Party, accepting the Prosecutor's *proprio motu* determination to prosecute, or accepting a State-Party's referral.

For this to happen, it seems that another State Party would have to refer the situation that occurred in a non-state party or the Prosecutor would have to do so *proprio motu*. In either case, the non-state party would have to make a declaration accepting the jurisdiction of the ICC pursuant to article 12(3) (location of the crimes) or by the country of which the accused is a national.[13] The ICC also has jurisdiction

8 *France et al. v. Göring, et al.*, 23 I.M.T. 1 (1946), [1946] Annual Digest 202; Rome Statute, *supra* note 1, at article 25(2). *See* Dominic McGoldrick, Peter Rowe, and Eric Donnelly, eds., The Permanent International Criminal Court: Legal and Policy Issues 52-53 (Hart Pub., 2004); Blakesley, et al., The International Legal System: Cases & Materials (2001) at Ch. 16.

9 Rome Statute, *supra* note 1, in the Preamble and in article 5. The crimes include: genocide, crimes against humanity, war crimes, aggression and offenses against the administration of justice. *See also* ICC articles 6, 7, and 8, which extend and elaborate the crimes of genocide, crimes against humanity and war crimes. *See also* ICC article 17. Machteld Boot, Genocide, War Crimes, Crimes Against Humanity: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court 138-139, 437-448, 439, 157 (2002). Schabas, An Introduction, *supra* note 3, at Chapter 2; Geert-Jan Alexander Knoops, An Introduction to the Law of International Criminal Tribunals: A Comparative Study, 9 (2003).

10 Rome Statute, *supra* note 1, at art. 12(2)(b). For a discussion of the ICC's temporal (*ratione temporis*) jurisdiction, see Schabas, An Introduction, *supra* note 3, at 69-72; 80-81. *See also* David J. Scheffer, *How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction,* 2 J. Int'l Crim. Just. 26 (2004); David Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l L. 12 (1999). See also generally, David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 Journal of International Criminal Justice 333 (2005).

11 Rome Statute, *supra* note 1, at art. 25(1), providing that only natural persons are accountable.

12 Rome Statute, *supra* note 1, at arts. 25(1), (2), and (3); Schabas, An Introduction, *supra* note 3, at 78-79, 80.

13 Thanks to my friend and colleague, Linda Carter, and the authority in this note for clarifying this point. *See* Rome Statute, *supra* note 1, at art. 12(3); Rome Statute, Rules of Procedure and Evidence, UN Doc. PNCICC/2000/INF/3/Add.1, Rule 44; Carsten Stahn, Mohamed M. El Zeidy, and Hector Olasolo, *The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 Am. J. Int'l L. 421, n. 3 (2005); Schabas, An Introduction, *supra* note 3, at 80. While Uganda was the first state to submit to ICC jurisdiction, but the Ivory Coast was the first non-state party to make a declaration incident to article 12(3). *See also* Payam Akhavan, *Development at the International Criminal Court The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 Am. J. Int'l L. 403, 412-414 (2005).

over a case, when the Security Council refers it to the Court.[14] Nationality, or *personalité active*, is one of the more important bases of jurisdiction.[15] Moreover, jurisdiction based on an alleged offender's nationality was the least controversial basis for the ICC.[16] As a matter of general international law, of course, a person's nationality must be based on his or her genuine and substantial links to the state in question.[17]

The advent of the International Criminal Court is certainly auspicious. Carston Stahn, Associate Legal Adviser to the International Criminal Court, describes the nature of the system that is developing:

> [t]he decision to join the ICC system marks a special commitment to accountability. By ratifying the Statute, a state acknowledges that two types of crimes within the jurisdiction of the Court shall be investigated or prosecuted: crimes committed by its nationals and crimes committed on its territory. The state of the nationality of the accused accepts that crimes committed by its citizens may be subject to investigation or prosecution by the Court, irrespective of where they have been committed. Moreover, victims of crimes situated in the territory of a State Party may be said to acquire a right to investigation or prosecution by the accession of the territorial state into the ICC system, which becomes part of an *acquis* of the people – a con-

14 Rome Statute, *supra* note 1, at art. 13(a-b). *See* Jamie O'Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 Harv. Int'l L.J. 295 at 296, n. 10 (2005), referencing, S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in the Darfur region of Sudan to the International Criminal Court ("ICC") for investigation and possible prosecution). Chief Prosecutor Ocampo has decided to open investigation on this. International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited Jan. 30, 2006). *See generally* George P. Fletcher, *Symposium Justice and Fairness in the Protection of Crime Victims,* 9 Lewis & Clark L. Rev. 547 (2005); W. Michael Reisman, *Editorial Comment On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court,* 99 Am. J. Int'l L. 615 (2005); *Contemporary Practice of the United States Relating to International Law United States Abstains on Security Council Resolution Authorizing Referral of Darfur Atrocities to International Criminal Court,* 99 Am. J. Int'l L. 691 (2005), *citing* in n.1, p. 691, John R. Crook, Contemporary Practice of the United States, 99 Am. J. Int'l L. 501 (2005); Erin Patrick, *Intent To Destroy: The Genocidal Impact of Forced Migration in Darful, Sudan,* 18 J. Refugee Stud. 410 (2005); *France Offers U.S. a Dilemma on Sudan,* Wash. Post, Mar. 24, 2005, at A16; Warren Hoge, *France Asking U.N. to Refer Darfur to International Court*, N.Y. Times, Mar. 24, 2005, at A3; Warren Hoge, *U.N. Votes to Send any Sudan War Crimes Suspects to [International Criminal] Court*, N.Y. Times, Apr. 1, 2005, at A6; Colum Lynch, U.N. Council's Resolution on Atrocities in Sudan Is Passed, Wash. Post, Apr. 1, 2005, at A21; Mark Turner, *US Compromise Allows Darfur Atrocities to Be Referred to ICC*, Fin. Times, Apr. 2, 2005, at 3; *Lengthening the Arm of Global Law*, Economist, Apr. 9, 2005, at 38.

15 *See generally* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* II International Criminal Law: Procedural and Enforcement Mechanisms at 33-105 (Bassiouni ed., 2nd ed. 1998).

16 William A. Schabas, An Introduction to the International Criminal Court 80 (2nd ed. 2004).

17 *Ibid*. This is the rule of customary international law, indicated in the Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase), Judgment of 6 April 1955[1955] ICJ Reports 24; Blakesley et al., The International Legal System: Cases & Materials, at 594 (5th ed. 2001). Customary International Law and its impact on jurisdiction personae will be discussed below.

> cept known from the practice of succession into human rights treaties and the law of the European Union.[18]

The Court, however, faces questions about the breadth of its effectiveness in fighting impunity. Professor Paul Dubinski writes that:

> [t]he three most populous countries--China, India, and the United States--declined to ratify the Rome Statute, even after extensive modifications were made to earlier drafts at the insistence of the U.S. delegation. These modifications moved the new court away from an early model premised on universal jurisdiction. Under the final statute, the ICC is able to hear only actions against natural persons; it affords very limited opportunity for involvement by victims and non-parties; its ability to adjudicate is secondary to that of domestic courts; its jurisdiction is limited to genocide, crimes against humanity, war crimes, and aggression; and its capacity is quite limited by virtue of it being just one court with only eighteen judges.[19]

The story of the vigorous battle waged by the United States to limit the scope of the Court's jurisdiction and the subsequent refusal to participate with, even to undermine, the ICC relates directly and poignantly to issues of jurisdiction *ratione personae*. The nature of these issues will be analyzed in this paper.

I have already noted briefly that the ICC has jurisdiction only over "natural persons" – it has no jurisdiction over states or other "legal persons."[20] Professor Leila Nadya Sadat reports that early discussions in the International Law Commission about the possibility of an international criminal tribunal included discussions about including state culpability,[21] but this was rejected as being "*science fiction*."[22]

Jurisdiction over some "legal persons" other than states, however, may be more subtle and possibly more hopeful. For example, Yaron Gottlieb noted that "the ICC Rules of Procedure and Evidence define the term 'victim' broadly enough to include

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18 Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. Int'l Crim. Just. 695, 705-706 (2005) (footnotes omitted).

19 Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict,* 30 Yale J. Int'l L. 211, 311-12, n.521 (2005) (discussing the fits and starts of the ICC's genesis), citing: Rome Statute of the ICC, *supra* note 1, at art. 5. Dubinski also notes that the "ICC will not be able to adjudicate cases involving aggression until the crime of aggression is defined in accordance with Article 5.2 of the Statute."

20 Rome Statute, *supra* note 1, at arts. 1, 5, and 25(1); Bassiouni, Introduction, *supra* note 1, at 506; Sadat, The International Criminal Court, supra note 1, at 105. Cf., Clive Walker, Dave Whyte, *Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom*, 54 Int'l & Comp. L.Q. 651, 684-685(2005); Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches To Attributing Liability To Corporations For Extraterritorial Abuses*, 26 Nw. J. Int'l L. & Bus. 43 (2005); Stephen Kabel, *Comment, Our business is people (even if it kills them),* 12 Tulane J. Int'l & Comp. L. 461(2004).

21 Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 Cornell Int'l L.J. 665, 678 n. 75 (1996); Sadat, The International Criminal Court, *supra* note 1, at 105.

22 Sadat Wexler, *The Proposed Permanent International Criminal Court, supra* note 21, at 680 n.88 (1996); Sadat, The International Criminal Court, *supra* note 1, at 105.

not only natural persons but also organizations and institutions that have sustained direct harm to certain types of their property such as historic monuments."[23] One may wonder whether the same logic would call for prosecution of perpetrators? Professor Rebecca Bratspies explains that the drafters of the Rome Statute seriously considered granting the ICC jurisdiction over transnational enterprises and other legal persons. The working draft Statute included paragraphs 5 and 6 of Article 23, imposing liability on legal persons, right up until the Statute's final draft.[24] Draft Article 23 (5) and (6)originally provided:

> (5) [The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.
> (6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][25]

This language was controversial, especially as applied to state responsibility.[26] The final and most developed version of this part of the working Draft's Article 23 was circulated after weeks of negotiation.[27] In this draft, the juridical person's culpability was tied much more explicitly to that of natural persons acting on behalf of the "juridical person":[28]

> (5) Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged if:
> a) The charges filed by the Prosecutor against the natural person and the

23 Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal For Defining New Crimes Under The Rome Statute of the ICC*, 23 Penn St. Int'l L. Rev. 857, 878-879, n. 99 (2005), citing: Rule 85 [Definition of Victims] of the ICC Rules of Procedure and Evidence, which states: "For the purposes of the Statute and the Rules of Procedure and Evidence: ... (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes." International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

24 Rebecca M. Bratspies, *Symposium "Organs of Society": A Plea For Human Rights Accountability For Transnational Enterprises and Other Business Entities*, 13 Mich. St. J. Int'l L. 9, 25 (2005).

25 Bratspies, *supra* note 24, at 26, *citing* Draft Statute for the International Criminal Court, U.N. GAOR, at 49, U.N. Doc. A/CONF.183/2/Add.1 (1998) (citations omitted), *available at* http://www.un.org/law/icc/docs.htm (last visited Feb. 21, 2005).

26 Sadat, *The Proposed Permanent International Criminal Court*, *supra* note 21, at 680, n. 88; Bratspies, *supra* note 24, at 26.

27 Bratspies, *supra* note 24, at 26, *referencing*: Working Paper on Article 23, Paragraphs 5 and 6, U.N. GAOR, U.N. Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2 (1998).

28 Bratspies, *supra* note 24, at 26.

juridical person allege the matters referred to in subparagraphs (b) and (c); and

b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

d) The natural person has been convicted of the crime charged. For the purpose of this Statute, 'juridical person' means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.

(6) The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be tried jointly. If convicted, the juridical person may incur the penalties referred to in article 76.[29] These penalties shall be enforced in accordance with the provisions of article 99.][30]

This final draft language was ultimately dropped by France, its original sponsor, so it never found its way into the adopted and promulgated Rome Statute.[31] Thus, the final version of the Rome Statute provides in Article 25(1), for jurisdiction to prosecute only natural persons.[32]

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29 Bratspies, *supra* note 24, at 27, *quoting* Draft article 76, in relevant part: "... (Penalties applicable to legal persons) states: "A legal person shall incur one or more of the following penalties:

(i) fines;

[(ii) dissolution;]

[(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]

[(iv) closure, for such a period as determined by the Court, of the premises used for the commission of the crime;]

[(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]

[(vi) appropriate forms of reparation]. Draft Statute for the International Criminal Court, *supra* note 25, at 121-22 (citations omitted).

30 Bratspies, *supra* note 24, at 27, noting that the relevant part of Draft Statute article 99 (Enforcement of fines and forfeiture measures), provided: "The provisions of this article shall apply to legal persons." Draft Statute for the International Criminal Court, *supra* note 25, at 155 (citations omitted).

31 Bratspies, *supra* note 25, at 27, *citing* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Convention on an International Criminal Court, in Liability of Multinational Corporations Under International Law* 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

32 Rome Statute, article 25(1); Bratspies, *supra* note 24, at 27.

The Rome Statute also provides that a person's official position or capacity may not exempt her from criminal responsibility and accountability.[33] This aspect of the Rome Statute is nuanced and ambiguous. It will provide the opportunity for more analysis in this chapter. I will discuss jurisdiction *ratione personae* and exemptions from or exceptions to that jurisdiction. First, however, a brief excursus into general principles of jurisdiction may be helpful.

I. General Principles of Jurisdiction

A. International and Domestic Law on Extraterritorial Jurisdiction

One may define jurisdiction as the authority to effect legal interests – to prescribe rules of law, to adjudicate legal questions and to compel, to induce compliance or to take any other enforcement action.[34] Jurisdiction provides the means of making law functional; through jurisdiction, states and legal institutions make law a reality. It relates to jurisdiction to prescribe rules of law---the jurisdiction to proscribe conduct as criminal. Any definition of crime and any institution that calls for application of the law to its subjects or objects necessarily includes the scope of application in time and space to the institution's subjects or objects – its jurisdictional breadth. My focus in this chapter is on jurisdiction *ratione personae*: the jurisdiction over persons.[35]

International law is the language by which the international community attempts to resolve competing legal interests. As with any other language, it is difficult to communicate, if the definitions or essential concepts become muddled. Confusion over terms, therefore, often leads to disagreement, diplomatic protest, or refusal to cooperate.[36] Exploitation of ambiguities in terminology relating to jurisdiction poses the same problem. The U.S. attempt to immunize all U.S. nationals from the jurisdiction of the ICC, through its interpretation of Rome Statute article 98, is an example of the latter.[37] I will discuss this latter subject, below.

The definition, nature, and scope of jurisdiction may vary depending on the institution claiming it; it depends on the context in which jurisdiction is claimed or asserted. Each legal entity must have an organic instrument, or functional equivalent, that creates its legal universe. Domestic constitutional law limits the jurisdiction of its judicial bodies and the scope of its legislation. The Rome Statute for the ICC limits the jurisdiction of the International Criminal Court (the breadth of prescriptive jurisdiction and the persons to whom it applies), just as domestic constitutional law limits the jurisdiction of its judicial bodies and the scope of the state's legislation.

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33 Rome Statute, *supra* note 1, at art. 27; *cf.*, art. 98.

34 Christopher L. Blakesley et al., The International Legal System: Cases and Materials 131-33 (5th ed. 2001) ; Restatement (Third) of the Foreign Relations Law of the United States para. 401 (1987) [hereinafter, Restatement 3rd].

35 Black's Law Dictionary (8th ed. 2004), defines *ratione personae* as follows: by reason of the person concerned.

36 *See* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in II International Criminal Law: Procedural and Enforcement Mechanisms, pp. 33-105 (Bassiouni ed., 2nd ed. 1998).

37 *See* discussion, *supra* at notes 90-122, and accompanying text.

In both the international and the domestic contexts, the interpretation of jurisdictional scope is dynamic, due to the natural ambiguity of language and the evolution of concepts. In the international arena, the dynamic nature occurs through the evolution of both customary international law and general principles of international law, which are authoritative sources.[38] This is not so different from domestic evolution. In domestic systems, the common law evolves, as does customary law in Civil Law systems. Constitutional jurisprudence causes the scope and breadth of the U.S. Constitution to evolve. Obviously, for example, as the Supreme Court of the United States interprets constitutional terms and phrases, their meaning evolves as well. So, too, does the meaning of terms of phrases of statutes and codes in all systems.

International law may limit or expand a state's authority to apply its domestic law to events that occur outside that state's territory.[39] National law and practice may limit or expand the scope of jurisdiction in international institutions. Domestic law obviously limits jurisdiction,[40] and on the enforcement side, may preclude prosecution or enforcement of a judgment rendered by a state that assumed jurisdiction or that sought extradition.[41] The same is true for international law, international humanitarian law, and the law of international institutions or tribunals.

In the United States, as in virtually all countries, jurisdiction must comply with constitutional principles, such as those relating to the separation of powers, federalism, and constitutional protections for its subjects, such as due process.[42] The International Criminal Court has similar principles that limit jurisdiction and protect against abuse. Unfortunately, the Bush administration attempts to thwart and seriously erode these constitutional principles and to destroy the effectiveness of the ICC.

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38 *See* Statute of the International Court of Justice, art. 38.

39 *See, e.g.,* Cutting Case, 1887 For. Rel. 751 (1888) (sanction for violating international law on jurisdiction may be an unfavorable diplomatic protest); S.S. "Lotus" (Fr. v. Turk.), 1929 P.C.I.J. (ser. A) No. 9 (Sept. 7, 1927) (indicating that although international law is permissive, sanction for violation may be an unfavorable judgment in the Int'l Court of Justice). See *generally* Christopher L. Blakesley, Terrorism and Anti-Terrorism: A Normative and Practical Assessment (2006); Christopher L. Blakesley, Terrorism, Drugs, International Law and the Protection of Liberty Ch. 3 (1992); Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime,* 73 J. Crim. L.& Criminology 1109 (1982) [hereinafter Blakesley, *U.S. Jurisdiction*]; Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime,* 1984 Utah L. Rev. 685 [hereinafter Blakesley, *Conceptual Framework*].

40 *See* Willis L. M. Reese, *Limitations on the Extraterritorial Application of Law*, 4 Dalhousie L.J. 589 (1978).

41 *See* Adolf Homberger, *Recognition and Enforcement of Foreign Judgments*, 18 Am. J. Comp. L. 367, 375 (1970). This is the function of the principle of double criminality. For discussion of this, see Christopher L. Blakesley, Terrorism, Drugs, International Law and the Protection of Human Liberty, 224-50 (1992); Christopher L. Blakesley, *Terrorism and Anti-Terrorism in Law & Literature*, 57 Miami L. Rev. 1041 (2003); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* II International Criminal Law 33 (M. Cherif Bassiouni ed. 1999).

42 *Cf.* U.S. v. Suerte, 291 F.3d 366 (5th Cir. 2002) (where the Fifth Circuit Court of Appeals held that the Due Process Clause of the U.S. Constitution may constrain the extraterritorial reach of the Maritime Drug Law Enforcement Act (MDLEA), it does not necessarily impose a nexus requirement, because the Congress promulgated the law pursuant to the Piracies and Felonies Clause of the U.S. Constitution, art. I, § 8, cl. 10.

The Bush administration's hijacking of the so-called War on Terror as an excuse to expand executive power relates to its continued attempts to thwart and erode the ICC.[43] The Bush administration's attempt to legitimize the idea of a so called "unitary executive theory,"[44] seems to be the ulterior motive domestically. Similarly, so-

43 On the erosion of the Separation of Powers and Checks & Balances, *see generally* David Cole, *Their Liberties, Our Security Democracy and Double Standards*, 31 Int'l J. Legal Info. 290 (2003). This has occurred in other periods, as well, but not with the velocity of today or the risk of permanency. Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War: The War Power of Congress in History and Law (2nd ed., 1989); Philip B. Heymann, Terrorism, Freedom and Security: Winning Without War (2003); Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences,* 102 Mich. L. Rev. 1906, 1955 (2004) (discussing how the emergency powers claimed by the federal government in the war on terror exceed those claimed by the government in the past and those exercised by other Western countries); Michael Stern, *Attacked from All Sides*, 2/2004 Am. Law. 59 (2004); Nat Hentoff, The War on the Bill of Rights and the Gathering Resistance (Seven Stories Press 2003); James Bovard, Terrorism and Tyranny: Trampling Freedom, Justice, and Peace to Rid the World of Evil (Palgrave Macmillan 2003); Eric K. Yamamoto, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*,68-SPG Law & Contemp. Probs. 285 (2005); Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 Willamette L. Rev. 941 (2005); Susan N. Herman, *The USA Patriot Act and the USA Department of Justice: Losing Our Balances?*, The Jurist (Dec. 4, 2001), at http:// jurist.law.pitt.edu/forum/forumnew40.htm. For arguments favoring the so-called unitary executive position, *see* John Yoo, The Powers of War and Peace:The Constitution and Foreign Affairs After 9/11 (2005).

44 This is so, at least, in relation to Commander in Chief Clause in the U.S. Constitution. *See generally* Cass R. Sunstein, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit National Security, Liberty, and The D.C. Circuit*, 73 Geo. Wash. L. Rev. 693, 693-694 (2005). Sunstein imagines two "extreme" positions that the federal courts might adopt: "National Security Fundamentalism" and "Liberty Perfectionism." Sunstein notes that National Security Fundamentalists "understand the Constitution to call for a highly deferential role for the judiciary, above all on the ground that when national security is threatened, the president must be permitted to do what needs to be done to protect the country." *Id.*, at 693. This creates a strong presumption favoring Presidential freedom of action. Id, referencing, e.g.: Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 Stan. L. Rev. 605, 606-10 (2003); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 Theoretical Inquiries L. 1, 1-2 (2004), at http:// www.bepress.com/til/default/vol5/iss1/art1. *See also* John Yoo, The Powers of War and Peace:The Constitution and Foreign Affairs After 9/11 (2005). Liberty Perfectionists, on the other hand, insist that in time of war it is necessary to protect liberty every bit as much as in time of peace or liberty will slip away. *Id.*, *citing*: David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism (2003); Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism (2004). Sunstein writes: "Minimalists believe that, in the most controversial areas, judges should refuse to endorse any large-scale approach and should be reluctant to adopt wide rulings that will bind the country in unforeseen circumstances. Instead, minimalists want judges to rule narrowly and cautiously." *Id.* at 693-694. *See also* Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999) (on minimalism in general). Generally on these various points of view, *see* authorities referenced *supra* note 42.

called "unilateralism"[45] is his parallel strategy at the international level. Both of these constructions are disastrous for international peace and to the U.S. Constitutional Republic. Both have a significant impact on the Bush administration's approach to the ICC.[46]

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45 *See, e.g.*, China Miéville, *Comparative Vision of Global Public Order (Part 1) Anxiety and the Sidekick State: British International Law After Iraq,* 46 Harv. Int'l L.J. 441, 453 (2005), noting the exchange between Ruth Wedgwood, *The International Criminal Court: An American View*, 10 Eur. J. Int'l L. 93 (1999), and Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 Eur. J. Int'l L. 108 (1999). See also, Peter Malanczuk, *The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind?*, 11 Eur. J. Int'l L. 77, 89 (2000) (remarking critically that the unilateralism of the United States with regard to the International Criminal Court ("ICC") makes it "a bad example"). *See also*, discussion, below, on the Bush administration's interpretation of ICC Statute, article 98, its bilateral immunity agreements, and the American Service Members Protection Act. *See, e.g.,* Jean Galbraith, *Between Empire and Community: The United States and Multilateralism 2001–2003: A Mid-Term Assessment: The Bush Administration's Response to the International Criminal Court*, 21 Berkeley J. Int'l L. 683, 686 (2003); Herbert V. Morais, *Symposium Fighting International Crime and Its Financing: The Importance of Following a Coherent Global Strategy Based On the Rule of Law* , 50 Vill. L. Rev. 583 (2005), who *cites*: Thomas M. Franck & Stephen H. Yuhan, *The United States and the* International Criminal Court: Unilateralism Rampant, 35 N.Y.U. J. Int'l L. & Pol. 519, 519 (2003); Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, Int. Crim. Ct. Monthly, at 3, 11 (June 2002); and Berta Esperanza Hernández-Truyol, *Nationalism Globalized Citizenship: Sovereignty, Security and Soul*, 50 Vill. L. Rev. 1009, 1033 (2005), *citing*: Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1 (2001). *See also* authority cited in the section of this chapter discussion these bilateral agreements and related matters.

46 *See*, for example, the discussion and authority in the section of this chapter on ICC article 98 and the American Servicemembers' Protection Act. Pub. L. No. 107-206. §§ 2001-2015, 116 Stat. 820 (2002), 22 USC §§ 7421-7433 (West Supp. 2005) (hereinafter, ASPA). For example, *see* Sean D. Murphy, *Contemporary Practice of the United States*, 96 Am. J. Int'l L. 975 (2002); Sean Murphy, *Contemporary Practice ..., Id.*, at 97 Am. J. Int'l L. 200 & 710 (2003); Diane Marie Amann and M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 Am. J. Int'l L. 381 (2002); Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 Geo. J. Int'l L. 809, 898 (2005); John Dugard, *John W. Turner Lecture: The Implications For the Legal Profession of Conflicts Between International Law and National Law*, 46 S. Tex. L. Rev. 579, 591(2005). James Podgers, *The National Pulse: Warming Trend – U.S. Position on Darfur Suggests It May Have Found a Way to Live with the ICC*, 91 Sep ABAJ 18 (Sept. 2005); Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers Immunity*, N.Y. Times, Aug. 10, 2002, at A1 (reporting Bush administration warning that nations could lose military assistance if they become members of the ICC without entering into a bilateral agreement with the United States pledging that they will not deliver U.S. troops to the Hague for prosecution by the ICC); Rosanna Lipscomb, Note *Restructuring the ICC Framework to Advance Transitional Justice: A Search For A Permanent Solution in Sudan*, 106 Colum. L. Rev. 182 (2006). The Bush Administration's stance on the ICC and the administration's use of bilateral agreements are articulated by John R. Bolton, the former Under Sec'y of State for Arms Control & International Security and current U.S. Ambassador to the United Nations, *Remarks to the Federalist Society: TheUnited States and the International Criminal Court*, (Nov. 14, 2002). China's position appears to be different from that of the United States. For a statement of the Peoples Republic of China's position, *see* Lu Jianping & Wang Zhixiang, *Symposium China's Attitude Towards The ICC,* 3 J. Int'l Crim. Just. 608, 608, 618 (2005).

B. Jurisdiction Ratione Personae *Based on Referral to the ICC by the Security Council*

ICC jurisdiction may be asserted in cases where the Security Council refers it to the prosecutor acting pursuant to Chapter VII of the United Nations Charter.[47] This was done for the first time, when the Security Council adopted Resolution 1564, which called for an international investigation into reports of genocide and crimes against humanity in Sudan.[48] A commission was established for this purpose, which ultimately wrote a report,[49] which resulted in a referral for prosecution before the ICC, pursuant to article 13(b).[50] As of January 30, 2006, the situation in Sudan has been the

47 Rome Statute, *supra* note 1, at art. 13(b). *See* S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in the Darfur region of Sudan to the International Criminal Court ("ICC") for investigation and possible prosecution) referenced in *See* Jamie O'Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 Harv. Int'l L.J. 295 at 296, n. 10 (2005). Chief Prosecutor Ocampo has decided to open investigation on this. International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited Jan. 30, 2006).

48 S.C. Res. 1564, P 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004), *available at* http://www.un.org/Docs/sc/unsc_resolutions04.html. *See also* Bureau of Int'l Info. Programs, U.S. Dep't of State, Security Council Asks for Genocide Investigation in Darfur, Sept. 18, 2004, *available at* http://usinfo.state.gov/gi/Archive/2004/Sep/20-733928.html ("The resolution asks Secretary-General Kofi Annan to 'rapidly establish an international commission of inquiry' in order to investigate reports of violations of international humanitarian and human rights law in Darfur to determine whether or not acts of genocide have occurred."), *referenced in* Rosanna Lipscomb, Note, *Restructuring the ICC Framework to Advance Transitional Justice: A Search For A Permanent Solution in Sudan*, 106 Colum. L. Rev. 182, 184 (2006). *See also* S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in the Darfur region of Sudan to the International Criminal Court ("ICC") for investigation and possible prosecution) *referenced in* Jamie O'Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 Harv. Int'l L.J. 295 at 296, n.10 (2005). Chief Prosecutor Ocampo has decided to open investigation on this. International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited June 29, 2006).

49 Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 3 (Jan. 25, 2005), available at http://www.icc-cpi.int/library/cases/Report_to_UN_on_Darfur.pdf, *cited in* Lipscomb, Note, *supra* note 46, at 185, n.20.

50 Rome Statute, *supra* note 1, at art.13(b). *See* S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005). Eleven members of the Security Council voted in favor of the resolution to refer the case to the ICC. None voted against it. Algeria, Brazil, China, and the United States abstained. Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of the International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005) (detailing vote tally for resolution), *referenced in* Lipscomb, Note, *supra* note 45, at 193, n. 65. *See* Luis Moreno Ocampo, Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593, at 1 (2005), *available at* http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf (relating to ICC article 17 and the issue of complementarity whereby the Court may take jurisdiction in cases of national unwillingness or capacity to prosecute). This is discussed below. Interestingly, perhaps, the United States did not veto Resolution 1564, nor oppose referral to the ICC. *See* George P. Fletcher, *Symposium Justice and Fairness in the Protection of Crime Victims,* 9 Lewis & Clark L. Rev. 547, 554 (2005). *See also generally* W. Michael Reisman, *Editorial Comment On Paying the Piper: Financial Responsibility*

only one referred by the Security Council to the Office of the Prosecutor.[51] Also as of January 30, 2006, Chief Prosecutor, Luis Moreno-Ocampo, "upon rigorous analysis in accordance with the Rome Statute and the Rules of Procedure and Evidence ... has decided to open investigations into the situations in The Democratic Republic of Congo, The Republic of Uganda, and Darfur, Sudan."[52]

C. Complementarity and Jurisdiction Ratione Personae

The ICC's jurisdiction is limited by complementarity, which provides for the primacy of national prosecution, if a national jurisdiction is willing and able to prosecute.[53] Article 17(1) requires the Court to defer when[54]

> (a) the case is being investigated or prosecuted by a state which has jurisdiction over the case, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.[55]

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for Security Council Referrals to the International Criminal Court, 99 Am. J. Int'l L. 615 (2005); *Contemporary Practice of the United States Relating to International Law United States Abstains on Security Council Resolution* Authorizing Referral of Darfur *Atrocities to International Criminal Court*, 99 Am. J. Int'l L. 691 (2005), *citing in* fn. 1, p. 691, John R. Crook, *Contemporary Practice of the United States*, 99 Am. J. Int'l L. 501 (2005); *France Offers U.S. a Dilemma on Sudan*, Wash. Post, Mar. 24, 2005, at A16; Warren Hoge, *France Asking U.N. to Refer Darfur to International Court*, N.Y. Times, Mar. 24, 2005, at A3; Warren Hoge, *U.N. Votes to Send any Sudan War Crimes Suspects to [International Criminal] Court,* N.Y. Times, Apr. 1, 2005, at A6; Colum Lynch, *U.N. Council's Resolution on Atrocities in Sudan Is Passed*, Wash. Post, Apr. 1, 2005, at A21; Mark Turner, *US Compromise Allows Darfur Atrocities to Be Referred to ICC*, Fin. Times, Apr. 2, 2005, at 3; *Lengthening the Arm of Global Law*, Economist, Apr. 9, 2005, at 38.

51 International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited June 29, 2006).

52 *Id.*

53 Rome Statute, *supra* note 1, at art. 17.

54 Inadmissibility is the term used by the Rome Statute for situations where jurisdiction would obtain, but the court may not assert it. *See* Schabas, An Introduction, *supra* note 3, at 68; 85-89.

55 Rome Statute, *supra* note 1, at art. 17(1)(a)-(b). Schabas, An Introduction, *supra* note 3, at 85-89. *See generally ICC, Office the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice'* (2003), available online at http://www.icc-cpi.int (homepage), cited in Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. Int'l Crim. Just. 695, 696 at fn. 2 (2005); Chet J. Tan, Jr., *Critical Essays: The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 Am. U. Int'l L. Rev. 1115, 1153-1158 (2004); Philippe Kirsch, *Keynote Address at the Cornell International Law Journal Symposium: The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression* (Mar. 5, 1999), *in* 32 Cornell Int'l L.J. 437, 438 (1999) ("[I]t is the essence of the principle [of complementarity] that if a national judicial system functions properly, there is no reason for the ICC to assume jurisdiction.");

The word *complementarity* is not to be found in the Rome Statute, but the concept of complementarity is reaposited in the term *admissibility*. "Admissibility" relates to situations in which the Court has jurisdiction, but should not assert it. The idea of, and principles underlying, complementarity are found in the Rome Statute Preamble and in Articles 1 and 17.[56]

Complementarity is perhaps a key, if not *the* critical, element for success of the ICC system.[57] It ought to promote cooperation because ICC prosecution will only take place when no state with jurisdiction is willing and able to prosecute.[58] The Rome Statute presupposes that nations will proscribe the conduct that comprises the core crimes: genocide, crimes against humanity, war crimes, eventually aggression, and, perhaps, others.[59] By June 2006, three States had referred cases to the ICC prosecutor. These were Uganda, the Democratic Republic of Congo and the Central African Republic.[60]

Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 Cornell Int'l L.J. 837, 852 (2005) ("[T]he Rome Statute, the ICC"s jurisdiction is triggered if, and only if, the national legal system is "either unwilling or unable" to exercise jurisdiction. These conditions will need to be interpreted, but as prefatory to the ICC's substantive adjudicatory work, this evaluatory enterprise is already a substantial element of the work of the tribunal."); Olivia Swaak-Goldman, *Shorter Article, Comment, and* Note*: Recent Developments in International Criminal Law: Trying to Stay Afloat Between Scylla and Charybdis*, 54 Int'l & Comp. L.Q. 691, 691-692 (2005); Gerhard Hafner, *Editorial Comment An Attempt to Explain the Position of the USA Towards the ICC,* 3 J. Int'l Crim. Just. 323, 327(2005); Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 Wm. & Mary L. Rev. 135, 184, n.209 (2005) ("Under the complementarity regime, the ICC may not consider a case if a state with jurisdiction is investigating or prosecuting the case, unless that state is "unwilling or unable genuinely to carry out the investigation or prosecution."); Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 Mil. L. Rev. 20 (2001) (discussing complementarity and jurisdictional issues with the ICC); Annie Wartanian, Note*: The ICC Prosecutor's Battlefield: Combatting Atrocities While Fighting For States' Cooperation Lessons From the U.N. Tribunals Applied to the Case of Uganda*, 36 Geo. J. Int'l L. 1289, 1294-1295 (2005). *Cf*. Frédéric Mégret, *In Defense of Hybridity: Towards A Representational Theory of International Criminal Justice*, 38 Cornell Int'l L.J. 725, 726, 731 (2005). For China's perspective, *see* Lu Jianping & Wang Zhixiang, *Symposium China's Attitude Towards The ICC,* 3 J. Int'l Crim. Just. 608, 608, 618 (2005).

56 Rome Statute *supra* note 1, at Preamble, article 1, and article 17.

57 Rosanna Lipscomb, Note*, Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan,* 106 Colum. L. Rev. 182 (2006).

58 Swaak-Goldman, *Shorter Article, supra* note 55, at 691.

59 Swaak-Goldman, *Shorter Article, supra* note 55, at 697-98 and authority in her fn. 20, (noting that, "Paragraph 6 of the preamble states that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. Such exercise of criminal jurisdiction presupposes that international crimes are contained in States' domestic legislation. Although in principle it would also be possible to prosecute them as normal crimes, many would argue that this would not suffice.").

60 Manisuli Ssenyonjo, Accountability of Non-State Actors in Uganda For War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court, 10 J. Conflict & Security L. 405, 408, n.20 (2005). See also Carsten Stahn, Mohamed M. El Zeidy, and Hector Olasolo, The International Criminal Court's Ad Hoc Jurisdiction Revisited, 99 Am. J. Int'l L. 421, n. 3 (2005); Payam Akhavan, Development at the International Criminal

Local and international NGOs have made extensive reports that the Ugandan government's army, the UDPF, has engaged in problematic activity that violate international law and fall under ICC jurisdiction. "These activities include: extra-judicial executions; torture; rape; sexual abuse; prolonged detention of alleged rebel collaborators lasting up to 360 days,"[61] holding children without charge or bail,[62] "recruitment of former LRA child soldiers into the UPDF; and forced displacement of civilians for reasons connected with the conflict."[63] The evidence provided has caused the ICC Prosecutor to indicate "that he will investigate all sides of the matter equally."[64]

It has also been reported that:

> [a] Ugandan delegation begged the ICC not to indict the leaders of the Lord's Resistance Army, a Uganda rebel group, that often tortures children [because] Ugandans worry that the threat of prosecution would scupper efforts to end the civil war by offering amnesty to those who surrender.[65]

D. Jurisdiction Ratione Personae *Based on Referral to the ICC by a State-Party*

Rome Statute article 14, provides for "referral of a situation by a State Party.[66] In December 2003, Ugandan President, Yoweri Museveni, pursuant to article 14, referred the situation in northern Uganda to the Prosecutor of the International Criminal Court (ICC), to investigate crimes committed by the Lord's Resistance Army (LRA).[67] Uganda was the first of three States, to date, to have referred situations to the Office of the Prosecutor. The other States are The Democratic Republic of Congo, and The Central African Republic.[68] The Security Council has referred

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Court The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court, 99 Am. J. Int'l L. 403, 412-414 (2005).

61 Annie Wartanian, Note, *The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting For States' Cooperation, Lessons From the U.N. Tribunals Applied To the Case of Uganda*, 36 Geo. J. Int'l L. 1289, 1312 (2005). *Noting that* "[t]his violates Article 9 of the Int'l Covenant on Civil and Political Rights (ICCPR). *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 18(3), U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

62 Wartanian, *supra* note 61, at 1312, n.88.

63 Wartanian, *supra* note 61, at 1312, n.89, *noting that* "[t]his is prohibited by Article 12, Freedom of Movement, of the ICCPR, prohibiting forced displacement except for "imperative military reasons," and Article 17 of Protocol II to the Geneva Conventions of 1977, obligating parties to provide for safe and hygienic IDP camps."

64 Wartanian, *supra* note 61, at 1312, n.91, referencing ICC, Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps, The Hague, Netherlands (February 12, 2004), *available at* http://www.icc-cpi.int/library/organs/otp/OTP.SM20040212-EN.pdf.

65 Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 38 Cornell Int'l L.J. 793, 817, n.92 (2005), *citing World This Week*, Economist (U.S. Edition), Mar. 19, 2005, at 8.

66 Rome Statute, *supra* note 1, at art. 14.

67 See *supra* note 60, 61.

68 International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited June 29, 2006).

one situation, that of the Darfur, Sudan, to the Office of the Prosecutor.[69]

As of January 30, 2006, the Chief Prosecutor, Luis Moreno-Ocampo, has, "upon rigorous analysis in accordance with the Rome Statute and the Rules of Procedure and Evidence ... has decided to open investigations into the situations in The Democratic Republic of Congo, The Republic of Uganda, and The Darfur, Sudan."[70] Professor Ruth Wedgwood suggests that the current "case-load" of the Office of the Prosecutor is about as full as it can manage: "[s]o at the moment, really, if anything, we are at the limit of international courts' capacity. The ICC decision to take on the situations in the Congo, the Central African Republic, and Uganda, may be close to the limit of what the ICC can handle. You cannot take on five or six or seven situations and then pretend you are going to do justice by all of them."[71]

E. Requests By The Security Council That The ICC Defer Prosecution

A version of immunity is available through Rome Statute Article 16 and the Security Council. The Security Council may request the ICC to defer an investigation or prosecution, when a resolution is adopted incident to Chapter VII of the United Nations Charter providing that the Security Council warrants that deferral is required for the promotion of peace and security.[72]

Rome Statute article 16, on "Deferral of Investigation or Prosecution," reads:

> No investigation or prosecution may be commenced or proceed with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

This article would seem to indicate deferral to accommodate the interests of peace and security. Thus, the ICC Statute calls for deferral if the U.N. Security Council sees amnesty, or possibility of amnesty as promoting peace and security.[73] Amnesties and personal jurisdiction will be discussed more fully below.

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69 *Id.*

70 *Id.*

71 Ruth Wedgwood, *Address to the Cornell International Law Journal Symposium: Milosevic & Hussein on Trial*, 38 Cornell Int'l L.J. 779, 784 (2005).

72 Rome Statute *supra* note 1, at article 16. *See* Luigi Condorelli and Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC,* 3 J. Int'l Crim. Just. 590, 594-595 (2005) (discussing the troubling aspects of inclusion of a condition that U.S. nationals will exempt from referral to the ICC). *See also* Rosanna Lipscomb, Note, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan,* 106 Colum. L. Rev. 182, 183-184, 192-193, 200-204 (2006); Erin Patrick, *Intent To Destroy: The Genocidal Impact of Forced Migration in Darful, Sudan,* 18 J. Refugee Stud. 410 (2005).

73 Rome Statute, *supra* note 1, at article 16; Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court, Symposium*, 32 Cornell Int'l L. J. 507, 522-23 (1999).

F. Jurisdiction Over Nationals of Non-State Parties

One may debate whether jurisdiction obtains over the nationals of non-State-Parties:[74] the better position is that jurisdiction will not obtain, unless the alleged perpetrator is referred to the ICC either by a State Party on whose territory the offense was committed,[75] or by a non-state party that accepts jurisdiction on an *ad-hoc* basis, incident to a declaration accepting the Court's jurisdiction to prosecute after referral by a State Party or initiated *propria motu* by the Prosecutor. For this latter to happen, another State Party would have to refer a situation that had occurred in a non-state party or the Prosecutor would have to decide to prosecute *proprio motu*. In either case, the non-state party would have to make a declaration accepting the jurisdiction of the ICC pursuant to Article 12(3) (location of the crimes) or by the country of which the accused is a national.[76]

G. Immunities from Jurisdiction[77]

Article 27 of the Rome Statute leaves tyrants no immunity from prosecution, even if the tyrants are heads of state. Article 27 reads:

> [O]fficial capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute ... Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[78]

Thus, the ICC has a *sui-generis* jurisdiction, based on the Rome Statute, which is controlling and has the authority of a multilateral treaty. Thus, the regime created by the Rome Statute and the practice that surrounds it creates its own legal system, so to speak, which pertains only to itself in a specific sense, but impacts general international law and domestic law of the various nations of the world.[79]

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74 *Compare* Michael P. Scharf, *The ICC's Jurisdiction Over The Nationals Of Non-Party States: A Critique Of The U.S. Position*, 64 Law & Contemp. Prob. 67, 70 (2001), *with* Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response,* 31 N.Y.U. J. Int'l L. & Pol. 855 (1999).

75 Rome Statute, *supra* note 1, at article 12; Schabas, An Introduction, *supra* note 3, at 75. *Cf.* Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches To Attributing Liability To Corporations For Extraterritorial Abuses*, 26 Nw. J. Int'l L. & Bus. 43, 58 (2005).

76 See *supra* note 13.

77 *See generally* Schabas, An Introduction, *supra* note 3, at 80, 111, 114-15; Geoffrey Robertson QC, *Symposium Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 Cornell Int'l L.J. 649 (2005).

78 Rome Statute, *supra* note 1, at art. 27. *See* Geoffrey Robertson QC, *Symposium Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, at 649.

79 *See* Blakesley, et al., The International Legal System, *supra* note 34, at Ch. 1 and Ch. 13 (Treaties), at Chs. 1, 11, and 17, on the impact of treaties on customary international law. See also, Anthony D'Amato, The Concept of Customary International Law 74-76, 160-

It should be noted that, like any treaty, the practice with and around it creates customary international law.[80] On the other hand, a serious question of both policy and interpretation arises, if peace may be reached through amnesty or immunity. For example, in trying to end the conflict in Uganda, the government granted amnesty and full immunity to members of the Lord's Resistance Army who renounced rebellion.[81] As we saw above, in 2003 President Yoweri Museveni referred the situation to the ICC prosecutor to investigate crimes committed by the LRA, pursuant to Rome Statute article 14, thus, trapping the LRA between amnesty and the ICC, causing some to suggest that the peace process may be damaged.[82] There is a possibility that some government leaders might be prosecuted in the ICC, as well, but it is not clear whether these prosecutions will go forward.[83] Even if no prosecution of government leaders occurs, this rather paints a picture of one or a few human rights abusers who try to use the ICC to gain strategic advantage over other human rights abusers. But then that's how good law works, isn't it – scoundrels use the law for their selfish purposes, but in using it, assist in the promulgation of the law and improve its reach, which in the long run makes things better.

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66 (1971); Anthony D'Amato, *Is International Law Really "Law"?*, 79 Nw. U. L. Rev. 1293, 1293-1303 (1985).

80 *See* Blakesley, et al., The International Legal System, *supra* note 34, at Chs. 1 and 11 (Treaties); Anthony D'Amato, *Is International Law Really "Law"?*, 1293, 1293-1303 (1985); Anthony D'Amato, *Trashing Customary International Law*, 81 Am. J. Int'l L. 101, 105 (1987) (customary international is the "primary source of international law"); Jason A. Beckett, *Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to A Response to Nail*, 16 Eur. J. Int'l L. 213, 220, n. 23 (2005); Anthony D'Amato, International Law: Process and Prospect 123-24 (1987); Anthony D'Amato, *Treaty-Based Rules of Custom*, in International Law Anthology 94 (A. D'Amato ed., 1994). *But see* A.M. Weisburd, *State Courts, Federal Courts and International Cases*, 20 Yale J. Int'l L. 1, 10 (1995) (challenging Professor D'Amato's argument that generalizable provisions of multilateral treaties are ipso facto rules of customary international law).

81 Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda For War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, at 405, 407, *citing* the Amnesty Act, 2000. Available at http://www.c- r.org/accord/uganda/accord11/downloads/2000_Jan_The_Amnesty_Act.doc.

82 Ssenyonjo, *Accountability of Non-State Actors in Uganda, supra* note 81, at 407-08. *See also* H. Abigail Moy, *Recent Development, The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate Over Amnesty and Complementarity*, 19 Harv. Hum. Rts. J. 267, 269-70 (2006) (indicating that mediator/negotiator, Betty Bigombe, had stated that rescinding the amnesty option deprived her of a crucial bargaining chip and sent a conflicting message that would undermine the LRA's trust in future negotiations). On the other hand, the author notes that, "[s]ince the ICC referral, a number of former rebels and a high-ranking LRA brigadier have turned themselves in under the much-neglected Amnesty Act of 2000, which had produced few converts until that point. Rather than impede the pursuit of peace, some have argued that ICC involvement has increased the pressure on LRA members to defect." *Id.*, *referencing* Akhavan, *Development at the International Criminal Court supra* note 76, at 419.

83 Ssenyonjo, *Accountability of Non-State Actors in Uganda, supra* note 81, at 408, *citing* HRW, World Report (2005): Uganda, *available at* http://hrw.org/english/docs/2005/01/13/uganda9862_txt.htm; and AI, Annual Report (2005): Uganda, *available at* http:// www.amnestyusa.org/countries/uganda/document.do?id=ar&yr=2005, which has *noted that* the "'PDF [the government's Ugandan Peoples' Defense Forces] has also committed abuses in the north, including arbitrary detention, torture, rape, and stealing."

II. Customary International Law, Immunities, the ICC, Jurisdiction *Ratione Personae,* and "Article 98 Agreements"

The United States has entered into bilateral agreements, based on ambiguities in Rome Statute Article 98, in an attempt to protect its nationals from being rendered to the ICC.[84]

Rome Statute Article 98 provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[85]

Customary international law is traditionally viewed as law that is promulgated on the basis of general or consistent state practice[86] (or the material element) and *opinio*

84 *See* Dan Belz, *The Excessive Use of Force is International Humanitarian Law Lapsing Into Irrelevance in the War on International Terror?*, 7 Theoretical Inquiries L. 97 (2006) (suggesting that, "Its fear that a Court with broad powers would impair its ability to provide global security and thereby jeopardize the global status quo led it to adopt a conservative view of the Court's jurisdiction. The main concern of the United States was that American troops deployed across the globe would be subject to politicized prosecutions, leading it to suggest that such prosecutions be left to each sending nation. Because of their involvement in peacekeeping operations and despite their differences on other matters, France and Britain joined the US on this issue. As permanent members of the Security Council, they also pleaded that the Court not undermine the authority of this body.") (footnotes omitted). *See also* Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, 77(6) Foreign Aff. 20 (1998) (discussing the U.S. fears); Salvatore Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. Int'l Crim. Just. 114 (2003).

85 Rome Statute, *supra* note 1, at art. 98. S*ee generally* David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. Int'l Crim. Just. 333 (2005); Gerhard Hafner, Editorial Comment, *An Attempt to Explain the Position of the USA Towards the ICC,* 3 J. Int'l Crim. Just. 323 (2005).

86 The Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987), defines customary international law as a "general and consistent practice of states followed by them from a sense of legal obligation." Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty,* 50 U. Kan. L. Rev. 779, 781 (2002) (analyzing the transition from "soft law" to "hard law"). Sean Murphy notes the significant divergences of views over what constitutes practice for purposes of customary international law, exemplified in the debate between Michael Akehurst and Anthony D'Amato, *in* Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, in Symposium, 50 Vill. L. Rev. 699, 739, n.153 (2005), *citing*, e.g., Michael Akehurst, *Custom as a Source of*

juris (the subjective or psychological element). *Opinio juris* is established when it is proved that a state acts or fails to act in a certain way, because it considers itself legally bound so to act or not to act.[87] Even negative conduct, such as reactions or over-reactions against it, creates customary international law.[88] This negative conduct

International Law, 47 Brit. Y.B. Int'l L. 1, 47 (1974-1975); Anthony A. D'Amato, The Concept of Custom in International Law 80-81 (1971) (explaining that "international law is all-pervasive" and indicating that the definition of customary practices, under international law, is broad). *See also* Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 Am. J. Int'l L. 370 (2005). *Cf.* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some Of Its* Problems, 15 Eur. J. Int'l L. 523, 525, n. 3 (2004), *citing, inter alia*, Bos, *'The Identification of Custom in International Law'*, 25 German Yearbook of International Law (1982) 9; M. Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (1999); Danilenko, *'The Theory of International Customary Law'*, 31 German Yearbook of International Law (1988) 9: International Law Association – Committee on the Formation of Rules of Customary (General) International Law, Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law (2000), *available at* http://www.ila-hq.org/pdf/customarylaw.pdf; Mendelson, *'The Formation of Customary International Law'*, 272 RdC 155 (1999); Mendelson, *The Subjective Element in Customary International Law*, 66 Brit. Y.B.I.L. 177 (1985).

87 *See* Restatement, *supra* note 86, at § 102(2). *See generally* Byers, Custom, Power *supra* note 84, at xi, 3; Ian Brownlie, International Law 4 (5th ed. 1998). *Opinio juris* is the term used to indicate the nation-state's sense of legal obligation to act or not to act. This is sometimes called the psychological part or subjective element of customary international law. The "sense of legal obligation" difficult to determine, but can be shown by state practice, both negative and positive. *See generally* D'Amato, The Concept of Custom, *supra* note 86 in which Professor D'Amato suggests that nations are obliged by international law as an entire system, without the freedom to opt out of a particular law not to their liking). *Cf.*, Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113 (1999) (rational choice theory of customary law seen as arising from unitary actors as they pursue selfishly defined national interests). *But see* Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 538 (1993) (arguing that "the rule is open to serious doubt"). It seems to me, however, that if customary international law is law, its subjects may not just "opt-out." They may refuse to obey, but this would be a violation of the law. It is quite true that violations of the law may end up changing it. On the other hand, within the international legal system, a violation is a violation and the price of breaching it obtains, until the law evolves into something new. The idea of the "persistent objector," may end up changing the law, but until it changes, that objector seems only to be a persistent violator. The status of "law violator" may be required by the violator's domestic legal system, but the violation is a violation of the law in the parallel international legal system.

88 D'Amato, The Concept of Custom *supra* note 86, at 73-86, 160-66; Anthony D'Amato, *The Elements of Custom*, *in* Burns Weston, Richard Falk, & Anthony D'Amato, International Law and World Order: A Problem Oriented Coursebook 79 (2nd ed. 1990), *adapted in* Burns Weston, Richard Falk, & Hilary Charlesworth, International Law and World Order: A Problem Oriented Coursebook 107 (3rd ed. 1997). Professors Danial Partan and Nathanial Berman discuss Professor D'Amato's interesting and provocative argument on how *opinio juris* and customary international law may be proved. D'Amato "discusses the idea that articulation, in word or action, by authoritative officials is what ultimately creates customary international law and any legal system. D'Amato applies Lon Fuller's view that "promulgative articulation'" is basic to any lawmaking system. *Id.* (*quoting* Fuller, The Morality of Law 49-51 (1964). D'Amato refers to the theory of legal systems in, for example, Myres McDougal's requirement of "promulgative communica-

may erode custom, general principles, or the intended meaning of a provision of the Statute.[89] Certainly subsequent practice of states parties to treaties, even relating to non-states-parties may create customary rules that impact interpretation of treaty terms.[90]

On the other hand, negative conduct may prove their validity and continued legality, through negative implication.[91] For example, when the Bush administration rather inventively forms its so-called article 98[92] agreements (intended to "immunize" any U.S. national from being sent to the Court), we should read this as recognition of the Court's legitimacy.

A difference of opinion exists among scholars on the impact or authoritative status of customary international law. For example, Professor Anthony D'Amato suggests that nations are obliged by international law as an entire system, without the freedom to opt out of a particular law not to their liking), although many nations opting out may erode and change a rule.[93] On the other hand, Professor Jonathan I. Charney counters that Professor D'Amato's point is open to serious doubt.[94] It is my opinion, however, that customary international law is law, not mere usage or practice, so its subjects may not just "opt-out."

Nations may refuse or fail to obey, but disobedience simply violates the law – a violation of international law in its sphere or realm. It is quite true that a large number of violations of the customary rule of law by nations over time may end up changing that law, through evolution. On the other hand, until this evolution amends the law, a violation is a violation and the price of breaching the legal obligation obtains within the international legal system. Professor Charney's position

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tion of the prescriptive content to the target audience,'" *Id.* at 75 (*quoting* McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision,* 19 J. Legal Educ. 403, 424 (1967)) and); referenced by Daniel G. Partan, *Multinational Corporations and Their New Responsibilities to Disclose and Communicate Risk Information The "Duty To Inform" In International Environmental Law*, 6 B.U. Int'l L.J. 43 (1988); Nathaniel Berman, *Legitimacy Through Defiance: From GOA To Iraq*, 23 Wis. Int'l L.J. 93, 97 (2005), *referencing* Anthony D'Amato, *The Theory Of Customary International Law*, 82 Am. Soc'y Int'l L. Proc. 242, 246 (1988) (every breach of a treaty contains the seeds of creating a new rule).

89 *See* Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 Am. U. Int'l L. Rev. 293, 332-33 (2005), *citing* The Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, which mandates "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

90 Dwight G. Newman, *The Rome Statute, supra* note 89, at 333; Nathaniel Berman, *Legitimacy Through Defiance: From GOA To Iraq*, 23 Wis. Int'l L.J. 93, 97 (2005), referencing Anthony D'Amato, *The Theory Of Customary International Law*, 82 Am. Soc'y Int'l L. Proc. 242, 246 (1988) (every breach of a treaty contains the seeds of creating a new rule).

91 See *supra* note 86.

92 *See generally* David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. Int'l Crim. Just. 333 (2005) (noting that the Bush administration's use of article 98, clearly transcends the intent of the drafters, including that of the U.S. delegation). This will be discussed more fully, below.

93 D'Amato, The Concept of Custom, *supra* note 86, at 190-96.

94 Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 538 (1993) (arguing that "the rule is open to serious doubt").

seems to be based on a common misunderstanding in the common law world of the nature of customary law, which was adopted by public international law from the civil law tradition and has many attributes of a civil law system.[95]

One of the most distinguishing features of the civil law, at least viewed by most common law jurists is the hierarchy of authoritative and persuasive sources.[96] Civilian doctrine and law provide that "legislation and custom are authoritative or primary sources of law.[97] They are contrasted with persuasive or secondary sources of law,

95 *See* Dan E. Stigall, *From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code,* 65 La. L. Rev. 131, 139-41 (2004); Symeon Symeonides, The Louisiana Civil Law System (Paul M. Hebert Law, pub. 1996); A.N. Yiannopoulos, Louisiana Civil Law System paras. 31, 32 (1977).

96 Stigall, *From Baton Rouge to Baghdad, supra* note 96, at 139, *quoting* Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons From the Civil Law and Realist Traditions*, 74 Am. Bankr. L.J. 173, 201 (2000), noting correctly that:

> Unquestionably, the most striking difference between the civil and common systems of law is to be found in the psychological attitudes of the judiciary toward legislation. The difference in attitude mirrors the differences that distinguish common and civil law lawyers in terms of the question of where a lawyer will, in the first instance, look for the source of law. In common law jurisdictions, judges tend to construe statutes narrowly and, at times, even ignore them as of inferior force. In contrast, in civil law jurisdictions, judges, like lawyers, begin their reasoning process by looking to the applicable codification which, through techniques like analogical reasoning, are regarded as capable of covering any conceivable situation that may arise.

Ponoroff, *The Dubious Role, supra* this note, at 201; Stigall, *supra* this note at 139. The French have not used the term "*coutume*" (custom) in their *Code Civile.* This seems strange, as customary law is certainly part of their authoritative law; it is more than just persuasive, as are judicial decisions, for example. One might speculate that the drafters of the *Code Civile* were worried that some of the "customs" of the *Ancièn Régime* would creep into their law, if they mentioned it. More importantly, it seems to have been assumed that custom is an authoritative source, binding on courts. It requires proof of continued and general practice based on the perception of the people that the practice is required by law. For an excellent discussion of the strange position that France takes on customary law, *see* William Thomas Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent,* 48 Tul. L. Rev. 1 (1973). The Spanish applied the term *custom* in their Civil Code (*Codigo Civil*). "Article 1(1) of the *Codigo Civil* (the Civil Code of Spain) provides in part: "The sources of the Spanish legal order are legislation, custom, and the general principles of law." C.C. art. 1(1)Article 1(1) of the Codigo Civil (the Civil Code of Spain) provides in part: "The sources of the Spanish legal order are legislation, custom, and the general principles of law." C.C. art. 1(1) (trans. Julio Romanach, Jr., Lawrence Publishing Co. 1994)," *cited and discussed in* Mary Garvey Algero, *The sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in A Common Law Nation*, 65 La. L. Rev. 775, 791, n.66 (2005). The Louisiana Digest of 1808 and the subsequent Civil Codes explicitly provided that custom was a primary (authoritative or binding) source of law. Louisiana Civil Code, article 1, reads: "The sources of law are legislation and custom." La. Civil Code, art. 1. Note how the terms, legislation and law are distinguished. See also, generally, Robert A. Pascal, *Book Review:* The Louisiana Civil code: A European Legacy for the United States, by Shael Herman (New Orleans, Louisiana Bar Foundation, 1993), 54 La. L. Rev. 827 (1994); Robert A. Pascal, *Of the Civil Code and Us*, 59 La. L. Rev. 301 (1998).

97 *See* A.N. Yiannopoulos, Louisiana Civil Law System §§ 31, 32 (1977); Dan E. Stigall, *From Baton Rouge to Baghdad, supra* note 96; Mary Garvey Algero, *The sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in A Common*

such as jurisprudence, doctrine, conventional usages [what common law states call practice or usage – and, sometimes, custom], and equity, that may guide the court in reaching a decision in the absence of legislation and custom."[98] Custom results,

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Law Nation, 65 La. L. Rev. 775, 791-805 (2005); W. Thomas Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 Tul.L. Rev. 1 (1971); Kelly M. Haggar, *Comment A Catalyst in the Cotton: The Proper Allocation of the "Goodwill" Of Closely Held Businesses and Professional Practices in Dissolution of Marriages*, 65 La. L. Rev. 1191, 1231, n. 158 (2005) ("[B]oth civilian tradition in general and Louisiana in particular provide that "custom" is a source of law. *See, e.g.*, La. Civ. Code art. 1. "Custom results from practice repeated for a long time and generally accepted as having acquired the force of law." Id. art. 3. *See also id.* cmt. d ("In all codified systems, legislation is the superior source of law."). Thus, at some point, custom can reach a "tipping point" and become law."). *See also* John Bell, Sophie Boyron, & Simon Whittaker, Principles of French Law 15-25 (1998); Dominique Custos, *The Status of Jurisprudence in France and in Louisiana, in Symposium on the Bicentennial of the French Civil Code*, 51 Loy. L. Rev. 73 (2005). *Cf.* H. Patrick Glenn, *Eason-Weinmann Lecture The Common Laws of Europe and Louisiana*, 79 Tul. L. Rev. 1041-43 (2005) (*noting in* n.2, p. 1043, that the Roman use of the term "common law" is an indicator of law that is common to all peoples, some of which was beyond their particular concerns. Still the point of a general customary law was understood. Professor Glenn references the following on this point:

> Just. Inst. 1.2.1 ("All peoples who are governed by laws and customs use law which is in part particular to themselves, in part common to all men ...."). The text, from the early sixth century A.D., adopts language used in the earlier Institutes of Gaius (second century A.D.). *See* H.F. Jolowicz & Barry Nicholas, Historical Introduction to the Study of Roman Law 104-06 (photo. reprint 1996) (3d ed. 1972) (discussing the Greek influence and indiscriminate use of the expressions natural law and ius gentium)"). Professor Glenn also notes that this general law, which I would call customary law today, is distinguished from local customary rules. Glenn, *supra* this note, at 1047-48, nn.27 and 28 (referring to Anglo-Saxon "common law" and English "custom); P. Petot, *Le droit commun en France selon les coutumiers*, 38 Revue Historique de Droit Français et Étranger 413, 422-23, 427 (1960). Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 Yale J. Int'l L. 435, 457-58 and nn.89-90 (2000), states: "Legal custom started to play an important role immediately following the enactment of the French and Austrian codes, sometimes in clear violation of their provisions. Even at the peak of the codification movement, codification did not mean absolute exclusion of all other sources. German codifiers rejected a formal provision about sources other than the code, leaving the ultimate question to legal academia. Referencing: Horst Heinrich Jakobs, Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechtsquellenlehre des 19. Jahrhunderts 128 (1983) (pointing to the discussion about § 4 (first commission) and § 2 (second commission) on custom with a formal exclusion clause--"'gelten nur insoweit, als das Gesetz auf Gewohnheitsrecht verweist'"--a proposal that was not adopted"). Finally, the Swiss code chose an even less exclusive solution, as is demonstrated by article 1 of the Schweizerisches Zivilgesetzbuch (ZGB), which expressly refers to customary law, legal doctrine, and case law in cases of gaps within the code. As the ZGB provides: 1) The Law must be applied in all cases which come within the letter or the spirit of any of its provisions; 2) Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator; 3) Herein he must be guided by approved legal doctrine and case law. ZGB art. 1, in 1 The Swiss Civil Code, English Version 1 (Ivy Williams trans., Siegfried Wyler & Barbara Wyler eds., 1987).

98 *See, e.g.*, La. Civ. Code art. 1, cmt. (b) (*citing* A.N. Yiannopoulos, Louisiana Civil Law System paras. 31, 32 (1977)). The Louisiana Civil Code, article 1, reads: "The sources of law

according to the Louisiana Civil Code, from practice repeated for a long time and generally accepted as having acquired the force of law.[99] This vision of authoritative or primary sources and its definition were adopted by public international law.[100]

Thus, while the idea of the so-called "persistent objector" may *end up* changing the law, until that law changes, the objector seems no more than a persistent lawbreaker.[101] The status of "law violator" may be required by the violator's domestic legal system, but the violation is a violation of the law in the parallel international legal system.

Is There a Thaw or Something Less?

Although President Clinton signed the Rome Statute on his last day in office, his administration never did seem too enthusiastic about it. President Bush unsigned it and, obviously, it has not been ratified by the United States. The Bush administration, moreover, has worked vigorously to undermine the International Criminal Court. The fact that around one-hundred nations have ratified the Statute, however, certainly creates international law, in and of itself. No doubt, the fact of this large number of ratifications must have an impact, even on the Bush administration, despite its protestations to the contrary.

Article 98(1), provides that the ICC may not proceed with a request for surrender or assistance that would require the requested State to act inconsistently with its obligations under international law.[102] Such legal obligations generally relate to the

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are legislation and custom." The Louisiana Civil Code was derived largely from French *Projet* (Draft) for what eventually became the *Code Napoléon,* which read, in pertinent part: "Art. 1: the sources of law are legislation and custom. Article 2: Legislation is the solemn expression of legislative will. Article 3: Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation." *See* discussion of the relationship of this to public international law *in* Blakesley, et al., The International Legal System, *supra* note 33, at 3-4. *See also* Kelly M. Haggar, Comment*: A Catalyst in the Cotton: The Proper Allocation of the "Goodwill" Of Closely Held Businesses and Professional Practices in Dissolution of Marriages*, 65 La. L. Rev. 1191, 1231, n.158 (2005) ("[B]oth civilian tradition in general and Louisiana in particular provide that "custom" is a source of law. *See, e.g.*, La. Civ. Code art. 1. "Custom results from practice repeated for a long time and generally accepted as having acquired the force of law." *Id*. art. 3. However, custom "may not abrogate legislation." *Id*. *See also id*. cmt. d ("In all codified systems, legislation is the superior source of law."). Thus, at some point, custom can reach a "tipping point" and become law.").

99 Louisiana Civil Code, art. 2; Stigall, *From Baton Rouge to Baghdad*, *supra* note 96, at 140.

100 Statute of the International Court of Justice at article 38, taken verbatim from the Statute of the Permanent Court of International Justice; Blakesley, et al., The International Legal System, *supra* note 34, at 3-4.

101 The so-called " persistent objector rule" is *discussed in* Johnathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit. Y.B. Int'l L. 1, 5 (1985) (finding a lack of solid substantive support for the persistent objector rule); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law,* 26 Harv. Int'l L.J. 457, 459 (1985) ("The paucity of empirical referents for the persistent objector principle is striking."); Oscar Schachter, International Law in Theory and Practice at 11 (Martinus Nijhoff 1991).

102 Rome Statute, *supra* note 1, at art. 98 (1). *See* Swaak-Goldman, *Shorter Article, supra* note 55, at 702. *See also generally* Gerhard Hafner, Editorial Comment *An Attempt to Explain the Position of the USA Towards the ICC,* 3 J. Int'l Crim. Just. 323, 327 (2005); David Scheffer,

State or diplomatic immunity of the person and prevent surrender, unless the third State waives the immunity.[103] While State Parties to the ICC Statute are seen to have waived this immunity (and thus a request for surrender of, for example, a sitting Head of State of a State Party who is currently visiting another State Party, must be complied with), the same is not necessarily true for non-State Parties. In such a situation the requested State would in all likelihood have to rely on Article 98.1 of the Statute and disregard the request from the ICC."[104] This "protection" would seem to end, when the individual ceases to hold her official position.[105]

Supposedly fearful that United States citizens might be rendered to and prosecuted by the ICC, the Bush administration has entered into some one-hundred so-called "Article 98 agreements" of highly questionable legality,[106] whereby the country, entering the agreement with the U.S., agrees that it will not deliver any United States national to the ICC. The U.S. Congress promulgated the American Service-Members' Protection Act (ASPA), which calls for these Article 98 agreements and provides for sanctions against countries that refuse to agree or do not comply.[107] The

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Article 98(2) of the Rome Statute: America's Original Intent, 3 J. Int'l Crim. Just. 333 (2005).

103 Swaak-Goldman, *Shorter Article, supra* note 55, at 702; Hafner, Editorial Comment, *supra* note 102; David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. Int'l Crim. Just. 333 (2005).

104 Swaak-Goldman, *Shorter Article, supra* note 55, at 702.

105 Gerhard Hafner, Editorial Comment *An Attempt to Explain, supra* note 103, at 323, 327; Geoffrey Robertson QC, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial,* Symposium, 38 Cornell Int'l L.J. 649, 657-661 (2005), both referencing the Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 2002 I.C.J. 121 (Feb. 14)(also called "the Arrest Warrant Case). Decisions of the International Court of Justice are binding only between the parties; nonetheless they are entitled to great respect insofar as they elucidate rules of international law.

106 *See* John Dugard, *John W. Turner Lecture: The Implications For the Legal Profession of Conflicts Between International Law and National Law*, 46 S. Tex. L. Rev. 579, 591(2005).

107 American Servicemembers' Protection Act. Pub. L. No. 107-206. §§ 2001-2015, 116 Stat. 820 (2002), 22 USCA §§ 7421-7433 (West Supp. 2005) (hereinafter, ASPA). *See* Sean D. Murphy, *Contemporary Practice of the United States*, 96 Am. J. Int'l L. 975 (2002); Sean Murphy, *Contemporary Practice ..., Id.*, at, 97 Am. J. Int'l L. 200 & 710 (2003); Diane Marie Amann and M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 Am. J. Int'l L. 381 (2002); Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 Geo. J. Int'l L. 809, 898 (2005); John Dugard, *John W. Turner Lecture: The Implications For the Legal Profession of Conflicts Between International Law and National Law*, *supra* note 106. *See also Coalition For the International Criminal Court, Factsheet: US Bilateral Immunity Agreements or So-Called "Article 98" Agreements*, *available at* http://www.iccnow.org/pressroom/factsheets/FS-BIAsAug2004. (last visited June 26, 2006); James Podgers, *The National Pulse: Warming Trend – U.S. Position on Darfur Suggests It May Have Found a Way to Live with the ICC*, 91 Sep ABAJ 18 (Sept. 2005); Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers Immunity*, N.Y. Times, Aug. 10, 2002, at A1 (reporting Bush administration warning that nations could lose military assistance if they become members of the ICC without entering into a bilateral agreement with the United States pledging that they will not deliver U.S. troops to the Hague for prosecution by the ICC). The Bush Administration's stance on the ICC and the administration's use of bilateral agreements are articulated by John R. Bolton, the former Under Sec'y of State for Arms Control and International Security and current U.S. Ambassador to the United Nations, *Remarks to the Federalist Society: The United*

ASPA also prohibits agencies of the United States government to cooperate with the ICC.[108]

The ASPA also bars U.S. participation in peacekeeping or like operations,[109] without presidential certification that the U.S. service members are protected from being sent to the ICC.[110] This requirement gave rise to the bilateral treaties, called article 98 agreements,[111] wherein countries into which U.S. forces are deployed agree not to send any member of the U.S. forces to the ICC.[112] Also, on July 1, 2003, the ASPA began to bar military assistance to States that are parties to the ICC Statute, with the exception of Taiwan and major NATO allies.[113]

Since the American Servicemembers' Protection Act "forbids the government from cooperating with the Court [and authorizes] any necessary action' including the use of force to free any American soldiers who may be held in custody by the Court,"[114] the ASPA is also sometimes known as the "Hague Invasion Act."[115]

States and the International Criminal Court, (Nov. 14, 2002). For China's ostensible position on this, *see* Lu Jianping and Wang Zhixiang, *Symposium China's Attitude Towards The ICC,* 3 J. Int'l Crim. Just. 608, 608, 618 (2005).

108 *See* Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 Geo. J. Int'l L. 809, 898 (2005), *citing* Johan D. van der Vyver, Book Review, 18 Emory Int'l L. Rev. 133, 143 (2004) (*reviewing* Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (2003)(noting the number of countries that had been pressured to sign bilateral immunity agreements and the relatively few who had refused were sanctioned).

109 John Dugard, *John W. Turner Lecture: The Implications For the Legal Profession of Conflicts Between International Law and National Law*, *supra* note 106, citing S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572nd mtg., U.N. Doc. S/RES/1422 (2002), available at http:// daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement; S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772nd mtg., U.N. Doc. S/RES/1487(2003),available at,http:// daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement.

110 Sean D. Murphy, *Contemporary Practice of the United States*, 97 Am. J. Int'l L. 200, 201 (2003).

111 It should be noted that the so-called Article 98 agreements are broader than the ASPA. The latter applies to official U.S. personnel, whereas the Article 98 agreements attempt to exempt all U.S. nationals from being rendered to the ICC. David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent,* 3 J. Int'l Crim. Just. 333 (2005) (noting that the original intent was not to consider Article 98 to extend to all U.S. nationals, but only to official personnel and to those directly contracted to undertake work associated with official missions). *See also* David A. Tallman Note *CATCH 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict,* 92 Geo. L.J. 1033, 1041-42 (2004).

112 Scheffer, Article 98(2), *supra* note 111; Tallman, Note, *supra* note 111.

113 Scheffer, Article 98(2), *supra* note 111; Tallman, Note, *supra* note 111.

114 *See* Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 Geo. J. Int'l L. 809, 898 (2005). *See also* R.J. Goldstone and J. Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism,* 16 Harv. H. Rts. J. 13, at 24-25 (2003). *See also* Yuval Shany, *Book Review The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003).

115 *See* Press Release, Human Rights Watch, *U.S.: 'Hague Invasion Act' Becomes Law – White House "Stops at Nothing" in Campaign Against War Crimes Court (Aug. 3, 2002)* http:// www.hrw.org/press/2002/08/aspa080302.htm, *referenced and discussed, among others, in* Jonathan H. Marks *Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council,* 42 Colum. J. Transnat'l L. 445, 486,

Kenneth Roth explained: "[t]he best provision here is that it actually authorizes invasion of The Hague should an American ever be sent there. You laugh. I wish it were not true, but it is. That's the law of the land, passed by Congress, signed by Bush, dubbed by opponents as 'The Hague Invasion Act.' The Dutch were so appalled that they joked about it. They said, "We'll hand out a map to help you find The Hague, please don't fire.'"[116] The president may waive any parts of ASPA, in the national interest of the United States.[117]

The Bush administration has interpreted Rome Statute article 98 in a way that was never intended by the U.S. delegation to the Rome Statute negotiations. David Scheffer, who was President Clinton's Ambassador at Large for War Crimes and head of the U.S. delegation to the negotiations on the Rome Statute, explains:

> The Bush Administration has been negotiating bilateral non-surrender agreements, not only as a reflection of its own reading of Article 98(2) and the protection it can afford even non-party States (such as the United States), but also as a direct consequence of the conditionality for military and, as recently amended, economic assistance to foreign governments set forth in extraordinarily punitive fashion in the American Service Members Protection Act (ASPA).[118]

Ambassador Scheffer continued:

> Yet, nothing in ASPA points to the need to negotiate bilateral non-surrender agreements of such broad application as those that have been negotiated and concluded by the Bush Administration. The Article 98 waiver provision of ASPA refers only to bilateral agreements that prevent the International Criminal Court from proceeding against United States personnel present in such country.[119]

Scheffer, then noted that:

> ASPA does not require the agreement to cover all US nationals present in such country. Further, under ASPA, the only individuals whom the President is authorized to use all means necessary and appropriate to bring about the release of, if they

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n.161 (2004); Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court,* 36 Cornell Int'l L.J. 415, 423, n.49 (2004); Etith Y. Wu, *Global Responses and Resources to Terrorism*, 25 Whittier L. Rev. 521, 539, n.136 (2004). *See also* John Dugard, *John W. Turner Lecture, The Implications for the Legal Profession of Conflicts Between International Law and National Law*, *supra* note 106; Angela R. Kircher, *Attack on the International Criminal Court: A Policy of Impunity,* 13 Mich. St. J. Int'l L. 263, 277 (2005); Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002,* 40 Harv. J. Legis. 537, 549 (2003).

116 Kenneth Roth, *Human Rights as a Response to Terrorism, Remarks Given at the University of Oregon School of Law February 11, 2004,* 6 Or. Rev. Int'l L. 37 (2003-2004) (footnote omitted).

117 Sean D. Murphy, *Contemporary Practice of the United States*, 97 Am. J. Int'l L. 200, 201 (2003).

118 David Scheffer, *Article 98(2) Of the Rome Statute: America's Original Intent*, 3 J.Int'l Crim. Just. 333, 350-51 (May, 2005), *referencing* 22 USC paras. 7401, 7421-7433 (2002).

119 Scheffer, *Article 98(2), supra* note 118, *citing* 22 USCA para. 7426(c)(2002).

> are detained or imprisoned by, on behalf of, or at the request of the ICC, are those who are military personnel or have some other official relationship with the US Government or, for so long as such government is not party to the ICC, a NATO member country government or a major non-NATO ally government.[120]

Finally, Ambassador Scheffer states:

> There is no authority to use all means necessary and appropriate to bring about the release of US nationals who have no official relationship with the US Government, or the nationals of relevant NATO or major non-NATO allies who have no official relationships with their respective governments. The preambular language of ASPA also refers only to official personnel and makes no mention of covering all US nationals. Nothing in the legislative history and floor debates of ASPA, including the recent amendment that broadened the punitive measures to include termination of economic assistance, points with clarity to any intention on the part of US lawmakers to seek the protection of all US nationals in the conclusion of Article 98(2) agreements with foreign governments, even though the opportunities clearly existed to broaden the language of coverage if that had been the intent of Congress.[121]

Thus, the Bush administration's attempts to expand immunity for all nationals, has given rise to the "*protection*" of private individuals who work for private military companies.[122] It has worked to provide a mechanism to immunize possible torturers, war criminals, and those who otherwise have committed atrocity that ought to be prosecuted.

Jurisdiction and Amnesties

The Preamble of the Rome Statute reads, in relevant part

> Affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured ....
>
> Recall[s] that it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes.
>
> [And] Emphasize[s] that the International Criminal Court established under this

120 Scheffer, *Article 98(2), supra* note 118, *citing* paras. 7427(b) and 7434 (3-4) (2002).

121 Scheffer, *Article 98(2) supra* note 118, at 333, 350-351 (some references omitted). *See* http://www.state.gov/t/us/rm/15158.htm (last visited January 30, 2006). For more on the ASPA, *see* Sean D. Murphy, *Contemporary Practice of the United States*, 96 Am. J. Int'l L. 975 (2002); and for more on the so-called Article 98 agreements, *see also* Murphy, Contemporary Practice ..., *id.*, at, 97 Am. J. Int'l L. 200 & 710 (2003); Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 Geo. J. Int'l L. 809, 898 (2005).

122 *See* Deven R. Desai, *Have Your Cake and Eat it Too: A Proposal For a Layered Approach to Regulating Private Military Companies*, 39 U. S. F. L. Rev. 825 (2005).

> Statute shall be complementary to national criminal jurisdictions.[123]

Michael Scharf suggests that the Rome Statute intentionally was left ambiguous on the issue of whether the ICC should defer for arrangements of an amnesty-for-peace.[124] David J. Scheffer, President Clinton's Ambassador at Large for War Crimes and chief U.S. negotiator at the Rome Conference noted that "amnesty is always on the table in [peace] negotiations."[125]

One might argue that Rome Statute articles 16 (on "Deferral of Investigation or Prosecution") article 53 (on Prosecutorial Discretion), and article 17 (on Complementarity) may appear to conflict with the apparent duty to prosecute indicated in the Preamble,[126] but this perception requires that we assume that justice is synonymous with punishment. The perceived inconsistency evaporates if we consider that *justice may include mercy*, and may also include mechanisms other than criminal prosecution or values other than punishment of particular offenders.

Article 53 reads, in part:

> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
>
> (b) The case is or would be admissible under article 17; and
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
>
> 2.(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
>
> (b) The case is inadmissible under article 17; or
>
> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

123 *See* Rome Statute, *supra* note 1, at Preamble; Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court, Symposium*, 32 Cornell Int'l L. J. 507, 522 (1999); Sarah Williams, *Amnesties in International Law: The Experience of the Special Court for Sierra Leone,* 5 Hum. Rts. L. Rev. 271, 298 (2005).

124 Scharf, *Amnesty Exception*, *supra* note 123, at 522-26.

125 Remarks by David Scheffer at the International Law Weekend (Nov. 2, 1996), *quoted in* Scharf, *Amnesty Exception*, *supra* note 123, at 525-26, *and in* Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law & Contemp. Probs. 1, 60 (1996).

126 *See* Scharf, *Amnesty Exception*, *supra* note 124, at 522.

Article 53 provides the prosecutor with wide discretion to scrutinize national amnesty laws and projects.[127] Of course, article 53 (3) requires Pre-Trial Chamber review of a prosecutorial decision to defer prosecution on the basis that it would not be in the interests of justice. Nevertheless, the article clearly provides the Prosecutor with discretion to decline to initiate a prosecution on this basis or when he or she finds that there is an insufficient legal or factual basis for prosecution – the case is inadmissible under the complementarity provisions.[128] Declining to prosecute in the interests of justice, could include deference to amnesties.[129]

Conclusion

We have seen that the International Criminal Court has jurisdiction to prosecute natural persons. We have noted that some argue that the Rome Statute provides room to consider prosecution of some "juridical persons," such as transnational legal enterprises. This would be especially apt in situations in which these enterprises function as virtual mercenaries to commit atrocities in an attempt by the nation state that hires them to distance itself from the conduct. We have also seen, however, that article 98 of the Rome Statute poses some difficulty in such prosecutions, if the enterprise is acting on behalf of the state. The United States' bilateral immunity agreements further muddy the waters and create difficulties.

We have seen that the ICC also has jurisdiction over a natural person of any nationality who commits a prescribed crime within the territory of a State Party or by a State Party, of which the perpetrator is a national.[130] Jurisdiction may also obtain, on an ad hoc basis, incident to a declaration by a non-State-Party, accepting the Prosecutor's, *proprio motu*, determination to prosecute, or accepting a State-Party's referral. For this to happen, it seems that another State Party would have

127 *See* Mark A. Drumbl, *Lecture Law and Atrocity: Settling Accounts in Rwanda,* 31 Ohio N.U. L. Rev. 41, 72, note 142 (2005); Sarah Williams, *Amnesties in International Law: The Experience of the Special Court for Sierra Leone,* 5 Hum. Rts. L. Rev. 271, 298, n.125 (2005).

128 Scharf, *Amnesty Exception*, *supra* note 124, at 524; Williams, *Amnesties, supra* note 128, at 271, 298, n.125; Gavron, *'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court'*, 51 Int'l and Comp. L. Q. 91 (2002).

129 Mark A. Drumbl, *Toward A Criminology of International Crime,* 19 Ohio St. J. on Disp. Resol. 263 , 268, n.6 (2003) (indicating that Professor Leila Sadat helpfully notes that this provision was included in the Rome Statute to shield initiatives such as the South African Truth and Reconsciliation Commission from being trumped by the ICC. *See* Leila Sadat, *Comments at the Americanization of Dispute Resolution Symposium,* The Ohio State University Moritz College of Law Symposium (Nov. 7, 2002) (notes on file with Professor Drumbl)). Professor Drumbl also references Secretary General Kofi Annan, to the effect that:"[i]t is inconceivable that ... the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future." *Referencing Press Release: Secretary-General Urges 'Like-Minded' States to Ratify Statute of International Criminal Court*, U.N. Doc. SG/SM/6686 (1998) available at http:// www.un.org/News/Press/docs/1998/19980901.sgsm6686.html (last visited June 29, 2006). *See also* Scharf, *Amnesty Exception*, *supra* note 124, at 524; Sarah Williams, *supra* note 127, at 271, 298, n.125; Gavron, *Amnesties supra* note 128.

130 Rome Statute, *supra* note 1, at art. 12(2)(a). Schabas, An Introduction, *supra* note 3, at 78-79, 80.

to refer the situation that occurred in a non-state party or the Prosecutor would have to do so *proprio motu*. In either case, the non-State Party would have to make a declaration accepting the jurisdiction of the ICC pursuant to Article 12(3) (location of the crimes) or by the country of which the accused is a national.[131] The ICC also has jurisdiction over a case, when the Security Council refers it to the Court.[132] Nationality jurisdiction is one of the most important bases of jurisdiction.[133]

It is to be hoped that all problems facing the ICC will be resolved, that the United States and other nations that have opposed the ICC, will soon recognize its value to them and to the world, diminishing impunity and placing an additional arrow in the quiver of justice for those who have been victims of the worst atrocities.

131 *See supra* notes 60, 61.

132 Rome Statute, *supra* note 1, at art. 13(a-b). *See* Jamie O'Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 Harv. Int'l L.J. 295 at 296, n. 10 (2005), referencing, S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in the Darfur region of Sudan to the International Criminal Court ("ICC") for investigation and possible prosecution). Chief Prosecutor Ocampo has decided to open investigation on this. International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited June 29, 2006). *See generally* George P. Fletcher, *Symposium Justice and Fairness in the Protection of Crime Victims,* 9 Lewis & Clark L. Rev. 547 (2005); W. Michael Reisman, *Editorial Comment On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court,* 99 Am. J. Int'l L. 615 (2005); *Contemporary Practice of the United States Relating to International Law United States Abstains on Security Council Resolution Authorizing Referral of Darfur Atrocities to International Criminal Court,* 99 Am. J. Int'l L. 691 (2005), *citing in* n.1, John R. Crook, *Contemporary Practice of the United States*, 99 Am. J. Int'l L. 501 (2005); Erin Patrick, *Intent To Destroy: The Genocidal Impact of Forced Migration in Darful, Sudan,* 18 J. Refugee Stud. 410 (2005); *France Offers U.S. a Dilemma on Sudan,* Wash. Post, Mar. 24, 2005, at A16; Warren Hoge, *France Asking U.N. to Refer Darfur to International Court*, N.Y. Times, Mar. 24, 2005, at A3; Warren Hoge, *U.N. Votes to Send any Sudan War Crimes Suspects to [International Criminal] Court*, N.Y. Times, Apr. 1, 2005, at A6; Colum Lynch, *U.N. Council's Resolution on Atrocities in Sudan Is Passed*, Wash. Post, Apr. 1, 2005, at A21; Mark Turner, *US Compromise Allows Darfur Atrocities to Be Referred to ICC*, Fin. Times, Apr. 2, 2005, at 3; *Lengthening the Arm of Global Law*, Economist, Apr. 9, 2005, at 38.

133 *See generally* Christopher L. Blakesley, Terrorism and Anti-Terrorism: A Normative and Practical Assessment, at Ch. 4 (2006); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* II International Criminal Law: Procedural and Enforcement Mechanisms pp. 33-105 (Bassiouni ed., 2nd ed. 1998).

Chapter 19

The ICC and the Security Council: An Uncomfortable Relationship

Nigel White and Robert Cryer

Introduction

It was foreseeable that when the Rome Statute of 1998 establishing the International Criminal Court (ICC) was adopted the relationship between the UN Security Council and Court was going to be an uncomfortable one.[1] That there was an overlapping competence between these organs was clear since the Council's understanding of its jurisdiction under Chapter VII of the UN Charter after the end of the Cold War led to an expansion of the concept of "threat to the peace" to include not only international conflicts but also internal matters of "extreme violence".[2]

Furthermore, it had considered that violations of humanitarian law could, in themselves, constitute threats to the peace,[3] and thus could be the object of Chapter VII action in the form of non-forcible and forcible measures.[4] Non-forcible measures had included the creation in the mid 1990s of international criminal tribunals to deal with serious breaches of international criminal law arising out of the conflicts in the Former Yugoslavia and Rwanda.

By these actions the Council's competence had developed,[5] some would argue strayed,[6] into matters of international criminal justice. Thus with the coming into being of the ICC with competence over war crimes, crimes against humanity, genocide, and potentially aggression, the relationship between the two institutions had the potential to develop in three ways: in a complementary fashion, where the Council and the Court act in harmony; in a conflictual manner, where they take opposing

1 A. Mokhtar, "The Fine Art of Arm-Twisting: The US, Resolution 1422 and Security Council Deferral of Power under the Rome Statute", (2003) 3 *International Criminal Law Review* 295. But see D. Sarooshi, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council", in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court* (Oxford: Hart, 2004), 95 at 109.

2 J. Frowein and N. Krisch, "Article 39" in B. Simma (ed.), *The Charter of the United Nations* (Oxford: Oxford University Press, 2nd ed., 2002), 723.

3 For example SC Res. 827, 25 May, 1993.

4 Articles 41 and 42 of the UN Charter.

5 P. Kirsch, John T. Holmes and M. Johnson, "International Tribunals and Courts", in D.M. Malone (ed.), *The UN Security Council* (Boulder: Lynne Rienner, 2004), 281.

6 See generally M. Koskenniemi, "The Police in the Temple: Order, Justice and the UN: A Dialectical View", (1995) 6 *European Journal of International Law* 325.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 455-484.

positions or try to usurp the competence of each other; or in an overlapping way, where they pursue their own agendas without regard to the other even though they may be dealing with the same situation.

The Rome Statute itself tried to limit the potential for an uneasy or competing relationship, by allowing the Council to refer cases to the Court in Article 13 of the Statute, if enough votes could be garnered in the Council and the veto of a permanent member could be avoided.[7]

Conversely, Article 16 of the Statute allowed the Council to block the jurisdiction of the Court, thus giving the Council a certain supremacy, but again only if it were able to garner the necessary votes in the Council and avoid a veto from a permanent member. Given the history of the veto power of each of the five permanent members, these relationship provisions, in which the Council has both a power of referral and one of deferral, might have been expected to have had a limited impact on the working of the Court, thus maybe leading to overlap but not intrusion.

This impression was strengthened by the failure in the Preparatory Commission to agree on a definition of aggression necessary to activate the Court's jurisdiction[8] over a crime that was also clearly within the Council's competence.[9] This removed a potentially explosive scenario where the Court was investigating an alleged crime of aggression, which the Council was unable to deal with because of the application of the veto by a permanent member allegedly committing or aiding the aggression.[10]

However, expectations that the Council would be deadlocked by the veto on issues of international criminal justice have proved to be premature. With the end of the Cold War, the veto is only one of many political factors operating in the Council and, as this chapter will show, the relationship between the Court and the Council has come into sharp relief due to the politically driven security function of the Council conflicting with the judicial nature of the Court and its concern with justice.

I. The Law of the Charter and the Rome Statute

We have introduced the underlying problem that faced the drafters of the Rome Statute – to calibrate the actions of the two independent international organisations (the UN and the ICC), which have partially overlapping mandates.[11] The UN, of

7 Article 27(3) of the UN Charter.

8 Article 5(2) Rome Statute.

9 Article 39 UN Charter. G. Gaja, "The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression", in M. Politi and G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004).

10 There is also the possibility that the Court may investigate instances of conduct by UN authorised troops that steps outside the mandate – Sarooshi, "Peace and Justice", 111.

11 On the drafting generally see M.C. Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32 *Cornell International Law Journal* 443; P. Kirsch & J.T. Holmes, "The Rome Conference on an International Criminal Court, The Negotiating Process" (1999) 93 *American Journal of International Law* 2. On the more specific point see e.g. P. Gargurilo, "The Controversial Relationship Between the International Criminal Court and the Security Council" in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (Ripa al Forno: il Sirente, 2000) 67.

course, was created primarily to ensure international peace and security. The ICC, by prosecuting crimes which are considered to be so serious they impact on international peace and security,[12] is thus also an operator in the same area. The possibility of conflict was clearly in the minds of the drafters, having been raised by the ILC in its draft Statute for the Court in the early 1990s.[13]

The precise conditions under which the Security Council could use the ICC, or prevent it from acting, were hugely controversial in the negotiations for the Rome Statute. The course between the Scylla of conflict between the ICC and Security Council and the Charybdis of a politicised Court was neither clear to, nor shared between, the delegations in Rome. The outcome is one that represents a delicate compromise which attempts to ensure the ICC does not the hamper the Security Council in its search for peace, but is independent from the politics of the Council, as its status as a court requires.[14]

This led to two "pillars" of Security Council involvement with the ICC.[15] As we have seen, and will develop further in the latter part of this chapter, action by the Security Council since Rome has attempted to alter this compromise with respect to both pillars, granting itself greater authority than the Rome Statute envisaged over its proceedings. It hardly needs to be said that this has proved highly controversial.

II. The Background to the Debate: Two Independent Institutions

Before moving into the substantive provisions of the Rome Statute, it is necessary to understand the legal background against which the delegations worked in Rome. The basic principle underlying their work was that the ICC and the UN (in this instance represented by the Security Council) were to be independent of one another, with their powers defined by their respective treaties.[16] Organisations have

12 Arguments that international crimes affect international peace and security considerably predate the recognition of the point by the Security Council in relation to Yugoslavia and Rwanda, let alone that in the preamble of the Rome Statute. See the opening speech by Justice Robert Jackson at the Nuremberg International Military Tribunal, 1 *Trials of War Criminals, Nuremberg* (London: HMSO, 1945) 49.

13 See, e.g. S.A. Williams, "Article 13" in O. Triffterer (ed), *Commentary on The Rome Statute of the International Criminal Court: Article by Article* (Baden-Baden: Nomos, 1999) 343 at 344-345.

14 See e.g. L. Condorelli and S. Villalpando, "Referral and Deferral by the Security Council" in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 627 at 644-646; M. Bergsmo and J. Pejić, "Article 16" in Triffterer (ed), *Commentary* 373 at 373.

15 See F. Berman, "The Relationship Between the International Criminal Court and the Security Council" in H. von Hebel, J.G, Lammers & J. Schukking (eds.), *Reflections on the International Criminal Court* (The Hague: Kluwer/T.M.C. Asser Press, 1999) 173 at 173-178 As he notes, (178) there is (probably) a "hidden pillar", in relation to the crime of aggression pursuant to Article 5(2) of the Statute. Discussion of that aspect of the Council's possible role belongs with the crime of aggression. It is also not yet operative.

16 On the international legal personality of the ICC see Kenneth S. Gallant, "The International Criminal Court in the System of States and International Organizations" (2003) 16 *Leiden Journal of International Law,* 553.

to operate within the powers granted to them under their own treaties.[17] The ICC cannot become a party to the UN Charter,[18] and the UN cannot be a party to the Rome Statute, therefore the powers of each cannot be altered by the constituent treaty of the other.

This meant that the Rome Statute could not grant the Security Council any additional powers it did not have, nor limit those it already possessed under the Charter.[19] The Council's powers are defined under the Charter, and the parties to the Rome Statute could not grant it the authority to act in an *ultra vires* fashion with respect to the Charter.[20] Nor could the Rome Statute limit the powers of the Council, for the same reason.

The converse also applies. The Security Council cannot alter the powers of the ICC as set out in its Statute. This was made abundantly clear by a number of States during the drafting and passage of Security Council Resolution 1422,[21] to which we will return. The understanding of the drafters that the Rome Statute, not the UN Charter, sets out the powers of the Court, can be seen in Article 1 of the Statute, and in the formulation of Article 16 of the Statute. Article 1 states that "[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute".

Article 16 of the Statute, when referring to a Chapter VII Resolution of the Security Council which would be binding on all States, terms the resolution a "request" to the ICC, not a "demand".[22] This is instructive. Provisions in the Rome Statute referring to the Security Council and its powers do not make the Security Council resolutions binding on the ICC as a matter of law by virtue of the UN Charter, they set out the way the Court must react if the Security Council acts in a certain way. Thus the ICC is bound only to react in the ways set out in the Statute, as that is the source of the ICC's obligation, not the powers of the Security Council under the Charter.

There was one way in which there is a treaty-based link between the ICC and the UN. This is the relationship agreement between the two which came into force in 2004.[23] The agreement, pursuant to Article 2 of the Rome Statute had to be approved by the Assembly of States Parties to the Rome Statute. The United States took the view that what it considered "flaws" in the Rome Statute could be "fixed" by limit-

17 See, for example Sarooshi, "The Peace and Justice Paradox", 106.

18 Article 4(1) of the Charter limits membership of the UN to "peace loving States".

19 Condorelli and Villalpando, "Referral", 629; Berman, "Relationship", 174.

20 Sarooshi, "The Peace and Justice Paradox", 106-108 If the ICC had been created by an amendment to the Charter, as some suggested, the situation would have been different, but the practical obstacles to following this course meant that it was discounted at an early stage, see *Yearbook of the International Law Commission Vol II: Report of the Commission to the General Assembly on the Work of its Forty-Sixth Session,* 27-28.

21 See R. Cryer and N.D. White, "The Security Council and the International Criminal Court: Who's Feeling Threatened", (2002) 8 *International Peacekeeping: The Yearbook of International Peace Operations*, 143 at 153-154.

22 *Ibid*., 154.

23 Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, October 2004, ASP/3/Rev.1.

ing the ability of the Court to operate in accordance with the Statute in that agreement.[24]

One such suggestion was to require Security Council consent for surrender of non-party nationals to the ICC unless the State of nationality had specifically consented.[25] This was unsuccessful, and even if it had not been, there would have to be some doubt about the ability of the relationship agreement to effectively amend the Rome Statute without utilising the amendment procedures provided in Articles 121-122 of the Statute.

In the event, by virtue of Article 2(1) of the Relationship Agreement "the United Nations Recognizes the Court as an independent permanent judicial institution which ... has international legal personality". Reciprocally, Article 2(2) provides that "the Court recognises the responsibilities of the United Nations under the Charter". Article 2(3) of the Agreement states that "the United Nations and the Court respect each other's status and mandate".

There is one other way in which it could be argued that the Security Council could take on a role in the Court outside what is contemplated in the Rome Statute. That would be by making use of Article 103 of the UN Charter. Article 103 of the Charter provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

In the negotiations at Rome, some suggested that the Security Council would be able to prevent proceedings in the ICC by virtue of Article 103 even without a provision in the Rome Statute.[26] In fact, this is highly doubtful. Article 103 is a part of the UN Charter, thus only applicable to parties to that Treaty. The ICC is not a party to the UN Charter. A further argument could be made, however, that it applies by analogy but there is no evidence that this has become a principle of international institutional law.[27]

It could be argued that since States are subject to Article 103, they could not create an institution that was not so bound. The argument would be one of *nemo dat quod non habet*. Again, there is no real evidence that this is indeed the case.[28] Indeed in setting up the UN, States created an institution with powers they did not have (in particular the right to use force in response to threats to international peace and security),[29] thus undermining the *nemo dat* argument. Furthermore, even if the non-delegation contention were correct, it can be argued that factually this is inapplicable to the ICC.

When the Rome Statute came into force, on 1 July 2002, creating the entity

24 See B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: OUP, 2003), 176-178.

25 *Ibid*., 173-174.

26 *Ibid.*, 82.

27 R. Bernhardt, "Article 103" in Simma (ed), *The Charter,* 1295 at 1298-1299; Cryer and White, "Security Council", 154. Sarooshi, "Peace and Justice", 106-107.

28 Sarooshi, "Peace and Justice", 106-108.

29 On pre-Charter rights to use force see I. Brownlie, *International Law and the Use of Force By States* (Oxford: OUP, 1963), 1-111.

with international legal personality separate to the States that were party to it, one of those States, Switzerland, was not a member of the UN therefore not bound by the Charter in general, and Article 103 in particular, so it could delegate independence from Article 103 to the ICC.[30] That it later became a member of the UN, on 10 September 2002 would not affect the separate international legal person (the ICC) set up in July 2002. While this may appear a technical argument, what it illustrates is that as an autonomous non-State subject of international law, the ICC is not caught by the "constitutional" provisions of the UN Charter.

It might also be noted that in the Relationship Agreement, although the ICC recognises the UN's responsibilities under the Charter and agrees to respect its mandate, the UN in turn recognises the ICC as an independent international legal person, undermining any idea that it is subject to the Charter. That said, the Security Council can do a great deal to frustrate the operation of the ICC by putting obligations not to cooperate with the ICC on member States of the UN.[31] As we will see, the Security Council has not been shy of using its powers, at times with scant regard for the terms of the Rome Statute.

III. The ICC and the Security Council: The Rome Statute

Leaving aside the issue of aggression, and focusing at this point more on a legal analysis of the issues, there are two main provisions that relate to the Security Council in the Rome Statute. One grants the Security Council the right to make use of the ICC's jurisdiction, the other permits the Council to request the Prosecutor to defer investigations and prosecutions when it considers it necessary in the interests of international peace and security. Let us take them in turn.

A. Enabling the Jurisdiction of the ICC: Article 13(b)

The vast majority of States at Rome were of the view that the Security Council had an appropriate role to play in enabling the ICC to exercise its jurisdiction. Since the Security Council's power to create international criminal tribunals has largely been accepted, at least since the *Tadić* interlocutory appeal in 1995,[32] most States took the view that it would be more appropriate (and cheaper) for the Security Council to refer matters to the ICC rather than to create further *ad hoc* tribunals.[33] The latter argument was influential in relation to the Sudanese referral.[34] A few States, in particular India and Mexico, were unhappy about any involvement of the

30 Switzerland being one of the original 60 parties to the Rome Statute, thus the relevant date was the entry into force of the Rome Statute.

31 Sarooshi, "Peace and Justice", 107-108.

32 *Prosecutor* v. *Tadić*, Interlocutory Appeal on Jurisdiction, Case No. IT-95-1-AR72, 2 October 1995, paras 26-40.

33 See, e.g. Williams, "Article 13", p.349; Condorelli and Villalpando, "Referral", 630.

34 SC Res. 1593, 31 March 2005; and *Report of the International Commission of Inquiry on Darfur To the United Nations Secretary-General Pursuant to Security Council Resolution 1564* 25 January 2005, para. 572.

Security Council with the ICC, on the basis that it would politicise a judicial body.[35] Although there is some mileage in this argument, the argument has more potency in relation to the Council's power to limit the jurisdiction of the ICC.

Either way, the overwhelming majority of States supported what became Article 13(b) of the Rome Statute. Article 13, in relevant part, reads

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
> ... (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.[36]

There are a number of issues that arise under Article 13(b). The first is that for the Security Council to take advantage of the provision, the Council has to ask the Court in the context of a Chapter VII resolution. In other words, the Council must determine that there is a situation in which measures are necessary to restore or maintain international peace and security.[37] This provides support to the idea, also included in the preamble of the Rome Statute, that there is an intimate link between breakdowns in international peace and security and the commission of international crimes.[38] Next, as should be clear, Article 13 shows that the Security Council does not have jurisdiction which it transfers to the ICC, but that the jurisdiction is the Court's. Article 13(1) refers to the Court's jurisdiction. This is correct, in that the Council does not have any criminal jurisdiction of its own to pass to the Court.[39]

The final thing to note is that the Council's power is to refer a "situation in which one or more of such crimes appears to have been committed". The choice of the word "situation" is entirely non-accidental. It was chosen in preference over "matter" or "case" as it more closely tracked the language of the UN Charter, and made clear that the Security Council could not refer a single case, or control the discretion of the Prosecutor by issuing what amounted to an Act of attainder in Resolution form.[40]

Some have suggested that, notwithstanding this, the Security Council can limit the situation it refers to the Court. David Scheffer, for example suggests that the Council can limit the personal extent of the referral, to exclude peacekeepers and the like.[41] Condorelli and Villalpando, in a slightly different form, go further, claiming that the wording of the Statute, being "a situation in which one or more of such

35 See e.g. Sarooshi, "Peace and Justice", 101-102.

36 On the Article see Williams, "Article 13"; Condorelli and Villalpando, "Referral", 629-644; Sarooshi, "Peace and Justice", 96-102.

37 Pursuant to its powers under Article 39 of the UN Charter.

38 See, e.g. Broomhall, *International Justice,* 41-51; Condorelli and Villalpando, "Referral", 630.

39 See Robert Cryer, "Commentary on the Rome Statute for an International Criminal Court: A Cadenza for the Song Of Those Who Died in Vain?" (1998) 3 *Journal of Armed Conflict Law* 271 at 278-279.

40 See e.g. Sarooshi, "Peace and Justice", 97-98.

41 David Scheffer, "Staying the Course With the International Criminal Court" (2001-2002) 35 *Cornell International Law Journal,* 47 at 90.

crimes" means that the Security Council could send individual cases to the ICC, or although it could "refer in broad terms to a situation ongoing in a particular geographical zone, or it could identify more specifically the crimes that appear to have been committed, and their authors, as it could even refer the case of single individuals".[42]

There is simply no evidence that Scheffer's position accurately reflects the intention of the drafters, which was to ensure that the Council would have to send a whole situation and respect the Prosecutor's independence with respect to who ought to be prosecuted in that situation.[43] Against Condorelli and Villalpando it might be noted that although the language ("in which one or more of such crimes") might imply that it could send an individual case this is to misunderstand the intention of the drafters and the concept of the situation referred. The drafters' choice of the term "situation" was precisely to avoid the implication that the Security Council could send individual cases.[44]

Condorelli and Villalpando also assert that the ICC could undertake prosecution of offences committed in situations prior to the entry into force of the Statute if the Security Council passed such situations to it under Article 13(b).[45] This assertion is based on Article 11 of the Rome Statute, which reads

> (1) The Court has Jurisdiction only with respect to crimes occurring after the entry into force of this Statute.
> (2) If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.

The authors begin by asserting, quite correctly, that the prosecution of a crime committed in the period prior to the entry into force of the Statute would not violate the principle of non-retroactivity (contained, *inter alia*, in Articles 22 and 24 of the Rome Statute).[46] So long as the offences were customary, or covered by applicable treaties at the time they were committed, this is correct. It is the next step that is problematic.

To avoid the seemingly imperative formulation contained in Article 11(1), the argument claims that Article 11 must be read as a whole, and turns to Article 11(2). Article 11(2) then notes that Article 11 refers to Article 12. Condorelli and Villalpando, therefore assert that this creates a link between the temporal jurisdiction of the ICC and the regime of State consent. Therefore, they argue, since the Security Council can effectively bypass the jurisdictional limitations in Article 12, it may be able to grant the ICC jurisdiction over events prior to the coming into force of the Statute.[47]

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42 Condorelli and Villalpando, "Referral", 633.

43 Sarooshi, "Peace and Justice", 97-100.

44 See e.g. L. Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16", in R. Lee (ed.), *The Making of the Rome Statute* (The Hague: Kluwer, 1999), 148; Williams, "Article 13", 349.

45 Condorelli and Villalpando, "Referral", 634-637.

46 *Ibid.*, 635-636.

47 *Ibid*., 636-637

The argument is elegant, but in the final analysis, unconvincing.

Their contention must fail on the basis of the uncompromising formulation of Article 11(1). Even if it did not, the background to the inclusion of Article 11 shows that the reason for Article 11 was less salubrious than Condorelli and Villalpando suggest. Article 11 was included in the Statute because enough States have skeletons in their closet that the possibility of the ICC being able to investigate past acts was politically unsaleable in Rome.[48] It was recognised at Rome that after the Statute came into force, States who had been involved in conflicts after that date might later be dissuaded from ratifying the Statute by the fact that by so doing, the ICC might assert jurisdiction over conflicts long since over.[49]

Irrespective of the merits of ICC intervention in such cases, the drafters of the Rome Statute took the view that it was better to encourage States to join the ICC regime than stay outside for fear of the ICC exercising jurisdiction over a State's past actions. Although this shows that, as Condorelli and Villalpando assert, there is a link between Article 11(2) and State consent, this does not lead to the conclusion that they (admittedly tentatively) proffer. Article 11(2) serves to cut down the ICC's jurisdiction further than 11(1), and cannot be cited in support of excluding the latter provision's express terms.

When the Security Council refers a situation to the ICC, the primary consequence is that the ICC is granted jurisdiction over that situation (if it does not already have it) and the prosecutor must begin to consider whether to initiate an investigation under Article 53 of the Rome Statute.[50] It would be wrong to assert, however, that in the situation where the Security Council has made a reference under Article 13(b) the ICC does not have to concern itself with the principle of complementarity.[51]

The problem with such a view is simple, there is nothing in the Statute that compels, or even implies this conclusion. The same applies to the Rules of Procedure and Evidence.[52] The International Commission of Inquiry into the Events in Darfur also took this view, which seems to be broadly accepted.[53]

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48 See e.g. William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: CUP, 2nd ed., 2004), 70-71.

49 For example, if the US were to ratify the ICC Statute in 2020, without Article 11(2) the ICC could assert jurisdiction, for example over US conduct in Iraq, and at Guantanamo bay. This would provide a strong argument for those opposing ratification to use.

50 See, for example M. Bergsmo and P. Kruger, "Article 53" in Triffterer (ed.), *Commentary.* 701. He does not, however, have to inform States that he has initiated an investigation, as the obligation to do so in Article 18(1) only applies where a State refers a situation or the Prosecutor initiates an investigation pursuant to his *proprio motu* powers, see, e.g. Condorelli and Villalpando, "Referral", 638.

51 I.e. the principle that requires to defer to national jurisdictions unless they are unwilling or unable to prosecute offences genuinely. On the principle see John T. Holmes, "Complementarity: National Courts *versus* the ICC" in Cassese, Gaeta and Jones (eds.), *Rome Statute,* 667.

52 For discussion see Condorelli and Villalpando, "Referral", 637-640.

53 *Report* paras 606-609. See also Flavia Lattanzi, The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism" in Lattanzi and Schabas (eds.), *Essays,* 51 at 63; Gargurilo, "Relationship", 82-85.

B. Deferring the Court's Action: Article 16

The flipside of Article 13(b) is the right of the Security Council pursuant to Article 16 to defer investigations and prosecutions. Article 16 reads:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a Resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

The issues surrounding what became Article 16 were extremely controversial in the PREPCOMs preceding Rome, and at the conference itself. Although, as we have seen, most States were willing to accept that the Security Council ought to be able to take advantage of the ICC to ensure prosecution, there was no real agreement that it ought to be able to prevent the ICC from exercising jurisdiction where it would otherwise be able to do so.[54]

Initially, in 1994, the ILC had proposed that this be the only way by which the ICC ought to be able to operate if the Security Council was dealing with the situation (which, given the nature of situations that tend to give rise to international crimes was quite likely) was if the Council adopted a resolution expressly permitting it to do so.[55] However, when it became clear that the Security Council would not be the exclusive trigger mechanism for the Court in such a situation, the debate moved to whether the Security Council ought to be able to prevent the ICC from exercising jurisdiction when it considered doing so to be in the interests of international peace and security.

The argument that had proved effective in relation to Article 13(b), that the Security Council had already done such things in its prior practice was not available for proponents of what became Article 16. The Security Council had not, prior to the negotiations, ever expressly required non-prosecution of international crimes.[56] Also, the argument against providing the Security Council with the power to prevent the ICC from operating in particular circumstances, that allowing a political body to prevent a judicial body from acting would politicise the Court, and give rise to claims of selectivity, was, and is, undoubtedly strong.[57]

Although the point of principle was on the side of those opposing a role for the Security Council,[58] the proponents of the ICC only being able to act when the

54 For discussions of the negotiations on this point see Yee, "International Criminal Court", 149-152, Condorelli and Villalpando, "Referral", 644-646; Bergsmo and Pejić, "Article 16", 373-378; Gargurilo, "Relationship", 85-90.

55 Article 23(3) ILC Draft Statute.

56 The closest it had come was Resolutions 731 and 748, which required Libya to hand over the suspects in the Lockerbie bombings to the UK or US for the purposes of prosecution, rather than prosecuting it itself.

57 See, for example, Bergsmo and Pejić, "Article 16", 374-375; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2005), 226-227.

58 Even one of the defenders of Article 16, UK head of delegation Sir Franklin Berman, was

Security Council expressly permitted it had power on their side. They also had a potentially powerful argument that where the Council was involved in delicate peace negotiations, international peace and security might require that the ICC not intervene. An impasse threatened to jeopardise the negotiations, until Singapore managed to find a way through the mire.

This was to concede that the Security Council could defer the work of the ICC, but to make the likelihood of the Council actually doing so fairly low, by making it difficult for it to do so.[59] Thus a positive resolution, which would be subject to the veto, was to be required. The resolution also could not, *per se*, prevent the ICC from acting at any time, but would only operate to defer action by a year, thus mitigating the imposition on the independence of the Court. This solution, subject to some tweaking, formed the basis for the tense compromise of Article 16. However, the assumption that the Council would be sparing in its reliance on Article 16 has not been borne out in practice.

To understand the ambit of Article 16, it is necessary to look at both its text and the understandings that its drafters had. To take an important limitation, Article 16 is intended to refer to particular instances of investigations and prosecutions. This is clear from the language, which is conspicuously different to that in Article 13(b). Whereas the latter speaks of "situations", a term which was deliberately included to ensure particular cases or groups of cases could not be referred to the ICC, the only limits on the concept of "situation" being geographical and temporal, Article 16 refers to an "investigation or prosecution".

The two separate terms were included to show that the Council could request the deferral of the entire investigation into a situation, or a particular case (or group of cases).[60] However, the understanding of the drafters was that the Council would have to exercise its judgment on the implications for international peace and security of the investigation or prosecution specifically, not *in abstracto*. As much is clear from the comments of one of Article 16's drafters, Sir Franklin Berman:

> At the fundamental level, the purpose of creating an International Criminal Court is to contribute to maintaining international peace and security, which obviously could not be done while inhibiting the operation-difficult at the best of times-of the Charter organ tasked with establishing that very international peace and security. The onus lies with the Security Council to decide *from case to case* (with full application of the veto) whether its action would or would not be jeopardized by proceedings before the Court [emphasis added].[61]

Such an interpretation was strongly asserted by a considerable number of States in

prepared to accept that Article 16 represented a "departure from pure principle", Berman, "Relationship", 177.

59 See, for example, Schabas, *An Introduction,* 65.

60 See Bergsmo and Pejić, "Article 16", 378-379. It would appear that the Security Council cannot prevent preliminary steps taken by the prosecutor to assist him in making an Article 53 determination that there is a basis to proceed, however, see Bergsmo and Pejić, "Article 16", 379, 381; Condorelli and Villalpando, "Referral", 651, n.96. As the authors note (*ibid.*), the line between those steps and an investigation is a thin one.

61 Berman, "Relationship", 177-178.

relation to the highly controversial Resolution 1422, and remains the better interpretation of Article 16. The second point to note is that although the Council may require States not to take action for as long as it considers it necessary by passing a resolution without a time limit,[62] this is not the case for the ICC. Article 16 makes it clear that the ICC is only required to defer its activities for 12 months when the Security Council passes a resolution "requesting" it to do so. It must be noted that the ICC is required to defer not by the Resolution itself, but by the terms of the Rome Statute. As we have seen, the ICC and the UN are entirely separate entities, therefore the Security Council cannot force the ICC to defer its activities *per se*, it is only through the operation of the Rome Statute that this may occur.

If the Security Council wishes to ensure that the ICC defers its action for a further 12 months, it must consider the matter afresh a year after the earlier resolution, and pass another resolution (which, again, is subject to the veto). Spanish proposals to limit Article 16 to a one-off 12 month period were rejected, making it clear that the Statute does contain a limit on the number of times the Council may request the ICC to defer however.[63] Owing to the possibility of evidence (including witness evidence) disappearing, being tampered with, being destroyed or simply decaying during this period, the Prosecutor is entitled to take certain limited actions during the deferral period. However, outside those actions he is unable to progress the investigations or prosecutions.[64] The fact that this occurs at the behest of a political body, and one which has shown itself to be quite profligate in its use of Article 16, is disquieting.

IV. The Practice of the Security Council

In many ways the practice of the Security Council has confounded expectations. The fact that there is any practice at all is surprising enough. As has been said, a perfectly reasonable case could be made that the Security Council would be unlikely to pass a situation to the ICC, owing to the antipathy of at least two permanent members of the Council (the US and China) to the Court.[65] Also, Article 16 was deliberately structured to make it difficult to invoke, leading some to, understandably, differentiate between the "positive" and "negative" functions of the veto.[66]

Yet the Security Council has both referred situations to the ICC, and requested that it defer matters, purportedly on the basis of Article 16, in ways that would have been almost impossible to predict other than with supernatural prescience. Owing

62 Which has given rise to problems of the "reverse veto", where one permanent member may prevent the removal of otiose sanctions for its own reasons by applying its veto to any resolution presented to the Council to terminate those sanctions. On this see David Caron, "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 *American Journal of International Law,* 552.

63 See Gargurilo, "Relationship", 89-90.

64 The power to take such action in Article 54(3)(f) does not seem to be affected by a deferral. See, for example, Bergsmo and Pejić, "Article 16", 380-381. On the practical problems here see Condorelli and Villalpando, "Article 16", 380-381. See also Garguilio, "Relationship", 90-91.

65 See, e.g. Broomhall, *International Justice*, 161.

66 Gargurilo, "Relationship".

to the fact that the Security Council practice has tended to build on its own "precedents",[67] and States treat any possible precedential value of such Resolutions very seriously, we will deal with the major relevant resolutions in chronological order.

A. The Deferral Resolutions, 1422 and 1487[68]

Security Council action in relation to the ICC practically coincided with the entry into force of the Rome Statute on 1 July 2002. This was no accident. The US was hugely concerned that any of its peacekeeping forces around the globe might become subject to the jurisdiction of the ICC.[69] Therefore it used the renewal of the mandate of the peacekeeping operation in Bosnia-Herzegovina (UNMIBH), which required at least its abstention in the Security Council, as a moment to wrest concessions from the other members of the Council over the ICC. The US position was clear and uncompromising, unless its concerns in relation to the ICC were addressed, the renewal of the mandates of peacekeeping missions would be vetoed.

As a shot across the bows of other members of the Council, on 30 June 2002 the US vetoed the extension of UNMIBH's mandate, and made it clear that to ensure the extension of its mandate beyond short interim periods granted for negotiation, members of the Security Council would have to agree to exemptions from the jurisdiction of the ICC for US personnel, perhaps permanently. Therefore members of the Security Council were put under considerable pressure to acquiesce in passing resolutions that attempted to limit the jurisdiction of the ICC. In other words, they were offered "Hobson's choice", either pass resolutions limiting the ICC's jurisdiction or place the future of peacekeeping in the balance.

Crisis loomed. The Security Council decided to have one of its rare open public meetings in which any State may speak. 39 States exercised that right. Considerable concerns were expressed in the meeting about the fact that the Security Council may have been looking to act inconsistently with the UN Charter and ask the ICC to defer jurisdiction in a manner inconsistent with its own founding document.[70] After

67 The fact that sometimes Resolutions are said not to form precedents implicitly makes the case that they are often seen as such.

68 This section is based on Cryer and White, "The Security Council". For other literature on Resolution 1422 see Carsten Stahn, "The Ambiguities of Resolution 1422" (2003) 14 *European Journal of International Law* 85; M Weller, "Undoing the Global Constitution: UN Security Council Action on the International Criminal Court"; (2002) 78 *International Affairs* 693; N. Jain, "A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court"; (2005) 16 *European Journal of International Law* 239; R. Lavalle, 'A Vicious Storm in a Teacup. The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court"; (2003) 14 *Criminal Law Forum*, 195; S. Zappalà, "The Reaction of the US to the Entry Into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements", (2003) 1 *Journal of International Criminal Justice* 114.

69 Although as has been candidly admitted by a present member of the Bush administration (albeit in his personal capacity, and prior to taking up office), the real concern of the US government is not peacekeepers, but high-ranking government officials. See John Bolton, "Courting Danger: What's Wrong With the International Criminal Court" (Winter 1998/99) 55 *The National Interest* 60 at 63.

70 See, for example, the comments in, UN Doc. S/PV 4568, 10 July 2002, *inter alia* of Brazil

this, on 12 July the Security Council passed Resolution 1422, operative paragraph 1 of which stated that the Council:

> [r]*equests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for twelve-month period starting from 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

Operative paragraph 2 of the Resolution expressed the Council's intention to renew that request on each 1 July for as long as may be necessary. The resolution was the outcome of difficult negotiations in which, to be fair to many States, international legal argumentation was genuinely important.[71] Nonetheless, considerable doubts must be expressed about the consistency of that resolution with both the UN Charter and the Rome Statute.

As can be seen, operative paragraph 1 picks up on much of Article 16, for example it imposes a 12 month limit on the deferral. Like Resolution 1422, Article 16 was a delicate balance between conflicting positions, and a highly controversial one. The problem is perhaps one of the difference between a conference negotiating a multilateral treaty and negotiations in the Security Council, in which sovereign equality does not exert such a strong normative pull.[72] This is problematic owing to the fact that, as we saw above, the ICC has to operate in accordance with its own Statute, not the UN Charter, over and above the level of (mutual) respect founded in the relationship agreement.

It might be noted that Resolution 1422 expresses its fidelity to Article 16 of the Rome Statute, however, as we saw above there must be an individual decision whether, in the circumstances of the particular issue at hand, Article 16 should be invoked.[73] This is not done by Resolution 1422. Although its adoption was a result of the requirement for the renewal of UNMIBH's mandate, Resolution 1422 is not limited to that operation.

Nor is it even, on its own terms, linked to that mission. It could be thought that Resolution 1422, in fact, amounts to a determination that in all existing situations in which there are UN established or authorised operations, it is necessary that Article 16 be invoked. However, it is clear that this was not the intended meaning of the resolution, which does not refer to those missions. It is also noteworthy that in its purported justification for invoking Chapter VII it does not refer to the existing situations, but to the future viability of UN operations.

(21-22), Canada (2-4); Costa Rica (on behalf of the Rio group and the Caribbean States) (14-15); Iran (15-16); Mexico (26-27); New Zealand (5-6) and Switzerland (22-23).

71 For an analogue in relation to the negotiations for the Rome Statute see Gerry Simpson, "Politics, Sovereignty, Remembrance" in McGoldrick, Rowe and Donnelly (eds.), *Permanent International Criminal Court* 47, 51.

72 See, for example, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: CUP, 2004) Chapter 6.

73 See, for example, the comments of New Zealand and Mexico, S/PV4568.

There was no particular discussion of the individual situations and the necessity for an Article 16 request for each force beyond the threats of the US to unilaterally remove its personnel from those missions that had a US contingent. The fact that Resolution 1422 could also apply to any future UN operations established during the currency of that resolution shows that the case-by-case analysis required for the ICC to defer to the Council under Article 16 was not entered into.[74] Indeed, there is also no determination that, in the particular circumstances, a deferral is required. Therefore Resolution 1422 is not consistent with the Rome Statute.[75]

This alone is sufficient to determine that the ICC is not bound by Resolution 1422, however. There is also the question of the compatibility of Resolution 1422 with the UN Charter. As was noted above, the ICC is required to operate in accordance with its Statute, and the Security Council is required to operate within the parameters of the Charter.[76] Resolutions passed by the relevant body in the UN system are entitled to a presumption of lawfulness.[77] The presumption, however, is a rebuttable one, and there are reasons to believe Resolution 1422 was not adopted in accordance with the Charter.

The failure of the Security Council to find a specific threat to the peace in Resolution 1422 means that the Resolution has a perilous relationship with Article 39 of the Charter. This was referred to by several States at the open meeting of the Security Council on 10 July at which an earlier version of what became Resolution 1422 was discussed, not least the United Kingdom, whose representative said that "the United Kingdom shares the concern that actions of the Security Council should remain within the scope of its powers. Article 39 of the United Nations Charter is relevant in that respect".[78] Unfortunately the United Kingdom, President of the Security Council during the relevant meetings, did not explain how and why Resolution 1422 overcame these objections and was *intra vires* despite the absence of a finding of a threat to the peace.[79]

As a creature of the Charter, the Security Council must be subject to the limits therein – it must act within the purposes and principles of the UN Charter and it must not violate clear provisions of the Charter that set (generous) limits to its powers. One of these limitations is the requirement of Article 39 that there be a

74 Although operative paragraph 1 refers to "current or former officials" it also simply refers to "personnel from a contributing State". As the point of the resolution is to ensure personnel are sent to future missions, it seems reasonable to imply that it applies to any missions created before 30 June 2003.

75 For the minority view, that the request is close enough to the intention of Article 16 to make it acceptable under that provision see Gallant, "The ICC", 574-575. For a fairly sympathetic appraisal of Resolution 1422 see Dominic McGoldrick, "Political and Legal Responses to the ICC" in McGoldrick, Rowe and Donnelly (eds), *The Permanent International Criminal* Court, 389 at 415-422.

76 As the Appeals Chamber of the ICTY put it in *Tadić,* para 28, "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus*".

77 *Certain Expenses of the United Nations* Opinion (1962) ICJ Reports 151, 168.

78 S/PV.4568, p.16. See also Canada, 3; Costa Rica, 15; Jordan, 16. S.PV.4568, Resumption 1: Samoa, 7; Germany, 9.

79 Stahn, "The Ambiguities", asserts that there is an implicit finding of a threat to the peace, but this reads something into the Resolution which was not agreed by those who passed it.

threat to or breach of the peace before it can act under Chapter VII. Since there was no threat to the peace, a fact recognised by the resolution itself, it cannot act under Chapter VII. The resolution was therefore not adopted in accordance with the Charter.[80]

The issue of the deferral, unsurprisingly, arose again about a year later, when the 12 month period requested for deferral was running out. The US sought to obtain a renewal of the period for a further year in June 2003. It was becoming clear at this point that the US would seek to obtain 12 month deferrals for an indefinite period of time, achieving an infinite deferral by hook (new resolutions on a yearly basis) what it could not achieve by crook (a single resolution). This led to considerable disquiet in the UN. The Secretary-General, in a rare address to the Security Council in its Chamber made his views abundantly clear.

The Secretary-General began by asserting that the proposed renewal resolution was inconsistent with Article 16, on the basis that it did not refer to a particular situation, and that the proposed resolution was unnecessary, although he understood perhaps the Council might want to defer cases for another year until the ICC was fully operational. However, he was quite forthright with the Council about the effects of renewals of 1422:

> Allow me to express the hope that this does not become an annual routine. If it did, I fear the world would interpret it as meaning that the Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes. If that were to happen, it would undermine not only the authority of the ICC but also the authority of the Council and the legitimacy of United Nations peacekeeping.[81]

Again, the public meeting preceding the adoption of what became Resolution 1487 was attended by a number of non-members of the Council who wished to be heard. In addition to members of the Council 18 other States spoke about the Resolution. The vast majority expressed their concern not only about the lawfulness of the proposed renewal, but its legitimacy.[82] Only the US[83] and the UK clearly asserted the legality of the resolution,[84] and the UK did not express unqualified support for the US position that the Resolution was a good thing.[85]

Spain, it appears, sought to read down the relative operative paragraph so to make

80 Cryer and White, "The Security Council", 156-7.

81 UN Doc. S/PV.4772, 2-3.

82 See *ibid.*, Canada, 3-5; New Zealand, 5-6; Jordan, 6-7; Switzerland, 7; Liechtenstein, 7-8; Greece (on behalf of the EU, the acceding countries, associated countries and members of the European Economic Area, 8-9; Iran, 10; Uruguay, 10-11; Malawi, 11-13; Brazil, 13; Peru (on behalf of the Rio Group) 13-14 (although the comments are somewhat vague); Trinidad and Tobago, 14-15; Argentina, 15-16; South Africa, 16-17; Nigeria, 17-18; Democratic Republic of Congo, 18-20; The Netherlands, 20; Cameroon, 21-22; Germany, 24-25; Syria, 25-26; Angola, 26-27.

83 *Ibid.*, 23-24.

84 *Ibid.*, 23.

85 *Ibid.*, 22-23.

it consistent with Article 16.[86] The Resolution was passed, and became Resolution 1487, but with the abstentions of France, Germany and Syria. These abstentions were evidence of increasing disquiet about the precedent that Resolution 1422 may have set, in particular its relationship with the rule of law.[87] In June 2004, after the revelations about US abuses of prisoners in Abu Ghraib prison in Iraq, the US found itself unable to muster support for a further renewal of Resolution 1422, and thus the first, rather insalubrious chapter of the Security Council's practice in relation to the ICC was closed.

B. The Exclusive Jurisdiction Resolution (1497)[88]

After Resolution 1487 the next action by the Security Council was Resolution 1497. Resolution 1497 related to the setting up of a multinational force to support the ceasefire in Liberia in 2003. This time, although dealing with a specific situation (thus perhaps more a candidate for an Article 16 request), the Security Council took another tack. This was to attempt to exclude the jurisdiction of the ICC (and other States) entirely and, apparently, permanently. The relevant part of Resolution 1497 was operative paragraph 7, which was included at the insistence of the US. Operative paragraph 7

> *[d]ecides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of the contributing State for all alleged acts or omissions arising out of or related to the Multinational Force ... unless such exclusive jurisdiction has been expressly waived by that contributing State.

During the passage of that resolution, a number of States expressed doubt about the compatibility of operative paragraph 7 with the Rome Statute and general international law. The two States that were clearest about their opposition to operative paragraph 7 were Germany and France.[89] Germany expressed its concerns about the fact that operative paragraph 7 would prohibit the use of passive personality or universal jurisdiction over individuals suspected of committing crimes under international law.[90] It also appears that Germany was uncomfortable with the relationship between operative paragraph 7 and the Rome Statute, mentioning it alongside its fears about national jurisdiction.[91] France's comments were the clearest, explaining

86 *Ibid*., 25.

87 *Ibid.*, 13 (Brazil).

88 This section, and the section on Resolution 1593, are based on R. Cryer, "Sudan and International Criminal Justice", (2005) 17 *Leiden Journal of International Law* 95.

89 Although Mexico noted its concerns in relation to "principles of international law" its statement concentrated primarily on Mexican constitutional law. UN Doc. S/PV.4803, 2-3. Chile expressed its concern that "by making exceptions, we might impede the harmonious development of international law", UN Doc. S/PV.4803, 6.

90 UN Doc. S/PV.4803, 4. France may have agreed, noting alongside its concerns about the Rome Statute, that it did not believe operative paragraph 7 was compatible with "principles of international law" without further explanation, UN Doc. S/PV.4803, 7.

91 *Ibid.*

that "[w]e do not believe that the scope of the jurisdictional immunity thus created is compatible with the Rome Statute of the International Criminal Court".[92]

None of the critics of the Resolution explained precisely why they considered operative paragraph 7 inconsistent with the Rome Statute, but the most likely reason is that although the Rome Statute gives the Security Council the right to request the Prosecutor to defer investigations into a situation for a period of a year pursuant to Article 16,[93] operative paragraph 7 seeks to have a permanent effect. The drafters of the Rome Statute were unwilling to grant the Security Council the authority to permanently limit the ICC's action in one fell swoop.

C. The Quiet Resolution (1502)

Unlike the other resolutions dealt with here, Resolution 1502 is not interesting because of what it says, but because of what it does not say. Resolution 1502 was part of the UN response to the terrorist attack on UN headquarters in Baghdad by insurgents that killed the Secretary-General's representative in Iraq, Sergio Vierra de Mello on 19 August 2003. The Resolution was intended to condemn that attack, and take steps to ensure that protection be granted to peacekeepers and other UN personnel. This was not a controversial objective, particularly against the background of the attacks on UN personnel in Iraq.

However the original draft of the Resolution submitted by Mexico included a reference to the Rome Statute, which expressly criminalises attacks on peacekeepers and analogous personnel. Although the Security Council had previously referred to the Rome Statute in Resolutions,[94] the US was unwilling to permit that language to remain in the draft of (as it became) Resolution 1502, as it considered that any reference to the Rome Statute would grant the ICC legitimacy, a result the US was willing to veto the draft Resolution to avoid.[95]

Mexico and the other co-sponsors of the draft[96] removed the reference to the Rome Statute to ensure the passage of the Resolution, which was unanimously adopted as Resolution 1502. However, Mexico, speaking on behalf of all the Resolution's sponsors expressly noted their regret that no reference to the ICC was made in the Resolution.[97] This Resolution perhaps showed more than Resolutions 1422, 1487 and 1497 the lengths to which the US would go to avoid the UN offering any support to the ICC, as Resolution 1502 did not even imagine the possibility of the ICC exercising jurisdiction over Americans.

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92 *Ibid.*, 7.

93 See generally L. Yee, "The International Criminal Court", in Lee (ed.), *The International Criminal Court,* 149; Morten Bergsmo and Jelena Pejić, "Article 16" in Triffterer (ed.), *Commentary*, 373.

94 See, e.g. Resolutions 1261 (30 August 1999) and 1265 (17 September 1999).

95 See Coalition for the International Criminal Court Press Release 25 August 2003, *United States Postpones Adoption of UN Resolution to Protects Humanitarian Personnel Over ICC Stance.* Amnesty International Press Release 26 August 2003, *Amnesty International's Statement on the Adoption of Security Council Resolution on Protection of Humanitarian and Peacekeeping Personnel* Ref: UN259/2003.

96 Bulgaria, France, Germany, Russia and Syria.

97 UN Doc. S/PV/4814, 4.

D. The Mandating Resolution: 1593

Cynics, with some justification, might have taken the view that even if the Security Council were to act to limit the jurisdiction of the ICC, it would not pass jurisdiction to the ICC. Since the US had been unwilling to permit even a reference to the ICC in Resolution 1502 for fear of granting legitimacy to the ICC, at that time the referral of a situation to the Court by the ICC was almost unthinkable.

Yet again the Security Council has confounded expectations, in early 2005 referring the situation in Darfur, Sudan, to the ICC in Resolution 1593 despite the US's avowed aversion to the granting of any legitimacy to the Court. Optimists might build on the refusal of the Security Council to renew Resolution 1422 and 1487, and assert that Resolution 1593 represents a sea change in the attitude of the Security Council. This is in part plausible, and indeed attractive. However, the reference of the Darfur situation is also replete with ambiguities, and concessions to political necessities. These will be explored in this section.

To begin with the basic facts underlying the referral, it occurred owing to the hard-negotiated abstentions from the veto of the US and China, and the abstentions (for very different reasons) of Algeria and Brazil, at the end of March 2005.[98] The referral was achieved by operative paragraph 1 of the Resolution which stated that the Security Council "*[d]ecides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court".

However, to obtain the referral, the US expected a payoff. As *quid pro quo* for its abstention, the US insisted on three things. One of its requirements for not exercising its veto was that no funding would be forthcoming from the UN for the costs of the investigations in Darfur. The second demand made by the US was that the resolution make reference to the controversial bilateral immunity agreements that the US has made with a number of countries.[99]

As a result the preamble of Resolution 1593 expressed that it was "taking note of the existence of agreements referred to in Article 98(2) of the Rome Statute". This was an important issue, but not one of massive practical import in relation to the situation in Darfur. The same might be said in relation to the final, hugely important, compromise required by the US: the inclusion of operative paragraph 6. That paragraph

> Decid[ed] that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorised by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that State.

As we saw above, it is unquestionable that the Security Council has the authority to

98 31 March 2005, UN Doc. S/RES/1593. The Resolution thus passed 10-0-4. For the US explanation of its abstention, being that it did not serve to grant the ICC any legitimacy, see UN Doc. S/PV.5158, p.3.

99 On which see Cryer, *Prosecuting International Crimes,* 154-155.

refer a situation to the ICC under Article 13(b). However, that is by no means the end of the matter. There are three possible ways of interpreting operative paragraph 6 which are referable, at least to some extent, to provisions of the Rome Statute. The first is the Security Council referring the situation in Darfur to the ICC under Article 13(b) of the Rome Statute, but, simultaneously issuing a (binding) request to the ICC under Article 16 that it not investigate nationals of non-party States outside of Sudan.

In favour of this interpretation the preamble of Resolution 1593 may be prayed in aid. Preambular paragraph 2 of Resolution 1593 specifically recalls Article 16 of the Rome Statute. A highly charitable reading of that recollection therefore, would be that operative paragraph 6 is simply a request under Article 16, which would expire on 30 March 2006, after which the Prosecutor could investigate the personnel mentioned in that paragraph. The Resolution has not been interpreted in this way.

The second way of seeing operative paragraph 6 is that it reflects the Security Council's wish to send the situation in Darfur to the ICC under Article 13 *except* insofar as it regards personnel of non-State parties. In favour of this interpretation is the wording of operative paragraph 6 itself, which does not request the prosecutor to defer investigations for a year, as per Article 16 of the Rome Statute, but declares that those personnel are in the exclusive jurisdiction of their sending State.

The third way of seeing operative paragraph 6 is as an application of bilateral non-surrender agreements to the situation. In other words that because of preambular paragraph 4's taking note of such agreements, and the exclusion of jurisdiction being limited to non-States party,[100] Resolution 1593 simply recognises those agreements. This is the least convincing of the ways of seeing Resolution 1593 alongside the Rome Statute. The resolution merely takes note of the agreements. Also, it refers to all non-parties to the Rome Statute, not simply those with non-surrender agreements. Finally, as the Rome Statute makes clear, even where lawful, the agreements do not exclude the jurisdiction of the ICC,[101] but preclude co-operation with the ICC against the opposition of the party to such an agreement whose national is sought to be surrendered to the ICC. Operative paragraph 6 is framed in terms of an exclusion of jurisdiction, not a recognition of a right not to co-operate.

The final way of seeing Resolution 1593 does not involve reference to the Rome Statute. This is to take the language of operative paragraph 6 as creating exclusive jurisdiction, thus ousting the jurisdiction of States and the ICC, or perhaps, just the

100 Agreements between States parties to not surrender may not be acceptable under the Rome Statute, and anyway, the ICC could order the surrender of the person from his/her home jurisdiction in such a situation.

101 Article 27 of the Rome Statute makes it very clear that the question of personal or State immunities are irrelevant when a person is before the ICC. The somewhat Delphic, and controversial, International Court of Justice judgment in the *Yerodia* case was prepared to accept that immunities do not apply before certain international courts. *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) ICJ General List 121, para. 60. On the decision see S. Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case" (2002) 13 *European Journal of International Law* 877; C. Wickremasinghe, "Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Preliminary Objections and Merits, Judgment of 14 February 2002" (2003) 52 *International and Comparative Law Quarterly* 775.

ICC.[102] This would involve requiring the ICC to act contrary to its Statute, which, as we have seen, the Security Council cannot do.

Either of the two more plausible ways of approaching operative paragraph 6 canvassed above involve legal problems for different, albeit cognate, reasons. To see Resolution 1593 as being an Article 13(b) referral, combined with a request under Article 16 of the Rome Statute not to investigate peacekeepers who are non-party nationals, has a number of problems. The first is the absence of any reference to Article 16 in the operative part of the Resolution. It is not impossible that the Security Council could rely on Article 16 without expressly referring to it.[103]

The question is whether the intention of the Council can be shown to have been to rely on that Article.[104] The first port of call is the text of the Resolution, but the terminology employed in Resolution 1593 offers little welcome for such arguments. To look behind the terms of operative paragraph 6, none of the statements in the Security Council invoked Article 16 of the Rome Statute. Indeed, almost all the comments that dealt with the matter questioned the consistency of Resolution 1593 with the Rome Statute.

Even if this were not the case, operative paragraph 6 is not consistent with Article 16 of the Rome Statute. Article 16 requires the ICC to defer to a request for a temporally limited period. It is quite clear that there is no such temporal limitation in envisaged in Resolution 1593, which contains no "sunset clause" for operative paragraph 6. Thus the problem is the same as that arises in relation to Resolution 1497.

Let us now turn to the other possible interpretation of Resolution 1593, that of the Resolution amounting to a referral to the ICC under Article 13(b) but the situation referred being the situation in Darfur minus the activities of peacekeepers and related personnel. There are considerable problems with this interpretation, both from the legal and principled point of view. The primary difficulty in seeing operative paragraph 6 as being consistent with the Rome Statute comes from the concept of a "situation". As we saw above, the term "situation" was deliberately chosen as it was more general, the drafters of the Statute were worried that any right to refer matters in a less omnibus fashion would threaten the independent exercise of prosecutorial discretion. If the Council can only refer situations, rather than "investigations", "prosecutions", and *a fortiori*, cases, then it cannot limit the referral, even by excluding a small group.

The fact that a situation may not be limited *ratione personae* also appears to

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102 Ms. Løj, the Danish representative, said that the Danish interpretation was that Resolution 1593 "does not affect the universal jurisdiction of member States in areas such as war crimes", UN Doc. S/PV.5158, 6.

103 A resolution that requested the Prosecutor to defer investigations in a particular situation, but not expressly invoking Article 16 should not, for that reason alone, be considered not to be valid. Equally, when important issues are at stake, it is not acceptable to induct a great deal from ambiguous passages in such resolutions, see Vaughan Lowe, "The Iraq Crisis: What Now?" (2003) 52 *International and Comparative Law Quarterly* 859, p.866. This ought not to be taken as claiming the issue of immunity of peacekeepers is as important as going to war. It is not.

104 On the question of the intention of the Security Council see Nigel D. White, "The Will And Authority of the United Nations After Iraq" (2004) 17 *Leiden Journal of International Law* 645.

have been the position adopted by the Prosecutor. When Uganda first sought to refer itself to the ICC under Article 13(a) of the Rome Statute, the referral was for the situation "concerning the Lord's Resistance Army" in Northern Uganda.[105] The Prosecutor, nonetheless, has opened an investigation into Northern Uganda more generally.[106] Article 13(a), like 13(b) refers to "situations", and there is no reason to believe that "situations" was not intended to mean the same thing in both Articles 13(a) and 13(b). As can be seen, there are a number of legal difficulties with the exclusive jurisdiction provisions of Resolution 1593.

In practice, it is extremely unlikely that any cases will be brought against personnel referred to in operative paragraph 6. There are no credible allegations against such personnel which come remotely close to those alleged against the parties to the Sudan conflict. Given this, it might be wondered why operative paragraph 6 was so important for the US in particular.[107] The answer is not in the likelihood of such charges being brought, but the establishment of a precedent for immunity from the ICC, and the normalisation of such immunities. The US representative made this quite clear in the Security Council chamber:

> The language providing protection for the United States and other contributing States is precedent setting as it clearly acknowledges the concerns of States not party to the Rome Statute and recognises that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Security Council ... Protection from the jurisdiction of the Court should not be viewed as unusual ....[108]

Such a normalisation has clear rule of law implications, and again shows the difficulties encountered when attempting to coordinate activity between political and legal organs in international society. It is to the conflicts between both political and judicial approaches, and between peace and justice raised by the above analysis of the law and practice, that this chapter now turns.

V. Political versus Judicial

It was only after several years of prevarication over the atrocities being committed in the Darfur region of Sudan during the period 2003-5,[109] that the Security Council

105 ICC Press Release, 29 January 2004. See Payam Akhavan, "The *Lord's Resistance Army* Case: Uganda's Submission of the First State Referral to the International Criminal Court" (2005) 99 *American Journal of International Law* 403.

106 ICC Press Release, 29 July 2004.

107 The same might be said in relation to Resolution 1422, see Lavalle, "A Vicious Storm in a Teacup", 195.

108 UN Doc. S/PV.5158, 3.

109 The main Security Council "actions" have been: Presidential Statement concerning the atrocities – UN Press Release SC/8050, 2 April 2004; SC Res. 1547, 11 June 2004 condemning the violence, violations of human rights and international humanitarian law; SC Res.

decided on 31 March 2005 to refer the situation to the International Criminal Court.[110] As we have seen Resolution 1593 on Sudan constituted the first such reference to the Court by the Security Council, though the precise basis of the reference has been shown to be much more opaque than a straightforward application of Article 13(b) of the Rome Statute.

Resolution 1593 appears to provide some balance to the negative approach of the Council towards the International Criminal Court expressed in Resolution 1422 of 12 July 2002 that granted immunity from the ICC to UN peacekeepers from states that were not parties to the Rome Statute. It has been seen that Resolution 1422 caused considerable damage to the legitimacy of the Security Council.[111]

Thus in the space of three years the relationship between the Council and the Court had been put firmly in the international spotlight far more than could have been imagined during the negotiation and adoption of the Rome Statute in 1998. The compromises that led to the provisions in that treaty that delineate the relationship between the Council and the Court – Articles 13 and 16 – in effect appeared to draw most of the sting from the Security Council wielding its Chapter VII powers in ways to frustrate or to activate the Court.

Pessimism about the Council's role in matters of international criminal justice has to be balanced against that organ's record in the 1990s of involvement in such matters. Having said that, the optimism of that period of creativity, has dissipated. A decade on, the "bold step in creating the two tribunals has given way to uncertainty and pessimism that this organ will be an engine of change in advancing the cause of international justice".[112] Furthermore, it will be argued that the bold steps themselves were motivated more by political concerns than the desire to do justice.

Pessimism about a positive role for the Council in the workings of the Court can be traced to the Preparatory Commission meetings (PREPCOMs) preceding the Rome Statute where it was the United States' position that "no investigation or prosecution be initiated by the prosecutor relating to a situation being dealt with by the Security Council under Chapter VII, unless that body decided otherwise". This would have ensured "that the ICC was kept firmly under Security Council control".[113]

1556, 30 July 2004, finding a threat to international peace and referring to the criminal responsibility of individuals though welcoming the Sudanese government's commitment to investigate and prosecute those responsible, though this was accompanied by a threat of Article 41 action; SC Res. 1564, Sept. 2004 demanding the arrest of those responsible for the atrocities being committed in Darfur and again threatening Article 41 action. The latter resolution also established a commission to investigate violations of international humanitarian and human rights law, and to identify the perpetrators. See Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur (UN Doc. S/2005/60). See further Cryer, "Sudan and International Criminal Justice".

110 SC Res. 1593, 31 March 2005.

111 See generally Weller, "Undoing the Global Constitution"; R. Lavalle, "A Vicious Storm in a Teacup".

112 Kirsch, Holmes, and Johnson, "International Tribunals", 281.

113 Cryer and White, "The Security Council and the International Criminal Court", 143 at 247. See further Bergsmo and Pejic, "Article 16"; 373-5; Yee, "The International Criminal Court", 149-52.

The so-called Singapore compromise that resulted in Article 16 in effect made it much harder for the Council to block the Court's jurisdiction by requiring a resolution from the Council to that effect and thus the agreement of the permanent members. Article 16 "was intended to minimise the possibility for political influence over the prosecutor, and its difficult negotiation involved the rejection of the view that the ICC was to be totally subordinated to the Council. Article 16 provides for the limited case in which the Security Council can assert a right of pre-emption over the court".[114]

Thus while the agreement achieved in the Rome Statute seemed to reduce the influence of the politics of the Council on the application of law by the Court, experience has shown that the presence of the Court has caused the Council to be a focus of the political debate and controversy that has surrounded the creation and operation of the Court. That focus has been so concentrated on several occasions so as to produce both a wide-ranging blocking resolution (1422) as well as a more specific enabling resolution (1593), in addition to the other resolutions discussed above.

It was clearly the coming into force of the Rome Statute in July 2002 that provoked the United States into forcing through Resolution 1422. The United States' objections to the Court having jurisdiction[115] over nationals from States that are not parties to the Rome Statute seemed to propel that country into an exercise of overkill – by securing a legally dubious resolution that would grant blanket immunity to US personnel (and others from non state parties) – when the likelihood of such personnel appearing before the ICC was remote.[116]

This evangelical zeal to prevent an international institution having power, no matter how notional, over the United States led to pressure being successfully applied for the renewal of the immunity in 2003.[117] The continuing damage to the legitimacy of the Security Council that these resolutions caused, found for example in the open meeting that preceded the adoption of 1422,[118] and by the criticism of the Non Aligned Movement in February 2003,[119] led to the decision not to seek a renewal of the immunity in 2004.[120]

The discarding of the sledgehammer that was first forged in Resolution 1422 should not be seen as a recognition by the Council that its attitude towards the

114 Cryer and White, "Security Council", 148.

115 Art. 12(2)(a) Rome Statute 1998.

116 Cryer and White, "Security Council", 167.

117 SC Res. 1487, 12 June 2003.

118 SC 4568th mtg, 10 July 2002.

119 Final Document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement, Kuala Lumpur, 24-25 February 2003, para.121. The government leaders "stressed the importance of safeguarding the integrity of the Statute and the need to ensure that the Court remains impartial and fully independent of political organs of the United Nations which should not direct or hinder the functions of the Court nor assume a parallel or superior role to the Court. They observed with concern actions geared at establishing a process to grant immunity to the members of the United Nations established or authorised peacekeeping operations. These actions seriously affect treaty law, are not consistent with the provisions of the Rome Statute and severely damage the Court's credibility and independence".

120 Jain, "A Separate Law for Peacekeepers", 254.

Court should be a more positive one, even though that may appear to be the case when considering the Council's reference of the situation in Darfur to the Court in Resolution 1593 of March 2005. As we have seen in the period between the renewal of 1422 in 2003 and the referral of the Darfur situation in 2005, the Council was used to further the political position as regards the Court of the most dominant member – the United States. In two resolutions in August 2003 we have seen that influence coming to bear.

First, in removing all but the most elliptical reference to individual criminal responsibility in a resolution adopted after the bombing of the UN office in Baghdad in August 2003 designed to achieve the greater protection of UN personnel and humanitarian workers.[121] Secondly, in a resolution authorising a multinational force in Liberia, the Council decided that troop contributing states not party to the Rome Statute should have "exclusive jurisdiction for all acts or omissions arising out of or related to" that force.[122]

Furthermore, despite appearances, it is the case that the reference to the Court of the Darfur situation in March 2005 was dominated by political considerations. It is clear that the situation in Darfur was one that should be brought within the Court's jurisdiction, given that the United States had itself labelled it as genocide,[123] and the Commission established by the Council to investigate the situation found at least crimes against humanity.[124] Both of these crimes fall squarely within the Court's jurisdiction.[125]

However, the Council's abject failure to deal with the threat to the peace in Sudan through the adoption of any real coercive measures under Chapter VII meant that the reference to the Court appeared to be another example of the Council using international criminal justice mechanisms as an excuse for not taking more positive action. Indeed, in its resolutions prior to 1593, the Council showed a tendency to deal with the Darfur situation as one of criminal justice by concentrating on condemning violations of humanitarian and human rights law and demanding that the perpetrators be brought to account. The Security Council only threatened Article 41 non-forcible measures.[126]

Just as in Yugoslavia and Rwanda, international criminal courts seemed to be used not as part of a strategy for securing peace in a particular situation, but as an excuse for failing to have a strategy. The inaction of the Council was again a result of familiar political interests – protecting the oil supplies of one of the permanent members (China),[127] and securing politically convenient allies in the war on terror by another (the United States).[128]

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121 SC Res. 1502, 26 August 2003.

122 SC Res. 1497, 1 August 2003.

123 House Concurrent Resolution 467, Senate Concurrent Resolution 133.

124 Report of the International Commission, paras. 73-564.

125 Art.5(1)(a) and (b) of the Rome Statute 1998.

126 See above n.108.

127 J. Watts, "No Questions, No Lies in China's Quest for Oil", (2005) *Guardian Weekly*, 3-9 June, 5.

128 S. Goldenberg, "Ostracised Sudan Emerges as Key American Ally in War on Terror", *Guardian Weekly*, 6-12 May, 2005, 6.

While some states voting for resolution 1593 clearly thought that the Council's decision was part of desperately needed "urgent action" to prevent the situation deteriorating any further,[129] it must be true that referral of the situation to the Court for investigation and possible prosecution of individuals suspected of commission of the international crimes being committed in the region can only form a relatively small part of any such action. In effect the Court is being used in this instance as a convenient institution to hide behind.

The representative of France grandly declared: "the resolution ... marks a turning point, for it sends the same message beyond Darfur to the perpetrators of crimes against humanity and war crimes, who until now have all too often escaped justice. The Security Council will remain vigilant to ensure that there is no impunity".[130] Some justice may well be done by the Court in Darfur in due course, but in the meantime even further and greater injustices will be done to the people of that region. It will be argued below that it is the Council's duty to stop this, a duty it has singularly failed to carry out.

In addition to the smokescreen thrown up by Resolution 1593 on Darfur, the resolution itself continues to reflect the political concerns of the dominant permanent member, and furthers the erosion of the Court's jurisdiction found in the above mentioned resolutions of August 2003. As has been seen Resolution 1593 does this in a number of ways. The legal hotchpotch of Resolution 1593 has been analysed above, but it is worth repeating that the United States was sufficiently satisfied with this protection for States not party to the Rome Statute since it "recognizes that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States *or a referral by the Security Council*".

This explains why it was able to abstain on the resolution in front of it.[131] Further, the United States saw this as a precedent so that "in the future, absent of the consent of the State involved, any investigations or prosecutions of nations of non-party States should come only pursuant to a decision by the Security Council".[132] This seems to be an attempt to assert political reality over the provisions of the Rome Statute that lawfully allows for the exercise of jurisdiction by the Court over nationals from non-party States.[133] If these assertions are accepted, moreover if they are applied in practice, the judicial role of the Court will have been overridden by the political concerns of the United States acting through the Security Council. The first shots have been fired in what promises to be a long-running struggle for supremacy in the area of overlap between the Council and the Court.

VI. Peace versus Justice

Up to this point it has been argued that the Security Council's political character has negatively impinged on the judicial character of the International Criminal Court. In the case of the referral of the Darfur situation by Resolution 1593 of 2005, it was

129 S/PV 5158th mtg, 31 March 2005, Benin, Romania.

130 S/PV 5158th mtg, 31 March 2005.

131 S/PV 5158th mtg, United States, emphasis added.

132 *Ibid*.

133 Art.12(2)(a) Rome Statute.

argued that the Council was using the Court as a political tool, not for the Court to do the Council's job, which it is certainly not equipped to do, but to be seen to be taking positive action regarding the worsening situation in Darfur.

While this appeared to be putting justice, in the shape of bringing those responsible to account for their actions, at the forefront of its actions, the Council was in reality only addressing one aspect of justice – namely the accountability of individuals for atrocities. It was not bringing the conflict to an end therefore ensuring the most basic elements of a just society – respect for the right to life. Peace and justice are not incompatible elements, indeed the analysis in this section will show that both the Council and the Court should both be mechanisms for achieving a more comprehensive justice.

Of course it may be argued that while the Court is empowered to exercise jurisdiction over crimes within its competence and in time can be required to at least consider doing so, the Council is a political animal and it can take action at its discretion. Hence it is perfectly within its rights to take very little by way of executive action in the case of Sudan, while it can take the maximum amount of action in the case of other threats to or breaches of the peace, as for instance in the case of its responses to the Iraqi invasion of Kuwait in 1990-1.

While agreeing that there is a large amount of discretion built into Chapter VII of the UN Charter, the Security Council is still bound by fundamental rules of international law, prohibiting, *inter alia*, genocide and crimes against humanity. Furthermore, it is argued that the Council is not simply under a duty not to breach such *jus cogens* but is also under a duty to prevent their breach, if, as would be likely, they constitute threats to or breaches of the peace. This was recognised by the High Level Panel in late 2004:

> The Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing, or serious violations of humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[134]

It is argued that coercive action, including military action, should be authorised to prevent breaches of fundamental rules of international law.[135] It is true to say that the UN Charter does not appear to require Security Council action. The Council has developed the concept of threat to the peace within Article 39 very widely, although its practice has been characterised as being driven by a concern to deal with situations where there is a "danger of the use of force on a considerable scale".[136] This is certainly compatible with the underpinnings of several peremptory norms (on the

134 High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (UN, 2004), recommendation 55, see also 56, 73-81.

135 See V. Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", (1994) 43 *International and Comparative Law Quarterly*, 55; P. Klein, "Responsibilities for Serious Breaches of Obligations Deriving From Peremptory Norms of International and United Nations Law", (2002) 13 *European Journal of International Law*, 1241.

136 Frowein and Krisch, in Simma (ed), *Charter*, 726.

non-use of force, and the prohibitions on genocide, war crimes, and crimes against humanity), and the prevention of their breach.

It is clear that Chapter VII measures were not intended to be limited to cases of non-compliance with fundamental obligations. Kelsen made this point when he declared that the purpose of enforcement measures "is not to maintain or restore the law but to maintain or restore the peace".[137] While the Council is not restricted to the enforcement of fundamental norms, this should form the core of its activities, and should be seen as a duty, rather than being part of its wider security discretion.

Simply put, there is a core of justice within the wider political make-up of the Council, which means that as regards a situation where breach of a fundamental norm is occurring, reference to the International Criminal Court should only be part of its strategy for restoring peace and providing security and justice for the inhabitants of the country or region.

Just as the Security Council's referral of the situation in Darfur to the Court cannot be seen as an unequivocal victory for justice in that particular situation, so Resolution 1422 of 2002 was more obviously a denial of the value of justice. As has been shown above, the legality of the resolution can be challenged under both the Rome Statute and the UN Charter. At an open meeting of the Council held on 10 July 2002, a number of States objected to an earlier draft on the wider ground that it was not within the Council's powers to undermine a treaty regime especially one dealing with issues of justice that are fundamental to the international legal order.[138]

Justice is a UN value as well as peace. Indeed, the securing of a positive peace requires that the UN tackle issues of international justice.[139] Nevertheless, the Council adopted Resolution 1422 in a pragmatic way that separates peace and justice. Such a view is not only outdated, but leads to dangerously divergent agendas between two bodies that should be working together to achieve justice.

Article 16 of the Rome Statute only envisages a temporary separation of peace and justice in exceptional circumstances that also constitute a threat to the peace. The clear premise behind Article 16 is that stopping the fighting in a particular conflict is the first step in the process of achieving justice, thus allowing the Council to temporarily defer the competence of the Court until the fighting is stopped. In the language of human rights, preserving the basic right to life by providing security is a necessary precondition to establishing respect for other human rights and promoting mechanisms that deal with past accountability for past atrocities.[140]

In many ways the Council is simply not fulfilling its part of the bargain encapsulated in Article 16 of the Rome Statute. Returning to Darfur, the Council had clearly failed to provide any security in that region before it referred the situation to the Court. In adopting Resolution 1422 in 2002, the Council asserted self-serving

137 H. Kelsen, *The Law of the United Nations* (London: Stevens, 1950), 294.

138 S/PV. 4568 mtg, 10 July 2002. See also the letter submitted by Canada, Brazil, New Zealand and South Africa to the meeting on 12 July – UN Doc. S/2002/754, 12 July 2002.

139 N.D. White, *The United Nations System: Toward International Justice* (Boulder: Lynne Rienner, 2002), 48-58.

140 Cryer and White, "The Security Council", 153.

definitions of security to deny the competence of the Court over peacekeepers from non-contracting States.

Resolution 1422 declared that it was "in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council", but it is questionable, to say the least, whether or not the use of Chapter VII powers to grant immunity for some UN personnel from the jurisdiction of the ICC is really in the interests of peace and security. It is equally possible to assert the opposite since respect for the fundamental principles of international law and justice is not only consistent with the purposes of the UN, but it is also a prerequisite for securing long-term peace. The resolution in effect places the value of peace over justice. It may be acceptable for the Council to temporarily place peace over justice when attempting to restore peace in the short-term within or between States (a fact recognised by Article 16 of the Rome Statute itself), but this does not necessitate granting immunity to UN personnel involved in this effort.[141]

While appearing to be different aspects of its relationship with the ICC, the Council's actions thus far under the Rome Statute have been consistent in their failure to uphold principles of justice. This is most obvious in the case of 1422, when the political order of the veto, secret meetings and arm-twisting, resulted in a perverse application of the security card to trump the principle of justice.

In the case of Resolution 1593, despite the appearances of being a victory for justice, the referral of the situation to the ICC was simultaneously a cynical exercise in papering over the non-existence of any strategy for securing peace to the brutal killing fields of Sudan. Justice was being wielded in part to hide the lack of action by the Council to achieve peace. Both resolutions represent a cynical exercise of *realpolitik*. It is unsurprising, therefore, to find that these resolutions not only failed to fulfil the requirements of both peace and justice, they are also legally flawed, not in a technical sense, but in fundamental ways that reflect their political objectives.

Conclusion

The UN Security Council and the International Criminal Court are separate international legal persons. Although there is an undoubted overlap of competence between them in a world were brutal violence on an international scale or with international repercussions seems to have no end, the basic message of this chapter is that each institution should respect the competence of the other.

What appears to have happened in the practice of the Council to date on the matter of the ICC, is that both relationship provisions hammered out in the Rome Statute, namely Articles 13 (referral) and Article 16 (deferral), have been abused by the Council. The political is asserting itself over the judicial, which undermines any tentative move towards establishing the rule of law in international relations. In a sense we should have seen this coming: this was very much the approach of the Security Council to the International Court of Justice when the two clashed in the inconclusive *Lockerbie* cases of the 1990s.[142]

141 *Ibid.*, 158.

142 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from*

Furthermore, the Security Council is so intent on asserting itself as supreme when engaging with the ICC, that it pays no regard to the limitations of its own legal regime. In the case of the deferral in Resolution 1422 this was clearly evidenced by the lack of a finding of a threat to the peace within the meaning of Article 39 of the UN Charter, while in the case of Resolution 1593, the issue was the wider one of using the referral to mask the inaction of the Security Council, when it has an obligation to tackle crimes against humanity.

The Council is a political body, with wide discretionary powers, but that discretion is granted to it by a legal document, the UN Charter.[143] Furthermore, the Council operates not in a vacuum but in the milieu of international law, and it is therefore bound by fundamental principles of such law. As such it needs to be much more careful and respectful in the future in its dealings with the ICC if it wishes to restore its waning credibility in the field of international criminal justice.

the Aerial Incident at Lockerbie, ICJ Rep. 1992, 114; ICJ Rep. 1998, 115. See N.D. White, "To Review or Not to Review: The Lockerbie Cases Before the World Court", (1999) 12 *Leiden Journal of International Law* 401.

143 *Conditions of Admission of a State to Membership of the United Nations*, ICJ Rep. 1948, 57 at 64.

Section 8

War Crimes in International Armed Conflicts

Chapter 20

Conduct of Hostilities – War Crimes

Lindsay Moir

Introduction

The Laws of War or, as they are often now called, International Humanitarian Law, have traditionally been viewed as composed of two main branches - Hague Law, regulating the conduct of hostilities and prohibited acts during combat, and Geneva Law, regulating the protection of victims of war, on territory under control of a party to the conflict. The adoption of the Additional Protocol I to the Geneva Conventions in 1977 might have blurred this distinction to a certain degree, but its importance does remain to an extent evidenced by the distinction made in the relevant practice of the *ad hoc* Tribunal for the Former Yugoslavia between, on the one side, Grave breaches of the Geneva Conventions (held not to include the Grave breaches of the Additional Protocol I), and on the other side, other serious violations of the laws and customs of war.

This chapter will address the relevant elements and controversial issues in the definition of certain war crimes committed in combat. One of the essential features of war crimes committed in combat is that the victims of these crimes are not "in the hands" of the perpetrator. Such crimes therefore happen either because the perpetrator acted disproportionately in the use of otherwise legitimate force in combat, or else because the perpetrator used force against non-military objectives.

The following violations of the laws and customs of war will be addressed: I. Attacking civilians; II. Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission; III. Attacking Protected Objects; IV. Mutilation and Medical or Scientific Experiments; V. Treacherously Killing or Wounding; VI. Denying Quarter; VII. Destroying or Seizing the Enemy's Property; VIII. Pillaging; IX. Attacking Objects or Persons Using the Distinctive Emblems of the Geneva Conventions.

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 ISBN 978 90 04 16308 9. pp. 487-536.

I. War Crime of Attacking Civilians[1]

The principle of distinction, or immunity of civilians from attack, is one of the most fundamental aspects of international humanitarian law.[2] As early as 1868, the St. Petersburg Declaration stated that the 'only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy', and there can be no doubt that this has become an established rule of customary international law, applicable to both international and internal armed conflict.[3] Indeed, Article 8(2)(e)(i) of the ICC Statute reproduces the terms of Article 8(2)(b)(i) exactly in the context of internal armed conflict and, other than the different context in which the offence is committed, the elements of the crimes are also identical. This is entirely consistent with the jurisprudence of the ICTY, which has held that:

> There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. ... the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited and the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law.[4]

Although not stated explicitly in the Geneva Conventions of 1949, the basic rule was codified and reaffirmed by Additional Protocol I of 1977,[5] Article 51(2) of which pro-

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1 This war crime is listed first in the relevant part of the ICC Statute (Article 8(2)(b)(i) and has the following extended formulation: 'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'.

2 Leslie C. Green, *The Contemporary Law of Armed Conflict* (second edition, Manchester, 2000), 124, asserts that it is perhaps 'the most basic rule of the law of armed conflict'. See also A.P.V. Rogers, *Law on the Battlefield* (second edition, Manchester, 2004), 7-9; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, 2004), chapter 5; Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford, 1995).

3 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, 2005), 3-8, where Rule 1 provides that 'The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.'

4 *Prosecutor* v. *Martic*, Review under Rule 61, 8 March 1996, paragraph 11. The Trial Chamber relied upon the Decision of the Appeals Chamber in *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, 2 October 1995, paragraph 127, where it was held that, 'it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks'.

5 More recently, see also Article 3(2) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II) and Article 3(7) of Amended Protocol II to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons; Article 2(1) of Protocol III to the 1980 Convention;

vides that, 'The civilian population as such, as well as individual civilians, shall not be the object of attack', whilst Article 85(3)(a) states that a violation of this provision (causing death or serious injury) is to be regarded as a grave breach.[6] PrepCom did discuss whether a similar result – in terms of death or injury – should be required in order for a violation of Article 8(2)(b)(i) to occur. The majority of delegations, however, argued that any such requirement had been deliberately omitted from the ICC Statute, and the inclusion of a result requirement elsewhere certainly lends weight to this view.[7] Death or serious injury is not therefore necessary in order for the ICC to exercise its jurisdiction.[8] Rather, the elements of this offence require only that:

> The perpetrator directed an attack.
> The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
> The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
> ...

It will, of course, be vital for the ICC to understand precisely what is meant by the term 'civilian'. Article 50(1) of Additional Protocol I defines a 'civilian' as any person who is not a member of the armed forces,[9] and Article 50(2) defines the 'civilian population' as comprising all persons who are civilians. Importantly, the population need only be *predominantly* civilian, in that, 'The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.'[10]

This has allowed a relatively broad interpretation to be taken of the notion by other tribunals, and it must be assumed that the ICC will follow suit. Indeed, the ICTY position is that an individual is considered to be a civilian provided, at that particular time, they were not taking an active part in hostilities.[11] Thus, relying on

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and the Preamble to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.

6 The offence is not, however, listed as a grave breach in Article 8(2)(a) of the Rome Statute.

7 Article 8(2)(b)(vii), for example, prohibits 'Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as the distinctive emblems of the Geneva Conventions, *resulting in death or serious personal injury*.' (Emphasis added).

8 See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge, 2002), 130-131. Article 51 of Additional Protocol I, likewise, contains no result requirement.

9 As determined by reference to Article 4 A (1), (2), (3) and (6) of Geneva Convention III, and Article 43 of Additional Protocol I.

10 Additional Protocol I, Article 50(3).

11 *Prosecutor* v. *Dusko Tadić*, Judgment of 7 May 1997, paragraph 615. See also *Prosecutor* v. *Zoran Kupreškić, Mirjan Kupreskic, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Santić* Judgment of 14 January 2000, paragraphs 547-549; *Prosecutor* v. *Tihomir Blaškić*, Judgment of 3 March 2000, paragraphs 208-214; *Prosecutor* v. *Dario Kordić and Mario Čerkez*, Judgment of 26 February 2001, paragraph 180. Article 51(3) of Additional Protocol I provides that civilians lose their protection once they actively take part in hostilities.

common Article 3 as representing customary international humanitarian law applicable to *any* armed conflict, Trial Chamber II held that:

> Whatever their involvement in hostilities prior to that time, [the individuals captured or detained in this particular case] cannot be said to have been taking an active part in the hostilities. Even if they were members of the armed forces of the Government of the Republic of Bosnia and Herzegovina or otherwise engaging in hostile acts prior to capture, such persons would be considered 'members of armed forces' who are 'placed *hors de combat* by detention'. Consequently, these persons enjoy the protection of those rules of customary international humanitarian law applicable to armed conflicts ...[12]

In the context of internal armed conflict, common Article 3 does not explicitly prohibit attacks on the civilian population. It does, however, require that all persons taking no active part in hostilities be treated humanely in all circumstances, prohibiting violence to the life and person of those individuals at all times. Article 13(2) of Additional Protocol II provides explicitly that, 'The civilian population as such, as well as individual civilians, shall not be the object of attack' but, in contrast to Additional Protocol I, Additional Protocol II offers no definition of who is to be considered a 'civilian' for the purposes of internal armed conflict. This omission is unfortunate as civilian status can be a particularly difficult question in internal armed conflict, where the natural assumption that civilians are those taking no active part in hostilities can be a dangerous one.

Many internal conflicts are characterised by a considerable degree of asymmetry between state armed forces and insurgents. The state tends to have access to the full array of military power, whereas insurgents are likely to have significantly more limited resources. Faced with such inequality, insurgents are often forced to resort to guerrilla warfare, relying upon the civilian population for shelter and concealment. Distinguishing between civilians and combatants in these situations is often impossible, and the best solution must be for the ICC to interpret the term in the same way for internal armed conflict as it has been interpreted in the context of international armed conflict.

As demonstrated above, this involves a broad approach to the question of civilian status. The ICTR has accordingly accepted that a wide definition of 'civilian' is equally applicable during internal armed conflict, agreeing that a 'targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population.'[13] The simple rule must be that where insurgents cannot be distinguished from civilians, they are not legitimate military targets. Thus, where insurgents have no identifiable armed forces, immunity from attack must be afforded to the entire civilian population.[14]

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12 *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 616.

13 *Prosecutor* v. *Clement Kayishema and Obed Ruzindana*, Judgment of 21 May 1999, paragraphs 127-128.

14 Assuming, of course, that the insurgents have attained the level of organisation necessary for there to be an armed conflict in the first place. See Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, 2002), 36-38.

The Inter-American Commission on Human Rights clearly articulated this position in the following terms:

> Common Article 3's basic purpose is to have certain minimum legal rules apply during hostilities for the protection of persons who do not or no longer take a direct or active part in the hostilities. ...
> ... the persons who participated in the attack on the military base were legitimate military targets only *for such time as they actively participated in the fighting*.[15]

This is unlikely to be popular with states, whose military personnel and equipment tend to be easily identifiable, legitimate military objectives throughout conflicts. Nonetheless, for the ICC to adopt any alternative approach would run contrary to the very foundations of the humanitarian laws of armed conflict.

Necessarily included within the prohibition on attacking civilians is the launching of attacks which are indiscriminate in nature. This represents another clearly established principle of customary international law applicable to all armed conflicts,[16] and Article 51(4) of Additional Protocol I expressly prohibits attacks which are either not directed against a specific military objective, or else which cannot be so directed. Regarding the latter, in particular, the choice of weapon made by a state will be of great significance,[17] and in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice held that states must 'never use weapons that are incapable of distinguishing between civilian and military targets.'[18]

Article 51(5)(a) of Additional Protocol I further states that indiscriminate attacks include 'bombardment by any method or means which treats as a single military objective a number of *clearly separated and distinct military objectives* located in a city, town, village or other area containing a similar concentration of civilians or civilian objects'.[19]

The immunity of the civilian population is not, however, absolute, in that civilian casualties are not necessarily unlawful *per se*. States are permitted to attack legitimate military objectives, even where this will cause collateral or incidental harm to civilians, provided certain requirements are met. Article 51(5)(b) of Additional Protocol I, also representative of customary international law,[20] therefore prohibits attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to

15 *Abella* v. *Argentina*, Report No. 55/97, *Annual Report of the Inter-American Commission on Human Rights 1997* (17 February 1998), paragraphs 176 and 189.

16 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 37-43.

17 See, e.g., *Prosecutor* v. *Milan Martić*, Review of Indictment Pursuant to Rule 61, 8 March 1996, paragraph 18, where it was stated that, 'even if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law.'

18 International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, paragraph 78.

19 Emphasis added. This also represents a rule of customary international law applicable to all armed conflicts. See Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 43-45.

20 *Ibid*., 46-50.

civilian objects, or a combination thereof' only where the incidental harm would be 'excessive in relation to the concrete and direct military advantage anticipated'.

Civilian casualties are, accordingly, acceptable provided the attack is aimed at military objectives within a populated area which are not clearly distinguishable, and provided the basic principle of proportionality is respected.[21] This is reflective of post-World War II jurisprudence, such as the *Einsatzgruppen* Trial, which outlined that:

> A city is bombed for tactical purposes: communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations, it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of hostile battle action. The civilians are not individualised. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them.[22]

Of course, whether incidental harm is excessive or not must necessarily be decided on a case-by-case basis, and nobody is suggesting that this particular balancing exercise will always be an easy one for the ICC to perform. This may be especially true in the context of internal armed conflict, where Additional Protocol II contains no provision relating to the test of proportionality for incidental civilian casualties. Bothe explains that this is due to the 'dramatic simplification' of the text of Protocol II during the drafting process,[23] and argues that the assumption was made that the general protection provided in Articles 13(1) and (2) would include this requirement implicitly.[24] The ICC will, then, have to use the proportionality test as set out in the context of international armed conflict. By those standards, disproportionate incidental civilian casualties will amount to an indiscriminate attack, and it is beyond doubt that these are equally prohibited during internal armed conflict.

In addition to the prohibition on attacking civilians *per se*, states are also required to take all necessary precautions to protect civilians from attack. Thus, Article 57 of Additional Protocol I requires that 'constant care' be taken to spare the civilian population. In particular, paragraph 2(a) provides that those planning attacks must take the following precautions:

> do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives ...;

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21 Dörmann, *Elements of War Crimes*, 136-137.

22 *US* v. *Otto Ohlendorf, et al.* (the *Einsatzgruppen* Trial), *Law Reports of Trials of War Criminals*, London, 1949, Volume XV, 111.

23 Michael Bothe, 'War Crimes' in Antonio Cassese, Paolo Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, 2002), Volume I, 421. For a discussion of the drafting process, see Moir, *Internal Armed Conflict*, 91-96.

24 Bothe, *ibid.*

> take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
> refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Paragraph 2(b) requires an attack to be cancelled or suspended if it becomes clear that the objective is not actually a military one, or that civilian casualties would be excessive, and 2(c) that, where possible, effective advance warning be given of attacks which may affect civilians. Article 57(3) states that where a choice between military objectives is possible, the target selected should be that which can be expected to endanger the civilian population least, and Article 57(4) requires parties engaged in military operations at sea or in the air to take all reasonable precautions to avoid the loss of civilian lives.

These also represent rules of customary international law,[25] as do a number of rules requiring the civilian population to be protected from the effects of attacks.[26] A failure to adequately take such precautions should therefore be regarded as a war crime. Whether this can be seen as equivalent to deliberately attacking the civilian population, and thus invoking the jurisdiction of the ICC under Article 8(2)(b)(i) or 8(2)(e)(i) is, perhaps, unclear – at least in terms of the elements of the crimes. Nonetheless, attacks carried out without precautions being taken to protect the civilian population must demonstrate a wanton disregard for their safety, and should be punished by the Court.[27]

Three further points remain to be made in the context of this particular offence. First, it would appear that civilian casualties are probably acceptable where they occur as a result of reasonable error.[28] Thus, where an attack launched against a legitimate military objective misses the intended target and instead strikes a civilian target, no criminal offence has been committed. Likewise, no violation of the law occurs where military personnel are mistaken as to whether a target is a military objective or not (provided precise information regarding the nature of the target was sought, and the decision to attack taken in good faith).

Secondly, in outlining the offence in the *Blaškić* Case, the ICTY Trial Chamber suggested that the deliberate targeting of civilians is only an offence 'when not justified by military necessity'.[29] This is certainly not the case – it is not permissible to

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25 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 51-67.

26 See Article 58 of Additional Protocol I and Henckaerts and Doswald-Beck, *ibid*., 68-76.

27 Dörmann, *Elements of War Crimes*, 131-132, states that the offence of attacking the civilian population 'encompasses attacks that are not directed against a specific military objective or combatants or attacks employing indiscriminate weapons or attacks effectuated without taking necessary precautions to spare the civilian population or individual civilians, especially *failing to seek precise information* on the objects or persons to be attacked.'

28 William J. Fenrick, 'War Crimes' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, 1999), 187.

29 *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraph 180. See Dörmann, *Elements of War Crimes*, 132.

deliberately attack civilians under any circumstances, and the position was rectified by the Appeals Chamber in the same case.[30]

Finally, it seems likely that the prohibition on attacking civilians includes reprisals. These are explicitly outlawed during international armed conflict by Article 51(6) of Additional Protocol I,[31] although reprisals in the context of internal armed conflict are not specifically prohibited by either common Article 3 or Additional Protocol II. Nonetheless, it seems to be generally accepted that common Article 3's requirement of humane treatment and protection from violence *at all times* for those not taking part in hostilities cannot possibly leave room for reprisals against the civilian population.

The result is that reprisals against the civilian population are (probably) also prohibited by customary international law. The ICTY has certainly expressed the opinion that this is the case. In the *Martić* Rule 61 Decision,[32] for example, Trial Chamber I held that:

> ... the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.[33]

The issue was also addressed – in considerably more detail – by Trial Chamber II in the *Kupreškić* Case.[34] There, it was held that a customary rule prohibiting reprisals against the civilian population has indeed emerged. The reasoning of the Tribunal in this regard merits quotation:

> ... elements of a widespread *opinio necessitatis* are discernible in international dealings. This is confirmed, first of all, by the adoption, by a vast majority, of a Resolution of the U.N. General Assembly in 1970 which stated that 'civilian populations, or individual members thereof, should not be the object of reprisals'. A further confirmation may be found in the fact that a high number of States have ratified the First Protocol, thereby showing that they take the view that reprisals against civilian must always be prohibited. It is also notable that this view was substantially upheld by the ICRC in its Memorandum of 7 May 1983 to the States parties to the 1949 Geneva

30 Indeed, on appeal, 'before even determining the scope of the term "civilian population", the Appeals Chamber deem[ed] it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which "(t)argeting civilians or civilian property is an offence when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.' *Prosecutor* v. *Blaškić*, Judgment of 29 July 2004, paragraph 109.

31 Kriangsak Kittichaisaree, *International Criminal Law* (Oxford, 2001), 159, suggests that they are also implicitly prohibited by Article 1 common to the Geneva conventions of 1949, which requires that the Conventions be respected 'in all circumstances', and Article 4(2)(b) of Additional Protocol II, prohibiting collective punishments.

32 *Prosecutor* v. *Martić*, Review under Rule 61, 8 March 1996, paragraphs 15-17.

33 *Ibid*., paragraph 17.

34 *Prosecutor* v. *Kupreškić,* Judgment of 14 January 2000, paragraphs 527-534.

> Conventions on the Iran-Iraq war and by Trial Chamber I of the ICTY in *Martic*. Secondly, the States that have participated in the numerous international or internal armed conflicts which have taken place in the last fifty years have normally refrained from claiming that they had a right to visit reprisals upon enemy civilians in the combat area. It would seem that such claim has been only advanced by Iraq in the Iran-Iraq war of 1980-1988 as well as – but only *in abstracto* and hypothetically, by a few States such as France in 1974 and the United Kingdom in 1998. The afore mentioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.
>
> The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on subparagraph (d) of Article 14 (now Article 50) of the Draft Articles on State Responsibility, which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that Article 3 common to the four 1949 Geneva Conventions 'prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment'. It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, Common Article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held in *Nicaragua*, it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.[35]

That reprisals against civilians are prohibited during internal armed conflict seems fairly settled. Dörmann argues that there is neither state practice nor *opinio juris* that would establish a customary norm permitting reprisals during internal armed conflict, and that they are accordingly prohibited,[36] whilst Rule 148 of the ICRC study on customary international humanitarian law states that the parties to internal armed conflict have no right to resort to belligerent reprisals at all, and that other countermeasures against those persons who are not taking an active part in hostilities are also prohibited.[37] Indeed, the ICTY in *Kupreškić* relied partly upon their prohibition during internal conflict to demonstrate that the prohibition was equally applicable in international armed conflict.[38] It is submitted then, that reprisals against the civilian population come within the ambit of Article 8(2)(e)(i).

The existence of a customary rule prohibiting reprisals against civilians in the

35 *Ibid*., paragraphs 532-534.

36 Dörmann, *Elements of War Crimes*, 446.

37 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 526-529.

38 *Prosecutor* v. *Kupreškić*, Judgment of 14 January 2000, paragraph 534.

context of international armed conflict is not, however, entirely beyond doubt. As noted by the ICTY, during the 1974-1977 Diplomatic Conference that adopted the Additional Protocols, France voted against Article 51(6) of Additional Protocol I on the basis that it was 'contrary to existing international law'.[39] Furthermore, on its ratification of Additional Protocol I in 1998, the United Kingdom lodged a robust reservation to Article 51(6) – to which there have been no objections. It provides that:

> The obligations of Articles 51 to 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe these obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or 52 against the civilian population or civilians or against civilian objects ... the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased.[40]

The UK Manual on the Law of Armed Conflict argues that the ICTY's reasoning in *Kupreškić* is 'unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment.'[41]

Despite the assertions of the ICTY in this regard, the ICRC therefore finds it 'difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities.'[42] It does maintain, however, that a right to resort to reprisals against civilians cannot be based on 'the practice of only a limited number of States, some of which is ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals.'[43]

This seems unnecessarily cautious, especially in light of the assertion that no belligerent reprisals whatsoever are permitted during internal armed conflict by virtue of common Article 3.[44] Given broad acceptance that common Article 3 is customary, and applies to *all* armed conflicts,[45] arguments that reprisals against the

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39 *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Official Records* (Berne, 1977), Volume VI, 162.

40 See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, 2004), 420-421.

41 *Ibid*., 421, note 62. Egypt, France, Germany and Italy also made rather unspecific declarations regarding the protection of civilians on ratifying Additional Protocol I.

42 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 523.

43 *Ibid*.

44 *Ibid*., 526-529.

45 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States*) (Merits), 76 *International Law Reports* 5, paragraph 218.

civilian population are possible during international armed conflict seem impossible to sustain. Despite claims made by France and the United Kingdom, it is extremely unlikely that attacks on civilians by way of reprisal would occur in practice, or that any such attacks would escape widespread condemnation. It is equally unlikely that such attacks would fall outside the scope of the ICC's jurisdiction under Article 8(2)(b)(i). They certainly should not.

II. War Crime of Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission[46]

Article 8(2)(b)(iii) of the ICC Statute prohibits attacks on personnel, installations, material, units or vehicles involved in either humanitarian assistance or peacekeeping missions in accordance with the United Nations Charter, and represents a new criminal offence in international law. Throughout most of the drafting process delegates had considered this to be a 'treaty crime', and it was not considered to be a war crime until the later stages of drafting, once it had become clear that treaty crimes as such would not be included in the Statute.[47]

The ICRC has since asserted that it represents an obligation of customary international humanitarian law, applicable to both international and internal armed conflict.[48] Thus, Article 8(2)(e)(iii) of the ICC Statute is identical to Article 8(2)(b)(iii), and the elements of the crime differ only with respect to the context in which the offence is committed. The relevant elements require that:

> The perpetrator directed an attack.
> The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
> The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
> Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
> ...

As with the other provisions protecting civilians from attack within the jurisdiction of the ICC, the simple fact of directing an attack is sufficient to trigger the offence. There is no requirement of any particular result.[49]

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46 This war crime is listed third in the ICC Statute (Article 8(2)(b)(iii)) and has the following extended formulation: "Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict".

47 See Michael Cottier, 'War Crimes' in Triffterer, *Commentary on the Rome Statute*, 187-188.

48 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 105-114.

49 See Dörmann, *Elements of War Crimes*, 153; Daniel Frank, 'Attacking Personnel or Objects

There is, however, an element of debate as to the precise legal basis of this crime. Bothe, for example, argues that both aspects (i.e., attacks on humanitarian assistance missions *and* on peacekeeping operations) are based primarily on the 1994 Convention on the Safety of United Nations and Associated Personnel,[50] Article 7(1) of which requires that 'United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.' In addition, Article 9(1) lists a number of acts that states will be bound to make criminal in their own domestic law, as follows:

> A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
> A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
> A threat to commit any such attack with the objective of compelling a physical or juridical person to do or refrain from doing any act;
> An attempt to commit any such attack; and
> An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack ...

Those persons protected by the Convention are defined in Article 1. 'United Nations personnel' are defined in Article 1(a) as:

> Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
> Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted.

'Associated personnel' are defined in Article 1(b) as being:

> Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
> Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
> Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency, to carry out activities

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Involved in a Humanitarian Assistance or Peacekeeping Mission' in Roy S. Lee (ed.), *The International Criminal Court* (Ardsley, 2001), 147.

50 UN Doc. A/49/49 (1994). Although the Convention is not yet operational, there seems to be little disagreement regarding its relevance to this offence. See Bothe, 'War Crimes', 411-412. Article 19 of the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind had also sought to make attacks on UN and associated personnel a criminal offence, UN Doc. A/51/332, 30 July 1996.

> in support of the fulfilment of the mandate of a United Nations operation.

Bothe therefore concludes that NGO personnel providing humanitarian assistance will be 'protected as being associated personnel under the conditions established in Article 1(b)(iii)'.[51] Whether the ICC will choose to follow these definitions remains to be seen. To be sure, Article 1 of the 1994 Convention states that the definitions are to apply only for the purposes of that specific instrument, and the ICC may indeed take a different approach.[52] Bothe argues, however, that the ICC Statute must implicitly be referring to the definition contained in the 1994 Convention, 'Otherwise the crime would be rather ill defined as the notion of "humanitarian assistance or peacekeeping mission" is quite vague.'[53]

It may be true that there is no universally accepted definition of 'humanitarian assistance'. International humanitarian law does, however, make specific provision for relief operations. Indeed, Dörmann argues that the protection of humanitarian assistance missions on the one hand, and peacekeeping operations on the other, have different legal bases, and that humanitarian law is the legal basis for the former.[54] Certainly, Article 71(2) of Additional Protocol I sets out explicit protection for personnel participating in relief operations, whilst paragraphs (2)-(4) of Article 70 require the parties to a conflict to allow 'rapid and unimpeded passage of all relief consignments, equipment and personnel', not to divert or delay, and to protect such consignments. In terms of defining 'humanitarian assistance', Article 69(1) of Additional Protocol I provides that:

> In addition to the duties specified in Article 55 of the Fourth [Geneva] Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

Article 70(1) states that, where the civilian population of territory under the control of a party to the conflict – but not occupied territory – is not adequately provided with the supplies enumerated in Article 69, relief actions shall be undertaken, provided they are humanitarian and impartial, involve no adverse distinction, and are carried out with the consent of the parties concerned. Thus, Cottier argues that 'humanitarian assistance' in the context of armed conflict – and in the context of ICC jurisdiction – should be taken as referring:

> ... primarily to relief assistance, that is, assistance to prevent or alleviate human suffering of victims of armed conflicts and other individuals with immediate and basic needs. In particular, it includes relief actions with the purpose of ensuring the provision of supplies essential to the survival of the civilian population. Such sup-

51 Bothe, *ibid.*, 412.

52 Dörmann, *Elements of War Crimes*, 156.

53 Bothe, 'War Crimes', 412.

54 Dörmann, *Elements of War Crimes*, 154-156.

> plies should at the very least include food, medical supplies, clothing and means of shelter ... [55]

In contrast to international armed conflict, however, personnel engaged in humanitarian relief activities receive no explicit protection in the humanitarian law of internal armed conflict. Attacks on such personnel must, nonetheless, be equated with attacks on civilians – which are clearly prohibited.[56] Protection can certainly be inferred from the terms of common Article 3 to the extent that its terms protect all those not actually involved in hostilities.[57] Only medical and religious personnel and units are specifically protected in the context of internal armed conflict, by Articles 9 and 11 of Additional Protocol II.[58] Relief action itself is regulated by Article 18 of Additional Protocol II, from which it would seem reasonable to infer that such operations are protected only where they are providing relief to civilian victims of the conflict as permitted by Article 18(2).[59] It provides that:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Where these criteria are not met, e.g., where the state concerned does not consent to the humanitarian action, it must be assumed that the assistance mission would no longer be entitled to the protection given to civilians or civilian objects, and that protection from attack is lost.

Unlike humanitarian relief activities, international humanitarian law treaties make no specific mention of peacekeeping in the context of either international or internal armed conflict. There can be little doubt, then, that the 1994 Convention on the Safety of United Nations and Associated Personnel is the basis for at least this aspect of the criminal offence. It fails to define peacekeeping *per se*, but does provide in Article 1(c) that a 'United Nations operation' means the following:

> ... an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations

55 Cottier, 'War Crimes', 189-190. He also discusses personnel, assistance to displaced persons, etc. Although humanitarian assistance would clearly seem to include medical assistance, this receives its own specific protection in the ICC Statute. See the discussion of Article 8(2)(b)(xxiv) below. Kittichaisaree, *International Criminal Law*, 161, argues that humanitarian assistance and medical assistance must therefore be different. This would not necessarily seem to be the case on a basic understanding of the term 'humanitarian'.

56 See discussion above of Article 8(2)(e)(i).

57 See Dörmann, *Elements of War Crimes*, 452-453. Collection and care for the wounded and sick, as also required by common Article 3, would equally fall within humanitarian assistance, although this receives its own specific protection in Article 8(2)(e)(ii) of the ICC Statute. See the discussion below.

58 See discussion below of Article 8(2)(e)(ii).

59 Dörmann, *Elements of War Crimes*, 456.

> authority and control:
> Where the operation is for the purpose of maintaining or restoring international peace and security; or
> Where the Security or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

There is nothing in the 1994 Convention to suggest that it does not apply equally to situations of internal armed conflict – indeed, the deployment of UN missions is more common in such situations.[60] Thus, in the context of internal armed conflict, the ICTR Prosecutor issued an Indictment against Bernard Ntuyahaga which contained the charge of murdering ten Belgian peacekeeping troops in 1994.[61] This offence was considered to be a crime against humanity, as part of an attack on the civilian population. No judgment was rendered by the Tribunal, however, as the Indictment was later withdrawn by the Prosecutor.[62] Ntuyahaga is now in Belgian custody, and awaiting trial before the Belgian domestic courts.

Peacekeeping operations have been characterised more precisely by the United Nations Secretary-General in the following terms:

> ... the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.[63]

The Secretary-General did accept, however, that the 'nature of peace-keeping operations has evolved rapidly in recent years [and that the] established principles and practices of peace-keeping have responded flexibly to new demands'.[64] Indeed, Cottier has recently described peacekeeping operations as:

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60 Bothe, 'War Crimes', 422. Kittichaisaree, *International Criminal Law*, 201, has suggested that the Convention provides guidance during international armed conflict only. Article 2(2), for example, states that the Convention 'shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of *international armed conflict* applies' (emphasis added). In fact, this serves only to distinguish between peacekeeping and peace enforcement operations, and should not be seen as significant in the context of internal armed conflict. Where UN troops are engaged in hostilities against a party to an internal armed conflict, the particular relationship between them would be international in character anyway, and so governed by the law of international armed conflict. See Moir, *Internal Armed Conflict*, 75-76.

61 *Prosecutor* v. *Bernard Ntuyahaga*, Indictment of 26 September 1998, in particular paragraphs 6.18 and 6.19.

62 *Prosecutor* v. *Ntuyahaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999.

63 Report of the Secretary-General, *An Agenda for Peace*, UN Doc. A/47/277 – S/24111 (17 June 1992), paragraph 20.

64 *Ibid*., paragraph 50.

> ... actions involving the temporary deployment of military personnel typically in a situation of tension but where no or no generalized fighting takes place, after hostilities have ceased de facto or by agreement, or to prevent the breaking out of fighting. The primary aim is to hinder the aggravation or spread of conflicts, to stabilize the situation and the relations among the disputing parties, and to allow for conditions favourable to a transition to a stable peace without using any coercive means to settle the underlying causes of tension. Peacekeeping forces may only use force in self-defence ... [and the] government of the host country must consent to the presence of the peacekeeping mission on its territory ... [65]

Such operations must also include multinational military observer missions and operations under the auspices of other international and regional organisations, such as the OSCE, EU and ECOWAS.[66]

Protection from attack is not absolute, and only attaches to humanitarian assistance missions or peacekeeping operations under Article 8(2)(b)(iii) and (e)(iii) for as long as they are entitled to the protection afforded to civilians or civilian objects under the law of armed conflict. Civilians and civilian objects are protected by Article 8(2)(b)(i) and (ii) in any case,[67] and it could reasonably be argued that this further provision is no more than a specific example of that protection, and therefore unnecessary. There was, however, a concern on the part of delegates over recent attacks on UN and other humanitarian personnel.[68] Indeed, the demand to condemn such attacks clearly reflected the importance attached to humanitarian assistance and peacekeeping operations by the international community.[69] Whilst it may be helpful for some particular classes of protected persons to be singled out in this way, Bothe nonetheless warns that this may ultimately detract from the general protection to be afforded the civilian population.[70]

As is the case for all civilians, then, humanitarian assistance missions lose any protection from attack once they are actively engaged in hostilities. Article 13(1) of Additional Protocol I deals specifically with medical units, and provides that they are no longer entitled to protection if 'used to commit, outside their humanitarian func-

65 Cottier, 'War Crimes', 191.

66 *Ibid*., 192.

67 And, in the context of internal armed conflict, by Article 8(2)(e)(i). See the relevant discussion above. The ICC Statute contains no explicit protection of civilian objects during internal armed conflict.

68 See, e.g., UN Security Council Resolution 987 (19 April 1995), which demanded in paragraph 1 that all parties to the conflict in Bosnia-Herzegovina refrained from acts of violence against UNPROFOR. Such concern on the part of the international community extended beyond UN forces, to include regional peacekeeping forces. Security Council Resolutions 788 (19 November 1992) and 813 (26 March 1993), for example, condemn attacks on ECOWAS forces in Liberia.

69 Bothe, 'War Crimes', 411; Cottier, 'War Crimes', 188; Kittichaisaree, *International Criminal Law*, 160; Frank, 'Attacking Personnel', 145. Indeed, Cottier quotes the International Law Commission's view that these attacks are 'of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind.'

70 Bothe, *ibid*.

tion, acts harmful to the enemy.'[71] Article 51(3) provides more generally for civilians that they lose protection on taking an active part in hostilities, whilst Article 52(2) states that civilian objects become legitimate military objectives where they are being used in order to make an effective contribution to military action, and where their destruction would offer a definite military advantage.

In the context of internal armed conflict, Article 11 of Additional Protocol II provides that protection for medical units and transports ends when they are 'used to commit hostile acts, outside their humanitarian function.' It must be the case that this rule applies to humanitarian missions more generally.

Likewise, for as long as peacekeeping missions take no active part in hostilities, they are entitled to protection as civilians by the laws of armed conflict. It would appear, however, that international law had probably already accepted some degree of special protection for such forces. Article 37(1)(d) of Additional Protocol I cites as an example of perfidy, 'the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict', and Cottier believes that this must mean persons entitled to use the signs, etc., of the UN enjoy a specific protected status, coterminous with that afforded to civilians or persons *hors de combat*.[72] He would seem to be correct. The ICTY, in its Indictment against Radovan Karadžić and Ratko Mladić, certainly asserts that UN peacekeepers are 'persons protected by the Geneva Conventions of 1949.'[73]

Of course, once peacekeeping forces depart from a passive role by engaging in combat, they lose their protected status. Peacekeeping operations must therefore be distinguished from peace *enforcement* operations under Chapters VII or VIII of the UN Charter, where UN troops are authorised to use force, and to become actively involved in hostilities. In such circumstances, they are clearly not entitled to civilian status and its correlative protection from attack. Instead they become combatants, and subject to the rules of international humanitarian law.[74] The 1994 Convention on the Safety of UN Personnel follows this approach, with Article 2(2) providing that the Convention is not applicable where any of the personnel are 'engaged as combatants'.

Quite when peacekeepers become actively engaged in hostilities may prove to be a difficult (and delicate) issue for the ICC to deal with, and is likely to depend upon the duration and intensity of the operations in question. Even more difficult, however, is whether active involvement in hostilities would (or should) include action taken by peacekeeping forces in self-defence. It would seem that this is indeed the case. Thus, although the Secretary-General's 1999 Bulletin states in Section 1.2 that it has no effect on the protected status of peacekeeping operations under the 1994 Convention for as long as they are entitled to protection as civilians, Section 1.1 provides that:

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71 A number of procedural requirements are, however, required.

72 Cottier, 'War Crimes', 194.

73 *Prosecutor* v. *Radovan Karadžić and Ratko Mladić,* Initial Indictment of 24 July 1995, paragraph 14.

74 Or at least to the fundamental principles and rules of humanitarian law. See the 1999 *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/ 1999/13.

> The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or *in peacekeeping operations when the use of force is permitted in self-defence*.[75]

Others have nonetheless argued that such a use of force would not deprive peacekeepers of their protected status.[76] It seems likely that the Secretary-General's Bulletin sets out the current position in international law, and that the ICC should accept that peacekeeping troops do indeed lose their protection whilst actively engaged in self-defence – although this must be true only for the strict duration of any such operations.

III. War Crime of Attacking Protected Objects[77]

The prohibition of attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected was not controversial. Indeed, the material elements of the crime were considered to be relatively straightforward.[78] The offence is based largely on the provisions of the 1907 Hague Regulations, which state in Article 27 that:

> In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

Article 56 further provides that, in the context of occupation, the 'seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.'

The general rule is certainly an established part of customary international law, and applies equally to both international and internal armed conflict.[79] Of course, Article 27 of the Hague Regulations may not apply to internal armed conflicts *per*

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75 *Ibid*. Emphasis added. It should be noted however, that Article 21 of the 1994 Convention provides that 'Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence.'

76 See, e.g., Cottier, 'War Crimes', 194-195.

77 This war crime is listed ninth in the ICC Statute (Article 8(2)(b)(ix)) and has the following extended formulation: "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives".

78 Didier Pfirter, 'Attacking Protected Objects' in Lee, *The International Criminal Court*, 163; Dörmann, *Elements of War Crimes*, 215.

79 Dörmann, *ibid*., 217. See also Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 127-135.

se, but it certainly does apply as customary humanitarian law.[80] Indeed, the rule was largely incorporated into the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which states in Article 19 that:

> In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.
> The parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.[81]

Article 8(2)(e)(iv) of the Rome Statute therefore corresponds exactly to Article 8(2)(b)(ix) and, other than the context in which the offence is committed, the elements of the crimes are also identical.

The question of what constitutes cultural property is dealt with in Article 1 of the 1954 Convention, where it is defined in paragraph (a) as:

> movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

Paragraphs (b) and (c) of Article 1 go on to provide that cultural property also includes buildings for the preservation or exhibition of such property (e.g., museums and large libraries), as well as those places designed to shelter movable cultural property in the event of armed conflict and centres containing a large amount of cultural property as defined in Article 1. Article 4 of the Convention outlines the basic rule of respect for such cultural property, and provides in paragraph (1) that:

> The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

Although Article 4(2) permits waiver of this obligation for reasons of military necessity, Article 6(a) of the Second Protocol to the 1954 Convention (1999) provides that such a waiver can only be invoked when, and for so long as, the property has been made into a military objective and no feasible alternative objective would provide similar military advantage. Furthermore, Article 6(b) provides that a waiver under

80 See Dörmann, *ibid.*, 459, and Henckaerts and Doswald-Beck, *ibid.*

81 Article 22(1) of the Second Hague Protocol, 1999, similarly provides that the Protocol is equally applicable to internal armed conflict.

Article 4(2) of the 1954 Convention can only permit the use of cultural property 'for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage'. Further protection of cultural property can be found in Article 53 of Additional Protocol I and in Article 16 of Additional Protocol II. Article 85(4)(d) of Additional Protocol I states that attacking, and causing the extensive destruction of, such protected objects shall be considered a grave breach, whilst Article 15(1) of the Second Protocol to the 1954 Hague Convention similarly provides for the criminality of certain acts. It states that:

> Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
> making cultural property under enhanced protection the object of attack;
> using cultural property under enhanced protection or its immediate surroundings in support of military action;
> extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
> making cultural property protected under the Convention and this Protocol the object of attack;
> theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.[82]

Of course, cultural property is but one category of protected objects. A number of other treaty provisions also provide protection. Medical units, for example, are protected by Articles 19-23 of Geneva Convention I, Articles 22-23 and 34-35 of Geneva Convention II, Articles 18-19 of Geneva Convention IV and Article 12 of Additional Protocol I. Such objects also receive explicit protection in terms of Article 8(2)(b)(xxiv) and (e)(ii) of the ICC Statute itself.[83]

Guidance in terms of how the ICC should deal with attacks on protected objects can perhaps be found in the jurisprudence of other international tribunals. Article 3(d) of the ICTY Statute, for example, grants the Tribunal jurisdiction over the 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science', and a small number of cases have dealt with this offence. Thus, In *Blaškić*, the Tribunal held that, 'The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity

82 Enhanced protection is also available under Article 10 of the Second Protocol for objects representing 'cultural heritage of the greatest importance for humanity'. Dörm*ann, Elements of War Crimes*, 221, explains that paragraphs (a), (b) and (c) are essentially grave breaches, since such violations entail mandatory universal jurisdiction under the Protocol. Paragraphs (b) and (c) were considered by the drafters to be new rules, whereas paragraphs (d) and (e) represent 'normal' war crimes, reflecting customary international law.

83 See the relevant discussion below.

of military objectives.'[84] In *Kordić*, the Tribunal similarly stated that:

> This offence overlaps to a certain extent with the offence of unlawful attacks on civilian objects except that the object of this offence is more specific: the cultural heritage of a certain population. ... The offence this section is concerned with is the *lex specialis* as far as acts against cultural heritage are concerned. The destruction or damage is committed wilfully and the accused intends by his acts to cause the destruction or damage of institutions dedicated to religion or education and not used for a military purpose.[85]

The definition of the crime as outlined in *Blaskic* seems, however, to contain a significant misunderstanding of the law, in that whether a protected institution is situated in the immediate vicinity of a military objective cannot really be a decisive factor. If a protected object is deliberately attacked and destroyed, the issue of whether it was in the vicinity of a legitimate military objective or not should, in fact, be irrelevant. As Jones and Powles explain, 'The point is, rather, that if the [protected object] were destroyed *as collateral damage during an attack on an adjacent military objective*, then such destruction may not amount to war crime under ICTY Article 3(d).'[86]

This anomaly would seem to have been remedied by the ICTY in *Prosecutor* v. *Naletilic and Martinovic* where, relying on Article 27 of the Hague Regulations, the judgment outlined that, 'The Chamber respectfully rejects that protected institutions "must not have been in the vicinity of military objectives". The Chamber does not concur with the view that the mere fact that an institution is in the "immediate vicinity of military objective" justifies its destruction.'[87]

Articles 8(2)(b)(ix) and (e)(iv) of the ICC Statute and the relevant elements of the crimes are consistent with this existing body of jurisprudence, the elements requiring that:

> The perpetrator directed an attack.
> The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
> The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of attack.
> ...

As with other unlawful attacks, no result is required – it is enough that an attack on a protected object was ordered.[88] In addition, a footnote to the elements provides

84 *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraph 185.

85 *Prosecutor* v. *Kordićand Čerkez*, Judgment of 26 February 2001, paragraph 361.

86 John R.W.D. Jones and Steven Powles, *International Criminal Practice* (Ardsley, 2003), 263.

87 *Prosecutor* v. *Mladen Naletilić and Vinko Martinović*, Judgment of 31 March 2003, paragraph 604.

88 Pfirter, 'Attacking Protected Objects', 163; Dörmann, *Elements of War Crimes*, 215.

that, 'The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.'

This reflects the rule set out in Article 59(3) of Additional Protocol I, although Article 59 applies only to non-defended localities and its relevance to this particular offence is not altogether clear.[89] Nonetheless, it was eventually adopted by PrepCom on the basis that it would not permit an *a contrario* conclusion to be drawn in the context of other crimes where no such footnote was included.[90] Any special protection is, of course, lost where the object is used for such purposes as would render it a legitimate military objective.[91]

The question remains, however, as to whether Articles 8(2)(b)(ix) and (e)(ii) are strictly necessary. To be sure, all of the objects protected by their provisions are also protected by other parts of the ICC Statute. Even where a given object – be it cultural, religious, educational, etc. – fails to meet the requirements for specific protected status as set out in either Article 53 of Additional Protocol I or Article 1 of the 1954 Hague Convention, it will still be protected as a civilian object under Article 8(2)(b)(ii) for as long as it is not used for military purposes.[92]

The offence can, of course, be seen as covering a special set of civilian objects, deserving of higher protection.[93] This may, in itself, be valuable. Nonetheless, Bothe argues that Article 8(2)(b)(ix) is 'legally awkward and to a large extent superfluous. ... in addition to creating confusion as to buildings enjoying a special protected status, the present provision does not add anything to the general protection of those buildings as civilian objects.'[94] Such a position does not seem unreasonable.

In the context of internal armed conflict, this specific protection also overlaps to a large extent with other protected categories. Medical objects and hospitals, for example, are already protected by common Article 3, Additional Protocol II, and Article 8(2)(e)(ii) of the Statute.[95] At the time of drafting the Statute, however, there seemed to be some doubt as to whether a general protection for civilian objects (in contrast to the civilian *population*) was a part of the customary international humanitarian law regulating internal armed conflict. The result is that Article 8(2)(e) contains no provision corresponding to Article 8(2)(b)(ii).[96] Thus, in contrast to the

89 Dörmann, *ibid.*

90 *Ibid.*, 215-216.

91 See, in general, Article 52(2) and (3) of Additional Protocol I. More detailed rules exist with respect to loss of protection for cultural and medical objects, along with further conditions regulating when and how they may be attacked. For cultural property, see Article 4(2) of the 1954 Hague Convention, in conjunction with Articles 6 and 13 of the Second Protocol. For medical objects, see the discussion below regarding Article 8(2)(b)(xxiv).

92 And, of course, medical objects are additionally protected by Article 8(2)(b)(xxiv).

93 See Pfirter, 'Attacking Protected Objects', 162. The ICTY in *Kordić and Čerkez*, Judgment of 26 February 2001, paragraph 361, described the offence as *lex specialis* regarding the protection of certain civilian objects.

94 Bothe, 'War Crimes', 409-410. He accepts that the protective regime for historic monuments is absent from the provisions of Article 8(2)(b), but 'only to that extent' does the provision fill a *lacuna*.

95 See discussion of Article 8(2)(e)(ii), below.

96 Andreas Zimmerman, 'War Crimes' in Triffterer, *Commentary on the Rome Statute*, 277.

situation in international armed conflict, it is not apparent that cultural, historical, religious, etc., objects will receive protection should they fail to meet the criteria set out in Article 1 of the 1954 Hague Convention or Article 16 of Additional Protocol II – even where they are not used for military purposes.

Of course, it is unlikely that such an outcome would be seen as acceptable by either the international community or by the ICC itself. Whilst there may be no explicit definition of military objectives or civilian objects for the purposes of internal armed conflict, the rule set out in Article 52(2) of Additional Protocol I is recognised as being equally applicable to internal armed conflict, and the principle of distinction between civilian and military objects has recently been affirmed as being part of the customary humanitarian law regulating both international and internal conflicts.[97]

IV. War Crime of Mutilation and Medical or Scientific Experiments[98]

Article 8(2)(b)(x) can be seen as elaborating upon the crimes of torture or inhuman treatment, including biological experiments, and of wilfully causing great suffering or serious injury to body and health, as outlined in Article 8(2)(a)(ii) and (iii) respectively. Its inclusion in the ICC Statute was first proposed by New Zealand and Switzerland in 1997, with the current formulation submitted by Germany following consultation.[99] Although prohibited by a single provision of the Statute, PrepCom adopted separate elements for the alternative aspects of the offence.

The legal basis of the prohibition on physical mutilation is largely to be found in Article 13 of Geneva Convention III, and in Article 11 of Additional Protocol I. Article 13 of the Third Convention provides that:

> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Article 11 of Additional Protocol I provides that:

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97 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 25-29. See also discussions above regarding the protection of civilians from attack in both types of armed conflict, and of civilian objects in international armed conflict.

98 This war crime is listed tenth in the ICC Statute (Article 8(2)(b)(x)) and has the following extended formulation: "Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons."

99 See Zimmerman, 'War Crimes', 215. The joint New Zealand/Swiss proposal can be found at UN Doc. A/AC.249/1997/WG.1/DP.2, paragraph 1(d), and the German proposal at UN Doc. A/AC.249/1997/WG.1/DP.23/Rev.1, section B(h).

> The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of the situation referred to in Article 1 shall not be endangered by and unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
>
> It is, in particular, prohibited to carry out on such persons, even with their consent:
>
> (a) physical mutilations;
> (b) medical or scientific experiments;
> (c) removal of tissue organs for transplantation;
>
> except where these acts are justified in conformity with the conditions provided for in paragraph 1.[100]

Similar provisions can be found in Article 12 of Geneva Conventions I and II (dealing in particular with biological experiments), Article 32 of Geneva Convention IV, common Article 3(1)(a), Article 75(2)(a)(iv) of Additional Protocol I, and Articles 4(2)(a) and 5(2)(e) of Additional Protocol II. The prohibition therefore applies to both international and internal armed conflict, and is accepted as being a rule of customary international humanitarian law equally applicable to both.[101] The ICC Statute follows this approach, with mutilation in the context of internal armed conflict being specifically prohibited by both Article 8(2)(c)(i) as a violation of common Article 3 and 8(2)(e)(xi) as a violation of the other laws and customs of internal armed conflict.

In both the international and internal contexts, the content and elements of the crime are essentially the same. Indeed, the elements of the crime were first discussed by PrepCom in the context of internal armed conflict under Article 8(2)(c)(i),[102] and it was decided that they should be the same for mutilation committed during international armed conflict. They closely reflect the language of Article 8(2)(b)(x), although the words 'physical or mental' are inserted before 'health', and require that:

> The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
>
> The conduct caused death or seriously endangered the physical or mental health of such person or persons.
>
> The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.
>
> Such persons were in the power of an adverse party.
>
> ...

100 Article 11(4) provides that a violation of these provisions is to be considered a grave breach of the Protocol..

101 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 320-323.

102 See Eve La Haye, 'Mutilation and Medical or Scientific Experiments' in Lee, *The International Criminal Court*, 165.

First, it will clearly be necessary for the ICC to be aware of the acts that will constitute the criminal offence. The treaty provisions referred to above, however, offer no precise definition of what actually constitutes mutilation. The Commentaries on the Geneva Conventions consider the term to be 'sufficiently clear not to need lengthy comment'.[103] Indeed, Pictet's Commentary on Geneva Convention IV states simply that mutilation is 'covered by the general idea of "physical suffering" [and is] a particularly reprehensible and heinous form of attack on the human person'.[104] The ICRC Commentary to Article 11 of Additional Protocol I states that physical mutilation refers 'particularly' to amputation and injury to limbs,[105] whereas the ICTY held in *Tadić* that it also includes sexual mutilation.[106]

The ICTR has simply stated that mutilation involves 'severe physical injury or damage to victims'.[107] Several delegations were keen to specify precisely what is meant by the term, and so PrepCom decided to explain it by giving examples.[108] Element 1 consequently mentions permanent disfigurement, permanently disabling or removing an organ or appendage. That these are referred to 'in particular' makes it clear, however, that the examples are purely illustrative and that other acts of mutilation will be possible.

A number of subtle differences exist between the offence as stated in the ICC Statute and Elements of Crimes on the one hand, and the offence as outlined in Article 11 of Additional Protocol I on the other. Article 11 of Additional Protocol I is, for example, broader in material scope in that Article 11(1) prohibits any unjustified act or omission endangering the physical or mental health or integrity of the victim. The statement in Article 11(2) that certain acts 'in particular' are prohibited – including physical mutilation – can only mean that the prohibition in paragraph 1 covers additional acts, and that physical mutilation and medical or scientific experiments are but examples of these. Only some violations of Article 11 are therefore criminal under the ICC Statute.[109]

The scope of personal application is also narrower in the ICC Statute. Article 11 of Additional Protocol I applies to 'persons who are in the power of the adverse Party, or who are interned, detained or otherwise deprived of liberty' as a result of an international armed conflict. In contrast, Article 8(2)(b)(x) applies only to persons 'in the power of adverse party'. As Zimmerman explains, acts will not therefore fall under the jurisdiction of the ICC where they are committed against 'nationals of a State not party to the conflict who are present in the territory of a party to the conflict, against nationals of the territorial State itself or against nationals of co-belligerents.'[110]

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103 Pictet, *Commentary on the Geneva Conventions*, Volume IV (Geneva, 1958), 223.

104 *Ibid*., 224.

105 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987), 156.

106 *Prosecutor* v. *Tadić*, Judgment of 7 December 1997, paragraph 45.

107 *Prosecutor* v. *Alfred Musema*, Judgment of 27 January 2000, paragraph 285. To the extent that mutilation requires *physical* injury, it is clear that 'mutilation' and 'physical mutilation' are the same thing. See, e.g., Dörmann, *Elements of War Crimes*, 230.

108 Dörmann, *ibid*.; La Haye, 'Mutilation', 165.

109 Bothe, 'War Crimes', 413.

110 Zimmerman, 'War Crimes', 215-216.

In terms of those covered by Article 8(2)(b)(x), however, the ICC should understand the scope of application in a broad, or general sense. The ICRC Commentary on Article 11, after all, states that persons in the power of an adverse party are 'prisoners of war, civilian internees, persons who have been refused authorization to leave the territory of this adverse Party, and even all persons belonging to a Party to the conflict who simply find themselves in the territory of the adverse Party.'[111]

Element 2 contains a result requirement, in that the mutilation must either cause the death of the victim, or else must seriously endanger their health. As Zimmerman states, the first alternative will be obvious.[112] The second may well be less evident, however, and could cause the ICC considerable difficulty. It is vital to remember that the Statute does not require the victim's health to be affected in actual fact – only that it be seriously endangered. Clearly, this requires some objective danger, although quite how this is to be measured remains open to question.

The ICRC Commentary to Article 11(4), for example explains that, 'it must be clearly and significantly endangered', but that it is 'difficult to be more specific on this point. To know whether a person's health has or has not been seriously endangered is a matter of judgment and a tribunal should settle this on the basis not only of the act or omission concerned, but also on the foreseeable consequences having regard to the state of health of the person subjected to them.'[113]

This result requirement does not, however, appear in either Article 8(2)(c)(i) or in the elements of that offence, which require only that the perpetrator subjected one or more persons to mutilation which was, in the circumstances, neither justified nor in their best interests. Consequently, *any* type of mutilation may represent a violation of common Article 3 in the context of internal armed conflict.

Why this should be the case is not entirely clear. To be sure, common Article 3 does not impose such a requirement and, although both Article 13 of Geneva Convention III and Article 32 of Geneva Convention IV do, neither of the 1977 Additional Protocols apply the 'death or seriously endangering health' formula. Rather than representing a significant policy decision, however, Dörmann has argued that the ICC position could simply be a drafting error.[114]

There was also a degree of controversy in PrepCom discussions as to whether element 2 should be applied to mutilation at all, or whether it should be limited instead to medical and scientific experiments. The English text of Article 8(2)(b)(x) itself is possibly rather ambiguous on this point, but the French text is clear, and element 2 was accordingly adopted for both offences.[115] In contrast to both the elements for scientific experiments and Article 11(1) and (4) of Additional Protocol I, however, element 2 contains no reference to 'integrity' in addition to health. Several

111 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 153. As Zimmerman explains, 'War Crimes', 216, this would include 'mercenaries or members of guerilla groups who have not complied with the requirement to wear their arms openly, ... and [also] inhabitants of occupied territories.'

112 *Ibid*., 217.

113 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 159.

114 Dörmann, *Elements of War Crimes*, 396. He states that – to the best of his knowledge – this difference in the elements of mutilation was not actually discussed by PrepCom.

115 See La Haye, 'Mutilation', 165.

delegations were apparently unconvinced that mutilation could affect the integrity of a person, and opposed its inclusion on that basis. The term was nonetheless seen as applicable to medical or scientific experiments.[116]

Finally, element 3 makes it clear that mutilation is an unjustifiable act. This provision is derived directly from Article 13 of Geneva Convention III, which is slightly different to the terms of Article 11 of Additional Protocol I.[117] Mutilation can, accordingly, only be justified by state of health of the person concerned, or if it is undertaken in their best interests. Clearly, some instances of physical mutilation, e.g. the removal of a gangrenous limb, may be perfectly justified and necessary in light of the medical condition of the patient, and would clearly not be criminal under the ICC Statute.[118]

The defining characteristic of mutilation will therefore be that it could not be justified on medical grounds. Again, however, whether any particular act is justifiable or not may be a difficult judgment for the ICC to make. Article 11(1) of Additional Protocol I refers to a set of 'generally accepted medical standards' as relevant to determining this question. Little in the way of further guidance can be found on this point, although Dörmann points to the World Medical Association Regulations for medical ethics in time of armed conflict as a possible tool for clarification.[119] Bothe finds it 'regrettable' that the consent of the patient concerned is not listed as a requirement for lawful treatment.[120] Reflecting Article 11 of Additional Protocol I, a footnote to element 3, however, states that:

> *Consent is not a defence to this crime*. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty.[121]

Many of the treaty provisions mentioned above as prohibiting mutilation also prohibit scientific or medical experiments. As with the prohibition of mutilation, this offence is based on Article 13 of Geneva Convention III and Article 11 of Additional Protocol I whilst, for offences committed in the context of internal armed conflict, specific treaty provisions can be found in Articles 4(2)(a) and 5(2)(e) of Additional Protocol II. Article 5(2)(e) in particular stipulates that, for the protection of all persons 'deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained':

116 See, e.g., La Haye, *ibid*., 166, note 85; Dörmann, *Elements of War Crimes*, 230.

117 Although the formulation of Article 11 is reproduced in the footnote to element 3.

118 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 156-157; Zimmerman, 'War Crimes', 216; Bothe, 'War Crimes', 414; Dörmann, *Elements of War Crimes*, 231.

119 *World Medical Association Regulations in Time of Armed Conflict*, adopted by the 10th World Medical Assembly, Havana, October 1956, edited by the 11th World Medical Assembly, Istanbul, October 1957, and amended by the 35th World Medical Assembly, Venice, October 1983. Dörmann, *ibid*., 232.

120 Bothe, 'War Crimes', 414.

121 Emphasis added.

> Their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

The elements of the crime reflect the language of Article 8(2)(b)(x) itself. Indeed, the adopted elements for both mutilation and medical or scientific experiments are largely the same. Element 1 requires that 'The perpetrator subjected one or more persons to a medical or scientific experiment', rather than to mutilation, and element 2 adds not only 'physical or mental' to 'health', but also expressly mentions 'integrity'. In every other way, the two sets of elements are identical. Accordingly, the discussion above in the context of mutilation is equally relevant here. The footnote to element 3 of mutilation, whereby the consent of the victim is no defence, expressly stipulates that it also applies to medical or scientific experiments.

Likewise, the elements adopted for Article 8(2)(e)(xi) in the context of internal armed conflict are virtually identical, so that the crime is the same in both situations. The only difference reflects the slightly different language of the ICC Statute itself, in that Article 8(2)(b)(x) applies to individuals 'in the power of an adverse party', whereas Article 8(2)(e)(xi) applies instead to individuals 'in the power of another party to the conflict'. The latter therefore covers both states and non-state actors.

Again, as with mutilation, the precise meaning of 'medical or scientific experiments' is not specified by international law. Following World War II, however, a number of individuals were accused of such activities. Rudolf Hoess, for example, was found guilty of a number of medical experiments at Auschwitz including castration, sterilization, premature termination of pregnancy and other experiments carried out on pregnant and child-bearing women, artificial insemination, cancer research and other experiments.[122] Nor is there any specific guidance as to when medical or scientific experiments may be justified.

Clearly, given the prohibition on any medical procedure not indicated by the state of health of the recipient, if the procedure has no therapeutic purpose it will be a war crime. There would seem to be certain circumstances, however, in which a certain degree of experimentation may be acceptable, e.g., the administering of some new medication where this represents the only possibility to save the life of the individual concerned.[123] In this regard, it may be helpful for the ICC to consider the basic principles of medical ethics outlined by the US Military Tribunal in

122 The *Hoess* Trial, *Law Reports of Trials of War Criminals*, Volume VII, 14-16. Other medical experiments carried out by the Nazis included the effects of altitude, malaria, mustard gas, etc. See *US* v. *Erhard Milch*, *Law Reports of Trials of War Criminals*, Volume VII; *US* v. *Karl Brandt et al* (The *Medical* Case), *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume I; and the *US* v. *Otto Pohl et al*, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume V.

123 Bothe, 'War Crimes', 414; Zimmerman, 'War Crimes', 216-217.

the *Medical* Case,[124] as well the relevant guidelines adopted by the World Medical Association.[125]

V. War Crime of Treacherously Killing or Wounding[126]

The prohibition of treacherously killing or wounding the enemy is based in custom, and represents one of the oldest principles of humanitarian law.[127] The underlying rationale is that, even during armed conflict, combatants must not abuse the good faith of the enemy and are not entirely free to practice any form of deception. In particular, deception regarding the specially protected status of certain persons and objects under international humanitarian law is likely to undermine respect for the rules of armed conflict, thereby endangering those most in need of – and legally entitled to – such protection.[128]

Article 8(2)(b)(xi) is clearly based directly on Article 23(b) of the 1907 Hague Regulations, providing that it is forbidden to 'kill or wound treacherously individuals belonging to the hostile nation or army'. Indeed, the wording is identical, and the provision was included in the ICC Statute with minimal debate.[129] The precise scope of the offence as stated in Article 23(b) is not, however, particularly clear.[130] International law offers no definition of what would constitute 'treacherous' conduct, although Dörmann quotes Oppenheim as asserting that:

> No assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlaw-

124 *US* v. *Karl Brandt et al*, 49-50.

125 See *World Medical Association Regulations in Time of Armed Conflict*, and *World Medical Association Recommendations Guiding Physicians in Biomedical Research Involving Human Subjects*, adopted by the 18th World Medical Assembly, Helsinki, June 1964, and amended by the 29th World Medical Assembly, Tokyo, October 1975, the 35th World Medical Assembly, Venice, October 1983, 41st World Medical Assembly, Hong Kong, September 1989 and the 48th World Medical Assembly, Somerset West, October 1996. Dörmann, *Elements of War Crimes*, 236-239.

126 This war crime is listed eleventh in the ICC Statute (Article 8(2)(b)(xi)) and has the following extended formulation: "Killing or wounding treacherously individuals belonging to the hostile nation or army."

127 Cottier, 'War Crimes', 217-218. Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 221-226, assert that the offence (in terms of 'Killing, injuring or capturing an adversary by resort to perfidy') is part of customary international humanitarian law for both international and internal armed conflict. See discussion below of perfidy in this context and the contrasting scope of the offence in customary law and the ICC Statute.

128 Cottier, *ibid.*, 218.

129 Cottier, *ibid.*, 217; Dörmann, *Elements of War Crimes*, 240; Charles Garraway, 'Treacherously Killing or Wounding' in Lee, *The International Criminal Court*, 167-168. Garraway recalls, 168, fears that the 'antiquity of the language might cause difficulty when it came to defining elements', but that, ultimately, 'those difficulties were comparatively few.'

130 Dörmann, *ibid.*

> ing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.[131]

In an attempt to clarify the situation, Article 37 of Additional Protocol I was adopted in 1977. It provides in paragraph (1) that:

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
> the feigning of an intent to negotiate under a flag of truce or of a surrender;
> the feigning of an incapacitation by wounds or sickness;
> the feigning of civilian, non-combatant status; and
> the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.[132]

Perfidy is thus constituted by an objective act inducing the confidence of the enemy, allied with a subjective intention to betray that confidence. This in itself would not differentiate perfidy from ruses of war, such as camouflage, misinformation, etc., and which remain perfectly lawful under Article 24 of the Hague Regulations and Article 37(2) of Additional Protocol I. The essential element of perfidy is, accordingly, that the confidence induced (and broken) must relate to protected status under the rules of international humanitarian law.[133]

Understood in these terms, Article 37 of Additional Protocol I is clearly narrower in scope than Article 23(b) of the Hague Regulations. Assassination, for example, would not represent the war crime of perfidy as it does not involve breaching the confidence of the enemy.[134]

Nonetheless, insofar as treacherous activity is an element of the broader prohibition of perfidy, or indeed is synonymous with perfidy, Article 37 of Additional Protocol I can be used to determine what is considered to be treacherous within the context of Article 23(b) of the Hague Regulations – and so also in the context

131 Lassa Oppenheim, *International Law* (7th edition, London, 1952), Volume II, 342, cited *ibid*., 241. Dörmann also quotes a similar passage by Morris Greenspan and various provisions from military manuals.

132 Some of these examples are reflected elsewhere in the ICC Statute, e.g. Article 8(2)(b)(vii). The examples listed in Article 37(1) are illustrative only, and are particularly clear. Indeed, difficult or borderline cases were deliberately avoided. See, e.g., Dörmann, *Elements of War Crimes*, 243, citing *Official Records of the Diplomatic Conference*, Volume XV, CDDH/236/Rev.1, paragraph 16.

133 See Cottier, 'War Crimes', 220; Kittichaisaree, *International Criminal Law*, 173; Dörmann, *Elements of War Crimes*, 243; Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 435-436.

134 Cottier, *ibid*., 219. Dörmann, *ibid*., admits that the implications of this for the traditional rule set out in Article 23(b) of the Hague Regulations are unclear, and that assassinations therefore remain 'problematic'.

of Article 8(2)(b)(xi) of the Statute.[135] That is certainly the approach adopted in the elements of this offence, which draw heavily on the language of Article 37 in requiring that:

> The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
> The perpetrator intended to betray that confidence or belief.
> The perpetrator killed or injured such person or persons.
> The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
> Such person or persons belonged to an adverse party.
> ...

It is important to note that the result requirement in element 3 makes perfidious or treacherous activity criminal only if it results in death or injury. This is in contrast to Article 37 of Additional Protocol I, which extends perfidy to the capture of an adversary. The actual requirement of a result itself, however, is entirely consistent both with Article 37 of Additional Protocol I and with Article 23(b) of the Hague Regulations.

The offence of treacherous killing or wounding is equally applicable to internal armed conflict and Article 8(2)(e)(ix) of the Statute simply repeats – to a large extent – the prohibition contained in Article 8(2)(b)(xi). Article 23(b) of the Hague Regulations is not, of course, directly applicable to internal armed conflict,[136] and neither common Article 3 nor Additional Protocol II contain a directly corresponding provision.

The Appeals Chamber of the ICTY has, however, declared that perfidy is indeed prohibited during internal armed conflict by means of customary international law,[137] and the ICRC has likewise asserted that customary law prohibits the killing, injuring or capturing of an adversary by perfidious means in the context of both international and internal armed conflict.[138]

In order to make the prohibition relevant to internal armed conflict, the language of the provision (and of the elements of the offence) required slight modification. In the context of international armed conflict, Article 8(2)(b)(xi) prohibits the treacherous killing or wounding of 'individuals belonging to the hostile nation or army'. Article 8(2)(e)(ix) talks instead of killing or wounding 'a combatant adversary'. This has important consequences in terms of limiting the possible victims of the offence. Thus, whereas under 8(2)(b)(xi) the treacherous killing of civilians is clearly

135 Bothe, 'War Crimes', 405; Cottier, *ibid.*, 219-220.

136 Kittichaisaree, *International Criminal Law*, 203-204; Dörmann, *Elements of War Crimes*, 476.

137 *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 125, where the Chamber relied on the Nigerian case of *Pius Nwaoga* v. *The State*, 52 *International Law Reports* 494, to demonstrate that the feigning of civilian status was not permitted. See, however, Moir, *Internal Armed Conflict*, 146 for discussion of this example.

138 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 221-226.

within the jurisdiction of the ICC,[139] Article 8(2)(e)(ix) limits the jurisdiction of the ICC during internal conflict to the killing or wounding of 'combatant' adversaries, i.e., adversaries who are taking an active part in hostilities.

Although common Article 3 and Additional Protocol II (in particular Article 4(1) and Article 13(3)) clearly provide that all those not directly participating in hostilities are entitled to protection, there is no legal concept of 'combatant' as such in internal armed conflict. Great care therefore had to be taken in drafting this provision, lest the contrary appear to be the case.

As Zimmerman explains, by making reference to 'combatant adversaries' rather than to 'enemy combatants', the ICC Statute successfully avoids giving the impression that a legal category of 'combatants' exists in internal armed conflict. Instead, the treacherous killing or wounding of any individual taking a direct part in hostilities on behalf of an adversary is prohibited.[140] The treacherous killing of civilians in the context of internal conflict would, instead, represent a violation of Article 8(2)(c)(i) of the Statute.[141]

VI. War Crime of Denying Quarter[142]

Although not always considered unlawful, the prohibition on denying quarter is now well established in both conventional and customary international humanitarian law as applicable to both international and internal armed conflict.[143] It is a logical corollary of the principle of proportionality, and of the rule that the lawful use of force is strictly controlled by the requirements of military necessity. Enemy *hors de combat* take no active part in hostilities, and so killing them cannot be necessary or proportionate as it offers no military advantage.

Such conduct was accordingly prohibited in the Lieber Code of 1863 (drafted to regulate an internal armed conflict),[144] and in Article 23(d) of the 1907 Hague Regulations, which states that it is 'especially forbidden ... to declare that no quarter will be given.' The Report of the Commission on Responsibility following World War I included 'Directions to give no quarter' in the list of charges,[145] and a number

139 See Dörmann, *Elements of War Crimes*, 478-479; Zimmerman, 'War Crimes', 282; Kittichaisaree, *International Criminal Law*, 204.

140 Zimmerman, *ibid.*, 282. See also Dörmann, *ibid.*, 478.

141 See relevant discussion below. Kittichaisaree argues, *International Criminal Law*, 204, that the treacherous nature of the crime could, however, be taken into account as an aggravating factor in sentencing. But see also Dörmann, *ibid.*, 479.

142 This war crime is listed twelfth in the ICC Statute (Article 8(2)(b)(xii)) and has the following extended formulation: "Declaring that no quarter will be given."

143 Cottier, *ibid.*, 225; Dörmann, *Elements of War Crimes*, 247. See also Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 473-477, and Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 161-163.

144 *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, Articles 60-71, in particular Articles 60 and 61.

145 *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919*, (1920) 14 *American Journal of International Law* 95, 115. See also the post-World War I case of *Karl Strenger and Benno Crusius*, where one of the accused was charged with ordering that all prisoners were to be killed, discussed in Dörmann,

of individuals were also found guilty of the offence following World War II.[146] Expanding the crime to include threats and actual conduct rather than simply the issuing of a declaration, Article 40 of Additional Protocol I provides that it is 'prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on that basis.'

In the context of internal armed conflict, the offence can be inferred from the terms of common Article 3, which prohibits violence against those placed *hors de combat*, and which further requires that the wounded shall be collected and cared for. Despite puzzling assertions to the contrary,[147] Article 4(1) of Additional Protocol II provides specifically that, 'It is prohibited to order that there shall be no survivors.' This represents the last remnant of the otherwise deleted draft section dealing with methods and means of warfare,[148] and the ICRC Commentary on Additional Protocol II explains that:

> This is one of the fundamental rules on the conduct of combatants inspired by Hague Law. It is aimed at protecting combatants when they fall into the hands of the adversary by prohibiting a refusal to save their lives if they surrender or are captured, or a decision to exterminate them. The text of the draft was more explicit and read as follows: 'It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis.' *The present wording is briefer, but does not alter the essential content of the rule.* Clearly respect for this rule is fundamental. It is a precondition governing the application of all the rules of protection laid down in the Protocol, for any guarantees of humane treatment, any rule on care to be given the wounded and sick, and any judicial guarantees would remain a dead letter if the struggle were conducted on the basis of orders to exterminate the enemy.[149]

The provisions of the Statute in terms of Article 8(2)(b)(xii) and Article 8(2)(e)(x) are therefore identical, as are the elements of the crimes (other than the particular context in which the offence is committed).

Given the long-standing and uncontroversial nature of the offence, it was included in the ICC Statute with no debate on its substance.[150] There is universal acceptance that the offence has its basis in Article 23(d) of the 1907 Hague

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Elements of War Crimes, 247-248, citing C. Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Study of the German Mentality* (London, 1921), 151-159.

146 Cottier, 'War Crimes', 225 and Kittichaisaree, *International Criminal Law*, 174, both give the example of the *Karl Moehle* Case, where the accused was convicted in 1946 by the British Military Court in Hamburg of ordering German u-boat commanders to kill survivors of torpedoed ships. See also the *Peleus* Case, *Law Reports of Trials of War Criminals* (London, 1947) Volume I, 1, and the discussion in Hilaire McCoubrey, *International Humanitarian Law* (second edition, Aldershot, 1998), 117-118.

147 Bothe, 'War Crimes', 421, and Zimmerman, 'War Crimes', 283, both state that there is no provision prohibiting the denial of quarter in Additional Protocol II.

148 See Moir, *Internal Armed Conflict*, 94.

149 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 1371. Emphasis added.

150 Cottier, 'War Crimes', 225.

Regulations, although the elements of the crime more closely reflect Article 40 of Additional Protocol I in requiring that:

> The perpetrator declared or ordered that there shall be no survivors.
> Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.
> The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.
> ...

Such conduct is clearly linked to the offence, contained in Article 8(2)(b)(vi) of the ICC Statute, of killing persons *hors de combat* – also explicitly prohibited by Article 23(c) of the Hague Regulations and by Article 41 of Additional Protocol I. Some commentators have therefore suggested that denying quarter would be criminal even without the provisions in Article 23(d) of the Hague Regulations, Article 40 of Additional Protocol I and Article 8(2)(b)(xii) of the Statute, and that the inclusion of both offences in the ICC Statute simply stresses their importance.[151]

There is, however, an important difference, in that Article 8(2)(b)(vi) deals only with the actual conduct of hostilities whereas, under Article 8(2)(b)(xii), a mere declaration or order – including threats to engage in such activity – is enough to incur criminal responsibility. Indeed, as is clear from the text of Article 8(2)(b)(xii) and the elements of the crime, this offence relates *only* to declarations or orders.[152] Actual conduct would be covered by paragraph (b)(vi), or by paragraph (a)(i).[153] There is, therefore, no result requirement for the crime.[154]

One additional question that the ICC may have to consider is whether the use of certain types of weapon which, due to their nature, would make surrender a practical impossibility, could represent a denial of quarter. Dörmann acknowledges the existence of this problem without offering any possible solution.[155] Kittichaisaree, however, would seem to be on reasonably firm ground in asserting that the answer must be 'in the affirmative if it could be proved that the accused intended to conduct hostilities on the basis that there be no survivors.'[156]

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151 Dörmann, *Elements of War Crimes*, 247; Cottier, *ibid.*

152 Kittichaisaree, *International Criminal Law*, 173; Charles Garraway, 'Denying Quarter' in Lee, *The International Criminal Court*, 169; Dörmann, *ibid.*, 246. The orders must, of course, be given by a commander in a position of effective authority if they are to be meaningful – hence elements 2 and 3. See Garraway, 170, and Dörmann, 246.

153 Bothe has argued, 'War Crimes', 406, that the definition contained in Article 40 of Additional Protocol I, and including the conduct of hostilities, also applies to this crime. On the basis of the text of Article 8(2)(b)(xii) and its elements, this would seem a difficult position to defend. Cottier, 'War Crimes', 227, also argues that the offence would probably extend to conduct on the basis of Article 40 of Additional Protocol I, although he accepts that this would also be covered by Article 8(2)(b)(vi), and that a restrictive interpretation may therefore be justified.

154 Garraway, 'Denying Quarter', 169; Dörmann, *Elements of War Crimes*, 246.

155 *Ibid.*, 248.

156 Kittichaisaree, *International Criminal Law*, 174.

VII. War Crime of Destroying or Seizing the Enemy's Property[157]

Enemy property is protected by several provisions of international humanitarian law, such as Articles 46, 47, 52 and 53 of the 1907 Hague Regulations, Article 18 of Geneva Convention III and Article 53 of Geneva Convention IV. The language of Article 8(2)(b)(xiii) of the ICC Statute, however, essentially reproduces the general prohibition set out in Article 23(g) of the 1907 Hague Regulations, which states that it is forbidden to 'destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'.

To an extent, this provision duplicates – or at least significantly overlaps with – the grave breach set out in Article 8(2)(a)(iv) of the ICC Statute, and covering the '[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'. The relevant threshold for commission of a war crime is higher in Article 8(2)(a)(iv), however, where the destruction of property must not only be extensive, but must also be unlawful and wanton. Article 8(2)(b)(xiii) is, in contrast, more general in scope.[158]

The first question to arise for the ICC will concern the precise context in which Article 8(2)(b)(xiii) is intended to apply. Indeed, Zimmerman suggests that three possible situations present themselves.[159] First, the destruction or seizure of enemy property might result from combat operations. Article 23(g) of the Hague Regulations lies within Section II of the Annex, dealing with hostilities, and it may therefore seem obvious that Article 8(2)(b)(xiii) of the Statute is concerned with methods and means of warfare.

But other provisions of Article 8(2)(b) also cover methods and means of warfare,[160] and Zimmerman argues that to regard this provision as doing the same would render it 'redundant and superfluous'.[161] A second possible scenario involves the destruction or seizure of enemy property located within the territory of a belligerent state. This is not, however, regulated by conventional humanitarian law, and Zimmerman concludes that, even if such rules have developed (which he doubts), their violation does not represent a war crime.[162]

Instead, Zimmerman argues that the situation in which enemy property is most likely to be exposed to belligerent acts is during occupation, and that Article 8(2)(b)(xiii) must, therefore, have intended this. As he explains, the prohibition of *seizure* in addition to that of destruction would make no sense otherwise.[163] This position would appear to run contrary to the provisions of the 1907 Hague Regulations,

157 This war crime is listed thirteenth in the ICC Statute (Article 8(2)(b)(xiii)) and has the following extended formulation: "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war."

158 Bothe, 'War Crimes', 403; Zimmerman, 'War Crimes', 230; Kittichaisaree, *International Criminal Law*, 174; Dörmann, *Elements of War Crimes*, 251–252.

159 *Ibid*., 228–230.

160 e.g. Article 8(2)(b)(ii) on attacking civilian objects, and Article 8(2)(b)(iv) on incidental damage to civilian objects.

161 Zimmerman, 'War Crimes', 228. See also Dörmann, *Elements of War Crimes*, 251.

162 *Ibid*., 229.

163 *Ibid*.

in that a specific provision protecting private property during occupation (Article 46) was placed in Section III[164] – whereas, as already stated, the basis for (b)(xiii), Article 23(g), was placed in Section II. Article 46 is not reproduced in the ICC Statute. Nonetheless, the application of Article 8(2)(b)(xiii) to situations of occupation is confirmed by its drafting history, with the original proposal talking only of enemy property 'within one's custody or control'.[165]

It should also be noted that the adopted elements of this particular crime depart in some respects from the language of the Statute, and require that:

> The perpetrator destroyed or seized certain property.
> Such property was property of a hostile party.
> Such property was protected from that destruction or seizure under the international law of armed conflict.
> The perpetrator was aware of the factual circumstances that established the status of the property.
> The destruction or seizure was not justified by military necessity.
> ...

First, the Statute's reference to 'the enemy's property' is changed in element 2 to refer to 'property of a hostile party', although Dörmann asserts that no substantive reason existed for this amendment.[166] Second, the requirement in element 3 that the relevant property be protected by humanitarian law might seem to be additional to the terms of the Statute. As Hosang explains, however, the Statute does require that the act concerned be criminal, and not every instance of destruction or seizure of enemy property would fall into this category – only that of protected property.[167] Unlike some of the traditional provisions of international humanitarian law,[168] the nature of the property destroyed or seized is qualified by neither the Statute nor the elements

164 It states that, 'Private property can not be confiscated'.

165 US Proposal, UN Doc. A/AC.249/1997/WG.1/DP.1, part (B), (v). Subsequent amendment of the provision was based on the understanding that the removal of this phrase did not expand its scope. See Zimmerman, 'War Crimes', 229. The ICTY Trial Chamber has held that, 'two types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory when the destruction was not absolutely necessary by military operations.' *Prosecutor* v. *Nalétilić and Martinović*, Judgment of 31 March 2003, paragraph 575.

166 Dörmann, *Elements of War Crimes*, 249.

167 Hans Boddens Hosang, 'Destroying or Seizing the Enemy's Property' in Lee, *The International Criminal Court*, 171. See also Dörmann, *ibid*., 250.

168 See, for example, the rules set out in the 1907 Hague Regulations. As noted above, Article 46 provides that, 'Private property can not be confiscated', whereas Article 53 provides that, 'An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations ...'. See also Articles 52 and 55.

of the crime. Enemy property thus includes both public and private property.[169]

Both the destruction and seizure of enemy property are prohibited. Acts representing destruction must be the same in this context as in the context of Article 8(2)(a)(iv),[170] and so it is possible to seek assistance in terms of defining the content of the offence both from the jurisprudence of the ICTY and from the post-World War II tribunals. In *Kordić* for example, the ICTY Trial Chamber asserted that:

> ... the crime of extensive destruction of property as a grave breach comprises the following elements, either:
>
> where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or
>
> where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and
>
> the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[171]

The ICTY also held in *Blaškić* that the 'notion of "extensive" is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.'[172] Given, however, that Article 8(2)(a)(iv) of the Statute criminalises only *extensive* destruction or appropriation of property, and that the jurisdiction of the ICC is limited to the most serious of crimes, Zimmerman suggests that individual acts of destruction or seizure – especially where they 'only concern items of marginal value' – would not be covered by Article 8(2)(b)(xiii).[173] This is probably the case.

In contrast to Article 8(2)(a)(iv), which talks of the 'appropriation' of property, Article 8(2)(b)(xiii) refers to 'seizing' enemy property. While this may appear relatively inconsequential, it may lead to problems of interpretation for the ICC in that seizure – unlike appropriation – is not defined by the relevant provisions of

169 Zimmerman, 'War Crimes', 230-231; Kittichaisaree, *International Criminal Law*, 175; Hosang, 'Destroying or Seizing Property', 171; Dörmann, *Elements of War Crimes*, 252.

170 See Kittichaisaree, *ibid.*, 174, and Dörmann, *ibid.*, 254.

171 *Prosecutor* v. *Kordić and Čerkez*, Judgment of 26 February 2001, paragraph 341. The elements of the offence of wanton destruction not justified by military necessity but charged under Article 3 of the ICTY Statute (i.e., not as a grave breach), are outlined in paragraph 346. See also *Prosecutor* v. *Naletilić and Martinović*, Judgment of 31 March 2003, paragraphs 574-580; *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraphs 157 and 183; and the discussion in Dörmann, *Elements of War Crimes*, 254.

172 *Prosecutor* v. *Blaškić*, *ibid.*, paragraph 157.

173 Zimmerman, 'War Crimes', 231-232. See, however, the discussion below regarding whether a particular act involves grave consequences, and hence can qualify as a serious violation of international law, in the context of pillage.

international humanitarian law.[174] In discussing Article 34 of Geneva Convention I, for example, which deals with the belligerent right of requisition, the ICRC Commentary states that:

> There is a distinction in law between seizure and requisition. Seizure applies primarily to State property which is war booty; requisition only affects private property. There are, however, certain cases mentioned in Article 53, paragraph 2, of the Hague Convention in which private property can be seized; but such seizure is only sequestration, to be followed by restitution and indemnity, whereas requisition implies a transfer of ownership.[175]

Kittichaisaree suggests that seizure should therefore be taken to mean 'depriving a person of the property legally belonging to him'.[176] In addition, he explains that this can be either temporary or permanent – a position demonstrated in the judgment of the US Military Tribunal in the *Krupp* Trial. There, the Tribunal rejected the Defence argument that 'the laws and customs of war do not prohibit the seizure and exploitation of property in belligerently occupied territory, so long as no definite transfer of title is accomplished'.[177]

In another apparent departure from the language of the Statute, which accepts that the destruction or seizure of property may not be criminal where it is 'imperatively demanded by the necessities of war',[178] element 5 talks instead of whether destruction or seizure of property can be 'justified by military necessity'. Following extensive debate, however, it was eventually accepted by the majority of delegations that the phrase 'military necessity' is simply 'the modern equivalent of the texts found in the Hague and Geneva Conventions.'[179] Different opinions also existed as to whether the term 'military necessity' ought to be preceded by 'imperative' or 'absolute' but, as Hosang explains:

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174 Kittichaisaree, *International Criminal Law*, 174-175; Dörmann, *Elements of War Crimes*, 256-257. Several provisions of humanitarian law regulate the seizure, requisition or confiscation of property, e.g. Articles 46, 53, 55 and 56 of the 1907 Hague Regulations, Article 34 of Geneva Convention I, Article 18 of Geneva Convention III, Articles 57 and 97 of Geneva Convention IV, and Articles 4 and 14 of the 1954 Hague Convention on the Protection of Cultural Property.

175 Jean S. Pictet, *Commentary to the Geneva Conventions of 12 August 1949*, Volume I (Geneva, 1952), 279, note 1. See, however, the points made by Dörmann in this regard, and his survey of alternative viewpoints from academic literature, *Elements of War Crimes*, 256-257.

176 Kittichaisaree, *International Criminal Law*, 174.

177 *US* v. *Alfried Felix Alwyn Krupp von Bohlen und Halbach, et al.* (The *Krupp* Case), *Law Reports of Trials of War Criminals*, Volume X, 137. See Kittichaisaree, *ibid*., 174-175, and Dörmann, *Elements of War Crimes*, 260-261.

178 As, indeed, does Article 23(g) of the Hague Regulations. Article 53 of Geneva Convention IV refers to destruction of property 'rendered absolutely necessary by military operations'.

179 Hosang, 'Destroying or Seizing Property', 171. See also Dörmann, *Elements of War Crimes*, 249. It should be noted, however, that Geneva Convention IV actually contains both phrases. Article 49 refers to 'imperative military reasons' and Article 53 to acts 'rendered absolutely necessary by military operations', whereas Article 147 talks of the grave breach of 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

> Where the laws of armed conflict speak of 'military necessity' ... such adjectives [i.e., imperative, absolute, etc.] are more commonly used only as regards special protection granted to very specific objects under the laws relating to cultural property [e.g. Article 4(2) of the 1954 Hague Convention on Cultural Property] ... Use of the term 'military necessity' instead of the alternatives found in the Statute and the Conventions, rendered the use of such adjectives superfluous given that this crime refers to property in general.[180]

Of course, military necessity does not represent a blanket opportunity for the avoidance of legal obligations. It permits the violation of international humanitarian law only where, and to the extent that, humanitarian law explicitly provides for such an eventuality.[181]

The destruction or seizure of enemy property is also a criminal offence in the context of internal armed conflict, and Article 8(2)(e)(xii) of the Statute essentially repeats the prohibition contained in Article 8(2)(b)(xiii). Neither common Article 3 nor Additional Protocol II make reference to this explicitly, although Article 14 of Additional Protocol II does prohibit the destruction or removal of 'objects indispensable to the survival of the civilian population'. The language of Article 8(2)(e)(xii) demonstrates instead that the prohibition therein is also based on Article 23(g) of the Hague Regulations which, although not applicable to internal armed conflict *per se*, does represent a rule of customary international law applicable to international and internal conflicts alike.[182]

The text of Article 8(2)(e)(xii) only differs from that of Article 8(2)(b)(xiii) to the extent necessary to reflect the different characteristics of internal armed conflict. Thus, where (b)(xiii) refers to enemy property, (e)(xii) refers to 'the property of an adversary'.[183] Likewise, where (b)(xiii) refers to the 'necessities of war', (e)(xii) refers to 'the necessities of the conflict'.[184] The elements of the crimes are also virtually identical, with only slight linguistic changes to reflect the Statute itself and the context in which the offence is committed.

VIII. War Crime of Pillaging[185]

The prohibition of pillage has been a part of the laws of war from their earliest stages of development, and represents a rule of conventional and customary international law, applicable to both international and internal armed conflict.[186] As early as 1863, para-

180 Hosang, *ibid*., 172. See also Dörmann, *ibid*., 249-250.

181 See, e.g., Bothe, 'War Crimes', 403; Hosang, 'Destroying or Seizing Property', 171; Dörmann, *Elements of War Crimes*, 250.

182 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 175-177.

183 The term 'enemy' is, of course, technically inapplicable to internal armed conflict. See Zimmerman, 'War Crimes', 284. It should be noted that the reference is not to 'combatant adversary', as in Article 8(2)(e)(ix), resulting in the equal protection of civilian property. See Zimmerman, *ibid*.

184 See Zimmerman, *ibid*.

185 This war crime is listed sixteenth in the ICC Statute (Article 8(2)(b)(xvi)) and has the following extended formulation: "Pillaging a town or place, even when taken by assault."

186 Jones and Powles, *International Criminal Practice*, 287; Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 182-185.

graph 44 of the Lieber Code prohibited – in the context of an internal armed conflict – 'all pillage or sacking, even after taking a place by main force'.[187] The basis of Article 8(2)(b)(xvi) of the Statute is, however, Article 28 of the 1907 Hague Regulations. It provides that, 'The pillage of a town or place, even when taken by assault, is prohibited'. Article 47 further provides that such conduct is 'formally forbidden.'

Although using slightly different terminology, 'plunder of public or private property' was also included as a war crime in Article 6(b) of the Nuremberg Charter, and a number of the sentences handed down by the International Military Tribunal involved responsibility for such activities.[188] Several convictions were also obtained before the US Military Tribunal sitting under Control Council Law No. 10.[189]

Since World War II, an impressive body of conventional international law has built up to outlaw such conduct. Article 15 of Geneva Convention I, for example, provides protection against pillage for the wounded and sick. Article 18 of Geneva Convention II does likewise for the wounded, sick and shipwrecked, and Article 18 of Geneva Convention III performs a similar function for prisoners of war. Article 16 of Geneva Convention IV provides similar protection to the above-mentioned articles of Conventions I and II, whilst Article 33 sets out explicitly that pillage is prohibited.[190]

The pillage or misappropriation of cultural property is further prohibited by Article 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. In the context of internal armed conflict, pillage is explicitly prohibited by Article 4(2)(g) of Additional Protocol II. Article 8(2)(e)(v) of the ICC Statute is identical to Article 8(2)(b)(xvi), and the elements of the crimes are also the same – other than the context in which the offence takes place. The law of internal armed conflict does not, however, make express provision for requisitions, war booty, etc.[191]

Article 3(e) of the ICTY Statute confirmed the Tribunal's jurisdiction over the

187 *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863.

188 International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946 in (1947) 41 *American Journal of International Law* 172, 235-238.

189 Using the terms 'plunder' and 'spoliation'. The Tribunal held in *US* v. *Carl Krauch, et al* (The *I.G. Farben* Case), *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume VIII, 1133, that, 'the Hague Regulations do not specifically employ the term "spoliation", but we do not consider this matter to be one of any legal significance ... We consider that "spoliation" is synonymous with the word "plunder" as employed in Control Council Law No. 10 and that it embraces offences against property in violation of the laws and customs of war.' See also *US* v. *Alfried Felix Alwyn Krupp von Bohlen und Halbach, et al* (The *Krupp* Case), *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume IX, and a number of other post-World War II trials as cited in Dörmann, *Elements of War Crimes*, 279.

190 See Pictet, *Commentary on the Geneva Conventions,* Volume IV, 226, where he states that this is both 'an old principle of international law' and 'general in scope. It concerns not only pillage through individual acts ... but also organized pillage ... '. Paragraph 2 of Article 33 is said to be 'extremely concise and clear; it leaves no loophole.'

191 See Dörmann, *Elements of War Crimes*, 464-465.

criminal offence of 'plunder of public or private property', and Article 4(f) of the ICTR Statute asserted jurisdiction over the crime of 'pillage'. The inclusion of pillage within the jurisdiction of the ICC was therefore proposed from the initial stages.[192] Indeed, the central issue was not its inclusion, but rather the definition of the crime. This was far from easy for several reasons.

First, previous practice had tended to treat the terms 'pillage', 'plunder', 'looting' and 'sacking' as synonymous and interchangeable. Secondly, it was necessary to distinguish pillage not only from the taking of war booty, which has traditionally been permitted by humanitarian law, but also from the war crimes of appropriation or destruction of protected property as stipulated in Articles 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii) of the ICC Statute.[193]

No universally accepted definition of the offence existed for PrepCom to rely upon, although a number had been offered. Steinkamm, for example, had suggested the following:

> in a narrow sense, the unauthorized appropriation or obtaining by force of property ... in order to confer possession of it on oneself or a third party;
> in a wider sense, the unauthorized imposition of measures for contributions or sequestrations, or an abuse of the permissible levy of requisitions (e.g. for private purposes), each done either through taking advantage of the circumstances of war or through abuse of military strength. In the traditional sense, pillage implied an element of violence. The notion of appropriation or obtaining against the owner's will (presumed or expressed), with the intention of unjustified gain, is inherent in the idea of pillage so that it is also perceived as a form of theft through exploitation of the circumstances and fortunes of war.[194]

The ICTY had also sought to provide a definition – or at least a definition of plunder – under Article 3 of its Statute. The issue was first addressed in *Delalic*, where it was held that, 'whereas historically enemy property was subject to arbitrary appropriation during war, international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party.'[195] After outlining the various treaty provisions prohibiting pillage, and underlining the fact that the prohibition is general in character, 'extending to the entire territories of the parties to a conflict [rather than being] limited to acts committed in occupied territories',[196] the Trial Chamber held the following:

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192 See Zimmerman, 'War Crimes', 237-238

193 Article 8(2)(a)(iv) prohibits the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. 8(2)(b)(xiii) prohibits the destruction or seizing of enemy property unless demanded by the necessities of war in international armed conflict – (e)(xii) does the same for internal armed conflict. See, e.g., Dörmann, *Elements of War Crimes*, 272.

194 Armin Steinkamm, 'Pillage' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Oxford, 1997) Volume III, 1029.

195 *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić & Esad Landžo*, Judgment of 16 November 1998, paragraph 587.

196 *Ibid*., paragraph 588.

> ... the prohibition against the unjustified appropriation of public and private enemy property ... extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory. ... the fact that it was acts of the latter category which were made the subject of prosecutions before the International Military Tribunal at Nürnberg and in the subsequent proceedings before the Nürnberg Military Tribunals does not demonstrate the absence of individual criminal liability under international law for individual acts of pillage committed by perpetrators motivated by personal greed. In contrast, when seen in a historical perspective, it is clear that the prohibition against pillage was directed precisely against violations of the latter kind.
>
> ... the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'. ... While it may be noted that the concept of pillage in the traditional sense implied an element of violence not necessarily present in the offence of plunder, it is for the present purposes not necessary to determine whether, under current international law, these terms are entirely synonymous. The Trial Chamber reaches this conclusion on the basis of its view that the latter term, as incorporated in the Statute of the International Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'.[197]

The elements eventually adopted for the crime of pillage under the ICC's jurisdiction are broadly in line with the existing law, and require that:

> The perpetrator appropriated certain property.
> The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
> The appropriation was without the consent of the owner.
> ...

A number of comments must, however, be made. First, and contrary to the ICTY's statement of international law as outlined in *Delalić*, no element of violence is required. This omission has surprised some commentators, although it is entirely possible that the ICC may still require an element of violence in practice.[198] Secondly, the elements are very similar to those for the grave breach of extensive destruction and appropriation of property, outlined in Article 8(2)(a)(iv) of the Statute.

One clear distinction between the two is that destruction or appropriation as a grave breach requires the criminal activity to be wanton and extensive, whereas pil-

197 *Ibid*., paragraphs 590-591. See also the subsequent cases of *Prosecutor* v. *Goran Jelisic*, Judgment of 14 December 1999; *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000; *Prosecutor* v. *Kordić and Čerkez*, Judgment of 26 February 2001; and *Prosecutor* v. *Naletilić and Martinović*, Judgment of 31 March 2003.

198 See, e.g., Kittichaisaree, *International Criminal Law*, 176.

lage must be carried out for personal or private use.[199] Another distinction, however, is that only pillage requires the perpetrator to have actually 'intended' to deprive the owner of their property. This is rather odd. Indeed, Dörmann questions whether intent is an element of pillage alone, or whether it is actually inherent in the very notion of appropriation, in which case it 'should either have been an element of both crimes or not have been mentioned at all in either.'[200]

Thirdly, the elements can be taken as referring to all types of property. Some commentators are therefore concerned that the taking of war booty seems to have become a criminal offence.[201] This seems unlikely, and others have argued that the prohibition must be limited by belligerent rights regarding the requisition and seizure of property provided for in Article 8(2)(b)(xiii) of the Statute.[202]

Delegates had been very keen to distinguish between the crime of pillage from that of destroying or seizing enemy property, and central to this was the question of military necessity, which can justify the latter. A footnote to element 2 accordingly states that, 'As indicated by the use of the term "private or personal use", appropriations justified by military necessity cannot constitute the crime of pillaging.' The precise need for this footnote is, however, rather unclear. It is, after all, difficult to contemplate an appropriation of property which could be justified by military necessity but which was also for private or personal use.[203] The very mention of military necessity in connection with pillage is arguably unfounded in that it introduces an extra element and permits an evaluation to be made, whereas pillage is prohibited absolutely.[204]

Finally, it must be remembered that the ICC has jurisdiction only over the most serious crimes of concern to the international community.[205] It would seem reasonable, then, to argue that the Court should not be required to deal with isolated acts of pillage, or concerning property of little or only marginal value.[206] In *Delalić*, the ICTY accepted that whether an alleged violation was serious enough to provide subject matter jurisdiction was a matter more closely related to the particular charge

199 This should be interpreted as being broad enough to encompass the passing on of property to third persons. See Dörmann, *Elements of War Crimes*, 273, and Bothe, 'War Crimes', 413.

200 Dörmann, *Elements of War Crimes*, 273.

201 *Ibid*. He concedes, however, that this could be 'corrected by applying paragraph 6 of the General Introduction relating to "unlawfulness" and by applying the second part of Element 2; it appears to be generally accepted now that even war booty ... cannot be taken for private or personal use'.

202 Zimmerman, 'War Crimes', 238.

203 See Hans Boddens Hosang, 'Pillaging' in Lee, *The International Criminal Court*, 177. Some delegates had suggested that the very essence of pillage was that it involved the appropriation of property not justified by military necessity. Such an approach, however, would have been less than helpful in terms of distinguishing Article 8(2)(b)(xvi) from 8(2)(a)(iv) and 8(2)(b)(xiii). See Dörmann, *Elements of War Crimes*, 272.

204 Dörmann, *ibid*. He also expresses the fear that this may criminalise the taking of war booty not justified by military necessity. International humanitarian law has always permitted this with no justification required. But see notes 192 and 193 above and accompanying text.

205 ICC Statute, Article 5.

206 Zimmerman, 'War Crimes', 238.

made in the Indictment, i.e., that it should be decided on a case-by-case basis.[207]

Of course, whether an act of pillage involves grave consequences for the victim – and is thus a serious violation of international law in terms of the ICC Statute – is, to an extent, a subjective determination and should not rely purely on an assessment of the monetary value of property appropriated. Although this may prove difficult for the Court to assess, it should attempt to do so and, in reaching its determination, the Court should probably also consider issues such as the relative poverty of the victims, whether the property carried particular sentimental value, etc.[208]

IX. War Crime of Attacking Objects or Persons Using the Distinctive Emblems of the Geneva Conventions[209]

The protection of medical units, personnel, buildings, material and transport is an established part of customary international law.[210] Numerous provisions in the Geneva Conventions also form the basis of this particular offence.[211] In terms of those medical personnel receiving protection, Geneva Convention I, for example, outlines the following:

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces ...;[212]
>
> Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick ... if they are carrying out those duties at the time when they come into contact with the enemy or fall into his hands;[213]
>
> The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on

207 *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, paragraph 592. The Trial Chamber held in paragraph 1154 that any property taken had insufficient monetary value for its appropriation to involve grave consequences for the victim. As such, the alleged violation was not serious, and the ICTY had no jurisdiction.

208 Jones and Powles, *International Criminal Practice*, 288. The authors recognise, however, the value in the ICTY's attempt to establish at least some threshold for the severity of the crime.

209 This war crime is listed twenty-fourth in the ICC Statute (Article 8(2)(b)(xxiv)) and has the following extended formulation: "Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law."

210 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 79-104.

211 On the scope of this protection, see, e.g., Green, *Contemporary Law of Armed Conflict*, 221-228; Fleck, *Handbook of Humanitarian Law*, 300-319; Dinstein, *Conduct of Hostilities*, 166-172.

212 Article 24.

213 Article 25.

> the same duties as the personnel named in Article 24 ... provided that the staff of such societies are subject to military laws and regulations.[214]

In addition, Article 27 states that recognised societies of neutral countries are permitted to lend the assistance of their personnel and units to a party to an armed conflict provided consent has been received from the neutral government, and authorisation from the party to the conflict concerned. These personnel then fall under the control of the party to the conflict. Article 36 of Geneva Convention II provides protection for the 'religious, medical and hospital personnel of hospital ships and their crews', whilst Article 20 of Geneva Convention IV provides protection for those persons 'regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases'.[215] Article 8 of Additional Protocol I provides a number of important clarifications regarding those persons and objects protected. 'Medical personnel' are thus defined as in Article 8(c) as:

> ... those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:
> medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
> medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
> medical personnel of medical units or medical transports described in Article 9, paragraph 2 [i.e., permanent medical units, transports, and hospital ships made available to a party to the conflict for humanitarian purposes by a neutral or other state not party to the conflict, by a recognised and authorised aid society of such a state, or by an impartial international humanitarian organisation].

In terms of medical units and establishments, the Geneva Conventions provide protection for fixed establishments and mobile medical units,[216] as well as hospital ships (i.e., military ships built or equipped specially and solely with a view to assisting, treating or transporting the wounded, sick and shipwrecked; ships utilised by National Red Cross Societies, officially recognised relief societies and private persons; and smaller, coastal rescue craft).[217] Finally, medical transports are also protected, encom-

214 Article 26.

215 See also Additional Protocol I, Article 15.

216 Geneva Convention I, Article 19.

217 Geneva Convention II, Articles 22, 24, 25 and 27. Names and descriptions of hospital ships must be notified to parties to the conflict at least ten days prior to their employment, and a number of other conditions must be met in the context of non-military ships, encompassing the granting of an official commission, control by a party to the

passing transports of the wounded and sick (both military and civilian),[218] medical equipment,[219] and medical aircraft (i.e., aircraft 'exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment', or likewise for the removal of wounded and sick civilians, the infirm and maternity cases).[220] Article 8(e) of Additional Protocol I defines 'medical units' as:

> ... establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.

This is a fairly sweeping definition, significantly expanding that contained in Article 19 of Geneva Convention I to include civilian, as well as military, medical units.[221] Additional Protocol I also makes a number of amendments to the protection of hospital ships, other medical ships and craft, and medical aircraft. Article 22 therefore extends the relevant provisions of Geneva Convention II to cover vessels carrying civilian casualties, and to ships made available for humanitarian purposes by neutral or other third states, or by impartial international humanitarian organisations. Article 23 protects medical ships and craft other than those referred to in Article 22, and Articles 25-31 alter the rules on protection of medical aircraft. Unlike Geneva Convention IV, Additional Protocol I also makes a clear distinction between those aircraft in areas not controlled by an adverse party, in contact zones, and in areas controlled by the enemy.[222]

Article 8(2)(b)(xxiv) may, then, be seen as reflecting the 'traditional duty to "respect and protect" medical personnel, units and transports'.[223] Nonetheless, the determination in the ICC Statute that attacks on such targets are a specific criminal offence represents a novel development in international law. It was not included in the ILC Draft Statute, nor in the Statutes of the two ad hoc criminal tribunals. Indeed, it did not make an appearance in the drafting process of the ICC Statute itself until the February 1997 PrepCom session.[224] The elements of the crime require that:

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conflict, previous consent of their own government and authorisation of the party to the conflict, in addition to the requirement of notification. Coastal rescue craft receive protection only 'so far as operational requirements permit'.

218 Geneva Convention I, Article 35; Geneva Convention IV, Article 21.

219 Geneva Convention I, Article 35.

220 Geneva Convention I, Article 36; Geneva Convention II, Article 39; Geneva Convention IV, Article 22. The specific rules contained within these provisions have, however, been superseded by the relevant provisions of Additional Protocol I.

221 See Fleck, *Handbook of Humanitarian Law*, 301; Dinstein, *Conduct of Hostilities*, 167.

222 Additional Protocol I, Articles 25-27 respectively.

223 Bothe, 'War Crimes', 410.

224 *Decisions Taken by the Preparatory Committee at its Session held from 11 to 21 February 1997*, U.N. Doc. A/AC.249/1997/L.5 (1997), 11, paragraph (q).

> The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
> The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.
> ...

Of course, identifying those classes of persons and objects protected from attack is only one aspect of the criminal offence. The other is just how they are to be identified in practice, i.e., that they must be using the distinctive emblems of the Geneva Conventions in conformity with international law. They must accordingly be identified by the display of a red cross or red crescent on a white background.[225] Provision in the Geneva Conventions for the utilisation of a red lion and sun on a white background as an alternative has been obsolete since 1980, when the Shah of Iran was overthrown and the Islamic Republic of Iran established.[226]

Israel makes use of a red Shield of David instead of a red cross and, although this is not an officially recognised emblem of the Geneva Conventions, it serves to protect the same objects in practical terms. Attacks should not, therefore, be directed against them.[227] Some states do consider it to be the equivalent of a red cross, and United Nations forces in the Middle East treat it as a protected emblem.[228]

Annex I to Additional Protocol I provides further guidance in terms of displaying the distinctive emblem, but also sets out additional methods of identification: a flashing blue light,[229] radio signals,[230] and electronic identification by the Secondary Surveillance Radar (SRS) system.[231] Article 1 of the Annex underlines that these additional methods are intended simply to facilitate the identification of protected objects and persons – they do not establish or expand the right to protection, which remains regulated by the Geneva Conventions and Additional Protocol I.

Attacks against objects employing the identification methods in Annex I should also, therefore, be criminal. The fact that the elements of the crime specify the use of 'a distinctive emblem *or other method of identification* indicating protection under the Geneva Conventions' makes this much clear – at least in the situation where the attacker has the technical capacity to receive any relevant signals transmitted.[232] Article 18(2) of Additional Protocol I requires only that the parties to a conflict should 'endeavour to adopt and to implement methods and procedures which will

225 Geneva Convention I, Articles 38-44; Geneva Convention II, Articles 41-45; Geneva Convention IV, Articles 18 and 20-22; Additional Protocol I, Article 18.

226 See Green, *Contemporary Law of Armed Conflict*, 221; Dörmann, *Elements of War Crimes*, 354.

227 Fenrick, 'War Crimes', 254.

228 Green, *Contemporary Law of Armed Conflict*, 221, note 35.

229 Annex I to Additional Protocol I as Amended on 30 November 1993: Regulations Concerning Identification, Article 7.

230 Annex I, Article 8.

231 Annex I, Article 9.

232 Dörmann, *Elements of War Crimes*, 361-362.

make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.' There is no obligation to do so, as it was considered that this may impose an excessive financial or technical burden on certain states.[233]

The inclusion of other methods of identification also reflects the emphasis on protection from attack rather than the use of certain emblems, accepting that in some circumstances it may be necessary to use identification other than the distinctive emblems, or that further methods of identification may well evolve.[234] Indeed, Article 1(4) of Annex I to Additional Protocol I provides that:

> The High Contracting Parties and in particular the Parties to the conflict are invited at all times to agree upon additional or other signals, means or systems which enhance the possibility of identification and take full advantage of technological developments in this field.

The expansive nature of the elements of the crime was deliberate, and represented a significant defeat for those states who had initially opposed inclusion of those methods of identification set out in Additional Protocol I.[235] The result is that the criminal offence in terms of ICC jurisdiction probably goes beyond that currently contained in the Geneva Conventions, Additional Protocol I and Annex I thereto.

Immunity from attack exists only as long as medical personnel, units, etc., employ the distinctive emblems 'in conformity with international law'. Misuse of the emblem can therefore result in a loss of protection. An American proposal to add that the protected object had not been used for military purposes at the time of the attack was therefore dismissed as unnecessary.[236] Indeed, making improper use of the distinctive emblems of the Geneva Conventions is a separate war crime under Article 8(2)(b)(vii) of the ICC Statute – at least where this results in death or serious personal injury.

There is, however, no similar result requirement for this provision. Interestingly, the ICRC Commentary to Additional Protocol II states that the use of the distinctive emblem is not a compulsory prerequisite for protection, but that it is optional: 'medical personnel and medical units and transports are protected in any event ... However, it is the direct interest of those enjoying protection to ensure that they can be identified'.[237] Nonetheless, a criminal offence under the ICC Statute is only committed where the distinctive emblem is actually employed.

Finally, it should be noted that there is a slight divergence in terms of the drafting of the elements of this offence as compared to other offences relating to the conduct of hostilities. Element 1 requires that protected persons or objects be attacked, and element 2 that that perpetrator intended the protected persons/objects to be the object of attack. Other crimes involving attacks on protected objects or persons require in ele-

233 *Ibid*., 362.

234 See Kittichaisaree, *International Criminal Law*, 185.

235 Didier Pfirter, 'Attacking Objects or Persons Using the Distinctive Emblems of the Geneva Conventions' in Lee, *The International Criminal Court*, 202.

236 *Ibid*.

237 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 1440. See also Dörmann, *Elements of War Crimes*, 450-451.

ment 1 that the perpetrator directed an attack, in element 2 that the object of the attack was protected, and in element 3 that the protected object or person was intended to be the object of the attack. There was no apparent intention behind this difference, and Dörmann suggests that it is nothing more than a drafting error.[238]

Attacking objects or persons using the distinctive emblems of the Geneva Conventions is equally criminal in the context of internal armed conflict. Article 8(2)(e)(ii) of the Statute simply repeats Article 8(2)(b)(xxiv), and the elements of the crimes are also identical, except for the context in which the offence is committed. This reflects the position in customary international law, whereby such conduct is prohibited in both types of conflict.[239] As has been outlined above, the Geneva Conventions and Additional Protocol I offer detailed rules for the protection of medical personnel and objects during international conflict.

In comparison, treaty provisions regulating internal armed conflict offer little. A level of protection can, nonetheless, be inferred from common Article 3(2), which requires that, 'The wounded and sick shall be collected and cared for.' Clearly, this is only possible in practice if those personnel, medical units, transports, etc., involved in such activities are protected from attack. Collecting and caring for the sick and wounded does not constitute taking an active part in hostilities, and therefore the guarantee of humane treatment contained within common Article 3 must apply.[240]

More explicit protection can be found in the provisions of Additional Protocol II, where Article 9(1) states that, 'Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties.' Article 11(1) additionally states that, 'Medical units and transports shall be respected and protected at all times and shall not be the object of attack', and Article 12 that, 'the distinctive emblem of the red cross, red crescent or red lion and sun on a white background shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.'

Unlike Additional Protocol I, however, Additional Protocol II fails to provide any definition of the terminology used. Nonetheless, the ICRC Commentary makes it clear that the terms used are to have the same meaning in both:

> In the end the definitions were omitted from the final version of Protocol II as part of the proposal to simplify the text ... The Part as a whole was not called into question, even though it was negotiated on the basis of definitions that were not adopted. The terminology used is identical to that of Protocol I and the definitions given there in Article 8 (*Terminology*), though of course they have no binding force in Protocol II, nevertheless constitute a guide for the interpretation of the terms.[241]

Attacks against protected objects using the distinctive signals set out in Annex I

238 Dörmann, *ibid.*, 349. See also Pfirter, 'Attacking the Distinctive Emblems', 202.

239 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 79-104.

240 See Dörmann, *Elements of War Crimes*, 448.

241 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 1405. See also Dörmann, *Elements of War Crimes*, 449.

to Additional Protocol I will also be criminal when committed during an internal armed conflict (provided, of course, that the attacker has the capacity to receive and identify such signals). As stated in the context of international armed conflict, the signals in Annex I do not expand the scope of protection – instead, they simply seek to make the identification of protected objects easier. By adopting the same elements for this offence as for Article 8(2)(b)(xxiv), PrepCom can be seen to be recognising explicitly that attacks on protected objects using the Annex I signals during internal armed conflict also fall within the jurisdiction of the ICC.[242]

242 Dörmann, *ibid*., 447, 451.

Chapter 21

Crimes involving Disproportionate Means and Methods of Warfare under the Statute of the International Criminal Court

Judith Gardam

Introduction

It is a sign of how the legal regulation of means and methods of warfare has advanced over the years that the Rome Statue of the International Criminal Court (Statute of the ICC)[1] includes within its jurisdiction a range of actions, directed at both the civilian population and combatants, that are prohibited in international humanitarian law (IHL) on the basis that they constitute disproportionate warfare.

Such actions against the civilian population or civilian objects were first criminalized in the 1970's with the adoption of Additional Protocol I to the Geneva Conventions of 1949[2] and, according to the decision in the *Prosecutor v Tadic,* are within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[3]

The use of weapons, prohibited because of the disproportionate level of suffering they inflict on combatants, however, is not specifically included in the grave breach provisions of Additional Protocol I. Breaches of the Protocol that are not listed as grave breaches but that nonetheless reach an accepted level of seriousness may, however, still constitute war crimes. The Statute of the ICTY is an example of this idea in practice and the use of prohibited weapons is specifically criminalized therein.[4]

1 Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9 (17 July 1998).

2 See Art 85 (3)(b) Protocol Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I), 12 Dec 1977, 1125 UNTS (1979) 3 (hereafter Additional Protocol I).

3 The ICTY was established in 1993 by the UN Security Council, see SC Res. 808 22 Feb. 1993; and SC Res. 827 25 May 1993. In *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, the Appeals Chamber of the Tribunal interpreted the phrase "violations of the laws or customs of war" in Art 3 of the Statute of the ICTY so as to encompass any serious violation of IHL under any treaty that was unquestionably binding on the parties at the time of the alleged offence. As this is the case for Protocol I, the ICTY has jurisdiction over disproportionate attacks occurring during that conflict.

4 See Art 3 (criminalizing the "employment of poisonous weapons or other weapons calculated to cause unnecessary suffering"). This definition adopts the terminology of Art 23 (e) of the Regulations annexed to the Hague Convention (No. II) Respecting the Laws and Customs of War on Land, 29 July 1899, and Regulations annexed to the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 18 Oct. 1907

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Crimes involving disproportionate means and methods of combat await a successful prosecution before an international court of criminal jurisdiction.[5] For some observers this is the way it should remain. It has been a constant refrain over the decades that proportionality is an unworkable concept.[6] This particularly is the view of the military establishment that are the ones who must apply the law and may be called upon to pay the price for any breaches. The main objection has been directed against the rule prohibiting disproportionate attacks against civilians and civilian objects. The prohibition of the use of certain weapons that are regarded as causing superfluous injury and unnecessary suffering, although controversial for a range of reasons, has not attracted sustained attack as has the rule protecting civilians and civilian objects.

Therefore it is heartening for those who regard such a prohibition as fundamental to the protection of both combatants and civilians in armed conflict to see it take its place in the Statute of the first permanent international criminal judicial body.

Having said this, there are sound reasons behind the objections to the regulation of warfare by a concept such as proportionality that involves a complex value judgment.[7] These criticisms must be acknowledged and overcome.[8] A criminal offence, whose constituent elements cannot be identified with precision, will either wither unused in the Statute or lead to unsatisfactory and controversial outcomes.

Therefore these crimes pose real challenges for ensuring a successful prosecution that meets the demands of justice. What is involved is such an undertaking? First, the material elements or *actus reas* of the offences, as defined in the Statue

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(hereafter the Hague Regulations). *Cf.* the Statute of the ICC that adopts the language of Art 35 (2) of Protocol I discussed below note 73 and accompanying text.

5 The accused in the *Prosecutor* v. *Strugar op cit.* was charged in the alternative with the offence of launching a disproportionate attack. The Court found it did not arise on the facts of the case so did not address the issue. The issue of proportionality was considered by the Trial Chamber of the ICTY in the *Prosecutor* v. *Kupreškić et al.*, Case No. IT-95-16-T-14, Judgement, 31 Jan 2000. The Court was of the view that proportionality, in the sense of Article 57 of Protocol I, represents customary international law and, moreover, is a general principle of international law (para 524). Note, also that in 2000 the Office of the Prosecutor (OTP) of the ICTY, under Art 18 of the Statute of the Tribunal, appointed a Committee to investigate the question of whether the conduct by NATO forces of their campaign in Kosovo in 1999 had, *inter alia,* infringed the requirements of proportionality in IHL. *See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (hereafter *Final Report to the Prosecutor*) available at <www.un.org/icty/pressreal/nato061300.htm. In this particular instance the Committee concluded that there was no justification for any further investigation by the OTP of these allegations.

6 See for example, W. Hays Parks, "Air War and the Law of War" (1990) 32 *Air Force Law Rev* 1, 174 (criticising the form of the rule in relation to civilians in Additional Protocol I).

7 These fears were expressed during the negotiation of the rule in Additional Protocol I, see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-977) (17 Vols, Bern, Federal Political Dept 1978) CDDH/111/SR.6, para 42; SR 7, para 48; SR 8, paras 9, 13, 79, 82.

8 See, for example, W. J, Fenrick, "Attacking the Enemy Civilian as a Punishable Offence" (1997) 7 *Duke J Int'l L* 539, 545-9 (describing the issues that remain unresolved in the application of proportionality in IHL).

of the ICC, must be clarified. Secondly, the necessary standard of criminal intent of the decision maker, the *mens rea,* must be ascertained. Finally the offences must be proven. The purpose of this paper is to clarify the first two of these steps in the Statute crimes based on proportionality. It was agreed that the definition of the crimes in the Statute of the ICC would reflect customary international law.[9]

Therefore, this process of clarification will involve an assessment of international treaties, particularly Additional Protocol I from which these crimes are largely derived; the *travaux préparatoires* of the Preparatory Commission (hereafter PrepCom);[10] the *Elements of Crimes* prepared by the PrepCom[11] and other relevant sources such as authoritative commentaries[12] and the case law of the ICTY. As to proof, this is a matter for the prosecutor and the Court.

The structure of the discussion is as follows. First, I provide a short background to the emergence of the concept of proportionality and the form it now takes in the rules of IHL. Secondly, the main body of the paper provides a detailed analysis of the material elements and *mens rea* of the crimes derived from the general prohibition on the use of disproportionate means and methods of combat in the Statute of the ICC. In relation to this question of *mens rea*, the focus of the paper is on the crime of disproportionate attacks involving civilians, civilian objects and the environment. The *mens rea* element for these crimes differs from the general test for other crimes within the Statute. In the case of disproportionate attacks involving combatants it is the common definition of *mens rea* in Article 30 of the Statute that is applicable.[13]

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9 See K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, (Cambridge University Press, 2003), p xiii.

10 The Preparatory Commission for the Establishment of an International Criminal Court was established by resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court that adopted the Rome Statute of the International Criminal Court on 17 July 1998.

11 The *Elements of Crimes* document was included in the report of the PrepCom sent to the Assembly of States Parties, *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, Preparatory Comm'n for the International Criminal Court*, addendum part II, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereafter *Elements of Crimes*]. Art 9 of the Statute of the ICC states that the *Elements* "shall assist the Court" and Art 9 (3) requires the *Elements* "to be consistent with the Statute". By Art 21 of the Statute, the Court is to apply "(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".

12 See, e.g., Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, M. Nijhoff, 1987); M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts* (The Hague, M. Nijhoff, 1982), Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, *op cit.* and J. M. Henckaerts & L. Doswald-Beck (eds) *Customary International Humanitarian Law, III Vols* (Cambridge University Press, 2005).

13 Article 30(1) of the ICC Statute reads: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

I. The Emergence of the Prohibition of Disproportionate Means and Methods of Combat

Modern IHL limits the effects of warfare for both civilians and combatants. The concept of proportionality, along with restraints derived from humanity and chivalry, plays a pivotal role in this process. Proportionality is reflected in the legal regime protecting both combatants and civilians.[14] However, the requirements of IHL derived from the principle that armed conflict should not be conducted in a disproportionate manner, take different forms in relation to each of these groups under IHL.

Combatants are legitimate targets in armed conflict, whereas civilians are not. In IHL it is the prohibition of means and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering, rather than the level of combatant casualties that today is designed to limit the impact of armed conflict on combatants.[15] This principle for many years has enjoyed customary and conventional status.[16]

The requirement that there be some relationship between the attainment of the military objective and civilian losses and damage to civilian objects, was a relative latecomer in the system of rules limiting the impact of armed conflict on civilians. By the beginning of last Century it was accepted in a general sense that civilians were not legitimate objects of attack.[17] This limitation was inadequate to deal with the changing reality of warfare, particularly in the light of the development of means and methods of warfare that inevitably resulted in civilian casualties.

It was not however, until developments in human rights, after the adoption of the United Nations Charter in 1945, began to influence the law of armed conflict that the movement to provide expanded protections for civilians culminated in the acceptance of the idea that even attacks on military targets must not lead to excessive collateral casualties and damage to civilian objects. This process came to fruition in 1977 with the adoption of the conventional form of the rule of proportionality in Protocol I. The Protocol rule is accepted nowadays in the main as customary international law.[18]

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14 See, e.g., Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, *ibid.* p 195 (confirming that the prohibition on weapons causing superfluous injury or unnecessary suffering is "another way of stating the rule of proportionality defined in the context of the civilian population").

15 See J. Gardam, *Necessity, Proportionality and the Use of Force by States,* (Cambridge University Press, 2004) pp 67-75 and S. Oeter, "Methods and Means of Combat" in D. Fleck (ed), *Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, 1995), pp 105-53 (for a discussion of this prohibition).

16 See generally, *Customary International Humanitarian Law, III Vols* op cit.

17 See J. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Dordrecht, M. Nijhoff, 1993), pp 16-20 and G. Best, *War and Law Since 1945* (Oxford University Press, 1994), pp 26-44.

18 See Rule 14 *Customary International Humanitarian Law, Vol I Rules*, op cit reiterating the rule as it appears in Art 57 (2) (a) (iii) of Additional Protocol I.

II. The Criminalization of Disproportionate Warfare in the Statute of the ICC

A. Civilians

The Statute of the ICC confers jurisdiction on the Court for war crimes. Article 8 (b) of the Statute of the ICC defines war crimes so as to include:

> 2. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The crime of launching a disproportionate attack in the Statute of the ICC is largely based on the form of the rule in Additional Protocol I.[19] The Statute definition, however, is an advance on the conventional law position as reflected in Protocol I, in that it applies the proportionality equation in relation to attacks involving the environment. The Statue criminalizes attacks involving excessive "widespread, long-term and severe damage to the environment". This prohibition although not reflected in Protocol I appears to be generally reflected in customary international law.[20] However, according to the 2005 ICRC Customary Study on IHL, the high threshold of "widespread, long-term and severe damage" in the Statute definition of this crime is not reflected in the customary position. It is the general proportionality test of balancing incidental damage to the environment with the direct and concrete military advantage anticipated, that is reflected in the customary rule.[21]

There are other differences of note between the Statute and Protocol rule pro-

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19 Art 85(3) defines as a grave breach the following acts:

> when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
>
> (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii).

Art 57 (2) (a) (iii) reads:

> [w]ith respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall
>
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated ....

20 See Rule 43 *Customary International Humanitarian Law, Rules, op cit.* pp 143, 145-6 prohibiting the launching of an attack "against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated".

21 See *Customary International Humanitarian Law*, *Rules, op cit.* pp 583.

hibiting the launching of a disproportionate attack, the relevant details of which are explained in the following discussion.

i. The material elements of the proportionality equation

The *Elements of Crimes* identify the following material elements for the offence of launching a disproportionate attack.

> The perpetrator launched an attack;
> The attack was such as that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
> ...
> 4. The conduct took place in the context of and was associated with an international armed conflict.
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

There are three separate offences in Article 8 (b) (2) (iv) of the Statute of the ICC, although more than one may arise from the same attack, namely a disproportionate attack on (i) civilians; (ii) civilian objects; or (iii) the environment.

Apart from determining what constitutes an attack for the purposes of this offence, there are two major issues that require clarification in relation to the material elements of this offence. First, how should the military advantage be calculated and what elements can it include? Secondly, in the case of the offence involving the civilian population what should be excluded in determining these casualties for the purpose of assessing the excessiveness of the attack? Finally, of considerable significance to the military establishment of States is the question on what information is the proportionality of an attack to be judged?

a. The Meaning of Attack

The proportionality equation is applied in relation to attacks. The meaning of 'attack', therefore, is pivotal to its operation. It determines in what situations the rule of proportionality applies and determines the context in which the military advantage is assessed. Neither the Statute nor the *Elements of Crimes* define the meaning of attack. 'Attacks' are defined in Article 49(1) of Additional Protocol I as "acts of violence against the adversary, whether in offence or defence".[22] The main issue that has

22 *See Prosecutor v. Dario Kordić et al.* Appeals Chamber Judgment, Case No. IT-95-14/2-A, Dec 17 2004, para 47 and *Strugar, op cit*,. para 282 adopting the Additional Protocol definition of 'attack' for the purposes of Art 3 of the Statute. See also Gardam, *Necessity and Proportionality, op cit.*, pp 99-100 and see *Prosecutor v. Milord Krnojelac,* Trial Chamber, Judgement Case No. IT-97-25-A, 17 Sept 2003 para 54-5 and *Prosecutor v. Dragoljub Kunarac et al.*, Trial Chamber, Judgement, Case No. IT-96-23 & 23/1, 12 June 2002 para 415 (considering the meaning of attack directed against any civilian population as consti-

attracted comment in the ICRC Commentary on the *Elements of Crimes* in relation to the meaning of attack, is that the reference to 'offence and defence' is intended to encompass the use of armed force to carry out a military operation during the course of an armed conflict. It is not a reference to the meaning that these words may have in the context of the *ius ad bellum,* or the law on the use of force.[23] This distinction is not particularly illuminating and the judges will be left to grapple with some areas of uncertainty such as how complex a military operation needs to be before it qualifies as an attack.

b. The Military Advantage

The Statute of the ICC adds the word 'overall' to the wording of the Protocol definition of the military advantage of the attack against which the excessiveness of the collateral damage to civilians, civilian objects or the environment is to be assessed. Moreover, an explanatory note accompanies the phrase 'concrete and direct overall military advantage anticipated' in the *Elements of Crimes*, viz:

> [note number omitted] The expression 'concrete and direct overall military advantage anticipated' refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack.

One area of uncertainty and disagreement in relation to assessing the military advantage of an attack under the Statute of the ICC is how close in terms of time and location the military advantage must be to the attack. The impact of certain attacks may be experienced at a location geographically or temporally remote from the place and time of attack. Arguably these effects can be included in the assessment of the military advantage of the attack. Allowing considerable scope for including geographically and temporally removed effects in the military advantage aspect of the proportionality equation can potentially legitimise higher levels of damage to the civilian population, civilian objects and the environment. It is of concern that the addition of the words 'overall' in the Statute offence allows for just this situation, particularly given the explanatory note to the effect that such advantage may or may not be temporally or geographically related to the object of the attack.

The method of assessing the military advantage of an attack was debated at the time of the adoption of Additional Protocol I. The words 'concrete and direct' in Article 51 (5) (b) were designed to remove some of the uncertainty as to the correct method of determining the military advantage of an attack. First of all they indicate that a consideration of proportionality on a case-by-case basis rather than on a cumulative basis is what is required.[24] Concern as to the implications of these words is reflected in the reservations placed by certain States Parties to Article 51 (5) (b) of the Protocol, to the effect that their interpretation of "direct and concrete military

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tuting a crime against humanity in Art 5 of the ICTY Statute).

23 See Dörmann, *Elements of War Crimes, op cit.*, p 150.

24 See Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *op cit.* p 2209.

advantage" was "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack".[25]

Secondly, the phrase 'concrete and direct' in Article 51 (5) (b) of the Additional Protocol imposes geographical and temporal limits on the assessment of the military advantage of the attack. The ICRC argued at the Rome Conference that the inclusion of the word 'overall' was redundant as the Protocol rule already encompassed the idea that "a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself".[26]

It appears, however, that the word 'overall' in combination with the explanatory note may provide support for an interpretation somewhat wider than that put forward by the ICRC, namely that a military advantage that would ensue at a later date or at a different location would be included by the use of the word 'overall'. Consequently, one could envisage a situation where the assessment of the proportionality of an attack took place where there was no 'temporal or geographical connection ... between the foreseeable military advantage and the attack causing civilian loss of life'.[27] It appears unlikely that the Court would accept, however, such an interpretation and will require that the addition of the word 'overall' in the Statute of the ICC does not undermine existing standards of IHL.

A further issue in relation to the assessment of the military advantage of an attack, that the judges of the ICC may find themselves confronted with, arises from the recent practice of States of resorting to strategies designed to minimize combatant casualties. The security of forces has been identified by a handful of States as a factor in the assessment of the military advantage of an attack.[28] Military commanders are under an obligation to limit their casualties and this factor of risk to one's own forces is a component of many of the decisions in relation to attacks such as the choice of means, the steps taken to verify the target and warn the civilian population, and the timing of the attack.[29] For example, a general zero casualties approach may mandate certain decisions in relation to individual attacks, such as flying at high

25 See the reservations of, for example, Belgium, Italy, Germany, Netherlands, New Zealand and the United Kingdom (full list and text of reservations available on < http://www.icrc.org/ihl.nsf/WebCONVPRES?OpenView (site visited 8th Sept 2005)). See the approach of the Committee of the OTP in its consideration of this issue in relation to the NATO attack on the Serb Television and Radio Station in Belgrade.

26 See ICRC, Statement at the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8 July 1998, UN Doc. A/CONF.183/INF/10, 13 July 1998, p1 para 2.

27 See M. Politi, "Elements of Crimes" in R. S. Lee (ed), *The International Criminal Court-Issues, Negotiations, Results*, (The Hague, Kluwer Law Int'l, 1999) pp 443, 471-2 and Dörmann, *Elements of War Crimes*, *op cit.,* p 163 (arguing that the interpretation placed on the word 'overall' in this explanatory note may "invite abusive interpretations of the concept 'direct military advantage'").

28 See *Customary International Humanitarian Law, Vol II Practice Part I, op cit.,* pp 326, 328. See also Bothe, Partsch & Solf, *New Rules for Victims*, *op cit.,* who include the security of the attacking force as a consideration in the concept of military advantage (at 311), see also the commentary in relation to Art 57, paras 2.4.3 & 2.7.2.

29 It is not only combatant casualties that dictate strategies to limit losses but also the cost of military hardware such as stealth bombers.

altitudes for the purpose of both target verification and subsequent attacks on the target.[30]

The Committee of the OTP identified such strategies to minimize combatant casualties as relevant in the proportionality equation but indicated that "the extent to which a military commander was obliged to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects was as yet unresolved".[31]

As for State practice, the overall policy of the United States in relation to the question of the allocation of risk in the conduct of the 1990-91 Persian Gulf conflict was "[t]o the degree possible and consistent with allowable risks to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the least risk to civilian objects and the civilian population".[32] The determination of what constitutes 'allowable risks' remains unclear. At the very least the willingness to accept casualties is consistent with good faith in the application of proportionality.[33]

To put this in the context of the 2000 Kosovo action, the insistence of the NATO forces that Operation Allied Force was conducted in accordance with the requirements of proportionality in IHL is brought into question by the statistics. There were 37,465 sorties flown of which more than 14,006 were strike missions.[34] Although the number is contested, it appears there were at least some 400-500 civilian casualties.[35] NATO forces in comparison incurred no combat casualties.

The 2000 attack by NATO forces on the Serb Television and Radio Station in Belgrade was also controversial in light of the military advantage that would ensue from its destruction. There is evidence to suggest that the station was targeted because of its propaganda role in the conflict.[36] Amnesty International alleged the attack was clearly disproportionate given the casualties and the negligible military gain that was in fact anticipated. The Committee of the OTP, whilst uneasy about the nature of the target and the direct and concrete military advantage conferred by the attack, were only prepared to conclude that "the civilian casualties were unfortu-

30 For example, in the NATO action in Kosovo, Amnesty International reports that initially aircraft "were restricted to flying above 15,100 feet to protect their aircraft and air crews against FRY air defences". NATO, however, although reportedly conceding that this tactic affected the effectiveness of the aerial campaign, denied that it increased civilian casualties, see Amnesty International, NATO/Federal Republic of Yugoslavia, *"Collateral Damage" or Unlawful Killing? Violations of the Laws of War by NATO during Operation Allied Force* (2000); available at http://web.amnesty.org/library/index/ENGEUR700182000.

31 *Final Report of the Prosecutor, op cit.*, para 49.

32 See *US Defence Report*, *op cit.,* p 612.

33 See Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols* op cit, pp 683-4 ("the interpretation [of proportionality] must above all be a question of common sense and good faith for military commanders") and Rogers, "Zero-casualty Warfare" op cit 186. See also Fenrick, "Attacking the Enemy Civilian as a Punishable Offence" *op cit.*, p 548.

34 See General W. K. Clark, "When Force is Necessary: NATO's Military Response to the Kosovo Crisis" (1999) 47 (2) *NATO Review* p 159.

35 See, Amnesty International, *Collateral Damage, op cit.* (detailing differing official FRY statistics and those of Human Rights Watch).

36 See Amnesty International, *Collateral Damage, ibid.* pp 39-41.

nately high but do not appear to be clearly disproportionate".[37]

c. The Determination of "Excessive" Damage

The ICC Statute definition of the offence of launching a disproportionate attack requires the damage to civilians, civilian objects or the environment to be 'clearly' excessive, an addition to the text of the rule as it appears in Protocol I. Ever since the designation of disproportionate attacks as a grave breach of Additional Protocol I there has been concern that the standard of care is too high on decision makers when making the value judgment as to the proportionality of an attack. This concern was reflected in the negotiation of the Statute of the ICC and the addition of the word 'clearly' is apparently intended to indicate to the Court that only obvious cases of disproportionate attacks should be punished.[38]

1. Requirement of a Result

Paragraph 2 of the *Elements of Crimes* for the offence of launching a disproportionate attack attempts to clarify the issue as to whether to constitute the crime of launching a disproportionate attack, the attack in question must actually result in collateral civilian damage and whether this damage needs to be excessive.[39] Both the Protocol and the Statute of the ICC criminalize an attack that 'will cause the prohibited level of damage'.[40] However, the Protocol provision only requires that the attack causes 'death, or serious injury to body or health'. Consequently, the offence is constituted in such cases even if the degree of damage is not that anticipated.

The Statute of the ICC contains no such clarification and thus leaves open the argument that not only must damage to the civilian population occur but that it must be excessive. The *Elements of Crimes* uses the phrase 'the attack was such that it would cause' rather than 'will' cause and this is intended to reflect the majority view that a particular result is not a pre-requisite to the crime.[41] Nevertheless the words of the Statue must prevail and it is open to the Court to arrive at a different conclusion, as has apparently the ICTY.[42]

A further distinction between the crime under the Protocol rule and the Statute offence is that under the latter it appears that excessive damage to civilian objects can constitute the crime even if there are no civilian casualties.

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37 See *Final Report to the Prosecutor, op cit.*, paras 75-77.

38 See H. von Hebel & D. Robinson, "Crimes Within the Jurisdiction of the Court" in R. S. Lee (ed), *The International Criminal Court-Issues, Negotiations, Results (*The Hague, Kluwer Law Int'l, 1999), p 79, pp 110-1.

39 No doubt the question of whether a result is necessary to constitute the offence is relevant in the context of "widespread, long-term and severe damage to the environment".

40 See Art 85 (3) of Additional Protocol I.

41 See the discussion of this issue in Dörmann, *Elements of War Crimes, op cit.*, p 162.

42 The ICTY has considered the issue of whether the damage to the civilian population and civilian objects must be extensive. The issue, however, remains open, see the *Strugar case* (in the context of direct attacks on the civilian population and civilian objects), *op cit.,* para 280 (citing the *Kordić* Appeals judgment).

2. Factors Included in the Calculation of 'Excessive'

The major issue in relation to the element of excessiveness of civilian casualties and damage to civilian objects (and the environment under the under the Statue rule) is what is to be included in this calculation. It is a controversial and unresolved issue and the Protocol provides no real guidance.[43] The question has arisen in the context of dual use targets and was highlighted by the 1990-91 Persian Gulf conflict. The majority of civilian casualties in that conflict were the result of the targeting of objects that were assessed as legitimate military objectives but which were also integral to the survival of the civilian population.

Among the facilities destroyed by coalition bombing were all the electrical power generation plants, oil refineries, the main oil storage facilities and water-related chemical plants. These facilities were not attacked once but repeatedly in situations where the military advantage appeared questionable to some observers.[44] This was particularly the case in relation to the attacks on Iraq's electrical system.[45] The result was the almost complete destruction of the infrastructure of what was a highly developed post-industrial State, with predictable impact on civilians.[46]

The difficulty with the argument that the attacks on the infrastructure of Iraq during the Persian Gulf conflict were disproportionate as a matter of law, irrespective of how the military advantage was calculated, is that the immediate civilian casualties of these attacks were negligible. This will often be the case in relation to such targets unless they are located in close proximity to the civilian population. The combined effects of the attacks, however, may be catastrophic in the long-term for the civilian population.[47]

Nevertheless, even in the case of a diminishing military advantage in relation to successive attacks on such objects as power stations, it may be that the immediate civilian casualties may be legitimately assessed as likely to be negligible and consequently no infringement of the proportionality rule would occur. It appears that the Protocol rule of proportionality only takes into account the proximate effect of attacks in the assessment of whether 'excessive' casualties may be expected[48] and this

43 See, for example, *Final Report to the Prosecutor, op cit* ., para 49 (identifying the unresolved issue of what to include in the application of the principle of proportionality) and see generally, Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols, op cit*., p 684 (for a discussion of the relevant factors in the proportionality equation).

44 See C. Jochnick & R Normand, "The Legitimation of Violence: A Critical Analysis of the Gulf War", 35 *Harv ILJ* 387, 405-7 (1994) and Human Rights Watch, *Needless Deaths in the Gulf War,* pp 82-7.

45 See *Needless Deaths*, *op cit*., pp 186-93.

46 See Harvard International Study Team on the Gulf Crisis, *Harvard Study Team Report: Public Health in Iraq after the Gulf War* (1991); Harvard International Study Team on the Gulf Crisis, *Health and Welfare in Iraq after the Gulf Crisis* (1991) and *Needless Deaths*, *op cit*.

47 See P Rowe, "Kosovo 1999: The Air Campaign-Have the Provisions of Additional Protocol I Withstood the Test", 837 *Int'l Rev Red Cross* 147 (2000) and see Report to the Secretary-General on humanitarian needs in Kuwait and Iraq, UN Doc S/22366 (20 Mar 1991).

48 Greenwood observes that the Protocol was negotiated primarily to minimise casualties during attacks, see C. Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf conflict", in *The Gulf War (1990-91) in International and English Law*, 63, 79 (P Rowe (ed), 1993).

appears to represent the customary position in light of the practice in the Persian Gulf conflict. If this is the case then it should be the approach followed by the Judges of the ICC.

The ICTY indicated its unease with cumulative attacks on dual-use targets in the *Kupreskic Case.*[49] The Trial Chamber suggested that rules of IHL of a broad discretionary nature, such as those in Articles 57 and 58 of the Protocol relating to negligent, indiscriminate and disproportionate attacks should be interpreted narrowly in light of the demands of humanity and the "dictates of public conscience" in the Martens Clause. In the view of the Tribunal, the Martens Clause could be used in situations where although single attacks on military targets do not infringe the 'loose' proscriptions in Articles 57 and 58, a pattern of such attacks may well do so.

The approach of the Trial Chamber on this point was criticised by the Committee of the OTP. The Committee was of the view that "where individual (and legitimate) attacks on military objectives are concerned, the mere cumulation of such instances, all of which are deemed to be lawful, cannot *ipso facto* be said to amount to a crime".[50] In turn this arguably narrow perspective has itself been criticised by commentators.[51]

The motivation of the Trial Chamber appears to be to encourage compliance with the spirit if not the letter of the law. However, as breaches of Articles 57 and 58 can constitute war crimes, caution must be exercised before adopting an interpretation that may lead to such a result. In such circumstances the use of the word 'clearly' in the text of the Statute crime, however, should ensure that the Court will not accept borderline cases. However, military commanders would be well advised to avoid saturation targeting of dual-use objects where the military advantage of each successive attack cannot be justified.

An issue on which views differ is the extent to which the decision-maker must take into account the likely casualties resulting from the defender locating military objectives close to civilian objects. It may also be the case that there is evidence that the defenders are deliberately exposing civilians or civilian objects to risk. This was a practice adopted by Iraq in the 1990-91 Persian Gulf conflict and was alleged to be the case in the 2000 Kosovo conflict.[52] One commentator is of the view that the casualties in the proportionality equation should not include those that are the result of such a practice by the other side.[53]

The Protocol approach is to be preferred in this context. Although the use of civilians to shield military targets is contrary to the rules of the Protocol under Article 51(7), the attacker is not thereby relieved from the obligation to consider

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49 *Op cit.*

50 *Final Report to the Prosecutor op cit.*, para 52. Cf the view of Amnesty International, "*Collateral Damage*", *op cit.*

51 See P. Benvenuti, "The ICTY's Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia" (2001) 12 *EJIL* 501, 517 (criticising the Committee for failing to adopt the approach of the ICTY in the *Kupreškić Case* to determining proportionality in the context of cumulative attacks).

52 See *Needless Deaths* op cit 76 (1991) and see US Department of Defence (USDoD) News Briefing, 17 May 1999, cited in *Collateral Damage, op cit.*, 8.

53 See Hays Parks, "Air War and the Law of War", *op cit.*, p 174.

whether the likely casualties will be excessive (Article 51(8)).[54] Therefore, although the tactic of exposing civilians to risk cannot prevent an attack on a target it will dictate the manner in which the attack is carried out.[55]

In summary the addition of the words 'overall' to the military advantage element of the equation and the word 'clearly' to the assessment of 'excessive' for the crime of launching a disproportionate attack in the Statue of the ICC, have probably made the offence somewhat more difficult to establish than the equivalent offence under Additional Protocol I. This offence, however, is distinctive from the other combat offences involving civilian and civilian objects, namely the direct targeting of civilians and civilian objects and the other categories of indiscriminate attacks, in that it involves the making of a value judgement. Such assessments in armed conflict may be extremely complex and consequently it is perhaps inevitable that only the most errant decision will be punished. It is in this context that the mental element of the crime becomes of pivotal importance.

ii. Mental element

The attempts by the Statute of the ICC and the *Elements of Crimes* to clarify the *mens rea* in relation to launching a disproportionate attack appear to have obscured rather than clarified the issue. This is unfortunately often the outcome when lawyers attempt to place the meaning of a concept or phrase beyond doubt. The imprecision of language will almost inevitably undermine their best efforts.

A range of provisions in both the Statute and the *Elements of Crimes* set out below, are relevant to establishing the necessary *mens rea* for the crime of launching a disproportionate attack. It must always be kept in mind that the *Elements* are for the guidance only of the Court and they are at liberty to disregard their provisions. Such an approach is not recommended however for the Prosecutor who will have to attempt to reconcile the conflicts in these provisions. In addition, it is not clear to what extent the other sources of IHL, such as Additional Protocol I and the jurisprudence of the ICTY are relevant to the interpretation of the *mens rea* provisions of the Statute.[56]

Article 30 of the Statute of the ICC reads as follows:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purpose of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

54 See also Art 58.

55 See F. Hampson, "Means and Methods of Warfare in the Conflict in the Gulf" in *The Gulf War 1990-1991 in International and English Law* (P. Rowe ed (1993)) 89 p 93.

56 Dörmann, *Elements of War Crimes, op cit.*, pp 11-12 observes that the phrase "unless otherwise provided" in Art 30(1) is unclear and may allow the Court to apply a less restrictive customary international law standard of *mens rea*.

> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

The *Elements of Crimes* is as follows in relation to the mental element required for the crime of launching a disproportionate attack:

> 3 The perpetrator knew the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

An explanatory note accompanies this paragraph:

> [note number omitted] As opposed to the general rule set forth in paragraph 4 of the General Introduction,[57] this knowledge element requires that the perpetrator make the value judgment as described therein. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time.[58]

Finally, Paragraph 3 of the General Introduction reads: "Existence of intent and knowledge can be inferred from relevant facts and circumstances".[59]

One of the issues in relation to the knowledge element in the crime of launching a disproportionate attack under the Statute of the ICC is whether it excludes recklessness. In relation to the crimes in Article 51 of Additional Protocol I of directly targeting civilians and the categories of indiscriminate attacks other than disproportionate attacks, the ICTY has adopted the ICRC Commentary view that 'wilfully' encompasses recklessness.[60] However, according to the Commentary, the addition of

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57 Paragraph 4 of the General Introduction reads:

> With respect to the mental elements associated with elements involving value judgments, such as those using the terms 'inhumane' or 'severe', it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated

58 It has been a concern of States even since the adoption of the Protocol rule on proportionality to clarify exactly what information should be relied on in evaluating a judgement of proportionality. For a comprehensive coverage of State practice on this issue, see *Customary International Humanitarian Law*, *Vol II Practice Part I*, *op cit.,* pp 331-335.

59 This was an issue of importance during the negotiations of the ICC *Elements of Crimes* and a provision to this effect is included in para. 3 of the General Introduction thereto. See generally, Dörmann, *Elements of War Crimes*, *op cit.*, p 12.

60 See Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols*, *op cit.,* para 3474. In the *Prosecutor v. Stanislav Galić* Trial Chamber, Judgment, Case No. IT-98-29-T, 5 Dec 2003, the Trial Chamber accepted the explanation of the term 'wilfully' in Article 85 of Additional Protocol I as encompassing recklessness. See also *Prosecutor v. Tihomir Blaškić,* Trial Chamber, Judgement, Case No. IT-95-14-T, 29 July 2004, para 152, to the effect that "the mens rea of all the violations of Article 2 of the Statute of the ICC includes both guilty intent and recklessness which may be likened to serious criminal negligence."

the words "in the knowledge" in the definition of the grave breach of launching a disproportionate attack, excludes recklessness and only covers the situation "where the person committing the crime knew with certainty that the described result would occur" presumably in the normal course of events.[61]

The Trial Chamber of the ICTY in the *Galic case* appears to adopt this approach: "To establish the *mens rea* of a disproportionate attack the Prosecution must prove, instead of the above-mentioned *mens rea* requirement, [that relating to the other offences under Article 52 of the Additional Protocol I such as direct attacks on civilians and the other categories of indiscriminate attacks in that Article] that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties".[62] The same result is reached with the Statute crime although 'intent' is substituted for 'willful' in relation to the mental element of launching the attack. As the ICRC Commentary on the *Elements of Crimes* observes, the specific requirement of knowledge in the statutory definition of a disproportionate attack makes the requirement of intention superfluous and is not repeated in the *Elements of Crimes*.[63]

Consequently, the words "in the knowledge" in Article 8 (b) (2) (iv) take their meaning from Article 30 of the Statute, namely the perpetrator must be aware that the consequences will occur in the ordinary course of events.[64] It is necessary to distinguish however, recklessness in terms of knowledge of the consequences of a particular attack from recklessness in making the value judgment between the military advantage and the civilian casualties. A perpetrator in full possession of the facts but who does not turn their mind to evaluating the possible excessiveness of that attack will not be thereby exonerated.[65]

Another area of uncertainty is whether the perpetrator must have appreciated not only the level of damage that will occur and the anticipated military advantage but also that the damage would be clearly excessive. What if the perpetrator acting on the facts at their disposal did not regard the collateral damage as clearly excessive? In such circumstances can the Court substitute its evaluation for that of the perpetrator? Paragraph 3 of the *Elements of Crimes* seems to indicate that the perpetrator needs to have appreciated the clear excessiveness of the attack. However, the documents to the PrepCom and the explanatory note to paragraph 3 indicate that what is intended is that the decision maker only had to have knowledge of the extent of the damage and the anticipated military advantage and that the value judgement of the 'excessiveness' of the damage should be made objectively by the Court.[66]

In my view the requirement in the definition of the crime of launching a disproportionate attack that the collateral civilian damage in the ordinary course of events would be clearly excessive, ensures that only the most serious cases will lead to a successful prosecution. The judgement of the 'excessiveness' in such cases should

61 *Ibid.* para 3479

62 *Prosecutor v Stanislav Galić*, *op cit*.

63 See *Elements of Crimes* 166.

64 See *Elements of Crimes* 166.

65 See *Elements of Crimes* 165.

66 Note this evaluation must be made on the basis of the information available to the decision maker at the time.

be a matter for the Court. It may be, however, that the Court will take a conservative view that the offence is not established unless it is proved that the perpetrator made the value judgement on the facts available to them at the time and concluded that the collateral damage would be clearly excessive in light of the anticipated military advantage.

Having considered disproportionate attacks involving civilians, civilian objects and the environment the discussion now addresses such means and methods of warfare as they affect combatants.

B. Combatants

i. Material elements

War crimes are defined in Article 8 (2) (b) of the Statute of the ICC so as to include:

> Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
> (xvii) Employing poison or poisoned weapons;[67]

The *Elements of Crimes* uses an 'effects' definition of poisoned weapons viz: "The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties".[68]

> (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;[69]

There is a considerable overlap between this offence and that of employing poisoned

67 This prohibition is derived from Art 23 (a) of the 1899 & 1907 Hague Regulations. For a comprehensive examination of State practice in relation to poisonous weapons, see *Customary International Humanitarian Law Vol II Practice Part I, op cit* .,pp 1590-1603 and for the definition of what constitutes poisoned weapons, see *Customary International Humanitarian Law Vol I Rules, op cit.,* pp 253-4 and see PCNICC/1999/WGEC/INF/2/Add.2 pp 8-10.

68 See Dörmann, *Elements of War Crimes*, *op cit.*, pp 281-4 (for a discussion of the *Elements of Crimes* for this offence).

69 This prohibition is derived from the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, see Dörmann, *Elements of War Crimes*, *op cit,*. pp 285-91 (for a discussion of the *Elements of Crimes* for this offence). It is debatable whether this includes chemical weapons. Biological and chemical weapons were not included in the final text of Article 8 although they were prohibited in an earlier article, see note 81 below. For a comprehensive examination of State practice in relation to biological and chemical weapons see *Customary International Humanitarian Law Vol II Practice Part I, op cit.,* pp 1607-1657 and 1742 and see *Customary International Humanitarian Law Vol II Practice Part I,* pp 1590-1603 and see also *Customary International Humanitarian Law Vol I Rules,* pp 259-267 (including riot–control agents and herbicides (in certain circumstances) as prohibited chemical weapons).

weapons and the *Elements of Crimes* uses the same 'effects' definition of the substances coved by this crime as in relation to poisoned weapons, with the addition of the word 'asphyxiating'.[70]

> (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; [71] ...
> (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;[72]

Article 8 (2) (b) (xx) (minus the proviso) is based on Article 23 (e) of the 1899 and 1907 Hague Regulations and Article 35 (2) of Additional Protocol I.[73] The Statute version of the prohibition also includes a reference to weapons that are inherently indiscriminate that is drawn from the general protections accorded to civilians in Articles 48 and 51 (4) and (5) of Additional Protocol I.[74]

With the addition of the proviso to the Statute of the ICC, the crime of using weapons causing superfluous injury or unnecessary suffering or which are inherently

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70 For a discussion of the deliberations at the PrepCom in relation to this crime, see Dörmann, *Elements of War Crimes, op cit.*, pp 285-6 and see PCNICC/1999/WGEC/INF/2/Add.2 pp 11-14.

71 This prohibition is derived from the 1899 Hague Declaration (IV, 3) Concerning Expanding Bullets. See Dörmann, *Elements of War Crimes, op cit.*, pp 292-96 (for a discussion of the *Elements of Crimes* for this offence). For a comprehensive examination of State practice in relation to expanding bullets, see *Customary International Humanitarian Law Vol II Practice Part I, op cit.*, pp 1771-1794 and see *Customary International Humanitarian Law, Vol I Rules, op cit.*, pp 268-271 and see PCNICC/1999/WGEC/INF/2/Add.2 pp 14-16.

72 For an explanation of the amendment process under Arts 121 and 123 of the Statute of the ICC see Clark "The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which are Inherently Indiscriminate", *op cit.,* pp 275-6.

73 Article 23 (e) of the 1907 Hague Regulations prohibits the "employment of arms, projectiles, or materials calculated to cause unnecessary suffering. Paragraph 35 (2) of Additional Protocol I prohibits the employment of "weapons of warfare, projectiles and material and methods of a nature to cause superfluous injury or unnecessary suffering". For the history of the different texts, see Gardam, *Necessity, Proportionality and the Use of Force by States, op cit.,* pp 51-2.

74 See generally Gardam, *Necessity, Proportionality and the Use of Force by States*, *op cit.*, pp 93-6 and for a discussion of the limited number of weapons upon which there is consensus as to their indiscriminate nature, see PCNICC/1999/WGEC/INF/2/Add.2 pp 23-4. For the status of this principle see *Customary International Humanitarian Law*, *Vol I Rules, op cit.*, and for the practice of States see *Vol. II Practice Part I,* pp 1554-1589. The question of the indiscriminate nature of nuclear weapons was at the heart of the decision of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, (hereafter *Nuclear Weapons* Advisory Opinion) ICJ Reports 1996.

indiscriminate, now will take its only content from the Annex to the Statute upon adoption.

The prohibition on superfluous injury and unnecessary suffering encompasses both weapons that inherently cause superfluous injury or unnecessary suffering and those that may do so if used in a certain manner.[75] This does not, however, mean that such weapons are automatically prohibited from use, either *per se*, or in certain circumstances.

The regulation of weapons in armed conflict has always been controversial. The issue of prohibited weapons, apart from the traditional established categories in paragraphs (xvii), (xviii) and (xix), followed this pattern and was very contentious during the negotiations of the Statute. One of the main points of contention in this area is whether the general maxim in Article 23(e) of the Hague Conventions (which is accepted as reflected in customary law)[76] of itself renders a weapon prohibited without any further action from States.

The practice of States in this context has been to specifically outlaw a number of weapons on the basis that they infringe the prohibition against superfluous injury or unnecessary suffering.[77] The argument that other weapons are nevertheless outlawed by the general prohibition has not been accepted in practice.[78]

This traditional lack of consensus as to whether the general prohibition on weapons with a certain effect actually outlaws any weapon continued to manifest itself.[79] It was weapons of mass destruction, particularly nuclear weapons, that was at the heart of the disagreement at the PrepCom.[80] Debate initially revolved around two options presented by the Working Group on weapons to the 1997 meeting of the PrepCom.

The first identified a list of prohibited weapons and the second included a gen-

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75 See Oeter, "Methods and Means of Combat", *op cit.,* p 114; and, Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols*, *op cit*., p 398. This dichotomy is also reflected in the proportionality test in relation to civilians. Some weapons arguably are of a nature to impact disproportionately on the civilian population; others will do so depending on the circumstances in which they are used.

76 See *Customary International Humanitarian Law, Vol. I Rules, op cit.*, p 568 (for State Practice in relation to this prohibition see *Customary International Humanitarian Law*, *Vol. II Practice Part I, op cit.,* pp 1505-1554).

77 See *Customary International Humanitarian Law, Vol I Rules, op cit.,* pp 242-3.

78 See Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols, op cit.*, pp 393-4. For the practice of States in relation to whether the principle as such outlaws particular weapons, see *Customary International Humanitarian Law, Vol I Rules, op cit*., pp 242-3; and see Dörmann, *Elements of War Crimes*, *op cit*., pp 298-300 (for details of the interpretation of the prohibition on means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering in the military manuals of States).

79 See R.S. Clark "The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which are Inherently Indiscriminate" in J. Carey, W. V. Dunlap & R. J. Pritchard (eds), *International Humanitarian Law: Challenges Vol. 2*, (Transnational Pubs New York 2003) p 259 and von Hebel and Robinson, *op cit.,* pp 114-6 (for a discussion of the negotiating history of the crimes relating to weapons in the Statute of the ICC).

80 This debate is exemplified in the *Nuclear Weapons* Advisory Opinion and see Clark The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which are Inherently Indiscriminate" *op cit.*

eral prohibitory clause in the Statute.[81] As the negotiations proceeded a whole range of variations on these two themes emerged.[82] The difficulty with the first option of a list of prohibited weapons is that there is little consensus as to candidates for inclusion in such a list. Moreover, by specifying all prohibited weapons, there is no scope for the general principle outlawing weapons causing superfluous injury and unnecessary suffering to operate in the future so as to reflect changes in the content of the principle. In particular as nuclear weapons are not included in this list it would mean that it would be difficult if not impossible to envisage the possibility of prosecution in the future of the use of weapons that can annihilate thousands of civilians.[83]

The second option of a general prohibitory clause was also perceived as unsatisfactory by many States as it provided no certainty for decision-makers as to the weapons that fall under such a clause.[84] Moreover, the traditional difficulty in ensuring that such a clause has any operation at all would no doubt have continued to be reflected in the attitude of States

The final text of Article 2 (b) (xx) of the Statute of the ICC is a compromise that in effect leaves the definition of this crime to be decided at a later date. This is the case not only in relation to weapons causing superfluous injury and unnecessary suffering, whose prohibition is based on considerations of proportionality but also inherently indiscriminate weapons, whose prohibition is based on their inability to distinguish between civilians and combatants.

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81 The following is the list of weapons included in the first option contained in the 1998 Draft Statute for the Court, PrepCom on the Establishment of an International Criminal Court, Report of the Inter-sessional meeting from Jan 19-30, 1998 UN Doc A/AC 249/1998/L.B 1998;

> employing the following weapons, projectiles and materials and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:
>
> (i) poison or poisoned weapon;
> (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
> (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
> (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict;
> (iv) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

82 See Clark, "The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which are Inherently Indiscriminate" *op cit.* (for a discussion of the negotiating history of the provisions of the Statute of the ICC relating to weapons).

83 See *Nuclear Weapons* Advisory Opinion, Dissenting Opinion of Judge Weeramantry at 8 and see R. S. Clark "Methods of Warfare that Cause Unnecessary Suffering or are Inherently Indiscriminate: A Memorial Tribute to Howard Berman" 28 *Calif West Int'l Law Journal* 379, 387; Clark "The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which are Inherently Indiscriminate" *op cit*.

84 See, generally Clark, "The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which are Inherently Indiscriminate" *ibid.*, (for the negotiating history of this clause).

As things stand presently, therefore, Paragraph 8 (2) (b) (xx) of the ICC Statute merely describes the effects of weapons that States may decide to include in the special Annex. It is possible, however, to identify some underlying principles that will guide States in the task of drafting the Annex.[85] There are a variety of approaches as to whether a particular weapon has the prohibited effects.[86] Some stress the humanitarian aim of the prohibition; others focus on the more pragmatic military efficiency aspect.[87] The ICRC has consistently supported a humanitarian or health-based approach to determining the legitimacy of weapons under IHL.[88]

Whether a weapon falls within the prohibition is clearly a question of balance or proportionality: 'unnecessary' "involved some sort of equation between, on the one hand, the degree of injury or suffering inflicted (the humanitarian aspect) and, on the other, the degree of necessity underlying the choice of a particular weapon (the military aspect)."[89] How then can the proportionality equation be formulated in the context of weapons and their effects on combatants? According to Greenwood: "the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury ..."[90] A comparison of weapons is thus required between their effects in terms of suffering and injury on the one hand and their military effectiveness on the other. The factors that fall to be considered in the equation in terms of suffering or injury, encompass both the physical and psychological effects of weapons, the long-term nature of the injuries, the painfulness or severity of the wounds, mortality rates and the treatment available in conflict situations.[91] In the treaty negotiations regarding blinding weapons, the long-term impact on society of blind veterans was an additional influencing factor that led to the prohibition of these weapons.[92]

The notion of 'suffering' has caused difficulties in terms of its definition given its

85 See PCNICC/1999/WGEC/INF/2/Add.2 pp 17-29.

86 See, e.g F. Kalshoven, "The Soldier and his Golf Clubs" in C. Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles* (Geneva, M. Nijhoff, 1984), p 369.

87 See e.g., "Memorandum of Law: The Use of Lasers as Antipersonnel Weapons", Judge Advocate General Sept. 1988, in "Blinding Weapons", 367.

88 See the discussion of Jean Pictet's "humanitarian" approach as evidenced in the work of the ICRC, *Les Principes du Droit International Humanitaire* (1966), cited in Kalshoven, "Golf Clubs", *op cit.,* p 378; and see generally H. Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering" (1994) 299 *IRRC* 98.

89 See Report of the ICRC for the Review Conference of the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Geneva, ICRC, 1994) 8.See *Customary International Law Vol. I Rules,* pp 240-1, note 23, detailing State practice in support of this approach). See also Bothe, Partsch and Solf, *New Rules*, *op cit*., p 196.

90 C. Greenwood, "Command and the Laws of Armed Conflict" (1993) 4 *The Occasional* 24; and see *Customary International Law Vol I Rules, op cit.,* pp 240-1, note 24 (detailing State practice in support of this approach).

91 ICRC, *Certain Conventional Weapons,* p 8; and see Greenwood, "Laws of Armed Conflict", 37, and Bothe, Partsch and Solf, *New Rules*, *op cit*., p 196.

92 See B. Carnahan and M. Robertson, "The Protocol on 'Blinding Laser Weapons': A New Direction for International Humanitarian Law" (1996) 90 *AJIL* 484.

highly subjective nature. The informal group of medical experts at the Conference on the Use of Certain Conventional Weapons in Lugano in 1976, explained in relation to the term unnecessary suffering: "that it seems impossible at the present stage of medical knowledge to objectively define 'suffering' or to give absolute values permitting comparison between human individuals". Therefore, in their view, "instead of 'suffering' the wound or injury caused by a weapon offered a better but still very complex way of defining the effect of that particular weapon ... it seemed preferable to use injury instead of suffering".[93]

The ICRC SirUS project, an attempt to quantify more fully the health side of the proportionality equation, mirrors this approach.[94] This project commenced in 1996 and is designed to provide information on the objective effects of weapons on health in order to allow States to review the legality of particular weapons in order to meet their obligations under Articles 35 and 36 of Protocol I. The proposals arising from the project to determine what constitutes superfluous injury or unnecessary suffering, specify a number of effects of weapons on humans that have not been commonly seen as a result of armed conflict over the last five decades.[95] The legality of a weapon or its use should then be judged in light of these effects.

It has been very difficult to achieve consensus over the years as to the military effectiveness or necessity part of the equation. Necessary is a relative term and requires a determination of "necessary for what". According to the 1868 St Petersburg Declaration, what is necessary in armed conflict is to disable the greatest possible number of men and no more in order to weaken the enemy forces. Superfluous injury results when means are used that inflict disablement or render death inevitable to an extent that offers no real advantage in achieving this objective.[96] Using this approach, military effectiveness is defined in terms of rendering the enemy *hors de combat*.[97] However, this approach is only valid when anti-personnel weapons are being considered[98] Weapons are used for a range of other objectives than to render the enemy *hors de combat* and their effectiveness in such cases must be determined by other criteria. Thus to determine the military effectiveness of a weapon you look at the primary purpose for which it was designed[99]

A number of experts at the Lucerne Conference on the Use of Certain Conventional Weapons in 1974 were of the view that military necessity in the context of weapons "included, besides their capacity to disable enemy combatants, such

93 See ICRC, Report of the Conference of Government Experts on the use of Certain Conventional Weapons, Lugano 1976, p 140.

94 The SirUS project originated from an ICRC symposium held in Montreaux in 1996 entitled "The Medical Profession and the Effects of Weapons". See generally, R. Coupland (ed), The SirUS Project: Towards a Determination of Which Weapons Cause Superfluous Injury or Unnecessary Suffering (Geneva, ICRC, 1997).

95 See ICRC, The SirUS Project and Reviewing the Legality of New Weapons, Background Paper, June 1999.

96 See Cassese, "Unnecessary Suffering", *op cit.,* p 17; and see the Report of Committee III on Conventional Weapons of the Diplomatic Conference that adopted Protocol I, Vol. 15 *Official Records,* CDDH/215/Rev 1, p 267, para. 21.

97 See Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols, op cit.,* 403.

98 See Bothe, Partsch and Solf, *New Rules*, *op cit.*, p 196

99 Fenrick, "New Developments", *op cit.,* 234.

other requirements as the destruction or neutralisation of enemy material, restriction of movement, interdiction of lines of communication, weakening of resources and, last but not least, enhancement of the security of friendly forces".[100] Kalshoven agrees, and points out that when a weapon that can be used for a range of purposes is being evaluated, the requirement of military necessity must be assessed in light of the practical circumstances in which it is to be used[101] The Fourth Protocol to CCW banning those "laser weapons, specifically designed, as their sole combat function, to cause permanent blindness", is an example of an approach to the regulation of weapons which can regulate their anti-personnel use but leave their operation in other circumstances covered by the general principle banning superfluous injury or unnecessary suffering.

The question of superfluous injury or unnecessary suffering and weapons was directly raised before the International Court of Justice (ICJ) in the *Nuclear Weapons Advisory Opinion*.[102] Nuclear weapons are not specifically outlawed, therefore, the issue fell to be determined under the general provisions of IHL. The difficulty, however, with the argument that nuclear weapons are unlawful due to the level of suffering and injury that they inflict on combatants is that it is doubtful, as we have seen, if the general principle in the Hague Regulations prohibiting superfluous injury or unnecessary suffering, per se outlaws any particular weapon. However, the Court described as a "cardinal principle" the rule prohibiting unnecessary suffering to combatants and was of the view that this principle outlawed certain weapons (although not nuclear weapons) irrespective of whether they were specifically prohibited by treaty or not.[103]

Other than this general statement little is added to the jurisprudence on the question of weapons by the majority opinion, other than the implication that if nuclear weapons are legitimate under *ius ad bellum* in extreme cases of self-defence, then the superfluous injury or unnecessary suffering test is either satisfied or irrelevant in such cases.[104]

ii. Mental element

The mental element for the above crimes involving combatants is as set out in Article 30 of the Statute of the ICC.[105] What is required is both 'intent' and 'knowledge' on the part of the perpetrator. It appears likely that the Court will interpret these words in accordance with the emerging jurisprudence of the ICTY on this point and that both guilty intent and recklessness will be included within the meaning of these words.[106]

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100 ICRC, Report of the Conference of Government Experts on the use of Certain Conventional Weapons, Lucerne 1974 p 9.

101 F. Kalshoven, "Arms, Armaments and International Law" *Receuil des Cour*s (1985-II) 183, 235.

102 *Nuclear Weapons* Advisory Opinion, *op cit.*, 26.

103 *Nuclear Weapons* Advisory Opinion, *ibid.*, 257.

104 See, however, the Dissenting Opinion of Judge Higgins p 586.

105 See above note 57 and accompanying text.

106 See above note 60 and accompanying text and see Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, pp 10-2.

Conclusion

The contribution of the international criminal justice system to the suppression of breaches of the provisions of IHL regulating the use of disproportionate means and methods of combat is in its very early days. The success or failure of this project clearly depends on a wide range of factors that have little to do with the clarity of the relevant provisions of the Statute of the ICC and the *Elements of Crimes*. The initial guidance in this area in relation to crimes involving the civilian population will be provided by the work of the ICTY.

The ICTY is currently developing its views on the complex interrelationship between direct attacks, indiscriminate attacks and disproportionate attacks directed at civilians and civilian objects. This body of jurisprudence will provide guidance to the ICC. As this paper has demonstrated, however, not only are there jurisdictional differences between these two bodies but significant areas of uncertainty remain in the interpretation of the relevant provisions of the Statute of the ICC and *Elements of Crimes* that will need to be worked out fully by the Prosecutor and the Court.

As for crimes involving combatants, prosecutions for these crimes (and indeed the mere adoption of the Annex to Article 8 (2) (b) (xx)) will mark a new chapter in the long history of individual criminal responsibility for war crimes and set a welcome precedent.

Chapter 22

International Legal Protections for Persons *Hors de Combat*

Sergei A. Egorov

Introduction

Throughout history, persons *hors de combat*, literally translated as those who are "out of the fight", have occupied a special place amongst categories of those requiring legal protection during international and non-international armed conflicts. Ancient and medieval history contain examples of military commanders ordering troops to spare soldiers defeated in battled and of other efforts to moderate the effects of war and even to punish those acting too brutal with the enemy. In 1762, Jean Jacques Rousseau reflected the philosophical underpinnings of these protections in 'The Social Contract or Principles of Political Right':

> "[War] then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers .... The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy and become once more merely men, whose life no one has any right to take."[1]

National leaders have issued declarations and international delegations have promulgated enactments identifying and protecting this class of individuals. Most recently, these efforts have culminated in Article 8(2)(b)(vi) of the Statute of the International Criminal Court (ICC), which criminalizes the deliberate attack against those who are *hors de combat* in the midst of an international conflict.

In devising Article 8(2)(b)(vi), the Preparatory Commission for the International Criminal Court (hereinafter "PrepCom") drew language from Article 23(c) of the Hague Regulations of 1897 and 1907. However, the PrepCom decided that Article 8(2)(b)(vi) should apply not only to scenarios covered in Article 23(c) but to the broader contexts covered by Articles 41 and 42 of Additional Protocol I of the Geneva Conventions of 12 August 1949 (hereinafter "Protocol I"), enacted in 1977.[2] Thus, the

1 Jean-Jacques Rousseau, *The Social Contract* Book I § IV Slavery (1762) (Translated by G.D.H. Cole), *available at* http://www.constitution. org/jjr/socon_01.htm#004>.

2 *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),1977, Arts. 41-42, 1125 U.N.T.S. 3.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 561-578.

PrepCom agreed that the terminology of Article 41 of Protocol I would be a correct "translation" of the language deriving from Article 23(c).[3]

The contours of the Article 8(2)(b)(vi) and its corresponding elements remain relatively undefined in the context of the ICC.[4] However, the concept of who is *hors de combat*, what protections such individuals are afforded, and to what extent these protections are limited have evolved considerably and are outlined in detail through the interplay of several international instruments.

Part II of this essay will trace the development of these concepts through legislative measures by highlighting the early attempts at codifying protections for those placed *hors de combat*. Part III, focusing on Articles 41 and 42 of Protocol I and the General Remarks that follow them, will discuss more recent provisions defining who is *hors de combat*, the protections afforded those who are *hors de combat*, and the limitations of such protections. With the drafting history as a backdrop, Part IV will review the conduct, *mens rea*, and the requisite nexus between the crime and the war that are required for conviction under Article 8(2)(b)(vi) of the ICC Statute.

I. Early Attempts at Codifying Protections for *Hors de Combat*s

Codifying protections for those who were *hors de combat* began in the nineteenth century with the Lieber Code in 1863. Promulgated by President Abraham Lincoln, the Lieber Code governed the conduct of the United States armed forces during the American civil war.

The Lieber Code expressly forbade Union troops to give no quarter, or, refuse to take prisoners. Efforts at codification at the international level followed, beginning with the first Geneva Convention of 1864, the Brussels Declaration of 1874, and the Oxford Manual of the Laws and Customs of War in 1880. These international efforts culminated in the Hague Peace Conferences of 1899 and 1907, convened on the initiative of the Russian government. The Hague Peace Conferences led to the drafting, among others, of the Hague Conventions respecting the Laws and Customs of War on Land and their annexed regulations ("Hague Convention").

Drawing heavily from provisions of the 1874 Brussels Declaration and the 1880 Oxford Manual which never came into force, Article 23(c) of the Hague Regulations of 1899 and 1907 forbids the killing or wounding of an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion. For several decades, the Hague Conventions remained the principal means of legal protection of persons placed *hors de combat* and the article's language remains intact in the new Article 8(2)(b)(vi) of the ICC Statute.

The adoption of the four Geneva Conventions of 1949 enhanced the legal protections of a number of categories of protected persons.[5] The definition of pro-

3 Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the ICC: Sources and Commentary* 185 (2003).

4 There is a considerable overlap between this offence as contained in Article 8(2)(b)(vi) of the ICC, Article 23(c) of the Hague Regulations, Article 8(2)(a)(i) of the ICC (Willful killing) and Article 8(2)(b)(xii) of the ICC (Declaring no quarter will be given).

5 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 (Geneva Convention I); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of

tected persons varies among the four Geneva Conventions. Article 4 of Geneva Convention III, which provides that persons protected by this Convention will be treated humanely when they "have fallen into the power of the enemy", however, implies Article 23(c) of the Hague Regulations.[6] Of note also, Article 4 of Geneva Convention IV defines protected persons as: "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[7]

In addition, the Geneva Conventions of 1949 extended the notion of war crimes to offences committed against persons *hors de combat* in time of internal armed conflict. Common Article 3(1)(a) of the Geneva Conventions provides that: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."

II. Articles 41 and 42 of Protocol I to the Geneva Conventions of 12 August 1949: Revisiting Protections Provided for Persons Categorized as *Hors de Combat*

In 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (hereinafter "Diplomatic Conference") adopted Protocol I, which relates to the protection of victims of international armed conflicts. Article 41(1) of Protocol I, perhaps regarded as the most authoritative definition of the principle, reads: "A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack." In the meaning of the Protocol I, "attacks", as defined in Article 49(1), refer to acts of violence against the adversary, whether done in offence or defence.[8]

In adopting the text of Article 41(1), the Diplomatic Confernece modified the language of Article 23(c) of the Hague Regulations, which concerns killing or wounding an enemy, in order to clarify that this norm prohibits the deliberate attack against persons *hors de combat* and not merely killing or injuring them as an incidental consequence of an otherwise justifiable attack.[9] Article 41(1)'s language recognizes

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Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85 (Geneva Convention II); Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (Geneva Convention III); and Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949) 75 U.N.T.S. 287 (Geneva Convention IV).

6 *See* International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* para. 1601 (1987)("Commentary").

7 *See* Geneva Convention I, *supra* note 5, arts. 5, 12, 14, 28 29, 32; Geneva Convention II, *supra* note 5, arts. 12, 16.

8 Commentary, *supra* note 6, para. 1606.

9 *See* Geneva Convention I, *supra* note 5, arts. 5, 12, 14, 28 29, 32; Geneva Convention II, *supra* note 5, arts. 12, 16.

the realities of modern warfare, where, in many cases, even civilians cannot be wholly shielded from military operations.[10] Such accidents are also to be expected on the battlefield itself, and the combatants are not necessarily responsible for them. Thus, Article 41(1) specifically prohibits deliberately targeting persons *hors de combat*.[11]

In the text of Article 41(1), the Diplomatic Conference also abandoned the term "enemy", as used in Article 23(c) of the Hague Regulations, replacing it with "person" to reflect that a person *hors de combat* can no longer be considered an enemy.[12] The reference to "person" as used in Article 41, as well as in Article 42, concerning persons parachuting from an aircraft in distress, mirrors the terminology employed in Part II of the Protocol.[13]

For example, Article 11 refers to "persons in the power of the adverse Party", and Article 8(a) refers to wounded and sick "persons".[14] Article 8(a) further clarifies that "person" encompasses both civilian and military personnel.[15] The language of Article 41(1) is sufficiently broad, protecting both regular and irregular combatants, those whose status appears unclear, and ordinary citizens.[16]

While the rule provides broad protections, both for combatants and civilians, it also imposes its obligations broadly. There are no exceptions, and respect for the rule is likewise imposed on the civilian populations, who like combatants, must also respect persons *hors de combat*.[17] Furthermore, protection extends beyond the period of combat, if necessary. As stated in Article 3(b) of Protocol I:

> the application of the Conventions and of this Protocol shall cease, in the territory of parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place therearfter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.[18]

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10 For an example of another article allowing for incidental loss of life, *see* Protocol I, *supra* note 2, art. 57(2)(a)(ii),(iii) (Precautions in Attack). This article requires all reasonable precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

11 Commentary, *supra* note 5, para. 1605.

12 Commentary, *supra* note 5, para. 1606. The word "enemy", however, remains in the title of Article 41.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the ICC* 187 (2003), *citing*, *UNWCC, LRTWC,* vol. III, p.60; 13 AD 254. Although predating Articles from Protocol I, a civilian in this case was found guilty of violating 'the laws and usages of war by willfully, deliberately and feloniously killing an American airman ... who had parachuted to earth ... in hostile territory and was then without any means of defence'. The unarmed airman had been forced to descend by parachute.

18 *See* Protocol I, *supra* note 2, art. 3(b).

A. Article 41(2) and Determining When Persons are Hors de Combat

As noted above, Article 41 generally prohibits attacks against those considered *hors de combat*. However, given the varied contexts of war, the Diplomatic Conference provided scenarios outlining when a person is *hors de combat* in the Article's subsections 2(a)-(c). Article 41(2) reads:

> A person is *hors de combat* if:
> (a) he is in the power of an adverse Party;
> (b) he clearly expresses an intention to surrender; or
> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
> provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

i. Article 41(2)(a): Is in the Power of the Adversary

During preparatory deliberations, the Diplomatic Conference determined that the language of Article 23(c) of the Hague Regulations, "surrendered at discretion", was not sufficiently close to Article 4 of the third Geneva Convention, "have fallen into the power of the enemy".[19] Thus, in drafting Article 41 of Protocol I, the Diplomatic Conference created a concrete link between the moment when an enemy soldier is no longer a combatant because he is *hors de combat* and the moment when he becomes a prisoner of war because he has "fallen into the power" of his adversary.[20] While this precise moment is not easily determined, the significance of the wording of sub-part (a), "he is in the power of an adverse Party", should be contrasted with the text of Article 23(c) of the Hague Regulations, which refers to "fallen into the power".[21]

In modern warfare, an attack by an air force can place enemy troops in its power without actually taking them into custody.[22] In other cases, land forces by virtue of superior fire power might place an adversary within their power and force them to cease hostilities without formally overrunning them.[23] Additionally, formal surrender is not always a realistic possibility given that the regulations of certain armies preclude any form of surrender even where all means of defence have been exhausted.[24] A defenceless adversary is *hors de combat* whether or not he has laid down his arms. Thus, by the use of the verb "is" rather than "fallen", Article 41(2) of Protocol I reflects that protection begins at the moment that a person is objectively within the power of the adverse party as opposed to formal capture or apprehension.[25]

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19 Commentary, *supra* note 5, para. 1601.

20 *Id.* at paras. 1603, 1612-13.

21 *Id.* at para. 1602.

22 *Id.* at 1612.

23 *Id.*

24 *Id.*

25 As reflected in the Commentary, *supra* note 5 at paras. 1614-1615, it should also be pointed out that not all members of the armed forces are combatants, including: medical and reli-

At the Diplomatic Conference some delegations considered that this situation was already covered by the third Geneva Convention.[26] If this is the case, this overlap arguably eliminated any gap in this protection whatever interpretation would be followed.[27] On the other hand, others considered that the third Geneva Convention only applied from the moment of the actual capture of the combatant, and that therefore the present provision constituted the only safeguard in the interim.[28]

Air warfare poses a unique situation as an aircraft is not considered to be in distress solely because its means of combat have been exhausted.[29] Article 42 of Protocol I, however, extends protection from the moment that the occupants parachute to save their lives.[30]

The purpose of Protocol I is not to regulate warfare at sea, which remains subject to customary international law.[31] Nonetheless, the text of Article 41(2) is sufficiently broad to cover any person rendered *hors de combat* at sea, regardless of whether they belong to one of the protected categories referred to in Article 13 of the second Geneva Convention, including the merchant marines when not engaged in hostilities.[32]

ii. Article 41(2)(b): Clearly Expressing an Intention to Surrender

According to Article 41(2)(b), a person is also considered to be *hors de combat*, if he clearly expresses an intention to surrender. In the context of land warfare, surrender is not bound by strict formalities, and, generally, a soldier wishing to surrender in combat lays down his arms and raises his hands. Additionally, he may wave a white flag, or emerge from shelter with hands raised.[33] If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons.[34]

In the air, it is generally accepted that a crew wishing to indicate their intention

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gious personnel, referred to in Article 43(2) of Protocol I; military personnel assigned to civil defence, as discussed in Article 67(1)(e); and persons who accompany the armed forces without actually being members thereof, referred to in Artice 4A(4) of the third Geneva Convention. These personnel, however, do not have the right to participate directly in hostilities. Therefore, they automatically fall under the present safeguards independent of the other protections to which they are accorded under the Geneva Conventions and Protocol I. Geneva Convention I, *supra* note 7, art. 24; Geneva Convention II, *supra* note 7, arts. 36, 37; Protocol I, *supra* note 3, art. 67. The same applies to any unarmed soldier, whether he is surprised in his sleep by the adversary, on leave or in any other similar situation.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at para. 1615.

30 *Id.*

31 *Id.* at para. 1617.

32 *Id.*

33 *Id.* at para. 1618.

34 *Id.*

to cease combat should do so by waggling the wings while opening the cockpit.[35] To indicate surrender at sea, fire should cease and the flag should be lowered.[36] Radio signals transmitted on international frequencies for call signs may supplement the aforementioned means of surrender, and no argument of military necessity may be invoked to refuse clear indications of unconditional surrender.[37]

iii. Article 41(2)(c): Incapacitated and Incapable of Self-Defence

Article 41(2)(c) provides protection to persons who are incapable of defending themselves at the time of an attack because they are unconscious or otherwise incapacitated due to wounds or sickness. This text provides more clarity to Article 23(c) of the Hague Regulations, which prohibits the killing or wounding of an enemy who no longer has the means of defence.[38]

Article 10 of Protocol I further emphasizes that all wounded, sick, and shipwrecked persons shall be respected and protected.[39] On this point, the rules of warfare and the basic philosophy of the founders of the Red Cross converge, emphasizing that the soldier who is rendered *hors de combat* by an injury or sickness is inviolable from that moment and shall be respected.[40] However, there is no obligation to abstain from attacking a wounded or sick person who is preparing to fire, or who is actually firing, regardless of the severity of his wounds or sickness.[41]

B. Article 41(2) and 41(3): Limiting the Protections Afforded to Those Categorized as Hors de Combat *Under Article 41*

Under Article 41(2) of Protocol I, any hostile act or an attempt to escape by one who is *hors de combat* gives the adversary the right to take countermeasures until the perpetrator of these acts is or should be recognized to be *hors de combat* once again.[42] Several actions, among others, may be considered to be hostile acts on the part of persons *hors de combat*. Such actions may include a person *hors de combat* destroying installations in their possession or their own military equipment; attempting to communicate with the Party to the conflict to which they belong, unless this concerns the wounded and sick who require assistance from this Party's medical service; any resumption of combat; or an act of perfidy.[43]

35 *Id.* at para. 1619.

36 *Id.*

37 *Id.*

38 *Id.* at para. 1620.

39 *Id.* (noting that "[t]he wounded and sick in the sense of Article 8(a) of Protocol I, are those persons who need medical care as a result of a trauma, disease or other physical or mental disorder or disability, and who refrain from any act of hostility. Shipwrecked persons in the sense of the same article are those persons who find themselves in peril at sea or in other waters, as a result of misfortune affecting them or the vessel or aircraft carrying them, and who refrain from any act of hostility.").

40 *Id.*

41 *Id.*

42 *Id.*at para. 1621.

43 *Id.* at paras. 1621-24.

The Party taking countermeasures against such acts must continue to apply the protections contained in Article 35(2) of Protocol I, prohibiting the infliction of superfluous injury and unnecessary suffering.[44] Moreover, any response should be proportionate to the threat posed.[45]

In addition, escape or an attempt at escape by a prisoner or any other person considered to be *hors de combat* justifies the use of arms for the purpose of stopping him.[46] However, the use of force is only lawful to the extent that the circumstances require it and it is only permissible to kill a person who is escaping if there is no other way of preventing the escape in the immediate circumstances.[47] It is prohibited to open fire as a preventive measure on persons who are *hors de combat* on the pretext that they have known intentions of escaping.[48]

Article 41(3) of Protocol I imposes an obligation to release persons *hors de combat* where unusual conditions of combat prevent their evacuation as described in Articles 19 and 20 of the third Geneva Convention.[49] Notably, the scope of Article 41(3) of Protocol I is more restrictive than its preceding two paragraphs, as it only applies to those "persons entitled to protection as prisoners of war" rather than all persons.[50]

The release envisioned by Article 41(3), of course, must be in the interests of the greater safety of the prisoner, as opposed to a means for a party to rid itself of a burden. It would not apply in many circumstances to the wounded or the sick who might run a greater risk by being released than remaining a prisoner.[51] Notwithstanding Articles 7 and 12 of the third Geneva Convention, this provision should not be interpreted as preventing the release of prisoners in the course of hostilities in which there are no chances of survivors.[52]

Most representatives of the Diplomatic Conference envisioned the phrase "unusual conditions of combat" to refer to the situation of long distance patrols, which are not equipped to detain and evacuate prisoners.[53] The requirement that all "feasible precautions" be taken to ensure the safety of released prisoners was intended to

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44 *Id.* at paras. 1621, 1623, 1631.

45 *Id.*at para. 1621 (noting that refusal to give quarter would never be a proportionate response).

46 *Id.*at para. 1623.

47 *Id.*

48 *Id.* (noting that "reference should be made to the corresponding provisions contained in Articles 91 to 94 of the third Geneva Convention.").

49 *Id.* at para. 1627.

50 *Id.* at para. 1626 (noting that if the Article is read in a literal sense, "the text applies equally to prisoners whose status is doubtful, as they are covered by the protection of the third Geneva Convention, pending clarification of their status by a competent tribunal"). *See also* Geneva Convention III, *supra* note 7, art. 5(2) *and* Protocol I, *supra* note 3, art. 45(1).

51 Protocol I, *supra* note 2, Part III, art. 41, General Remarks, para. 1626 (noting that "releasing a prisoner who would have virtually no chance of survival might amount to the equivalent of the refusal to grant quarter").

52 *Id.*at para 1627. Article 7 refers to the non-renunciation of rights of prisoners of war, and Article 12 provides that they are in the hands of the enemy Power, and not of the individuals or military units who have captured them.

53 *Id.* at para. 1625.

emphasize that the detaining Power, even in those extraordinary circumstances, was expected to take all measures that were practicable in the light of the combat situation.[54]

The text of Article 41(3) does not clarify at what level of authority decisions on release have to be taken.[55] It might be the commanding officer in the field, or the Party to the conflict itself that gives the appropriate instructions to this effect.[56] The Diplomatic Conference surmised that the Party to the conflict concerned would be competent to decide upon whom the responsibility should fall.[57]

C. Article 42 and Airborne Combatants Rendered Hors de Combat

Article 42 of Protocol I, which is designed to protect airmen who are *hors de combat*, is the logical and natural complement to the protections outlined in Article 41 and the basic principles established in Article 35. Article 42 reads:

> (1) No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
> (2) Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
> (3) Airborne troops are not protected by this Article.

The Commentary relevant to Article 42 are instructive in providing the article's contours as well as distinguishing it from other protections found in Protocol I. In drafting Article 42, a majority of the Diplomatic Conference considered that airmen in distress were comparable to the shipwrecked persons protected by the second Geneva Convention.

According to Article 42(2), the airman who parachutes from an aircraft in distress is considered to be temporarily *hors de combat* until the moment that he lands on the ground.[58] The main purpose of paragraph 2 consists of giving the airman an opportunity to surrender before he becomes a legitimate object of attack.[59] Unlike Article 41, the intent to surrender is presumed to exist for an airman whose aircraft has been brought down and any attack, therefore, should be suspended until the person concerned has had an opportunity of making his intentions known.[60]

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54 *Id.* (noting, for instance, that "a long distance patrol ... need not render itself ineffective by handing the bulk of its supplies over to the released prisoners, but it should do all that it reasonably can do in view of all the circumstances to ensure their safety").

55 *Id.* at para. 1628.

56 *Id.*

57 *Id.*

58 *See* Commentary, *supra* note 5, para. 1644 (noting that "the provisions of Article 41 fully apply to any person landing in territory controlled by an adverse Party, after parachuting from an aircraft in distress").

59 *Id.*

60 *Id.* (extending the presumption that one intends to surrender to a grounded airman, which is not contained in Article 41 of Protocol I); *see also id.* at para. 1648 ("A priori, fire

In addition, it often happens that airmen in distress do not actually land on the battlefield in an enemy controlled sector.[61] In such a case, they could be captured under similar conditions to those which pertain to other combatants, but altogether outside the zone of military operations.

Confronted with the likelihood that airmen could be at the mercy of a civilian population on the territory in which they land, the Diplomatic Conference concluded that the obligation to respect persons who are *hors de combat* applies equally to civilians and combatants.[62] Therefore, Contracting Parties of Protocol I must take all measures required for this purpose, particularly by instructing the civilian population in an appropriate manner and by giving realistic directives on the conduct that should be observed in these circumstances.[63] The same applies with respect to the police or any other armed force charged with imposing respect for domestic order.[64]

Airmen are equally entitled to be treated as prisoners of war from the moment of their capture or surrender.[65] The same applies if their status is doubtful, as set forth in Article 45(1) of Protocol I, or if the persons concerned are civilian air crews as reflected in Article 4(A)(5) of the third Geneva Convention. Indeed, civilians are entitled, at the very least, to the minimum guarantees laid down in Article 75.[66] Even, spies who are caught in the act cannot be punished without a previous trial as set forth in Article 30 of the Hague Regulations.[67]

Despite the presumption of surrender, two explicit exceptions qualify the presumption. The first is expressed in Article 42(2), by the phrase "unless it is apparent that he is engaging in a hostile act".[68] The Diplomatic Conference declined to define "hostile act"; however, Article 28(4) of Protocol I, for example, helps shed some light on the matter. Article 28(4) prohibits the use of medical aircraft, including helicopters, to search for the wounded, sick and shipwrecked, except by prior agreement with the adverse Party.

Thus, if a pilot is shot down, the Party to the conflict to which he belongs must, unless there is an agreement to the contrary, attempt to retrieve him *manu militari*.

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must not be opened on the ground against persons who have parachuted from an aircraft in distress, whether they land in or behind the enemy lines. These airmen are presumed to have the intention of surrendering, and all possible measures should be taken to enable this surrender to take place under appropriate conditions.").

61 Protocol I, *supra* note 3, art. 42, part III, General Remarks, para. 1645.

62 *Id.* at para. 1647.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 1647 n. 34. (noting that "the problem of uniform has sometimes led to a degree of confusion in this respect, particularly as airmen do not necessarily wear the same uniform as those of the troops on the ground. However, if airmen wear not their own but enemy uniform they are probably spies or saboteurs and therefore airborne troops who are not protected by this Article, though they are covered by the general rule of Article 41. This means that they are protected under the conditions specified in that article, but no further.").

68 The Diplomatic Conference declined to define what constituted a hostile act. *See Id.* at para. 1649.

If the Party attempts to retrieve him, this will undeniably constitute a hostile act if it occurs in territory under the control of the enemy. The rescue, however, cannot be viewed as a hostile act on the part of the pilot himself. The latter only loses his right to protection if he actively and knowingly participates in the rescue operation mounted on his behalf.[69]

Some argue that the transmission of distress signals by a pilot who has been brought down, does not in itself constitute proof that the person concerned does not intend to surrender because these signals are transmitted automatically when the pilot parachutes from the aircraft.[70] Additionally, if a plane is forced to land in enemy territory, the crew's instructions may oblige them to destroy the aircraft, but it is also the duty and the right of the adversary to try and prevent this, if necessary by force of arms. This destruction, therefore, would constitute a hostile act.[71]

The commentary on Article 42 of Protocol I highlights that the second exception to the general rule protecting airmen in distress is found in Article 42(3), which expressly excludes airborne troops.[72] The exception includes parachutists who are on a "special mission". The term "airborne troops" can have a wide range of interpretations and covers units of infantry dropped from the air, as well as groups of commandos instructed to penetrate behind the enemy lines, liaison officers, spies, technical experts accompanying materiel dropped by parachute, groups of saboteurs, or propagandists.[73]

This exception allows for open fire on airborne troops, either from the ground, or from an aircraft, during their descent by parachute.[74] The exception highlights that parachuting from an aircraft normally constitutes an attack, and not a response to distress.[75] In practice, it would be difficult to discern, during an airborne attack, when anti-aircraft batteries enter into play, between airborne troops leaving their aircraft in order to attack and parachutists leaving in distress, particularly when the event takes place in the same location as the attack.[76]

In addition, if the aircraft transporting airborne troops is brought down away from the target of the airborne attack, it will be difficult to distinguish, during their descent, these parachutists from the crew of any other aircraft in distress.[77]

Once on the ground, airborne troops are governed by Article 41 and not by Article 42. Thus, airborne troops at no point benefit from a presumption that they intend to surrender, and until rendered *hors de combat*, there is nothing preventing civilian populations from attacking them.[78] Nonetheless, all such persons and all

69 *Id.*

70 *Id.* at para. 1649, n. 38.

71 *Id.* at para. 1650; *see also* Commentary, *supra* note 5, para. 1622. (noting that troops destroying their own installations after surrendering can constitute a hostile act).

72 *Id.* at 1652-1654.

73 *Id.* at para. 1653.

74 *Id.* at para. 1652.

75 *Id.* (asserting that "the Diplomatic Conference noted that this exception applies even if the troops leave their aircraft because it is in distress.").

76 *Id.*

77 *Id.*

78 *Id.* at para. 1653.

other categories which may play a role in modern conflicts, including rescue teams entrusted with missions such as retrieving a pilot who has been brought down or liberating prisoners of war, are entitled to the guarantees of Article 41 from the moment that they are *hors de combat*.[79]

III. Criminal Liability for Killing or Wounding a Person *Hors de Combat* Under Article 8(2)(b)(vi) of the ICC

The Hague Regulations and the Additional Protocols and their corresponding General Remarks provide a textured analysis of who is considered *hors de combat* and will guide inquiries under Article 8(2)(b)(vi) of the ICC, which criminalizes "the killing or wounding of a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion".

However, to ascribe criminal liability under Article 8(2)(b)(vi) of the ICC, the prosecution must also establish that the perpetrator that killed or wounded a person who was *hors de combat* "was aware of the factual circumstances that established this status"; that "the conduct took place in the context of and was associated with an international armed conflict"; and, that "the perpetrator was aware of factual circumstances that established the existence of an armed conflict".[80] Focusing on Article 8(2)(b)(vi)'s requirements for conduct, the required *mens rea*, as well as the nexus between the crime and an armed conflict, the following sections will survey existing articles and case law, some predating Article 8(2)(b)(vi) of the ICC Statute, which may provide an understanding of the article's elements and serve as persuasive authority with respect to proving them.

A. Article 8(2)(b)(vi): The Required Criminal Conduct

The ICC Statute distinguishes between three aspects of the material elements, which may be described as a conduct, consequence and causation, and additional circumstances.[81] Conduct is described in the definition of the crime, and in this case consists of killing or wounding a person. Thus, consequences in this sense include all effects of the criminal conduct and must consist of harm that has actually occurred.

If a crime under international law requires a specific consequence, a causal link must exist between the perpetrator's conduct and the consequence, so that the concrete consequence can be seen as having been caused by the perpetrator.[82] Under customary law, the requirement of a causal connection between conduct and consequence is recognized as a precondition of criminality.[83]

79 *Id.* at para. 1654.

80 Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the ICC: Sources and Commentary* 185 (2003).

81 Gerhard Werle, *Principles of International Criminal Law* 97 (2005).

82 *Id.* at 98.

83 *Id.*

B. Article 8(2)(b)(vi): The Required Mens Rea

Under international criminal law, individual criminal responsibility requires a certain state of mind on the part of the perpetrator, which must accompany the act or omission as specified in the definition of the crime. The requirement of a mental element as a prerequisite for criminal responsibility is generally recognized.

Article 85(3) of Protocol I, which also criminalizes the act of attacking those who are *hors de combat*, is informative with respect to Article 8(2)(b)(vi)'s *mens rea* requirement. Article 85(3) of Protocol I, which creates criminal liability for attacking a person *hors de combat*, requires that (i) the acts must be committed 'willfully'; (ii) they must be carried out in violation of the relevant provisions of the Protocol; and (iii) they must cause death or serious injury to body or health. The same provision also requires 'knowledge' as a condition of criminal liability.

Thus, the provisions clearly require intent or at least recklessness (so-called dolus eventualis), which exists whenever somebody, although aware of the likely pernicious consequences of his conduct, knowingly takes the risk of bringing about such consequences. In criminal law 'knowledge' normally is part of 'intent' (dolus) and refers to awareness of the circumstances forming part of the definition of the crime.[84] In this instance, international rules require knowledge in the sense of awareness of a circumstance of fact, as part of criminal intent (dolus). Thus, Article 85(3)(e) makes it a crime to willfully attack a person 'in the knowledge that he is *hors de combat*'.[85] It is likely that the ICC will apply the principles reflected in Article 85(3) of Protocol I.

The Elements of Crimes relevant to Article 8(2)(b)(vi) explicitly require that the perpetrator have a subjective awareness of the circumstances rendering a person *hors de combat*; however, it does not explicitly ascribe a *mens rea* with the *actus reus* of killing or wounding that person. As stated in Article 30 of the ICC Statute, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime only if the material elements are committed with intent and knowledge. Applying these requirements to Article 8(2)(b)(vi) appears consistent with the article's placement in the ICC Statute[86] and prevailing international humanitarian theory and case law.[87]

Proving the requisite criminal intent presents an additional challenge. For obvious reasons, explicit manifestations of criminal intent are often rare in the context of criminal trials.[88] Thus, where admissions of knowledge and intent do not exist, the

84 *See* Antonio Cassese, *International Criminal Law* 57-58 (2003).

85 *Id.*

86 Article 8(2)(b)(vi) is almost immediately preceded by Article 8(2)(a)(i) (Willful killing).

87 *See* Antonio Cassese, *International Criminal Law,* 57-58 (2003). The author notes that where the statute leaves the required *mens rea* unstated, "it would seem appropriate to hold that what is required is the intent, or depending upon the circumstances, recklessness as prescribed in most legal systems of the world for the underlying offence."; s*ee also Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (TC), 15 May 2003, para. 341 (holding that with respect to the unsettled *mens rea* required for the crime of extermination "in the absence of express authority in the Statute or in customary international law, international criminal liability should be ascribed only on the basis of intentional conduct").

88 *Prosecutor v. Kayishema et al.,* Case No. ICTR 95-1-A, Judgment (AC), 1 June 2001,

ICTR and ICTY have generally inferred intent from facts and circumstances surrounding the act,[89] a practice likely to be followed in adjudicating intent and knowledge under 8(2)(b)(vi) of the ICC Statute as well.

With respect to the second of the three subjective elements, knowledge of the circumstances rendering a person *hors de combat*, objective proof of incapacitation or defenselessness, for example, may be sufficient to establish this element.[90] This assumes, however, that mitigating factors, which would preclude the attacker's awareness of these objective circumstances, are not present. Surrender, while somewhat more complex, may be inferred where objective proof of accepted customs surrounding surrender were exhibited by the victim and were obvious to the perpetrator at the time of the attack.[91]

For example, in the *von Ruchteschell* trial, one of the charges facing the accused was continuing to fire (on a vessel) after the enemy had indicated his surrender.[92] The central question with regard to this charge was whether there are generally recognised ways of indicating surrender at sea. Although there is no one agreed method of signaling a wish to surrender, there are a number of methods that are generally recognized: hauling down its flag; hoisting a white flag; surfacing in the case of submarines; stopping engines and responding to the attacker's signals; taking to life boats; at night, stopping the vessel and switching on its lights. The accused was found guilty.[93] Thus, objective presence of signals customarily used to surrender may provide a basis for the ICC judges to infer the knowledge required under Article 8(2)(b)(vi).

C. Article 8(2)(b)(vi): The Required Nexus Between the Crime and the Existence of an Armed Conflict, and the Perpetrator's Required Subjective Awareness of the Conflict

The purpose of the legal protections afforded to persons placed *hors de combat* by the Geneva Conventions is to safeguard them from the armed conflict, not the protection of people against crimes unrelated to the conflict, however reprehensible such crimes may be.[94] Thus, crimes under international law normally require the presence of additional circumstances, which play a key role in war crimes. So-called contextual circumstances or elements constitute the objective requirement that lend individual

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para. 159; *see also Semanza*, Judgment (TC), 15 May 2003, para. 313-314. *Prosecutor v. Ndindabahizi*, Case No. ICTR 2001-71-I, Judgment and Sentence (TC), 15 July 2004, para. 454.

89 *See, e.g., Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment (AC), 5 July 2001, para. 47 (noting that intent may be inferred for the crime of genocide); *Prosecutor v. Semanza,* Case No. ICTR-97-20-A, Judgment (AC), 20 May 2005, paras. 261-262 (citing *Jelisić*).

90 Article 8(2)(b)(vi) has a third subjective element, "the perpetrator was aware of factual circumstances that established the existence of an armed conflict". This will be discussed under the following subsection.

91 For examples of acknowledged modes of surrender see Commentary, *supra* note 5, para. 1619.

92 Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the ICC: Sources and Commentary* 185 (2003).

93 *Id.*

94 *Semanza*, Judgement (TC), 15 May 2003, para. 368.

acts an international dimension.

The Elements of Crimes relevant to Article 8(2)(b)(vi) require that "the conduct took place in the context of and was associated with an international armed conflict". Consequently, in order to establish a violation under the Geneva Conventions for killing or wounding persons placed *hors de combat* it is necessary to show the existence of what has been referred to in the jurisprudence of the *ad hoc* tribunals as a "nexus" between the alleged breach and the underlying armed conflict. In this regard, the humanitarian law jurisprudence of the *ad hoc* tribunals is illustrative.

To start, ICTY jurisprudence notes that an "armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[95] With respect to determining if a nexus exists between such a conflict and a crime, the *Tadić* decision, stated that a sufficient nexus would be present if "each of the alleged acts was ... closely related to the hostilities."[96]

The ICTY and ICTR have since produced a body of jurisprudence that defines when a nexus exists between the crime and the conflict. And while the *ad hoc* tribunals have named few factors that are required for a conflict to be "closely related" to crimes, they have identified a plurality of factors that courts may weigh as they see fit.

One of the few required factors that the tribunals have identified is that the conflict play a "substantial part" in the perpetrator's ability or decision to commit a crime, the manner in which he commits it, or the purpose for which the crime is committed.[97] The conflict does not, however, need to be a causal factor in the commission of the crime.[98] Moreover, it is not necessary that fighting take place either at the same time or the same place as the alleged crime.[99] Rather, it is sufficient that the crime be "closely related to the hostilities occurring in other parts of territories controlled by the parties to the conflict."[100]

As the Appeals Chamber of the ICTY stated in *Kunarac*:

> *[T]he existence of armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the offence], his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established ... that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.*[101]

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95 *Prosecutvor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. para. 573.

96 *Id.* at para. 573.

97 *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment (AC), 12 June 2002, para. 58.

98 *Id.*

99 *Id.* at para. 57; *Prosecutor v. Kunarac et. al.*, Case No. IT-96-23 & IT-96-23/1-T, Judgement (AC), 22 February 2001, (TC), para. 568; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement (TC), 29 November 2002, para. 25; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgement (TC), 7 May 1997, para. 573; *Prosecutor v. Čelebići*, (TC) para. 194.

100 *Tadić*, Judgement (TC) , 7 May 1997, para. 573.

101 *Kunarac*, Judgement (AC), 22 February 2001, para. 58.

Aside from this, the factors which courts may consider to determine whether a nexus is present are much richer. The first factor, which will be met for most crimes committed against persons taken *hors de combat*, is that the perpetrator himself be a combatant or closely associated with combatants.[102] The second factor is whether the crime committed furthered a party's goals within the armed conflict or whether the crime was carried out as a part of a party's policy.[103] Third, courts may weigh whether the victim is a member of the opposing party in the conflict.[104] Finally, courts may consider whether the crime is carried out within the context of the perpetrator's official duties.[105]

Despite their importance, no single factor, in and of itself, must be present to establish a nexus between the armed conflict and the criminal act. Rather, a Trial Chamber must carefully weigh the evidence bearing one or more of these in mind in order to make a determination on a case by case basis. Additionally, the perpetrator of a crime need not have the intent to participate in the relevant armed conflict, nor must the crime be part of an endorsed policy of a party to the conflict.[106] Neither does the crime need to advance a goal of a party to the conflict.[107]

A nexus is patently not present, however, when the only connection between the conflict and the crime is opportunism. The ICTR has held that, "the expression 'under the guise of the armed conflict' does not mean simply 'at the same time as an armed conflict' and/or 'in any circumstances created in part by the armed conflict.'"[108] Moreover, the mere presence of any one single factor is usually not sufficient either, as "the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one."[109]

The Trial Chamber judgement in *Semanza*, as quoted below, is illustrative of the process by which a Trial Chamber might go about to establish a nexus between an alleged crime and the armed conflict, particularly in situations where the perpetrator is not formally tied to the armed forces. While this judgment was concerned with the nexus between an alleged violation of international humanitarian law and an internal armed conflict, its analysis of the nexus between the violation and the armed conflict would also be relevant, *mutatis mutandis*, to a violation of the law of armed conflict and a conflict of an international nature.

> *518. In the Chamber's opinion, the ongoing armed conflict between the Rwandan government forces and the RPF, which was identified with the Tutsi ethnic minority in*

102 *Kunarac et al.*, Judgment (TC), 22 February 2001, para. 569; *Vasiljević*, Judgement (TC), 29 November 2002, para. 57; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement (TC), para. 65.

103 *Vasiljević*, Judgement (TC), 29 November 2002, para. 57; *Kunarac et. al.*, Judgement (AC) para. 59; *Semanza*, Judgement and Sentence (TC), 15 May 2003, para. 552; *Tadić*, (TC) para. 575. These factors do not suggest that civilians are exempt from criminal responsibility. They may be held accountable for killing or wounding persons *hors de combat*.

104 *Kunarac et al.*, Judgement (AC), 12 June 2002, para. 59.

105 *Id.*; *Ntagurera*, Case No. ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, para. 793.

106 *Blaškić,* (TC) para. 71; *Tadić*, Opinion and Judgement (TC), 7 May 1997, para. 573.

107 *Tadić*, Opinion and Judgement (TC), 7 May 1997, para. 573.

108 *Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 570.

109 *Id.*

Rwanda, both created the situation and provided a pretext for the extensive killings and other abuses of Tutsi civilians. The Chamber recalls that in this case the killings began in Gikoro and Bicumbi communes, shortly after the death of President Habyarimana, when the active hostilities resumed between the RPF and government forces. Civilians displaced by the armed conflict, as well as those fearing the increasing violence in their localities, who were mostly Tutsi, sought refuge at sites such as Mabare mosque, Musha church, and Mwulire Hill, or went into hiding, such as Victims A and B.

519. In the Chamber's opinion, certain civilian and military authorities, as well as other important personalities, exploited the armed conflict to kill and mistreat Tutsis in Bicumbi and Gikoro. Rwandan government soldiers and gendarmes played an active role in the attacks against the concentrated refugee populations at Musha church, Mabare mosque, and Mwulire Hill. The participation of armed soldiers and gendarmes in the massacres substantially influenced the manner in which the killings were executed. The evidence reflects that these attacks generally involved a number of armed soldiers, gendarmes, Interahamwe militiamen, and commune authorities. The involvement of military officials and personnel in the killings of local Tutsi civilians tied these killings to the broader conflict.

520. The Accused participated in these operations by gathering or bringing Interahamwe militiamen and soldiers to the attacks. He also worked in tandem with the soldiers and Interahamwe to identify and kill Tutsi civilian refugees. The Chamber also recalls that with soldiers and high ranking military and commune officials at his side, the Accused asked a crowd how their work of killing the Tutsis was progressing and encouraged them to rape Tutsi women before killing them.

521. The armed conflict also substantially motivated the attacks perpetrated against Tutsi civilians in Bicumbi and Gikoro. During the massacre at Musha church, the Chamber recalls, the Accused specifically sought out Rusanganwa, who was a prominent Tutsi, and questioned him about the RPF advance. When Rusanganwa did not provide any information, the Accused struck him with a machete contributing to his death. Moreover, as the RPF army advanced toward Bicumbi and Gikoro, the killings of Tutsi civilians in these two communes intensified. This is illustrated in particular by the Mwulire Hill massacre, where the refugees had successfully defended themselves between 8 and 18 April 1994 from daily attacks. The Chamber recalls, however, that on 18 April 1994, as the RPF army neared the commune, the Accused brought Interahamwe and armed soldiers to Mwulire Hill to participate in a massive assault, which decisively defeated the refugees' resistance and resulted in the massacre of most of the civilians there.

522. The Accused's participation in the military operations conducted against civilian refugees and, in particular, his attempt to elicit information concerning the advance of the enemy army reveal that his conduct was closely related to the hostilities. The Chamber therefore has no doubt that a nexus existed between the Accused's alleged offences and the armed conflict in Rwanda."[110]

110 *Semanza*, Judgement and Sentence (TC), 15 May 2003, para. 518-522.

While the *ad hoc* tribunals have employed an objective test to determine the presence of a nexus, the ICC PrepCom has added this subjective element to the Court's subject-matter requirements. As a common element of war crimes under Art. 8(2)(a) of the ICC Statute, the ICC requires not only that "[t]he conduct took place in the context of and was associated with an international armed conflict," but also that "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict."[111]

It is unclear how this latter subjective requirement will operate in practice, but the Working Group on the EOC clarified that under this rule the prosecution does not need to prove that the accused "made a legal evaluation of the existence of an armed conflict" or that the accused "was aware of the factual circumstances that made the armed conflict international or non-international."[112] In fact, in most circumstances it will suffice to prove the nexus objectively, since it will be very difficult in most conflicts to argue that a perpetrator was unaware of the surrounding conflict.[113]

Conclusion

The nature and conduct of war is evolving. For example, there are military operations against terrorists and emerging categories such as "unlawful combatants", which complicate making important determinations related to who is *hors de combat*. Existing legal regulations may be inadequate to cover all foreseeable permutations. It is likely that the task will fall to domestic and international criminal courts to make their decisions in the context of realities, which may not have been foreseen by the drafters of the present legal framework.

This assessment, of course, should be carried out mindful of the progressive evolution of international humanitarian law reflected in the spirit of the Martens clause: *"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."*[114] In applying these legal norms as well as customary international law, international and domestic courts should strive to create a body of jurisprudence that both ensures adequate safeguards for protected persons as well as offers clear guidance to combatants and civilians alike in the treatment of such individuals.

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111 ICC Statute, Art. 8(2)(a).

112 Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the ICC: Sources and Commentary* 21-22 (2003).

113 *Id.* at 22.

114 The *Martens Clause* has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. *See generally* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 Int. Rev. Red Cross. 125, 125 (1997). Both the Geneva Conventions of 1949 and the two Protocols additional thereto of 1977 restated the *Martens Clause*.

Chapter 23

Child Recruitment as a Crime under the Rome Statute of the International Criminal Court

Matthew Happold

Introduction

Children[1] have always participated in armed conflict.[2] Over the past few decades, however, the recruitment and use of child soldiers has become a matter of increasing international concern. There appear to be two reasons for this: an increase in the use of child soldiers, and a change in our perceptions of what childhood is and when it ends. Whatever the cause, however, the result has been a rapid development in the international law concerning children's participation in armed conflict.

The United Nations Secretary-General's Special Representative for Children and Armed Conflict's most recent report[3] estimated that some 250,000 children were serving as soldiers in the world in over 30 "situations of concern".[4] The Secretary-General, in his 2005 report to the Security Council on children and armed conflict,[5] listed 42 parties which were recruiting or using children in some eleven armed conflicts around the world.[6] Moreover, the roles which children have been called upon to change have played. Children have always participated in armed conflict. In the past, however, to a large extent adulthood and the ability to bear arms went together.[7] Today, this link no longer exists. The worldwide availability of cheap, lightweight, automatic weapons means that children can participate in combat on a far more equal footing with adult combatants than in any previous period.[8] Although children

1 This chapter will follow the convention of defining as children all persons under 18 years of age. See Article 1 of the Convention on the Rights of the Child, 1577 UNTS 3 (1989).

2 Recent discussions of children's participation in armed conflict include Rachel Brett and Irma Specht, *Young Soldiers: Why They Choose to Fight* (2004); Alcinda Honwana, *Child Soldiers in Africa* (2005); David M. Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (2005); and Peter Warren Singer, *Children at War* (2005). See also Coalition to Stop the Use of Child Soldiers, *Child Soldiers: Global Report 2004* (2004).

3 UN Doc. A/61/275 (17 August 2006).

4 *Ibid*, para. 11.

5 UN Doc. A/59/695-S/2005/72 (9 February 2005).

6 *Ibid*, Annex I. The conflicts listed were those in Burma, Burundi, Colombia, Côte d'Ivoire, the Democratic Republic of Congo, Nepal, the Philippines, Somalia, Sri Lanka, Sudan and Uganda.

7 See T.E. James, "The Age of Majority" (1960) 4 American Journal of Legal History 22.

8 See Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers; The Role of Children in Armed Conflict* (1994), at p. 3: "More children can be more useful with less training than ever before."

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 579-607.

continue to be used where their size and agility is particularly useful, for espionage, carrying communications and (more recently) de-mining, they now increasingly participate in hostilities as combatants.

Moreover, changes in society and in expectations have seen the age at which childhood ends and adulthood begins revised upwards. Although there is no definition of who is a child in the Fourth Geneva Convention of 1949, the text of the Convention indicates that, for its purposes, childhood ends at a person's 15th birthday.[9] Conversely, the 1989 Convention on the Rights of the Child defines a child as a person under the age of 18 years.[10] This view is by no means a universal one, particularly in the developing world, where school leaving ages, either *de facto* or *de jure*, tend to be lower and individuals enter the workforce earlier. Recent moves to push the minimum age of recruitment and participation in hostilities up to 18 do, however, owe much to this change of perception. The ability to bear arms is no longer considered to be a relevant criterion in assessing adulthood. Instead, persons below the age of 18 are not seen as sufficiently psychologically mature either to make an informed choice whether to participate in hostilities or to stand the peculiar stresses of combat.

International concern about the use of children in armed conflict has manifested itself in several ways. First, there has been a concerted effort to strengthen the legal standards restricting children's recruitment into armed forces and groups and their participation in hostilities. By seeking to improve the relevant treaty regime, however, this initiative has largely addressed itself to States. Much illegal recruitment of children is undertaken by non-State actors such as armed opposition groups.[11] Second, the issue has seen the increased involvement of the political organs of the United Nations, particularly the Security Council, which in 2005 established a "monitoring, reporting and compliance mechanism".[12] This surveys the activities of "parties" to armed conflicts, whether governments or armed groups. Thirdly, there has been a move to criminalisation; that is, to subject individuals who violate the international rules governing the recruitment and use of child soldiers to criminal sanction.

The most significant result of this last development has been the criminalisation of child recruitment in the Rome Statute of the International Criminal Court (the Rome Statute).[13] Indeed, the first defendant to be indicted by the International Criminal Court (the ICC) has been charged exclusively with child recruitment.[14] Despite this, however, uncertainties remain about the definition of the crime. This

9 In a number of articles an age limit of 15 is given: see Articles 14, 23, 24, 38 and 50, Geneva Convention (IV) relative to the Protection of Civilians in Time of War of August 12, 1949, 75 UNTS 973 (1950).

10 See footnote 1 above.

11 Of the 42 parties to armed conflicts listed in the UN Secretary-General's 2005 report (*op. cit.* note 5) only three are government armed forces, although a number of others are armed groups allied to their State's government.

12 SC res. 1612 (26 July 2005).

13 UN Doc. A/CONF.183/9* (1998), 2187 UNTS 90.

14 See *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06-2, 10 February 2006; and *Prosecutor v. Thomas Lubanga Dyilo*, Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), ICC-01/04-01/06-356, 28 August 2006.

chapter seeks to analyse the relevant provisions in the Rome Statute to elucidate better their meaning. In order to do so, attention will be paid not only to the provisions of the Rome Statute and the activities of the ICC, but also to the Special Court for Sierra Leone, the Statute of which includes a near-identical provision and where all the defendants appearing before the Court have been charged with child recruitment.[15]

Child recruitment is a crime within the ICC's jurisdiction whether committed in an international or a non-international armed conflict. As such, it appears in two provisions of the Statute: Article 8(2)(b) (other serious violations of the laws and customs of war applicable in international armed conflict) and Article 8(2)(e) (other serious violations of the laws and customs of war not of an international character). Save for the contextual element (which is covered elsewhere), the two provisions are substantially similar and are best treated together, as will be done here.

I. Child Recruitment in International Law

The recruitment and use of children in armed conflict was first specifically regulated in the two Additional Protocols of 1977.[16] Additional Protocol I (AP I), which applies in international armed conflicts, provides that:

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces...[17]

Additional Protocol II (AP II), applicable in non-international armed conflicts, rather more tersely states that: "children who have not attained the age of fifteen years shall neither be recruited in the armed forces nor allowed to take part in hostilities."[18] A similar provision, largely following the wording in AP I, was included in

15 See *Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa:* Indictment, Case No. SCSL-03-14-I, 4 February 2004; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao:* Corrected Amended Consolidated Indictment, Case No. SCSl-2004-15-PT, 2August 2006; *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*: Further Amended Consolidated Indictment, Case No. SCSL-2004-16-PT, 18 February 2005; and *Prosecutor v. Charles Ghankay Taylor*: Amended Indictment, Case No. SCSL-2003-01-I, 16 March 2006.

16 A number of provisions in GC IV make special provision for children: see *op. cit.* note 9. However, although the Convention concerns itself with the protection of children in situations of occupation or armed conflict and sets an age of fifteen as the end of childhood, it only restricts the recruitment of children into States' armed forces if they are protected persons, not because they are children. It says nothing about the conditions under which a State can recruit children of its own nationality into its armed forces. See Matthew Happold, *Child Soldiers in International Law* (2005), pp. 54-57

17 Article 77(2), Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (1977).

18 Article 4(2)(c), Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (1977).

the 1989 Convention on the Rights of the Child (the CRC).[19] Article 38 of the CRC provides, *inter alia*, that States Parties "shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities" and "shall refrain from recruiting any person who as not attained the age of fifteen years into their armed forces." At present, AP I has 167 parties and AP II 163,[20] whilst some 193 States are parties to the CRC.[21]

Recent years have seen considerable attempts to build upon these rather shallow foundations. In 1999, the International Labour Conference of the International Labour Organisation adopted ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,[22] which prohibits the forced or compulsory recruitment of children for use in armed conflict.[23] One year later, in 2000, the UN General Assembly adopted an Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (the OP).[24] The Protocol prohibits States Parties from accepting the voluntary enlistment of children under the age of 16 and prohibits the compulsory recruitment of all children.[25] States Parties to the OP are required to take all feasible measures to keep all children from directly participating in hostilities.[26] Armed forces distinct from the armed forces of a State are prohibited from recruiting any children.[27] Both treaties have been extensively ratified in a comparatively short length of time. There are presently 163 State parties to ILO Convention 182[28] and 110 parties to the OP.[29]

Action has also been taken at the regional level. The African Charter on the Rights and Welfare of the Child,[30] adopted in 1990, requires States Parties to take all necessary measures to ensure that no child takes a direct part in hostilities and refrain from recruiting any children into their armed forces. 39 African States are parties to the Charter.[31]

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19 Article 38, CRC.

20 See http://www.icrc.org/ihl.nsf/INTRO?OpenView (last visited 29 March 2007).

21 See http://www.ohchr.org/english/countries/ratification/11.htm (last visited 29 March 2007).

22 (1999) 38 ILM 1207.

23 For further discussion of the Convention, see Michael J. Dennis, "The ILO Convention on the Worst Forms of Child Labor" (1999) 93 AJIL 943; and Happold, *op. cit.* note 16, pp. 81–3.

24 GA res. 54/263 of 25 May 2000; (2000) 39 ILM 1285. For further analysis, see Michael J. Dennis, "Newly Adopted Protocols to the Convention on the Rights of the Child" (2000) 94 AJIL 798; Matthew Happold, "The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict" (2000) 3 YIHL 226; and Daniel Helle, "Optional Protocol on the Convention on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child" (2000) 839 IRRC 797.

25 Articles 2 and 3, OP.

26 Article 1, OP.

27 Article 4, OP.

28 See http://www.ilo.org/ilolex/english/newratframeE.htm (last visited 29 March 2007).

29 See http://www.ohchr.org/english/countries/ratification/11_b.htm (last visited 29 March 2007).

30 OAU Doc. CAB/LEG/24.9/49 (1990).

31 See http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm (last visited

In addition, customary international law at a minimum prohibits the recruitment of children under 15 years of age and their use to participate directly in hostilities.[32] As already mentioned, AP I and II have been widely ratified, and only two States[33] have not ratified the CRC. Moreover, whereas the provisions relating to children's participation in hostilities in AP I were the subject of extensive debate during the diplomatic conference that adopted the Protocol,[34] Article 77(2) of AP I was simply seen as the starting point for discussions during the negotiation of the CRC, even by States which were neither parties nor signatories to the Protocol.[35] In the meantime, Article 77(2) had been relied upon against non-parties to AP I.[36] Indeed, there is evidence that at least one non-signatory State considered that the restrictions on the participation of children in hostilities in AP I had, or should have, customary status.[37] In consequence, Article 77(2) of AP I can be seen as the *fons et origo* of a rule of international law which subsequently secured the general consent of States and was thereby transformed into customary law, whereas Article 38 of the CRC can be viewed as incorporating or giving recognition to a rule of customary international law that existed prior to the treaty.[38]

Subsequent developments confirm this analysis. The rule contained in Article 77(2) of AP I formed the basis of the war crime of child recruitment in the Rome Statute.[39] In 2004, the Appeals Chamber of the Special Court for Sierra Leone held that the prohibition on the recruitment and of children under 15 and their active participation in hostilities had crystallised as customary international law prior to the beginning of the Court's temporal jurisdiction in November 1996.[40] And in his

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29 March 2007).

32 For a more in-depth discussion, see Happold, *op. cit.* note 16, pp. 86-99.

33 Somalia and the USA, one of which (the USA) is a party to the OP.

34 See Happold, *op. cit.* note 16, p. 60.

35 See *ibid*, pp. 72-4 and 90.

36 Both the International Committee of the Red Cross and the United Nations Commission on Human Rights relied upon Article 77(2) in the 1980-8 Gulf War. However, AP I was not in force between Iran and Iraq. Iran had signed but not ratified the treaty, whilst Iraq had neither signed nor ratified it. See Christopher Greenwood, "Customary Status of the 1977 Geneva Protocols", in Astrid J.M. Delissen and Gerald J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (1991), pp. 101-2.

37 See the comments of Michael J. Matheson, then Deputy Legal Adviser, US State Department, in "The Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions" (1987) 2 American University JILP 415, at p. 421.

38 See Richard R. Baxter, "Multilateral Treaties as Evidence of Customary International Law" (1965-6) 41 BYBIL 275, at p. 277.

39 See Michael Bothe, "War Crimes", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), vol. I, p. 416.

40 *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2004-14-AR729E, Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, para. 17. The Court's reasoning cannot be seen as particularly compelling but, if for the wrong reasons, it came to the right result: see Matthew Happold, "International Humanitarian law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision

recent reports listing parties to armed conflicts recruiting or using children in armed conflicts in violation of their international obligations,[41] the UN Secretary-General has utilised the standards set out in the CRC as the minimum applicable to UN Member States, with non-State armed groups being assessed in accordance with the standard that children under age 15 shall not be recruited into armed forces or groups or used by them to participate actively in hostilities.[42] Moreover, the Security Council appears to have concurred with this categorisation, because it agreed that the parties on the Secretary-General's list were acting in violation of their international obligations.[43] The existence of a customary rule governing children under 15's recruitment and participation in hostilities seems incontestable; the only issue appears to be whether it prohibits their direct or active participation in hostilities, or whether the two standards amount to the same thing.[44]

II. Child Recruitment in the Rome Statute

Article 8(2) of the Rome Statute includes in its list of war crimes within the jurisdiction of the Court:

> (b) ... serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely the following acts:
>
> ...
>
> Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
>
> (e) ... serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely any of the following acts:
>
> ...
>
> Conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities.

In the ICC Elements of Crimes, the elements of the war crime of using, conscripting or enlisting children under Article 8(2)(b)(xxvi) are that:

> 1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.

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in *Prosecutor v Samuel Hinga Norman*" (2005) 18 Leiden JIL 283 at pp. 288-9.

41 See the Secretary-General's reports on children and armed conflict of 26 November 2002 (UN Doc. S/2000/1299); 10 November 2003 (UN Doc. A/58/546-S/2003/1053*); 9 February 2005 (UN Doc. A/59/695-S/2005/72); and 26 October 2006 (UN Doc. A/61/529-S/2006/826).

42 The Secretary-General stated that this was the standard set out in the CRC and AP II, as well as the Rome Statute. This conclusion, however, is problematic because the provisions of the three treaties are not identical. See text to footnote 83 below.

43 See SC res. 1460 of 30 January 2003 and SC res. 1539 of 22 April 2004.

44 See text to footnotes 85-107 below.

2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The elements of the war crime of using, conscripting or enlisting children under Article 8(2)(e)(vii) are very similar, being that:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

No more will be said about Elements 4 and 5 of each crime.

It is, however, worth emphasizing at this stage that the *chapeaux* to both Articles 8(2)(b) and 8(2)(e) describe the crimes listed therein as "serious violations of the laws and customs applicable in [international armed conflict/armed conflicts not of an international character], within the established framework of international law". Moreover, a similar provision appears in the Elements of Crimes: "The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict." These provisions appear to be clear indications that the drafters did not intend to create new law. At the least, it is suggested, the onus is on those arguing that Article 8(2) creates new criminal offences to prove their assertions. The presumption should be that Article 8(2) merely reflects international criminal law as it existed in 1998.

III. The Material Elements of the Crime

The wording of Article 8(2)(b)(xxvi) indicates that the crime of child recruitment can be committed in three different ways:

(a) by *conscripting* children under the age of 15 years into *national armed forces*;
(b) by *enlisting* them into *national armed forces*, and
(c) by *using* them *to participate actively in hostilities*.[45]

45 *Op. cit.* note 40, Dissenting Opinion of Justice Robertson, para. 5. See also s. 268.68 Criminal Code Act 1995, as amended by the International Criminal Court (Consequential Amendments) Act 2002 (Australia).

Similarly, the crime of child recruitment under Article 8(2)(e)(vii) can be committed:

(a) by *conscripting* children under the age of 15 years into *armed forces or groups*;
(b) by *enlisting* them into *armed forces or groups*, and
(c) by using them to *participate actively in hostilities*.[46]

We will consider each of the highlighted terms in turn.

a. Conscription and enlistment

Both Articles and the corresponding Elements distinguish between "conscripting" and "enlisting" children under 15 years of age. This contrasts with AP I and the CRC, which refer to "recruiting". Indeed, this was the term originally used, but it was replaced by "enlisting and conscripting" on the ground that the former term implied the existence of an active policy to have persons join the armed forces.[47] It is interesting to note that the original ICRC draft of what became Article 77(2) of AP I not only obliged parties to refrain from recruiting children under 15 but also from "accepting their voluntary enlistment"[48] but the latter phrase was deleted during the negotiations.[49] More recently, in his dissenting opinion in *Hinga Norman*,[50] Justice Robertson stated that: "'Recruitment' is a term which implies some active soliciting of 'recruits', i.e. to pressure or induce them to enlist: it is not synonymous with 'enlistment'."[51]

The ordinary meaning of "to enlist" is "to enrol on the 'list' of a military body; to engage as a soldier": "to conscript" means "to compel to military service by conscription; to enlist compulsorily".[52] On this basis, conscription occurs when recruits are compelled to enlist, if only by compulsion of law. A distinction has been made elsewhere between compulsory and forced recruitment[53] (ILO Convention 182 prohibits the "forced or compulsory recruitment" of children for use in armed conflict)

46 This convention has been followed in the indictment of Thomas Lubanga: see *op. cit.* note 14.

47 Herman von Hebel and Daryl Robinson, "Crimes within the Jurisdiction of the Court" in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), p. 118.

48 See Happold, *op. cit.* note 16, p. 60.

49 Although one might cavil as to whether AP I and the CRC really allow States to enrol under-15s into their armed forces as long as they don't "pressure or induce them to enlist". See Happold, *ibid*, pp. 64-5.

50 *Prosecutor v. Samuel Hinga Norman*, *op. cit.* note 40.

51 *Ibid*, Dissenting Opinion of Justice Robertson, para. 27.

52 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003), p. 377.

53 Whereas compulsory recruitment is lawful under domestic law, forced recruitment occurs when persons are enrolled into an armed force or group without legal sanction under the threat or by the use of force. In recent conflicts, for example, children have been forcibly recruited by being taken out of school or seized by troops at road checkpoints. See Happold, *op. cit.* note 16, pp. 8-15.

but this is not the case in the Rome Statute. The reference to conscription can be taken to apply to all forms of coerced recruitment, whether lawful under domestic law or not.[54] In general, enlistment can be both voluntary and coerced; although as "enlisting" is listed as an alternative to "conscripting" in both provisions, it may in this instance be intended to refer only to the acceptance of volunteers into armed forces and groups.[55] Accordingly, it appears that any form of enrolment of children under 15 years of age into national armed forces (under Article 8(2)(b)(xxvi)) or armed forces or groups (under Article 8(2)(e)(vii)), whether voluntary, compulsory or forced, and whether as the result of governmental policy, individual initiative or acquiescence in demands to enlist, falls within this element of the crime. This, of course, has the further implication that the consent of those enlisted does not provide a defence to the crime.[56]

b. National armed forces, armed forces and armed groups

A charge of enlistment or conscription under Article 8(2)(b)(xxvi) must concern a "national armed force". The 1949 Geneva Conventions (the GCs) contrast "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces" with "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict"[57] but do so without defining either category. However, Article 43(1) of AP I provides that:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Article 43(3) of AP I is also of interest, as it states that: "Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict." This would seem to suggest that recruitment of children who have not yet attained 15 years of age into such organisations, unless they fall within Article 43(1), is not *per se* criminal. The same might be said with regard to the militias, volunteer corps and organized resistance movements not forming a part of a Party's armed forces referred to in GC I and GC III.[58]

54 See *Prosecutor v. Lubanga*, Pre-Trial Chamber I, ICC, Décision sur la confirmation des charges, 29 January 2007, ICC-01/04-01/06-803, para. 246.

55 *Ibid*.

56 *Ibid*, para. 247.

57 See Article 13, Geneva Convention (I) for the Amelioration of the Condition of the Sick and Wounded in Armed Forces in the Field of August 12, 1949, 75 UNTS 31; and Article 4, Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949, 75 UNTS 135.

58 *Ibid*. See also Article 1 of the Regulations Respecting the Laws and Customs of War on Landed annexed to Convention (IV) Respecting the Law and Customs of War on Land,

In addition, the term also excludes under-15s recruited into non-State armed groups participating in international armed conflicts. The use of the word "national", it is argued, emphasises that the armed forces must be those of a State. The term was introduced into Article 8(2)(b)(xxvi) to assuage concerns among Arab States that otherwise the participation of Palestinian youth in the *intifada* would be criminalised.[59] If correct, this would seem to be a significant omission, given that a modern trend is that conflicts are "internationalised" when one State exercises "overall control" over insurgents in another State, even though those insurgents do not form part of the first State's armed forces.[60] However, as the nation is an entity distinct from the State, one might say that "national armed forces", as a concept, extends beyond States' armed forces to include the armed forces of national liberation movements,[61] governments in exile and, perhaps, rebels which have been recognised as having belligerent status.

In *Prosecutor v Lubanga*, however, Pre-Trial Chamber I went rather further. The Chamber made reference to Article 43 of AP I, to the ICRC commentary on that provision, and to Article 1 of the Regulations annexed to Hague Convention IV of 1907. The Chamber then stated that:

> Le cadre du conflit armé international n'est pas uniquement limité à l'utilisation de la force entre deux Etats mais comprend également certaines situations dans lesquelles des parties au conflit peuvent être des forces ou groupes armés organises. La question soulevée ici est celle de savoir si l'adjectif "*nationales*" qui caractérise le terme des "*forces armée*" limite la portée de l'application de cette disposition à des forces armées "gouvernamentales".[62]

The Chamber then purported to apply Articles 31 and 32 of the Vienna Convention on the Law of Treaties[63] to the issue. The ordinary meaning of the adjective "national", it considered, did not restrict its use to governmental armed forces. In support of this view, the Chamber referred to the jurisprudence of the ICTY with regard to the definition of "protected persons" in Article 4 of GC IV, which interpreted the requirement that a protected person be of a different nationality than the party into whose hands he or she has fallen as referring not to legal nationality but to ethnicity and

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(1908) 2 AJIL Supplement 9, which provides that the "laws, rights and duties of war" apply not only to armies but also to militia and volunteer corps which are commanded by persons responsible for their subordinates; have fixed distinctive emblems recognisable at a distance; carry arms openly, and conduct their operations in accordance with the laws and customs of war.

59 See Michael Cottier, "Article 8: War Crimes", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, p. 261; and von Hebel and Robinson, *op. cit.* note 47, p. 118.

60 The trend originates in the *Tadić* judgment of the ICTY: see *Prosecutor v Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, para 80-149.

61 See Article 1(4), AP I. However, few organisations today are generally recognised as having such status.

62 *Op. cit.* note 54, para. 275.

63 (1969) 1155 UNTS 331.

allegiance.[64] The Chamber also considered that interpreting the term "national" as meaning "governmental" would be contrary to the object and purpose of the Rome Statue, which it found encapsulated in the fourth paragraph of the Statute's preamble, in which the parties to the Statute affirmed "that the most serious crimes of concern to the international community as a whole must not go unpunished". For the Chamber:

> considerer que le term "nationales" signifie "gouvernamentales" pourrait amener le juge à un véritable paradoxe. En effet, il serait amené à considerer qu'un auteur presume peut être tenu pour responsable s'il appartient a une Partie au conflit qui est rattachée à un Etat (les forces armées d'un Etat, à l'instar des UPDF) mais qu'il ne serait pas poursuivi s'il appartenait à une partie au meme conflit qui serait qualifée de group armé (telle que les FPLC).'
>
> ...
>
> 'De fait, des considerations élémentaires d'humanité et de bon sens redent absurde que le crime d'enrôlement ou de conscription d'enfants de moins de 15 puisse engager la responsabilité de Thomas Lubanga Dyilo uniquement dans le cadre d'un conflit interne du seul fait que les FPLC, en tant que force armée, ne pourrait être qualifiées de "forces armées nationales" au sens de l'article 8-2-b-xvxvi du Statut. [65]

In consequence, the Chamber held that the term "national armed forces" in Article 8(2)(b)(xxvi) was not limited to States' armed forces but included groups such as Lubanga's FPLC.

It might be thought, however, that the Pre-Trial Chamber's conclusions virtually denude the term of meaning. More specifically, the Pre-Trial Chamber's interpretation ignores the fact that Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) distinguish between "armed forces" and "armed groups". Indeed, it seems to collapse the latter category into the former. Moreover, although it mentioned Article 43 of AP I and Article 1 of the Hague Regulations,[66] the Chamber failed to appreciate that they also embody the distinction between armed forces and other armed groups (militia, volunteer corps, organised resistance movements, paramilitary and other armed law enforcement agencies), as do Article 13 GC I and Article 4 GC III. It is incontestable that a narrower interpretation determines whether conduct is criminal or not by reference to the character of the armed conflict but international humanitarian law has always made a distinction between international and non-international armed conflicts. Although it might well be said that those negotiating the Rome Statute inserted, even reinforced, the distinction for no good reason, it does not seem that they did so for no reason.[67] To require that the law be logical seems to miss the point. It was drafted as it was in response to the "felt necessities of the time".[68]

In any case, it might be questioned whether the gap in the law identified by

64 See *Tadić*, *op. cit.* note 60, paras 164-6 and *Prosecutor v. Delalić* et al., Case No. IT-96-21-A, Appeals Chamber, ICTY, Judgement, 20 February 2001, paras 56-84;

65 *Op. cit.* note 54, paras 282-4 (paragraph numbers omitted).

66 See text to footnotes 57 and 58 above.

67 See text to footnote 59 above.

68 Oliver Wendell Homes Jr., *The Common Law* (1881), p. 1.

Pre-Trial Chamber I is as serious as it is said to be. It is only necessary to show that recruitment was into a national armed force if it is alleged that children were enlisted or conscripted, rather than used to participate actively in hostilities. Commanders of armed forces and groups which are not national armed forces behave criminally if they knowingly use children under 15 years of age to participate actively in hostilities in international conflicts.[69]

The conscription and enlistment of children under 15 years into armed groups, however, undoubtedly is criminal in non-international armed conflicts. There are a wide variety of "armed groups". Some mirror government armed forces in their structure and discipline; others differ little from bands of brigands. Article 1(1) of AP II refers to "dissident armed forces or other organized armed groups ... under responsible command", which seems to require some form of hierarchical organisation. In *Prosecutor v. Tadić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia's definition of an internal armed conflict required that the fighting be with or between "organized armed groups".[70] In *Prosecutor v. Milosevic*, it was argued that "the KLA [Kosovo Liberation Army] did not constitute a sufficiently organised armed group under responsible command or an organised military force".[71] The ICTY Trial Chamber, however, found that:

> there is in fact a sufficient body of evidence pointing to the KLA being an organised military force, with an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.[72]

On the basis of these findings, it concluded that the *Tadić* test had been met. In particular, it does not appear that such groups must control territory,[73] nor need they act under the direction of an organised civil authority.[74]

The practice of the International Criminal Court so far has followed that of the

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69 Recruitment of under-15s into armed groups during an international armed conflict might also be illegal because they would be unprivileged belligerents not entitled to participate in hostilities. Indeed, by participating in the activities of such groups and absent any defence, under-15s might themselves be criminally liable. See, for example, US v Omar Ahmed Khadr: Charges and Specifications, 2 February 2007, available at: http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf (last visited 29 March 2007). No such charges, however, can be brought before the ICC, as the Court has jurisdiction neither over such offences nor over persons under the age of 18 at the time of the alleged commission of the crime. See Article 26 of the Rome Statute.

70 *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. See also *Prosecutor v. Akayesu*, Case No. ICTR-96-1-T, Trial Chamber, ICTR, Judgement, 2 September 1998, para. 620, where the Trial Chamber referred to "armed forces organized to a greater or lesser extent".

71 *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, Trial Chamber, ICTY, 16 June 2004, para. 23.

72 *Ibid*.

73 *Ibid*, para. 36. See also article 8(2)(f) of the Rome Statute, which, in distinction to Article 1(1) of AP II, includes no such requirement.

74 *Ibid*, para. 34.

ad hoc tribunals. Indeed, Article 8(2)(f) of the Rome Statute, which provides that Article 8(2)(e) only applies in situations of "protracted armed conflict between governmental authorities and organized armed groups or between such groups", largely reproduces the *Tadić* test. In the arrest warrant for Joseph Kony,[75] issued by Pre-Trial Chamber II, it was alleged that the Lord's Resistance Army "is organised in a military-type hierarchy and operates as an army". The arrest warrant for Thomas Lubanga,[76] issued by Pre-Trial Chamber I, referred to the UPC/FPLC as "a hierarchically organised armed group". In its decision confirming the charges against Lubanga, Pre-Trial Chamber I had to determine whether an armed conflict existed in Ituri at the relevant times. In considering the existence of an internal armed conflict in the period between June and December 2003, it referred to: "la nécessité que les groupes armés en question aient la capacité de concevoir et mener des operations militaries pendant une période prolongée."[77]

A problem might be thought to arise because, unlike government armed forces, armed opposition groups do not always keep formal records of persons enrolled into their ranks. In practice, however, this is unlikely to cause difficulties. Except for family members, any person associated with such a group can be assumed to be a member, not least because by associating with the group they are aligning themselves in opposition to their Government.

It might be argued that one cannot be convicted for using under-15s to participate actively in hostilities without having first enlisted or conscripted them into a national armed force or group. However, the disjunctive wording of the provision strongly suggests against such an interpretation. The distinction between the three ways of committing this material element of the offence may rather go to sentence. This is the approach taken, for example, in the Australian implementing legislation, which imposes a penalty of imprisonment of ten years for enlisting, 15 years for conscripting and 17 years for using an under-15 year old to participate actively in hostilities.[78] In addition, enlisting and conscripting might be thought to be crimes which continue until such time as a recruited child is demobilised or attains the age of 15. Certainly, this was the view of Pre-Trial Chamber I in *Prosecutor v. Lubanga*.[79] Such an interpretation would have obvious implications for the ICC's temporal jurisdiction.[80] However, it might perhaps be argued that Article 8(2)(b)(xxvi) and 8(2)(e)(vii) refer to the act of conscripting or enlisting a child under 15 into an armed force or

75 Situation in Uganda: Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, para. 5.

76 *Op. cit.* note 14, p. 4.

77 *Op. cit.* note 54, paras 233-4.

78 *Op. cit.* note 45.

79 *Op. cit.* note 54, para. 248.

80 The ICC has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute: 1 July 2004. Moreover, if a State becomes a party to the Statute after its entry into force, the Court only has jurisdiction with respect to crimes committed after the entry into force of the Statute for that State (that is, the first day of the month after the 60th day following the deposit of its instrument of ratification) unless it makes a declaration accepting the jurisdiction of the Court in relation to the crime in question. See Articles 11, 12(3) and 126 of the Rome Statute.

group;[81] that is, to his or her induction into the organisation, rather than to the child's subsequent use as a soldier.

c. Active participation in hostilities

AP I and the CRC prohibit children under 15 from taking "a direct part in hostilities". Conversely, AP II prohibits children under 15 from taking (any) part in hostilities. The African Charter on the Rights and Welfare of the Child is broader in scope in that its provisions apply to all children but only prohibits their direct participation in hostilities. ILO Convention 182 simply refers to the "forced or coerced recruitment of children for use in armed conflict". The OP requires State parties to "take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities" and prohibits all use of children in hostilities by non-State actors. Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), however, use rather different terminology, criminalising the use of children under 15 "to participate actively in hostilities".[82] This is also the standard which the Secretary-General and, by implication, the Security Council have held applicable to non-State armed groups although, confusingly, the Secretary-General has stated that it is the standard set out in the CRC and AP II, as well as in the Rome Statute.[83]

As a result, the question arises of what "to participate actively in hostilities" entails. Is it the same as taking a direct part in hostilities, with direct and active participation in hostilities being synonymous; or is all participation active, so that active participation means taking any part in hostilities?

Article 43(2) of AP I attributes the right to participate directly in hostilities to members of the armed forces of a party to a conflict. The phrase also appears in Article 51, dealing with the protection of the civilian population against the effects of hostilities, paragraph 3 of which provides that: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[84] Commenting on Article 51(3), the ICRC commentary states:

> In general, the immunity afforded to civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e., that they do not become combatants on pain of losing their protection. Thus, "direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.[85]

Putting matters more concretely, taking a direct part in hostilities means:

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81 See the *chapeaux* to Articles 8(2)(c) and 8(2)(e), which refer to "the following acts".

82 As does the Statute of the Special Court for Sierra Leone, Article 4(c) of which reproduces Article 8(2)(e)(vii) of the Rome Statute.

83 See text to note 43 above.

84 Article 13(3) of AP II is in similar terms.

85 Yves Sandoz, Christoph Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p. 619. See also *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber, judgement, 5 December 2003, para. 48.

> that the person in question performs warlike acts which by their nature of purpose are designed to strike enemy combatants of materiel; acts, therefore, such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying enemy war materiel, and so on.[86]

On this reading, taking a direct part in hostilities means taking part in combat. It does not include such activities as the gathering or transmission of military information, the transportation of arms and munitions or the provision of supplies. Consequently, the use of children in such activities is not prohibited in AP I or the CRC.

It is doubtful whether such a rule is broad enough to provide children under 15 with effective protection from the acts of the forces of an adverse party. First, the use of children for the gathering and transmission of military information can place them in danger, if they fall into enemy hands, of being accused of espionage and treated as spies.[87] It appears that children are commonly used for such tasks.[88] Secondly, despite Article 51 of AP I's insistence that civilians should not be objects of attack unless and for such time as they take a direct part in hostilities,[89] instances spring to mind where for adverse forces not to target civilians who were taking a part, but not a direct part, in hostilities, would be highly improbable; for example, if civilians were being used to transport munitions up to the front line for use by the troops fighting there. AP II, on the other hand, by prohibiting children under 15 from taking any part in hostilities, would seem to prohibit them from not only taking part in combat but also being involved in such activities as the obtaining and communication of militarily sensitive information and the transportation of munitions or other materiel, as well as from acting as sentries or spies.[90]

The question of what "active" participation in hostilities entailed was raised in the Preparatory Commission for the ICC. Some delegations wanted the term clarified in the Elements of Crimes. Others argued that it was already sufficiently clear, as the question had already been answered.[91] At the session of the Preparatory Committee immediately preceding the Diplomatic Conference at Rome, a footnote was inserted explaining what was meant by the terms "use and "participation". The footnote provided that:

> The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, the use of children in a direct support function

86 Frits Kalshoven, *Constraints on the Waging of War* (1st edn., 1987).

87 See Article 46, AP I.

88 As Cohn and Goodwin-Gill state: "A Zimbabwean officer who fought against the Smith regime explained it simply: children can move freely and are not instantly suspected of spying and supplying.": see Cohn and Goodwin-Gill, *op. cit.* note 8, at p. 96.

89 Article 51(2) and (3), AP I.

90 Sandoz, Swinarski and Zimmermann, *op. cit.* note 85, p. 1380.

91 Dörmann, *op. cit.* note 52, p. 376.

> such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology.[92]

On this interpretation, active participation in hostilities is far broader than taking a direct part in hostilities. Indeed, it seems identical to taking part in hostilities *per se*.

To add to the confusion, the concept of active participation in hostilities has a history preceding the phrase's use in the Rome Statute. Common Article 3 of the 1949 GCs protects; "Persons taking no active part in hostilities". General Assembly resolution 2675 on the basic principles for the protection of civilian populations in armed conflicts[93] affirms the principle that: "In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in hostilities and civilian populations." In *Tadić*, the Appeals Chamber of the Criminal Tribunal for the former Yugoslavia stated that resolution 2675 was declaratory of customary international law regarding the protection of civilian populations in armed conflicts of any kind; the customary law relating to internal armed conflicts protects those who do not (or no longer) take an active part in hostilities.[94] On this reading active participation would seem to be synonymous with direct participation. Both AP I and II distinguish between the civilian population and persons taking a direct part in hostilities. Civilians enjoy general protection against the dangers arising from military operations and are not lawful objects of attack unless and during such time as they take a direct part in hostilities.[95] This, indeed, has been the view of the International Criminal Tribunal for Rwanda. The Trial Chamber in *Akayesu* held that the term "direct part in hostilities" had evolved from the term "active part in hostilities".[96] Similarly, the Trial Chamber in *Rutaganda* equated persons taking no active part in hostilities to persons taking no direct part in hostilities and, following the ICRC commentary, concluded that: "To take a 'direct' part in hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[97]

Accordingly, there appear to be two interpretations of what taking an active part in hostilities means: one articulated during the negotiation of the Rome Statute, the other the product of existing treaty and customary law. The first interpretation gives rise to a problem in that it means that the crime of child recruitment under the Rome Statute is wider than the prohibition on child recruitment in AP I and the CRC and, possibly, under customary international law. In other words, individual criminal liability is not coterminous with State responsibility, even when an offender is acting as an agent of a State. This seems unsatisfactory although, in principle, not impossible.

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92 Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, at p. 21.

93 GA res. 2675 (XXV) of 9 December 1970.

94 *Prosecutor v. Tadić, op. cit.* note 70, paras 111-9.

95 See Article 50 AP I and Article 13, AP II.

96 *Prosecutor v. Akayesu*, *op. cit.* note 70, para. 629.

97 *Prosecutor v. Rutaganda*, Case No. ICTR-1993-3-T, Trial Chamber, judgment, 6 December 1999, paras 99-100. See also *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, judgement, 27 January 2000, paras 276-9; and *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, judgement, 15 May 2003, paras 363-6.

Adoption of the second interpretation, however, would align State responsibility and international criminal liability for the recruitment and use of children.

Consequently, one must ask the question: which interpretation is the one adopted in the Rome Statute? The Rome Statute being a treaty, one might expect to find the answer by application of the rules on treaty interpretation. Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which are generally seen as reflecting customary international law,[98] provide, in relevant part, that

> *Article 31 General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> ...
>
> 3. There shall be taken into account, tighter with the context:
>
> ...
>
> any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> *Article 32 Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

The footnote would seem to be preparatory work and, as such, a supplementary means of interpretation, resort to which can only be had in specific and limited circumstances. By contrast, the equation of active with direct participation results from treaty and customary rules already binding on the parties to the Rome Statute at the time of its conclusion, and so should take priority as "relevant rules of international law applicable in the relations between the parties". One might argue that the footnote establishes that a special meaning should be given to the term for the purposes of the Statute. However, a counterargument could also be made that Article 31(4) cannot be used to elevate preparatory work from its subordinate status; it must be the treaty itself that indicates that a term has a special meaning and, in this case, the

98 See *Territorial Dispute* (Libyan Arab Jamahiriyia/Chad), judgment, ICJ Reports 1996, p. 4 at para. 41; *Oil Platforms* (Islamic Republic of Iran/USA), preliminary objections, judgment, ICJ Reports 1996, p. 803 at para. 23; and *Kasikili/Sedudu Island* (Botswana/Namibia), judgment, ICJ Reports 1999, p. 1045 at para. 18.

footnote was not retained in the adopted text.[99]

It might also be recalled that the *chapeaux* to Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) describe the crimes thereafter listed as "serious violations of the laws and customs applicable in [international armed conflict/armed conflicts not of an international character], *within the established framework of international law*".[100] This description appears in the text of the treaty.[101] One might consider it a strong indication that the concept of active participation in hostilities should be interpreted so as to conform to its definition in existing international law, rather than extending it.

Given the recent adoption of the Rome Statute, there is a tendency to emphasise the views of those engaged in the negotiations as to what the treaty means, not least because many of the commentators on the Rome Statute were also involved in its negotiation. However, once a treaty has been adopted those who negotiated it are in no more privileged position than any other interpreter. The rules on treaty interpretation give only a subsidiary role to the negotiating history and still less to the subjective recollections of the negotiators. Primacy is given to the treaty text. With regard to multilateral treaties, where dozens of States participated in the negotiations leading to their adoption, there are cogent policy reasons for taking an objective approach to its interpretation.[102] Indeed, one might argue that such an approach is particularly apposite with regard to the Rome Statute because a subjective approach would be unfair to defendants, who are not "repeat players" familiar with the culture of the Court.[103]

In its recent decision confirming the charges against Thomas Lubanga, however, Pre-Trial Chamber I took a more expansive approach. The Chamber held that active participation in hostilities included not only direct participate in hostilities (that is, engaging in combat) but also those activities set out in the Preparatory Committee's footnote:[104]

> La Chambre estime cependant que les articles 8-2-b-xxvi et 8-2-e-vii sont applicable dans le case de l'emploi d'enfants pour garder des objectifs militaries, tells que les quartiers militaries des différentes unités des parties au conflit, ou pour protéger l'intégrité physique des commandants militaires (en particulier lorsque les enfants sont utilisés comme garde du corps). En effet, ces activités n'ont un lien avec les hostilités dans la mesure òu: i) les commandants militaries sont en mesure de prendre toutes les décisions nécessaires à la conduite des hostilités; ii) elles ont un impact direct sur le niveau de resources logistiques et sur l'organisation des opérations

99 Nor was it reintroduced into the Elements of Crimes.

100 Emphasis added. It might also be recalled that a similar provision appears in the Elements of Crimes.

101 So it should be seen as part of the context in which the provisions are to be interpreted: see Article 31(2), VCLT.

102 See the arguments made with regard to the interpretation of domestic statutes in Jeremy Waldron, "Legislative Intent and Unintended Legislation", in Andrei Marmor, *Law and Interpretation* (1992).

103 Indeed, the Rome Statute specifically requires that in cases of ambiguity, the definition of a crime should be interpreted in the manner which favours the accused. See Article 22(2), Rome Statute and text to footnote 112 below.

104 *Op. cit.* note 54, para. 257.

> nécessaires pour l'autre partie au conflit lorsque cette dernière a pour but d'attaquer de tels objetifs militaires.[105]

The Pre-Trial Chamber, however, came to this conclusion without either reference to the jurisprudence of the ICTY and ICTR, or any consideration of the rules on treaty interpretation.[106] One might recall that the Pre-Trial Chamber's legal determinations are only provisional[107] and hope that the issue will receive full consideration before the Trial Chamber.

d. Persons under the age of 15 years

Those persons enlisted, conscripted or used to participate actively in hostilities must have been under 15 years of age at the time of their enlistment, conscription or use. This requirement may give rise to evidentiary problems if the victim is unsure of his age and lacks identity papers and/or a birth certificate. Other ways of judging age may not be sufficiently certain to prove beyond reasonable doubt that the person was under 15 years of age at the relevant time.

IV. The Mental Element of the Crime

A. "knew or should have known"

Whereas Article 77(2) of AP I and Article 38 of the CRC prohibit all recruitment of children under 15, the Elements of Crimes only criminalises such conduct if the perpetrator "knew or should have known" that the person or persons conscripted, enlisted or used to participate actively in hostilities were under 15 years of age.

At the Preparatory Commission for the ICC, some States argued that there should be no mental element to the crime; that it should be a crime of strict liability.[108] If a person recruited children under 15, he should be guilty of an offence regardless of whether he had any reason to know or suspect that their age. This approach was justified on the basis that it was for recruiters to satisfy themselves that recruits were not under age. On the other hand, it was argued that such an approach was inconsistent with Article 67(1)(i) of the Rome Statute, which provides that an accused before the ICC has the right not to have imposed on him any reversal of the burden of proof or any onus of rebuttal.[109] Strictly speaking, this counter-argument missed the point, as making an offence a crime of strict liability does neither of those things; it simply does not require the prosecution to prove that the accused had any *mens rea*. The result, however, was a compromise. It suffices not only that

105 *Ibid*, para. 263.

106 The only references were to Article 77(2) of AP I, the ICRC commentary on that provision and the Preparatory Committee's footnote.

107 Its role is simply to determine whether there is sufficient evidence to establish substantial grounds to believe that the accused committed each of the crimes charged. See Article 61(7) of the Rome Statute.

108 Dörmann, *op. cit.* note 52, p. 375.

109 *Ibid*.

the accused knew, but also that he should have known that the person recruited was under 15 years of age.

Commentators, however, differ on what the phrase "should have known" implies. Cottier argues that an accused must have been "wilfully blind to the fact that the child was under fifteen years."[110] Dörmann advocates a higher standard, stating that: "the *mens rea* requirement would ... be met if the accused does not provide for safeguards and inquire the age of the child even though the child's age appears close to the protected minimum age." Recruiters should ask recruits their age, and seek to verify their answers by reference to their parents or guardians, or by looking at birth certificates or other identity documents. Recruits whose physical appearance suggests they are under age should be rejected. Such an interpretation would correspond to the obligation upon States Parties to AP I and the CRC to take "all feasible measures" to avoid children under 15's direct participation in hostilities. Adolescents develop physically at different rates and the systems for the recording of births are rudimentary and ineffective in many countries, not least those embroiled in conflict. The adopted drafting, it can be argued, avoids penalising persons who recruited children whom they genuinely considered to be over 15 years of age and who took reasonable measures to confirm their belief, whilst requiring good faith efforts from recruiters to ensure that those recruited are not under-age.

This, however, is a policy argument. Article 30(1) of the Rome Statue states that:

> Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with knowledge and intent.

Article 30(3) states that for the purpose of the article "'knowledge' means awareness that a circumstance exists", so the prosecution must prove that the accused was aware that the relevant circumstances existed.

There appears to be a discrepancy between the Statute and the Elements of Crimes. Article 30(1) does start with the words "[u]nless otherwise provided", but this only begs the question.[111] There is no such provision in the Statute itself, only in the Elements of Crimes. Article 9 of the Rome Statute provides that the Elements of Crimes "shall assist the Court in the interpretation and application of articles 6, 7 and 8" and that they shall be consistent with the Statute. The implication, which was probably thought too obvious to need stating, is that the Elements are not binding on the Court and in cases of conflict the Statute prevails. The argument can be made that the adoption of the "knew or should have known" standard by the Preparatory Commission is subsequent practice in the application of the Rome Statute establishing the agreement of the parties regarding the interpretation of Article 30(1), so as

110 Cottier, *op. cit.* note 59, p. 262. See also, *R v. Finta* 104 ILR 284 at 363, cited in Dörmann, *ibid*, p. 379.

111 For discussion of the issue, see Gerhard Werle and Florian Jessberger, "'Unless Otherwise Provided': Article 30 and the Mental Element of Crimes under International Criminal Law" (2005) 3 JICJ 35, pp. 43-9; and Thomas Weigend, "The Harmonisation of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR and ICC: A Overview" (2004) 19 *Nouvelles Etudes Pénales* 319, p. 326.

to permit the *mens rea* of a crime within the jurisdiction of the ICC to be "otherwise provided" in the Elements of Crimes. However, the Rome Statute also includes the principle of favouring the accused (*rei favori*).[112] This requires, in cases of conflicting interpretations of a legal provision, the adoption of the interpretation most favourable to the accused. In the instant case, it would appear to mean interpreting Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) to require "knowledge and intent" on the part of the accused, rather than that he "knew or should have known".

V. Child Recruitment as a Crime under Customary International Law

As already mentioned, the *chapeaux* to Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) describe the crimes listed in those provisions as "serious violations of the laws and customs applicable in [international armed conflict/armed conflicts not of an international character], within the established framework of international law". The extent to which this characterisation is correct, however, has been questioned. In his October 2000 report on the establishment of a Special Court for Sierra Leone,[113] the UN Secretary-General declined to follow Article 8(2)(e)(vi) on the ground that it was unclear whether it reflected customary international law. The report stated that:

> While the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.
> Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is itself a crime under common article 3 of the Genera Conventions; (b) forced recruitment in the most general sense – administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its [*sic*] use as, among other degrading uses, a "child-combatant".[114]

Accordingly, draft article 4(c) of the Special Court's Statute only criminalised the "[a]bduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities."

A campaign by NGOs followed to have the draft statute modified so as to

112 See Article 22(2) of the Rome Statute, which provides that: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

113 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (4 October 2000).

114 *Ibid*, paras 17-8 (paragraph numbers omitted).

reflect the provisions of the Rome Statute.[115] The Security Council requested that draft article 4(c) be modified to follow Article 8(2)(e)(vi) of the Rome Statute, "so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community",[116] and the Statute as adopted reflects this position.[117]

However, the issue had to be addressed by the Special Court's Appeal Chamber following a challenge to the Court's jurisdiction to prosecute Samuel Hinga Norman for child recruitment on the ground that the crime had not formed part of customary international law at the times relevant to the indictment and that, therefore, his prosecution on the charges would violate the principle *nullum crimen sine lege*. The motion was denied; a majority of the Appeals Chamber holding that child recruitment had been criminalised by November 1996 (the beginning of the Court's temporal jurisdiction) at the latest.[118]

In coming to its decision, the Appeals Chamber relied heavily on the negotiating history of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii). The inclusion of child recruitment as a crime was not specifically suggested until late in the negotiations, in December 1997. However, on the basis that at the second session of the Preparatory Committee it had been proposed that the ICC should have power to prosecute serious violations of Common Article 3 and AP II, the Appeals Chamber concluded that: "The discussion during the preparation of the Rome Statute focused on the codification and effective implementation of the existing customary norm rather than the formation of a new one."[119] In other words, the form of the negotiations evidenced the existence of a customary rule criminalising child recruitment. This conclusion, however, ignored the fact that AP II only prohibits the recruitment or use of children under 15 to participate in hostilities in non-international armed conflicts. Suggestions to grant the ICC power to prosecute violations of AP II could not of themselves evidence a belief that child recruitment was criminal, as such behaviour when engaged in during international armed conflicts would not caught by such a proposal. Instead, it seems likely that the provisions regarding child recruitment in AP II were included in the proposal simply because they were included in Article 4 of the Protocol.[120]

It appears that at least some States thought they were innovating when they adopted Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).[121] In particular, the USA did not consider the prohibition on child recruitment to have customary status and saw it as

115 See, e.g., Amnesty International news release, "The Special Court for Sierra Leone", 20 October 2000, AFR 51/081/2000: Human Rights Watch, "Justice and the Special Court: Letter to the United Nations Security Council", 1 November 2000; and Coalition to Stop the Use of Child Soldiers, "Appeal on Sierra Leone: Special Court should prosecute recruiters, not child soldiers", 7 November 2000.

116 Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, p. 2.

117 Article 4(c), Statute of the Special Court for Sierra Leone, 12 January 2002.

118 *Prosecutor v. Sam Hinga Norman*, *op. cit.* note 40, para. 53.

119 *Ibid.*

120 Article 4 is largely an elaboration of Common Article 3 and, as such, much of it is thought to reflect customary international law: see Greenwood, *op. cit.* note 36, p. 113.

121 See von Hebel and Robinson, *op. cit.* note 47, p. 117.

belonging to the corpus of human rights rather than humanitarian law.[122] Although the Appeals Chamber argued that the USA was simply a lone persistent objector, the evidence was that it was not alone in its opinion that child recruitment was not a war crime under customary international law. Although it is correct that when some States suggested raising the minimum age for recruitment from 15 to 18 the proposal was rejected as not reflecting customary law,[123] this might simply have meant that most States thought that there was a customary rule prohibiting the recruitment of children below 15 years of age, rather than criminalising such conduct.[124] At best, the evidence of the negotiations is equivocal. Nor was the other evidence adduced by the Appeals Chamber to support is conclusions any more convincing.[125]

In his dissenting opinion, Justice Robertson took a different approach. He considered that the more narrowly drawn offence in the Secretary-General's draft Statute was a war crime by November 1996, as it "amounted to a most serious breach of Common Article 3".[126] However, Article 4(c), as adopted, was in a different form, and could be committed in three different ways: (i) by conscripting children; (ii) by enlisting them, or (iii) by using them to participate actively in hostilities.[127] Offence number (ii) extended liability considerably, as the prosecution would need only to show that the defendant knew that the person he enlisted was under 15 at the time. Justice Robertson commented that:

> It might strike some as odd that the state of international law in 1996 in respect to criminalization of child enlistment was doubtful to the UN Secretary-General in October 2000 but very clear to the President of the Security Council only two months later. If it was not clear to the Secretary-General and his legal advisers that international law by 1996 criminalized the enlistment of child soldiers, could it really have been any clearer to Chief Hinga Norman or any other defendant at that time, embattled in Sierra Leone?[128]

All of the judges, however, agreed that the recruitment of use of children under 15 to participate actively in hostilities is a war crime in contemporary international

122 *Ibid*. It is generally accepted that individual breaches of human rights norms are not *per se* criminal unless specifically criminalised. See, for example, Article 4 of the Convention Against Torture, 1465 UNTS 65 (1989). Crimes against humanity must be part of a widespread or systematic attack against a civilian population.

123 *Ibid*, pp. 117-8.

124 Although the stance taken does indicate that the customary status of the prohibition of child recruitment did matter to the negotiators.

125 For analysis of the decision, see Happold, *op. cit.* note 40; Alison Smith, "Child Recruitment and the Special Court for Sierra Leone" (2004) 2 JICJ 114; and William A. Schabas, "The Rights of the Child, Law of Armed Conflict and Customary International Law: A Tale of Two Cases", in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children* (2006), pp. 29-35.

126 *Prosecutor v. Samuel Hinga Norman*, *op. cit.* note 40, Dissenting Opinion of Justice Robertson, para.4.

127 *Ibid*, para. 5

128 *Ibid*, para. 6.

law. This conclusion has been questioned.[129] However, it does not seem without justification, not only given the large number of ratifications the Rome Statute has received but also because of the view expressed on the issue by Security Council (the members of which include a number of States not party to the Rome Statute) in 2000.[130] What does seem to be the case, however, is that if the provisions on child recruitment in the Rome Statute reflect customary international law it is not because they codified existing customary rules. Rather, the negotiation and adoption of the Statute had a crystallising effect, transforming rules *in statu nascendi* into *lex lata*.[131]

VI. Child Recruitment as Enslavement

Although child recruitment is specifically criminalised in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), this is not to say that particular instances of such behaviour cannot fall within other provisions of the Rome Statute. It will be recalled that the Secretary-General's draft statute for the Special Court for Sierra Leone listed the"[a]bduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities" as a serious violation of international humanitarian law, and that Justice Robertson, in *Hinga Norman*, agreed that such acts had been criminal throughout the temporal jurisdiction of the Special Court.[132] The wording of the provisions suggests that what was objectionable was not the recruitment of children under 15 *per se* but their recruitment by forcible or coercive means and their use for a particular degrading purpose.[133]

Holding a person in slavery or servitude or subjecting him to forced or compulsory labour is contrary to international law. It is prohibited in a number of treaties[134] and under customary international law.[135] In the Charter of the International Military Tribunal, "deportation to slave labour" was listed as a war crime within the Tribunal's jurisdiction, whilst "enslavement" was included in the list of crimes against humanity. Enslavement was also listed as a crime against humanity in Control Council Law No. 10, and is a crime within the jurisdiction of the ICTY, the ICTR, the ICC and

129 See Schabas, *op. cit.* note 125, pp. 34-5.

130 See text to footnote 116 above.

131 See *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), judgment, ICJ Reports 1969, p. 3 at p. 41.

132 *Prosecutor v. Samuel Hinga Norman*, *op. cit.* note 40, Dissenting Opinion of Justice Robertson, para. 18.

133 See the Secretary-General's Report, *op. cit.* note 113.

134 Slavery Convention, 60 LNTS 253 (1926); Convention Concerning Forced or Compulsory Labour, 39 UNTS 55 (1930); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 266 UNTS 3 (1956); European Convention on Human Rights, ETS No. 5 (1950); International Covenant on Civil and Political Rights, 999 UNTS 171 (1966); American Convention on Human Rights 1144 UNTS 123 (1969): and African Convention on Human and Peoples' Rights (1982) 21 ILM 58.

135 See *Barcelona Traction* (*Belgium v. Spain*), ICJ Reports 1970, p. 3 at p. 32; and American Law Institute, R*estatement of the Law, the Third, the Foreign Relations Law of the United States* (1987), vol. 2, para. 702.

the Special Court for Sierra Leone.

International law originally emphasised the elimination of "chattel slavery": that is, the situation where the enslaved person is assimilated to a piece of property owned by another. However, the prohibition has progressively widened to include not only slavery but also servitude and forced and compulsory labour. Tribunals ruling on charges of enslavement have taken this wider view. Cases following World War II included instances of forced or compulsory labour within the crime against humanity of enslavement.[136] In *Kunarac*, the ICTY, analysing the crime against humanity of enslavement under customary international law, stated that:

> [I]ndications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. ... The "acquisition" or "disposal" of someone for monetary or other compensation is not a requirement for enslavement.[137]

The ICC Elements of Crime for the crime against humanity of enslavement under Article 7(1)(c) largely reproduce the definition of the crime given in *Kunarac*.

It is clear that child soldiers have been subject to treatment within this definition of enslavement.[138] Conscription for military service, at least of adults, is generally viewed as lawful. Although individuals have a right not to be subjected to slavery or servitude, or be required to perform forced or compulsory labour, an exception is usually made for service of a military character. Children under 15, however, are immune from conscription (as they are from all forms of recruitment into armed forces and groups), so it is difficult to see how the exception could apply to their recruitment if it falls within the legal definition of enslavement. Strength is added to this argument by the provisions of ILO Convention 182, which defines "the worst forms of child labour" as including: "all forms of slavery or practices similar to slavery, such as ... forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict". It is apparent from the wording of the provision that the International Labour Conference, when adopting the Convention in

136 See the cases listed in *Prosecutor v. Kunarac, Kovać and Vuković*, Case No. IT-96-23-T and IT-96-23/1-T, judgment of 22 February 2001, paras 523-7.

137 *Ibid*, para. 542. The ICTY Appeals Chamber agreed that whether a particular phenomenon is a form of enslavement depends on the operation of the factors identified by the Trial Chamber: see judgment of the Appeals Chamber, 12 June 2002, para. 119

138 Indeed, in an application for refugee status, the US Court of Appeals for the Third Circuit expressly categorised the petitioner's treatment as "enslavement": *Lukwago v. Ashcroft* 329 F.3d 157 (2003). L, when aged 15, had been kidnapped by the Lord's Resistance Army and forced to fight in their ranks.

July 1999, considered that the forced or compulsory recruitment of children for use in armed conflict already amounted to enslavement. Indeed, given the similarity in the wording of Article 3(a) of ILO Convention 182 and article 4(c) of the draft statute of the Special Court, one can deduce that the former was one of the sources of the latter. In other words, the Secretary-General's draft might be thought to reflect existing customary law because the forced or compulsory recruitment of children for use in armed conflict is a form of enslavement, which is incontestably a crime in customary international law. However, by characterising the forced or compulsory recruitment of children under the age of 15 for the purpose of using them to participate actively in hostilities as a war crime, the Secretary-General erred. The offence is merely a sub-set of the crime against humanity of enslavement.

Armed forces and groups which abduct and forcibly recruit children tend to do so systematically, so categorisation of such behaviour as crime against humanity, it might be argued, better reflects the systemic nature of the offence. Classification as a crime against humanity would also emphasise the gravity of such conduct, given that crimes against humanity are, in general, considered more serious offences than war crimes.[139] The arrest warrants issued by the ICC against three of the leaders of the Lord's Resistance Army allege them to have committed not only the war crime of child recruitment ("enlisting, through abduction") but also the crime against humanity of enslavement, and in one instance (an attack on a camp for internally displaced persons in 2004) both charges have been made in respect of the same incident.[140] It will be interesting to see what evidence the Office of the Prosecutor brings to prove the case in respect of those charges should Joseph Kony, Vincent Otti or Okot Odhiambo ever appear before the Court, in particular whether it will be argued that the instances of enslavement alleged included the abduction of children for forcible recruitment into the ranks of the LRA. Certainly, there is no legal impediment to the Court entering multiple convictions under different statutory provisions based on the same conduct providing that each statutory provision involved has a materially distinct element not contained in the other,[141] as is the case here,[142] although any sentences of imprisonment handed down in respect of such convictions would need to be served concurrently.

139 See Michaela Fruili, "Are Crimes against Humanity More Serious than War Crimes?" (2001) 12 EJIL 329.

140 See Situation in Uganda: Warrant of Arrest for Joseph Kony, *op. cit.* note 75, Counts 11 and 13; Situation in Uganda: Warrant of Arrest for Vincent Otti, ICC-02/04-01/05-54, 8 July 2005, Counts 11 and 13; and Situation in Uganda: Warrant of Arrest for Okot Odhiambo, ICC-02/04-01/05-56, 8 July 2005, Counts 11 and 13.

141 *Prosecutor v. Delalić et al.,* Case No. IT-96-21-A, judgment of 20 February 2001, para, 339.

142 To prove a war crime one must show that the conduct was linked to an armed conflict. This element need not be proved to prove the commission of a crime against humanity, but one must show that the offence was part of a widespread or systematic attack on the civilian population, which element is not in turn required to prove a war crime.

VI. Prosecuting Child Recruitment

Issues also arise in relation to how cases of child recruitment are prosecuted before the ICC. Child soldiers can be both the victims and perpetrators of international crimes.[143] Indeed, in some cases it appears that children are targeted for recruitment specifically because they are more easily persuaded to commit atrocities.[144] However, although there is uncertainty as to what might be the age of criminal responsibility in international criminal law,[145] what is clear is that no person can be tried before the ICC in respect of his or her behaviour whilst a child. Article 26 of the Rome Statute provides that: "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the offence."

What this means is that although former child soldiers cannot be prosecuted before the ICC (at least for crimes committed whilst they were children), as victims of crimes within the Court's jurisdiction, they are entitled to have their views and concerns presented and considered during the proceedings against their alleged persecutors.[146] Indeed, on a successful conclusion to any such prosecution, they would be entitled to receive reparations for the harm inflicted on them,[147] either from the convicted offenders or from the Victims Trust Fund.[148]

The problems inherent in this regime have been described in a recent report by the human rights NGO Redress.[149] Former child soldiers are often viewed with considerable ambivalence, if not suspicion or even hatred, in their own communities. Privileging them as victims, eligible for reparations, has the capacity to exacerbate these feelings. Indeed, such treatment is likely to be seen as doubly unfair if other crimes against children within the jurisdiction of the Court are not also prosecuted. Indeed, the indictment of Thomas Lubanga solely on charges of child recruitment was criticised for this reason during the ICC Prosecutor's 2006 public hearing with NGOs. As a contemporaneous report put it:

> Many of the pressure groups represented ... are adamant that the entire range of criminality is not being dealt with under the OTP's current strategy, pointing out that war crimes suspect Thomas Lubanga is only being tried on suspicion of having

143 For examples of such behaviour, see Rachel Brett and Margaret McCallin, *Children: The Invisible Soldiers*, Stockholm: Rädda Barnen, rev. ed., 1998, pp. 92-93.

144 *Ibid*, pp. 153-154. See also the comments in Cole P. Dodge, "Child Soldiers of Uganda and Mozambique", in Cole P. Dodge and Magne Raundalen (eds.), *Reaching Children in War: Sudan, Uganda and Mozambique* (1991); Cohn and Goodwin-Gill, *op. cit.* note 8, p. 26; Human Rights Watch, *Easy Prey: Child Soldiers in Liberia* (1994), p. 57; Amnesty International, *Sierra Leone: Childhood – A Casualty of Conflict* (2000), p. 4; and Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda* (2003), p. 9.

145 For discussion of the issue, see the contributions by Matthew Happold, Claire McDiarmid and Angela Veale in Arts and Popovski (eds.), *op. cit.* note 125.

146 Article 63(3), Rome Statute.

147 Article 75, *ibid.*

148 Article 79, *ibid.*

149 Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court* (2006).

> conscripted child soldiers to fight in his rebel militia. They argue that Lubanga is responsible for orchestrating rafts of crimes against humanity and war crimes, and are concerned that these are being ignored despite the OTP's promise to review the charges in the indictment at a later date.[150]

Prosecutions of individuals for child recruitment needs be done in a manner that does not hinder the reintegration of child soldiers back into their communities. Nor must a focus on the crime of child recruitment mean that other crimes committed against children are ignored. These are issues to which the Office of the Prosecutor needs to be sensitive through the entire criminal process, from investigation to prosecution to conviction. Child recruitment is prohibited because children under 15's participation in hostilities is seen as contrary to their best interests. The ICC needs to ensure that in prosecuting individuals for crime of child recruitment it too acts in "the best interests of the child".[151]

Conclusions

Despite, or perhaps because of, their brevity, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute raise a number of questions about the contours of the crime of child recruitment. This chapter has argued that both provisions should be interpreted conformably with existing international law, as indicated in the *chapeaux* to Articles 8(2)(b) and 8(2)(e), and, where there is ambiguity, so as to favour the accused, as required by Article 22(3). Thus far, however, the ICC, in its only decision on the issue, that of Pre-Trial Chamber I confirming the charges against Thomas Lubanga, has taken a more expansive approach. This is understandable. As Justice Robertson stated in *Prosecutor v. Samuel Hinga Norman*, "The enlistment of children of fourteen years and below to kill and risk being killed in conflicts not of their own making ... is abhorrent".[152] However, as he went on to say: "abhorrence alone does not make that conduct a crime in international law."[153] In considering the victims of such conduct, we must not forget the rights of the accused, including the principle of *nullum crimen sine lege*. Fortunately, the *Lubanga* Trial Chamber will have precisely such an opportunity and it is to be hoped that it will give full consideration to the various questions concerning the interpretation of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

However, although this chapter has concentrated on examining the specific crime of child recruitment, it has also argued that it should not be viewed in isolation. Certain instances of forcible recruitment and the manner in which child recruits are treated by their captors fall within the definition of the crime against humanity of enslavement, and it is more appropriate to charge them as such. Children suffer from other violations of their rights in armed conflicts, which the Court should also prosecute. What is in the best interests of child victims and witnesses needs to be considered at all stages of the criminal process. These are issues that concern the Office

150 Katy Glassborow, "ICC Prosecutors' Performance Reviewed", Institute for War and Peace Reporting. *Tribunal Update*, No. 471, 6 October 2006.

151 Article 3(1), CRC.

152 *Op. cit.* note 40, Dissenting Opinion of Justice Robertson, para. 9.

153 *Ibid.*

of the Prosecutor and the Registry as much as Chambers, requiring all of the organs of the Court to exercise judgment to ensure justice is done both to the accused and to the alleged child victims of their crimes.

Section 9

War Crimes in Non-International Armed Conflicts

Chapter 24

Particular Issues Regarding War Crimes in Internal Armed Conflicts

Lindsay Moir

Introduction

That the ICC should have jurisdiction over violations of the laws and customs applicable during international armed conflict was never seriously questioned.[1] In contrast, whether jurisdiction should be extended to include the laws of internal armed conflict was the source of considerable disagreement. Indeed, the final draft of the Statute placed before the Diplomatic Conference in April 1998 retained the option of expunging reference to such jurisdiction entirely.[2]

I. Whether to Include or Not Crimes Committed in Internal Armed Conflicts in the ICC Statute

Most states were keen to see those war crimes committed during internal armed conflict included, for two principal reasons. First, because 'it was precisely in internal armed conflicts that national criminal justice systems were in all likelihood unable to adequately respond to violations of such norms'.[3] Secondly, a failure to include internal armed conflicts would have rendered the ICC impotent regarding prosecution of what are now the most common violations of international humanitarian law. The majority of armed conflicts are, after all, internal rather than international in character.

II. Whether Violations of Laws of Internal Armed Conflicts Entail Criminal Responsibility

A number of participants nonetheless opposed ICC jurisdiction over internal armed conflicts.[4] They believed that it would undermine attempts at universal acceptance of

1 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I, UN Doc. A/51/22 (13 September 1996), paragraph 74.

2 Option V ('Delete sections C and D'), UN Doc. A/CONF.183/2 (April 1998).

3 Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Roy S. Lee (ed), *The International Criminal Court. The Making of the Rome Statute* (The Hague, 1999), 105.

4 The minority included China, India, the Russian Federation, Turkey, and a number of Asian and Arab states. See von Hebel and Robinson, *ibid*., 105, n.87.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 611–618.

the Statute, and that the existence of individual criminal responsibility for such violations had not been clearly demonstrated.[5]

The latter argument was not novel. Plattner, for example, wrote in 1990 that, 'international humanitarian law applicable to non-international armed conflict does not provide for individual penal responsibility.'[6]

Commenting upon the establishment of the ICTY in 1993, the ICRC stated the view that war crimes were limited to international armed conflicts,[7] a position supported by the Commission of Experts established by the UN Secretary-General to examine alleged violations of humanitarian law in the former Yugoslavia.[8] Indeed, in 1995 the UN Secretary-General described Article 4 of the ICTR Statute – asserting jurisdiction over individuals accused of violating Article 3 common to the 1949 Geneva Conventions and Additional Protocol II of 1977 – as a provision which 'for the first time criminalises common Article 3'.[9] It is not surprising, then, that the defence in the *Tadić* Case before the ICTY argued that, even if certain rules were applicable in conflicts of both internal and international character, no individual criminal responsibility resulted for those violations committed during internal conflict.[10]

To be sure, common Article 3 does not state that criminal responsibility attaches to violations of its provisions. Nor do violations of common Article 3 represent grave breaches of the Conventions, since they are not committed against 'protected persons' – at least in the context of the Fourth Geneva Convention, i.e., nationals of another state.[11] Likewise, Additional Protocol II fails to explicitly criminalise viola-

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5 *Report of the Preparatory Committee*, Volume I, paragraph 78.

6 Denise Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts' 278 *International Review of the Red Cross* (1990) 409, 414.

7 Preliminary Remarks of the International Committee of the Red Cross, 25 March 1993, unpublished. See Christopher Greenwood, 'International Humanitarian Law and the *Tadic* Case' 7 *European Journal of International Law* (1996) 265, 280, n.2.

8 *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674, paragraph 52.

9 Although the Security Council clearly thought that, in adopting the ICTR Statute, it was complying with the principle of *nullum crimen sine lege*, and that violations of common Article 3 were thus already criminal in international law. See *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, UN Doc. S/1995/134 (13 February 1995), paragraph 12.

10 *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, 2 October 1995, paragraph 128. The argument found favour with Judge Li. See, in particular, paragraph 13 of his dissenting opinion.

11 Although this issue has proved controversial, the ICTY Appeals Chamber arguing in *Prosecutor* v. *Tadić* Judgment of 15 July 1999, paragraph 166, that modern considerations ought to mean that individuals can have protected status even where they are the same nationality as their captors. The position is not replicated in the ICC Statute, although the Elements of Crimes require the perpetrator to know only that the victim belonged to an 'adverse party to the conflict'. See, e.g., Kittichaisaree, *International Criminal Law*, 139-141; Peter Rowe, 'War Crimes', in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court* (Oxford, 2004), 203, 221-222; and Dörmann, *Elements of War Crimes*, 28-32. The grave breaches provisions are contained in Geneva Convention I, Articles 49 and 50; Convention II, Articles 50 and 51; Convention III, Articles 129 and 130; and Convention IV, Articles 146 and 147.

tions of its provisions.[12] Nonetheless, the ICTY held in *Tadić* that the alleged crimes did indeed involve individual criminal responsibility, regardless of whether they had been committed in an international or internal context.[13]

In support of its decision, the Appeals Chamber cited several elements of international practice – including national military manuals, national legislation implementing the Geneva Conventions, and unanimously adopted Security Council resolutions as evidence of *opinio juris* – to demonstrate that states did, indeed, intend that serious breaches of the laws and customs of internal armed conflict should be treated as war crimes, entailing criminal responsibility, despite the fact that they are not grave breaches.[14] Such violations are not subject to the grave breaches regime of the Geneva Conventions, whereby all states are required to exercise jurisdiction over offenders or else to surrender them for trial in another state, but that does not in any way serve to negate individual criminal responsibility. The Appeals Chamber therefore concluded that:

> ... customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.[15]

This position was confirmed in subsequent jurisprudence of the ICTY and the ICTR,[16] and – in policy terms – it must be entirely correct. Greenwood, for example, argued in 1996 that violations of the laws of war have always been regarded as criminal and there is no reason why, 'once those laws [were] extended to ... inter-

12 In contrast, Additional Protocol I contains provision for grave breaches in Articles 11 and 85.

13 *Prosecutor* v. *Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 129. In coming to its decision, the Appeals Chamber relied heavily on the reasoning of the Nuremberg Tribunal that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. See paragraph 128.

14 *Ibid*., paragraphs 130-133.

15 *Ibid*., paragraph 134.

16 See, for example, *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, where the ICTY Trial Chamber held, in paragraph 308, that the failure of common Article 3 to explicitly mention criminal responsibility 'does not in itself preclude such liability' and, in paragraph 316, that 'the substantive prohibitions in common Article 3 ... constitute rules of customary international law which may be applied by the International Tribunal to impose individual criminal responsibility'. Likewise, in *Prosecutor* v. *Jean-Paul Akayesu*, Judgment of 2 September 1998, ICTR Trial Chamber I held, in paragraph 617, that the violation of common Article 3 and Additional Protocol II 'entails, as a matter of customary international law, individual responsibility for the perpetrator.' In a pleasing example of symmetry, having relied on the 1958 UK *Military Manual* as evidence of war crimes in internal armed conflict, the *Tadić* Case itself is cited as authority for the same point in the latest version of the UK Manual (UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 397-398). See also Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 551-555 and 568-603, where Rules 156 and 151 state that serious violations of humanitarian law constitute war crimes in both international and internal armed conflicts, and that both types of war crimes carry individual criminal responsibility.

nal armed conflicts, their violation in that context should not have been [equally] criminal, at least in the absence of a clear indication to the contrary.'[17] The Lawyers Committee for Human Rights took a similar position, asserting in 1998 that it would be 'untenable to argue that the perpetrators of atrocities committed in non-international armed conflict should be shielded from international justice just because their victims were of the same nationality.'[18] Those states opposing the inclusion of internal armed conflict in the ICC Statute were, then, destined to fail, and jurisdiction over such violations was duly provided for in Article 8(2), subparagraphs (c), dealing with violations of common Article 3, and (e), dealing with other serious violations of the laws and customs applicable to internal armed conflicts. An examination of their provisions follows below.

III. The Scope of the Norms Applicable in Internal Armed Conflicts

Equally difficult was the issue of which humanitarian norms should be applicable during internal armed conflict. Division on this issue was reflected in the contrasting proposals submitted to the Working Group on the Definition of Crimes, with the US proposing that those crimes within the jurisdiction of the Court should be limited to violations of common Article 3,[19] whilst New Zealand and Switzerland proposed a much more extensive list.[20] Most delegations were prepared to accept the fairly uncontroversial notion that common Article 3 represented customary law, and that the ICC should accordingly have jurisdiction over violations of its provisions.[21] Delegates also agreed, however, that several of the provisions of Additional Protocol II were customary, and should therefore be included in the Statute, as were a number of humanitarian law provisions found in neither common Article 3 nor Additional Protocol II (and therefore drawn from the rules of *international*, rather than internal, armed conflict).

This is consistent – at least, to an extent – with 'the gradual blurring of the fundamental differences between international and internal armed conflicts'.[22] Indeed, the ICTY Appeals Chamber asked:

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of

17 Greenwood, 'Humanitarian Law and *Tadic*', 280-281.

18 Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* (New York, 1998), section IV.

19 UN Doc. A/AC.249/1997/WG.1/DP.2.

20 UN Doc. A/AC.249/1997/WG.1/DP.1. For the consolidated draft, containing both options, see UN Doc. A/AC.249/1997/WG.1/CRP.2.

21 Although even this was not accepted unanimously. See Zimmerman, 'War Crimes', 269, who states that China, India, Indonesia, Pakistan and Turkey were not in favour.

22 Von Hebel & Robinson, 'Crimes Within the Jurisdiction of the Court', 125.

> States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[23]

Nonetheless, the Appeals Chamber maintained that internal conflicts had not suddenly become subject to all of the rules applicable during international conflicts.[24] Although a number of scholars were far from convinced, Zimmerman is right to point out that, whilst the Rome Statute certainly represents progress, it still 'does not completely follow the approach by the ICTY which stated that "what is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife"'.[25] The Statute treats international and internal conflicts entirely separately, and (surprisingly) fails to assert jurisdiction over, for example, the use of prohibited weapons or starvation of civilians when committed in the context of internal conflict. Even serving to reflect the continuing view of states that international and internal armed conflicts are in fact fundamentally different in character, such omissions are a major weakness.[26]

IV. The Definition of Internal Armed Conflict

Whether or not to include war crimes committed during internal armed conflict was, however, only one difficult issue. If the laws of internal armed conflict are to be enforced against individuals, it is vital to know when an internal armed conflict actually exists. This is markedly more difficult than determining whether an international armed conflict exists, as states frequently use forcible measures against their own populations. The use of force against other states is much less common and – in most cases – more obvious. In addition, the first line of defence for states is always likely to be a denial that armed conflict exists, so that humanitarian law is consequently inapplicable. Common Article 3, however, states only that it is to apply 'in the case of armed conflict not of an international character'. No precise criteria for the identification of such conflicts are offered.[27]

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23 *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 97.

24 *Ibid*., paragraph 126. It is very interesting to note, however, that of the 161 rules of customary humanitarian law recently identified by the ICRC, 147 rules apply to both international and internal armed conflict. Twelve apply to international conflict alone, and only two to internal conflict. See Henckaerts and Doswald-Beck, *Customary Humanitarian Law*.

25 Zimmerman, 'War Crimes', 263.

26 See, e.g., Lindsay Moir, 'Towards the Unification of Humanitarian Law?' in Richard Burchill, Justin Morris and Nigel D. White (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge, 2005), 108; Peter Rowe, 'War Crimes', 228; Luigi Condorelli, 'War Crimes and Internal Conflicts in the Statute of the ICC' in Mauro Politi & Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, 2001), 107; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp, 2002), 604-605.

27 Several delegations had pressed for the inclusion of objective criteria, but these attempts were eventually abandoned. See Pictet, *Commentary on the Geneva Conventions*, Volume I, 49-50.

In contrast, Additional Protocol II sets out a number of conditions in Article 1(1) which must be met before the Protocol is applicable.[28] In addition, Article 1(2) provides that 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are not covered by the Protocol, as they are not armed conflicts. Protocol II, although designed to develop and supplement common Article 3, does so 'without modifying its [i.e. common Article 3's] existing conditions of application'.[29] The end result is that Additional Protocol II is narrower in scope than common Article 3, with a higher threshold for its application. Some conflicts will meet the standards for common Article 3, but not Protocol II, whereas other conflicts will meet the more restrictive requirements of Protocol II. Common Article 3, its application unchanged by Protocol II, nonetheless continues to apply even to these conflicts.[30]

In *Tadić*, the ICTY Appeals Chamber held that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'[31] This represents a relatively wide interpretation of internal armed conflict, requiring neither territorial control nor compliance with humanitarian law on the part of the non-state party. Nor is there any requirement that governmental troops take part in hostilities. As such, the ICTY definition falls well short of the threshold set in Additional Protocol II. Indeed, the sole requirements of protracted armed violence involving organised non-governmental armed groups ensure that even common Article 3 applies to a broad range of situations. Despite subsequent reliance by both the ICTY and ICTR on the Appeals Chamber's definition, however, the ICTR Trial Chamber has cautioned that it is still 'termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis'.[32]

The ICC Statute takes a similar approach to that of the ICTY. Article 8(2) sets out the scope of application for subparagraphs (c) and (e) in subparagraphs (d) and (f). Article 8(2)(d), outlining the material scope for violations of common Article 3, provides that:

> Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated or sporadic acts of violence or other acts of a similar nature.

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28 i.e., that the armed conflict must take place between the 'armed forces [of a High Contracting Party] and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol'.

29 Additional Protocol II, Article 1(1).

30 It should be noted that internal armed conflicts fought for the purpose of liberation from colonial or oppressive regimes are deemed to be international in character, and regulated by international humanitarian law in its entirety rather than common Article 3 and Additional Protocol II alone. See Additional Protocol I, Article 1(4).

31 *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 70.

32 *Prosecutor* v. *Georges Rutaganda*, Judgment of 6 December 1999, paragraph 91.

This clearly echoes Article 1(2) of Additional Protocol II, and it had originally been intended that a similar threshold would be set for Article 8(2)(e).[33] Subparagraph (f), however, provides additionally that Article 8(2)(e) applies to 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups'. This sets a much lower threshold than Additional Protocol II, significantly enhancing the ICC's jurisdiction.

De Than and Shorts express a measure of concern that case law from the ICTY would seem to exclude the possibility that terrorist activity could ever constitute an armed conflict.[34] In *Delalić*, for example, the Trial Chamber distinguished protracted armed violence between organised groups from 'cases of civil unrest and terrorist activities'.[35] De Than and Shorts argue that this position is a 'regrettable over-simplification: terrorism can be both "protracted" and "organised" (and it can, of course, also be international).'[36] Such fears would, however, only be warranted had 'terrorism' as a discrete legal category been intentionally excluded from humanitarian law. This is a difficult argument to sustain and, in fact, provided the violence perpetrated by 'terrorists' is both protracted and organised, it would meet the requirements of an armed conflict and be subject to international legal regulation.

This preliminary issue of whether an armed conflict exists is vital, in that acts can only be classed as war crimes if they are associated with an armed conflict – be it either internal or international – and committed in such a context.

V. The Nexus Requirement to an Armed Conflict

The Elements of Crimes do not require 'a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international', nor do they require 'awareness by the perpetrator of the facts that established the character the character of the conflict as international or non-international'. They do, however, require the 'awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".'[37]

Not every offence set out in Article 8, and carried out whilst an armed conflict is in progress, will accordingly fall under the jurisdiction of the ICC.[38] Some element of knowledge on the part of the perpetrator is required, although this need not be detailed or extensive, and is accepted as being lower than that required by Article 30 of the Statute. Indeed, the majority of those delegations responsible for drafting

33 See von Hebel and Robinson, 'Crimes Within the Jurisdiction of the Court', 120.

34 Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London, 2003), 162.

35 *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, paragraph 184. See also *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 562.

36 De Than and Shorts, *International Criminal Law*, 162.

37 Elements of Crimes, Report of the First Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 3-10 September 2002, ICC-ASP/1/3, 108, Article 8, Introduction.

38 See, e.g., William A. Schabas, *An Introduction to the International Criminal Court* (second edition, Cambridge, 2004), 56-57.

the Elements of Crimes believed that an objective determination would mean that 'in most situations, it would be so obvious that there was an armed conflict, that *no* additional proof as to awareness would be required.'[39]

Even this requirement does not mean that offences must be committed during, or at the scene of, hostilities. Where an internal armed conflict exists, humanitarian law applies to the whole territory of the state concerned, and not just to the specific region(s) where combat takes place.[40] As the ICTY has stated:

> It is ... sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if ... the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.[41]

Provided, then, that an offence is sufficiently closely linked to the armed conflict, it would be a war crime and the ICC would have jurisdiction. This will inevitably fall to be decided on a case-by-case basis. A direct connection is not always necessary, and an offence need not 'be part of a policy or practice officially endorsed by one of the parties to the conflict', nor 'in actual furtherance of a policy associated with the conduct of the war or in the actual interests of a party to the conflict'.[42] Offences committed for purely personal reasons, however, and wholly unrelated to the armed conflict, would not be war crimes and remain punishable by domestic criminal law.

39 See Dörmann, *Elements of War Crimes*, 18-22.

40 See *Prosecutor* v. *Tadić*, Appeal on Jurisdiction, paragraph 70.

41 *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, Judgment of 22 February 2001, paragraph 568.

42 *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 573. This position has been followed in subsequent jurisprudence. See, e.g., *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, paragraph 195, and *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraph 70.

Chapter 25

Violations of Common Article 3 of the Geneva Conventions

Lindsay Moir

Introduction

Article 8(2)(c) of the Statute asserts jurisdiction over violations of common Article 3 committed during internal armed conflict. In doing so, it reproduces – almost exactly – the prohibitions contained in (a)-(d) of common Article 3, paragraph (1).[1] Before assessing the particular acts within the jurisdiction of the ICC, however, it is important to note that Article 8(2)(c) of the Statute limits itself to 'serious violations' of common Article 3. Zimmerman explains that this stance is consistent not only with experience from both the ICTR and ICTY, but also with Article 5 of the ICC Statute itself, which limits its jurisdiction to those 'most serious crimes of concern to the international community as a whole.'[2] It could, of course, reasonably be argued that *any* violation of common Article 3 would be 'serious'. The ICTY Appeals Chamber has, after all, stated that an act would be serious where it constituted 'a breach of a rule protecting important values, ... [involving] grave consequences for the victim.'[3] Since common Article 3 has been held to represent those 'elementary considerations of humanity' applicable to any armed conflict,[4] it is difficult to see how a violation of its terms could be anything else.[5]

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1 There is a slight difference in the order that the prohibited acts are enumerated, with the taking of hostages and outrages upon personal dignity swapping places. In addition, the words ' ... by civilised peoples', in the context of those judicial guarantees recognised as being indispensable, find no place in the Rome Statute.

2 Zimmerman, 'War Crimes', 270.

3 *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 94.

4 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *US*) (Merits) 76 *International Law Reports* 5, paragraph 218.

5 See Zimmerman, 'War Crimes', 271; *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 612. The ICTR has supported this position in, e.g., *Prosecutor* v. *Akayesu*, Judgment of 2 September 1998, paragraph 616; *Prosecutor* v. *Rutaganda*, Judgment of 6 December 1999, paragraph 106; *Prosecutor* v. *Alfred Musema*, Judgment of 27 January 2000, paragraphs 286-8; *Prosecutor* v. *Laurent Semanza*, Judgment of 15 May 2003, paragraph 370, etc. Trial Chamber II of the ICTY did, however, suggest in *Tadić*, Judgment of 7 May 1997, paragraph 612, that 'it might be possible that a violation of some of the prohibitions of Common Article 3 may be so minor as to not involve "grave consequences for the victim"'. This would clearly depend on the facts of any given case, but Zimmerman, 'War

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In this context, however, the insistence of Article 8(2)(c) that serious violations of common Article 3 are 'namely' those that follow is significant in that the following list is thereby rendered exhaustive. Other violations of common Article 3, but which are not contained within paragraph (c) – such as the duty to collect and care for the sick and wounded – do not, therefore, fall within the jurisdiction of the ICC (at least as specific criminal offences).

I. Violence to Life and Person, in Particular War Crimes of Murder, Mutilation, Cruel Treatment and Torture

Violence to life and person is an integral part of armed conflict. Numerous such acts are therefore entirely lawful. What distinguishes certain acts of violence to life and person as criminal is the target of such action, in that it may not be directed against protected persons.

A. The victims group: 'Persons not taking a direct part in hostilities'

In the context of common Article 3, protected persons are either civilians or else those persons not otherwise actively participating in hostilities, i.e., those placed *hors de combat*.[6] The Elements of Crimes adopted for the ICC Statute accordingly require that all violations of Article 8(2)(c) involve a victim or victims who 'were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities', and that the perpetrator 'was aware of the factual circumstances that established this status'.

In determining the status of victims, Trial Chamber II of the ICTY has used the test of 'whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities'.[7] For this purpose it is deemed 'sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.'[8] Thus, irrespective of the prior level of involvement, provided the victims are not actively involved in hostilities at the precise time of an alleged offence, they receive the protection of common Article 3.[9]

Crimes', 270, suggests that an example might be the 'singular passing of a short term (!) imprisonment without adequate judicial guarantees.'

6 Additional Protocol I of 1977, Article 41(2), provides that: 'A person is *hors de combat* if: (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.'

7 *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 615.

8 *Ibid*., paragraph 616. See also Zimmerman, 'War Crimes', 271-272.

9 See also *Abella* v. *Argentina*, Report No. 55/97, *Annual Report of the Inter-American Commission on Human Rights 1997*, paragraphs 176 and 189, where it was held that, 'Individual civilians are ... covered by Common Article 3's safeguards when they are captured or otherwise subjected to the power of an adverse party, even if they had fought for the opposing party. ... the persons who participated in the attack on the military base were legitimate targets only *for such time as they actively participated in the fighting*.' For further discussion, see Moir, *Internal Armed Conflict*, 58-61.

B. Violence to life and person – not a distinctive war crime

ICTY Trial Chamber I accepted that violence to life and person in the context of common Article 3 is 'a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences'. It proceeded to hold that the requisite *mens rea* is satisfied 'once it has been established that the accused intended to commit violence to the life or person of the victims deliberately or through recklessness.'[10] Trial Chamber II, however, has since held that, 'In the absence of any clear indication in the practice of states as to what the definition of the offence of "violence to life and person" identified in the [ICTY] Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law.'[11] The ICC Elements of Crimes do not expand specifically on the wider notion of violence to life and person, outlining instead the requirements for its constituent offences. As such, prosecution by the ICC for violence to life and person as a general offence, distinct from attacks on civilian targets prohibited elsewhere in the Statute, would seem difficult. Article 8(2)(c)(i)'s inclusion of the phrase 'in particular' clearly signifies, however, that the subsequent list of criminal acts is not exhaustive.

C. War Crime of Murder

What constitutes murder is, at least in the abstract, comparatively straightforward. Zimmerman asserts that, 'murder is a crime that is clearly understood and well defined in the domestic law of every State',[12] and ICTY Trial Chamber I explained that it has been consistently defined by both the ICTY and ICTR as 'the death of the victim resulting from an act or omission of the accused committed with the intention to kill or cause serious bodily harm which he/she should reasonably have known might lead to death.'[13]

Although different phraseology is employed, the ICTY has determined that murder in the context of common Article 3 is, in fact, the same as 'wilful killing' in the context of grave breaches. Since the primary purpose of common Article 3 is to extend the elementary considerations of humanity to internal armed conflict, and since it is prohibited to kill protected persons during international armed conflict, it must also be prohibited to kill those taking no active part in hostilities during an

10 *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraph 182. See also *Prosecutor* v. *Kordić and Čerkez*, Judgment of 26 February 2001, paragraph 260. This *mens rea* element has been criticised, first, because intention and recklessness must be mutually exclusive, so that it is difficult to comprehend how an individual could intend to do something through acting recklessly, and secondly, because to the extent that violence to life and person actually encompasses murder, it would appear that double jeopardy is inevitable where both are charged simultaneously. See Jones and Powles, *International Criminal Practice*, 264.

11 *Prosecutor* v. *Mitar Vasiljević*, Judgment of 29 November 2002, paragraph 203.

12 Zimmerman, 'War Crimes', 273.

13 *Prosecutor* v. *Radislav Krstić,* Judgment of 2 August 2001, paragraph 485.

internal armed conflict.[14] Thus, in *Kordić*, it was held that 'the elements of the offence of "murder" under Article 3 of the [ICTY] Statute are similar to those which define a "wilful killing" under Article 2 ..., with the exception that under Article 3 of the Statute the offence need not have been directed against a "protected person" but against a person "taking no active part in hostilities".'[15] Comments made elsewhere in this work regarding wilful killing as a grave breach of the Geneva Conventions therefore apply equally to murder as a crime during internal armed conflict. Only the context of the act is different. PrepCom agreed with this position and, beyond those elements common to all crimes in Article 8(2)(c) of the Statute,[16] the elements of this crime require simply that, 'The perpetrator killed one or more persons.'

D. War Crime of Mutilation

Mutilation is discussed in Chapter 21 above in the context of Article 8(2)(b)(x).

E. War Crime of Cruel Treatment

Jurisdiction over cruel treatment as a violation of common Article 3, however, is not replicated anywhere else in Article 8 of the ICC Statute. The only other references to cruel treatment in humanitarian law appear in Article 87 of Geneva Convention III and in Article 4(2)(a) of Additional Protocol II, where it seems to be a fairly broad provision, including at least 'torture, mutilation or any form of corporal punishment'. It does, however, appear in several international human rights instruments. Article 5 of the Universal Declaration of Human Rights, for example, provides that, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[17] Nonetheless, no international instrument has actually defined cruel treatment,[18] nor has its precise nature and content been elaborated upon in the international human rights jurisprudence.

The ICTY has stated its view that 'cruel treatment' in common Article 3 has the same meaning as 'inhuman treatment' in the context of the grave breaches provisions.[19] It should be recalled, however, that none of the relevant international human

14 *Prosecutor* v. *Delalić et al*, Judgment of 16 November 1998, paragraph 423.

15 *Prosecutor* v. *Kordić and Čerkez*, Judgment of 26 February 2001, paragraph 233. See also *Prosecutor* v. *Delalić*, *ibid*., paragraph 422, where it was stated that, 'there can be no line drawn between "wilful killing" and "murder" which affects their content.'

16 i.e., concerning the status of the victim and nexus with an internal armed conflict.

17 See also International Covenant on Civil and Political Rights 1966, Article 7; American Convention on Human Rights 1969, Article 5; African Charter on Human and Peoples' Rights 1981, Article 5.

18 See *Prosecutor* v. *Tadić* Judgment of 7 May 1997, paragraph 724, where the Trial Chamber referred to the work of Burger and Danelius, stating that any definition had proved impossible since its 'application to a specific case must be assessed on the basis of all the particularities of the concrete situation.' It went on to argue, in paragraphs 725 and 726, that 'the inclusion of "any form of corporal punishment" [in Additional Protocol II, Article 4, demonstrates] that no narrow or special treatment is ... given to the phrase'. It is, instead, a 'general concept'.

19 *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, paragraph 443. See also *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraph 186; *Prosecutor* v. *Kordić and Čerkez*,

rights instruments actually define 'inhuman treatment' either,[20] and it therefore fell to the ICTY to do so itself.[21] Having done this in relatively broad terms,[22] the Trial Chamber in *Delalić* proceeded, then, to give 'cruel treatment' precisely the same meaning:

> ... cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common Article 3 ... as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common Article 3 of the Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common Article 3, constitutes cruel treatment.[23]

In addition to the absence of a purposive requirement, the ICTY has also held that the level of physical or mental suffering required for treatment to be recognised as cruel is lower than that required for the crime of torture.[24] ICC PrepCom agreed with the findings of the ICTY,[25] and the elements of both inhuman treatment as a grave breach and cruel treatment as a violation of common Article 3 simply require that the perpetrator 'inflicted severe physical or mental pain or suffering upon one or more persons.' Clearly, then, the ICC will be required to assess the severity of suffering on a case-by-case basis.

Judgment of 26 February 2001, paragraph 265; etc. Trial Chamber II had found in *Prosecutor* v. *Tadic*, Judgment of 7 May 1997, paragraph 723, that 'cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in hostilities shall in all circumstances be treated humanely', noting the close relationship in human rights law between cruel treatment and inhuman treatment.

20 There is, however, a considerable body of jurisprudence doing just that. See, in particular, the work of the European Court of Human Rights in distinguishing torture from inhuman treatment in cases such as *Ireland* v. *UK*, 2 *European Human Rights Reports* 25. For a critical analysis of the ECHR jurisprudence on the point, see Malcolm D. Evans, 'Getting to Grips with Torture' (2002) 51 *International and Comparative Law Quarterly* 365.

21 *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, paragraph 517.

22 *Ibid*., paragraph 543.

23 *Ibid*., paragraph 552, upheld in *Prosecutor* v. *Kordić and Čerkez*, Judgment of 26 February 2001, paragraph 265. In *Delalić*, an individual was actually convicted for both cruel and inhuman treatment based on the same facts. See paragraphs 1052-1059, and discussion in Jones and Powles, *International Criminal Practice*, 247-248.

24 *Prosecutor* v. *Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Zigić and Dragoljub Prcać*, Judgment of 2 November 2001, paragraph 161.

25 See de Than and Shorts, *International Criminal Law*, 164, and Dörmann, *Elements of War Crimes*, 398.

F. War Crime of Torture

The final aspect of Article 8(2)(c)(i), i.e., the prohibition of torture, is both an established rule of customary international law and a *jus cogens* norm,[26] criminal during both internal and international armed conflict. Not only does such activity violate common Article 3 – it also represents a grave breach of the Geneva Conventions and, indeed, a crime against humanity (so that torture is equally criminal whether or not an armed conflict is in progress).[27] PrepCom accepted that the crime of torture in the context of grave breaches and in the context of internal armed conflict is the same,[28] and those comments made elsewhere in this volume regarding the offence as a grave breach are equally applicable in this context. Detailed discussion is not, therefore, necessary. A number of important points should, however, be made.

Despite the wide-ranging nature of the prohibition on torture, the offence is not defined in humanitarian law. Even a number of international human rights instruments proscribing such conduct fail to offer a definition.[29] Faced with this problem, the ICTY determined in *Delalić* that the definition of torture provided in Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is 'representative of customary international law.'[30] Subsequent jurisprudence from both the ICTY and ICTR has – in general – agreed with this position.[31] Article 1 of the Torture Convention provides that torture is:

> ... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

In summary, then, the crime of torture involves the infliction of serious harm for an illegitimate purpose.[32] Slight modifications have, however, been made to this defini-

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26 *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, paragraph 454.

27 See the discussion of crimes against humanity above.

28 See de Than and Shorts, *International Criminal Law*, 164.

29 Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights, Article 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3; American Convention on Human Rights, Article 5; African Charter on Human and Peoples' Rights, Article 5. Jurisprudence of the relevant enforcement mechanisms provides more guidance on the matter.

30 *Prosecutor* v. *Delalic*, Judgment of 16 November 1998, paragraph 459.

31 See, e.g., *Prosecutor* v. *Akayesu*, Judgment of 2 September 1998, paragraphs 593-595; *Prosecutor* v. *Anto Furundžja*, Judgment of 10 December 1998, paragraphs 159-160.

32 See, e.g., Bothe, 'War Crimes', 392-3.

tion through the ICTY jurisprudence. In *Furudžija*, for example,[33] it was held that torture during armed conflict:

> consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
> this act or omission must be intentional;
> it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
> it must be linked to an armed conflict;
> at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.

This definition includes a reference to humiliation, a factor which does not appear in the Torture Convention, but which the Trial Chamber felt warranted introduction in light of the 'general spirit of international humanitarian law'.[34] Whether this is true is open to question, and there is no reference to humiliation in the elements of the crime for the purposes of ICC jurisdiction. Furthermore, recent judgments suggest that the fifth element stated in *Furundžija*, i.e., official involvement, may not be a requirement for the offence of torture after all. It had been stated in *Delalic* that the requirement of official involvement must extend to officials of non-state parties,[35] a position absolutely necessary if the prohibition is to retain any value in the context of internal armed conflict. In *Kunarac*, however, Trial Chamber II held that the elements of torture in humanitarian law are not necessarily the same as those in human rights law and that, in particular, 'the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.'[36]

Private acts, with no connection to the state, can thus still constitute torture during armed conflict on the basis that, whereas international human rights law seeks to engage state responsibility, international criminal law instead engages the criminal responsibility of individuals.[37] This would also seem to be the position in terms of ICC jurisdiction, and the elements of the crimes for torture as a violation of common Article 3 (and, indeed, for torture as a grave breach or a crime against humanity) do not express the need for any official involvement. Instead, all that is required is that:

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33 Judgment of 10 December 1998, paragraph 162.

34 *Ibid*. See also discussion in Jones and Powles, *International Criminal Practice*, 280-1.

35 *Prosecutor* v. *Delalić*, Judgment of 16 November 1998, paragraph 473.

36 *Prosecutor* v. *Kunarac*, Judgment of 22 February 2001, paragraph 496. This was upheld in the Appeals Chamber Judgment of 12 June 2002, paragraph 148.

37 See discussion in *Prosecutor* v. *Kunarac*, Judgment of 22 February 2001, paragraphs 465-497, and Boot, *Genocide, Crimes Against Humanity, War Crimes*, 585-586. Jones and Powles, *International Criminal Practice*, 281, however, question whether the prosecution of private acts by an international tribunal is entirely appropriate, in that such a tribunal would 'usually concern itself with crimes of a massive or systematic nature, sponsored by States or quasi-State entities.'

> The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
> The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
> ...

Indeed, the definition of torture as a crime against humanity contained in Article 7(2)(e) of the Rome Statute, and the draft elements for torture as a war crime apparently influenced the ICTY in reaching its decision in *Kunarac*.[38]

Torture as a crime against humanity requires neither official involvement, nor that the criminal act be carried out for a specific purpose.[39] It should be noted, however, that ICTY jurisprudence and, indeed, the elements of the crime have specifically retained this requirement for torture as a war crime. Thus, it was stated by Trial Chamber II that:

> The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment. Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture ... [40]

There is, however, no requirement that the prohibited purpose be the sole, or even the main, purpose behind the infliction of suffering. Provided the prohibited purpose is simply 'part of the motivation behind the conduct', it is likely to qualify as torture in terms of ICC jurisdiction.[41] In any case, it will be recalled that, even where the purposive element is missing, conduct can still be a violation of common Article 3 entailing individual criminal responsibility under the broader notion of 'cruel treatment'.

II. War Crime of Outrages upon Personal Dignity

Outrages upon personal dignity fall within the jurisdiction of the ICC as violations of common Article 3 under Article 8(2)(c)(ii), but also as violations of the laws and customs of international armed conflict under Article 8(2)(b)(xxi). They are therefore criminal in all armed conflict and, in terms of the Court's jurisdiction, only the context of the offence differs. The nature and content of the crime is the same, and stems from the overriding duty to respect human dignity, first set out in the Preamble

38 *Prosecutor* v. *Kunarac*, Judgment of 22 February 2001, paragraph 495, note 1210. See also Boot, *ibid*., 586.

39 See Elements of Crimes, Article 7(1)(f).

40 *Prosecutor* v. *Milorad Krnojelac*, Judgment of 15 March 2002, paragraph 180.

41 It has been held to do so in the context of ICTY jurisdiction. See, e.g., *Prosecutor* v. *Kunarac*, Judgment of 22 February 2001, paragraph 486, and *Prosecutor* v. *Kvoćka*, Judgment of 2 November 2001, paragraph 153.

to the Universal Declaration of Human Rights.[42] Dignity and honour are clearly similar concepts, and Article 46 of the 1907 Hague Regulations does require respect for 'family honour'. Likewise, Article 14 of Geneva Convention III and Article 27 of Geneva Convention IV both state that those protected by their provisions are entitled to respect for their honour, as does Article 75(1) of Additional Protocol I. Common Article 3(1)(c), however, contains the first explicit prohibition of 'outrages upon personal dignity, in particular humiliating and degrading treatment'. Article 52 of Geneva Convention III prohibits prisoners of war from being 'assigned to labour which would be looked upon as humiliating', and Article 95 of Geneva Convention IV provides that protected persons may not be employed 'on work which is of a degrading or humiliating character', but both of these are narrower provisions than that contained in common Article 3.

Some commentators have expressed dismay at the inclusion of such a prohibition within common Article 3. Elder, for example, believes that:

> ... upon superficial analysis [it would seem] to be an anachronism of chivalry, somewhat out of place in a listing of proscribed inhumane activities. These acts do not endanger the physical or mental health of prisoners. Furthermore they may not be practically capable of regulation. But is it not somewhat anomalous to proscribe such treatment while allowing the death penalty if not capriciously executed?[43]

Of course, it is entirely possible to take issue with such a view, and to have failed to include such a provision in common Article 3 would have directly contradicted the recently adopted Universal Declaration of Human Rights. Subsequent international agreements in both human rights and humanitarian law have maintained this position.

As with the rest of common Article 3(1), paragraph (c) aims to ensure humane treatment for those taking no active part in hostilities. Unfortunately, exactly what constitutes 'humane treatment' may not always be readily apparent. The ICRC Commentaries provide precious little guidance on the point, arguing that the phrase had entered sufficiently into everyday language as to be clearly understood.[44] In addition, it was thought that to draw up a list of such behaviour would be unhelpful. As explained in the context of common Article 3(1)(a):

> However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wishes to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible, and at the same time, precise. The same is true of item (c).[45]

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42 See Bothe, 'War Crimes', 414.

43 David A. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949' (1979) 11 *Case Western Reserve Journal of International Law* 37, 63.

44 Pictet, *Commentary on the Geneva Conventions*, Volume I, 53.

45 Pictet, *Commentary on the Geneva Conventions*, Volume IV, 39. Article 27 of Geneva Convention IV did, however, list rape, enforced prostitution and indecent assault as examples of inhumane treatment. See Patricia Viseur Sellers, 'Outrages Upon Personal Dignity' in Triffterer, *Commentary on the Rome Statute*, 246-247.

Instead of providing a substantive list, subsequent humanitarian law has accordingly opted to provide examples of such treatment. Article 75(2)(b) of Additional Protocol I, for example, prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault',[46] whilst Article 85(4)(c) states that '*apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' are to be considered grave breaches. The criminal offence of outrages upon personal dignity is therefore broad and residual in character, including at least humiliating and degrading treatment, with those examples given being illustrative rather than exhaustive.

The ICTY has had cause to consider this offence in prosecutions under Article 3 of its Statute. In *Delalić*, although dealing with inhuman treatment rather than outrages upon personal dignity, the Trial Chamber held that inhuman treatment extended beyond those acts included within both torture and serious injury to body and health, to include 'other acts which violate the basic principle of humane treatment, particularly the respect for human dignity.'[47] In *Furundžija*, the accused was convicted of 'outrages upon personal dignity including rape'. In coming to its decision, the Trial Chamber held that:

> The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law ... [it] is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.[48]

Neither of these cases, however, dealt specifically with the elements of the offence. These were instead set out in the *Aleksovski* Case,[49] where it was held that an outrage upon personal dignity is 'a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*.'[50] In particular:

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46 Repeated in Article 4(2)(e) of Additional Protocol II, but with the additional inclusion of 'rape'.

47 *Prosecutor* v. *Delalić* Judgment of 16 November 1998, paragraph 544.

48 *Prosecutor* v. *Furundžija*, Judgment of 10 December 1998, paragraph 183. See also jurisprudence of the ICTR, such as *Prosecutor* v. *Akayesu*, Judgment of 2 September 1998, paragraph 688, where it was stated that sexual violence in the form of forcing a female student to do gymnastics naked in front of a crowd constituted 'sexual violence', falling within the scope of outrages upon personal dignity as set out in Article 4(e) of the ICTR Statute; and *Prosecutor* v. *Musema*, Judgment of 27 January 2000, paragraph 285, where it was held that humiliating and degrading treatment involved subjecting victims to 'treatment designed to subvert their self-regard. Like outrages upon personal dignity, these offences may be regarded as lesser forms of torture; moreover ones for which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority.'

49 *Prosecutor* v. *Zlatko Aleksovski*, Judgment of 25 June 1999.

50 *Ibid*., paragraph 54.

> An outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule. The degree of suffering which the victim endures will obviously depend on his/her temperament. ... Consequently, an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged.[51]

This was refined slightly in *Kunarac*, where the Trial Chamber held that, provided the humiliation or degradation suffered was 'real and serious', there is 'no reason why it would also have to be "lasting".'[52] Thus, 'it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity.'[53] Any act which is so intense as to satisfy the objective test of outraging the dignity of the reasonable person will therefore represent the criminal offence, provided that the accused 'knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity'.[54] In other words, the crime requires knowledge only of the possible consequences.

The elements of the crime for ICC jurisdiction are entirely consistent with previous case law, and require that:

> The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
> The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
> ...

Article 8(2)(c)(ii) and the relevant elements therefore reproduce the language of common Article 3 rather than the Additional Protocols. No examples of prohibited acts are provided, although clearly 'or otherwise ... ' indicates that the offence goes beyond humiliating or degrading treatment. Nor is any reference is made to rape or other sexual violence, which is specifically prohibited elsewhere in the Statute. Sellers is therefore confident that this provision 'deliberately envelops a wide range of inhumane acts.'[55]

Vitally important is the footnote added by PrepCom to the first element. It includes three additional clarifications, rendering the content of the crime consistent with post-World War II and human rights jurisprudence. First, it states that, for the purposes of this crime, '"persons" can include dead persons.' This arises from cases such as that of *Max Schmid*, prosecuted following World War II for mutilating the

51 *Ibid*., paragraph 56.

52 *Prosecutor* v. *Kunarac*, Judgment of 22 February 2001, paragraph 501.

53 *Ibid*.

54 *Prosecutor* v. *Kunarac*, Appeals Chamber Judgment of 12 June 2002, paragraph 164.

55 Sellers, 'Outrages Upon Personal Dignity', 247.

dead body of a prisoner of war and refusing an honourable burial.[56] Secondly, the footnote explains that 'the victim need not be personally aware of the existence of the humiliation or degradation or other violation.' This reflects the body of European human rights case law providing that treatment can be degrading so long as it is sufficiently humiliating to the victim either in his own eyes, or 'in the eyes of others'.[57] Accordingly, outrages upon personal dignity can also be carried out against mentally disabled or unconscious victims.[58]

Finally, it is provided that, 'This element takes into account relevant aspects of the cultural background of the victim.' Such a clarification was considered important, as cultural and religious values can play an extremely significant role in determining whether a particular victim would find certain treatment humiliating and degrading or not. Examples cited during PrepCom negotiations included forcing victims to eat certain substances (e.g., pork), perform certain activities (e.g., to drink alcohol or smoke tobacco), or alter their appearance in some way (e.g., to cut their hair or shave off their beard) prohibited by their religious beliefs.[59]

The particular relationship between outrages upon personal dignity involving humiliating or degrading treatment and other cruel treatment or torture as covered by Article 8(2)(c)(i) may not always be an easy one for the Court to deal with. Clearly, outrages upon personal dignity could in some cases – where the level of suffering caused is severe and the purposive element is satisfied – amount to torture. Indeed, a single action could represent degrading treatment, cruel or inhuman treatment and torture simultaneously, and the ICC may find European human rights jurisprudence particularly instructive in this regard. In the *Greek* Case, for example, the European Commission of Human Rights stated that:

> ... there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical ... The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.[60]

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56 *Max Schmid Trial*, *Law Reports of Trials of War Criminals*, London 1949, Volume XIII, 151-152. See Dörmann, *Elements of War Crimes*, 314 and 323. The *Schmid* judgment was cited with approval in *Prosecutor* v. *Tadić*, Judgment of 7 May 1997, paragraph 748 (in the context of inhuman treatment as a crime against humanity).

57 *Campbell and Cosans* v. *United Kingdom*, ECHR Series A, Volume 48, Judgment of 25 February 1982, paragraph 28.

58 See, e.g. Dörmann, *Elements of War Crimes*, 315. De Than and Shorts, *International Criminal Law*, 159, give the example of transmitting television images of prisoners or victims being humiliated (either dead or alive).

59 See, e.g., Dörmann, *ibid*.

60 *The Greek Case*, (1969) 12 *Yearbook of the European Convention on Human Rights*, 186. See further discussion in, e.g., Nigel S. Rodley, *The Treatment of Prisoners under International Law* (second edition, Oxford, 1999), and cases such as *Ireland* v. *United Kingdom*,

There is, accordingly, a legal continuum, running from humiliating or degrading treatment to torture and – provided the minimum threshold of objective severity is crossed – no gap in protection for the victims of such offences should exist.

III. War Crime of Taking Hostages

Historically, the taking of hostages during armed conflict was relatively commonplace. Executing hostages, however, was criminal.[61] The Nuremberg Charter, for example, provided in Article 6(b) that the 'killing of hostages' was a war crime – although the jurisprudence of the Nuremberg Tribunal suggested that even this may not always be the case. In the *Hostages* Case, for example, it was held that the execution of hostages could, under certain circumstances, be justified 'as a last resort',[62] whilst the *High Command* Case held that hostages could be sentenced to death 'after a judicial finding of strict compliance with all pre-conditions and as a last desperate remedy'.[63] At any rate, the criminalisation of taking hostages, even without killing them, is now beyond doubt.

Taking hostages is prohibited by common Article 3(1)(b). It is also explicitly prohibited by Article 34 of Geneva Convention IV, Article 75(2)(c) of Additional Protocol I, and by Article 4(2)(c) of Additional Protocol II. Indeed, Article 147 of Geneva Convention IV provides that the taking of hostages is to be considered a grave breach. The offence is therefore criminal in both international and internal conflicts, and only the context in which the crime is committed is different.

Clearly, Geneva Convention IV applies only to civilians, a position reflected in the ICTY Statute, Article 2 of which has been held to cover the taking of civilian hostages as a grave breach. The approach of the ICTY under Article 3 of its Statute, in contrast, would seem to be broader in that reference is made to hostages *per se*, rather than 'civilian hostages'.[64] Of course, this can probably be explained by reason of the fact that, as Kittichaisaree explains, in the context of international armed conflict, those members of the armed forces who are captured become prisoners of war.

It is not, therefore, difficult to comprehend why Article 2 of the ICTY Statute talks of taking civilians hostage.[65] Kittichaisaree also points out that this terminology is rather unhelpful and misleading in that the category of civilians also includes those troops placed *hors de combat* anyway. Article 3 of the ICTY Statute – and,

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2 *European Human Rights Reports* 25, and *Tyrer* v. *United Kingdom*, ECHR Series A, Volume 26, Judgment of 25 April 1978. Again, however, see Evans, 'Getting to Grips with Torture'.

61 See, e.g., Lord Wright, 'The Killing of Hostages as a War Crime' (1948) 25 *British Yearbook of International Law* 296; Dinstein, *Conduct of Hostilities*, 227.

62 *Trial of Wilhelm List and Others* (the *Hostages* Trial), *Law Reports of Trials of War Criminals*, Volume VIII, 61.

63 *Trial of Wilhelm von Leeb and Others* (the *High Command* Trial), *Law Reports of Trials of War Criminals*, Volume XII, 84. This decision was based on a dubious reading of the *Hostages* judgment, and both have been the subject of much criticism. See Wright, 'The Killing of Hostages', Dinstein, *Conduct of Hostilities*, 227 and Kittichaisaree, *International Criminal Law*, 155-156.

64 See Jones and Powles, *International Criminal Practice*, 250-251.

65 Kittichaisaree, *International Criminal Law*, 156.

indeed, common Article 3 – are not, then, necessarily more extensive in scope.[66] The ICC Statute follows the latter approach, and talks only of the taking of hostages. No reference is made to their character, be it civilian or otherwise.

The essence of taking hostages is the seizing of protected persons and depriving them of their liberty. Of course, the detention of protected persons or civilians is not always unlawful. It may, for example, be intended to ensure their safety. What marks the detention out as hostage taking is the purposive element of the crime. Hostages were thus defined by the Nuremberg Tribunal as, 'those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they are taken.'[67] The Commentary to Geneva Convention IV likewise states that hostages are 'nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces',[68] a formulation essentially reproduced in the Commentary to Additional Protocol I.[69] The approach of the ICTY, as reflected in its jurisprudence, has been broadly similar. Thus, in the *Kordic* Case, it was held that:

> ... the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement ...
> The additional element that must be proved to establish the crime of unlawfully taking civilians hostage is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a 'threat either to prolong the hostage's detention or to put him to death'. In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition. The Trial Chamber in the Blaskic case phrased it in these terms: 'The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage.'[70]

There is, of course, a specific Convention on the subject matter – the International Convention Against the Taking of Hostages, 1979. Article 1(1) states that the offence is carried out by:

> ... any person who seizes or detains and threatens to kill, to injure or to continue to detain another person ... in order to compel a third party ... to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

66 *Ibid*.

67 The *Hostages* Trial, *Law Reports of Trials of War Criminals*, Volume VIII, 61.

68 Pictet, *Commentary on the Geneva Conventions*, Volume IV, 229.

69 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 874.

70 *Prosecutor* v. *Kordić and Čerkez*, Judgment of 26 February 2001, paragraphs 312-313. See also *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraph 158. Both cases accepted that the elements of the offence itself must be broadly the same, whether committed in an international conflict under Article 2 of the ICTY Statute, or in an internal armed conflict under Article 3. See *Kordić*, paragraph 320 and *Blaškić*,, paragraphs 158 and 187.

This Convention, however, is not considered to be part of international humanitarian law, and was certainly not drafted in the context of armed conflict.[71] Indeed, Article 12 states explicitly that, 'the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto'. In addition, Article 13 provides that the Hostages Convention does not apply 'where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.' Clearly this would be the case for internal armed conflict. Nonetheless, PrepCom based their definition of hostage taking for ICC purposes on the 1979 Convention, with some minor adaptation.[72] The elements of the crime accordingly require that:

> The perpetrator seized, detained or otherwise held hostage one or more persons.
> The perpetrator threatened to kill, injure or continue to detain such person or persons.
> The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
> ...

In terms of internal armed conflict, the taking of hostages has often been equated with the use of protected individuals as human shields, an activity not explicitly prohibited by any of the relevant treaties.[73] The ICRC asserts that this is prohibited in the context of internal armed conflict by customary international law, and that the commission of such an act would be a war crime.[74] The ICC Statute contains no such provision, however, and the ICTY has considered such acts to be examples of either cruel treatment or of outrages upon personal dignity.[75]

IV. War Crime of Sentencing or Execution without Due Process

Common Article 3(1)(d) prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.' Article 8(2)(c)(iv) of the ICC Statute is virtually identical, with only the description of the required guarantees as 'generally recognized as indispensable'

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71 Knut Dörmann, 'Taking Hostages' in Lee, *The International Criminal Court*, 139.

72 Dörmann, *Elements of War Crimes*, 124. Although element 1 is broader, including the catch-all provision of 'or otherwise held hostage', other changes are insignificant.

73 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 338. Human shields are, however, explicitly prohibited during international armed conflict by Geneva Conventions III and IV, and by Additional Protocol I. The ICC Statute asserts jurisdiction over the offence when committed in that context in Article 8(2)(b) (xxiii).

74 *Ibid*., 337-340 and 602.

75 *Ibid*., 602. See, e.g., *Prosecutor* v. *Blaškić*, Judgment of 3 March 2000, paragraph 716; *Prosecutor* v. *Kordić and Čerkez*, Judgment of 26 February 2001, paragraph 256; *Prosecutor* v. *Aleksovski*, Judgment of 25 June 1999, paragraph 229.

replacing the rather outdated notion of 'civilized peoples'.[76]

There is clearly a close relationship between these provisions and the grave breach of wilfully depriving a prisoner of war or other protected person 'of the rights of fair and regular trial' as set out in Geneva Conventions III and IV, and in Article 8(2)(a)(vi) of the Rome Statute.[77] The denial of due process as a grave breach and as a violation of common Article 3 are not stated in identical terms, however, and clearly apply in different contexts. Nonetheless, the question of just which judicial guarantees are protected – in the context of what constitutes a fair trial – is essentially the same for both.[78]

Common Article 3 and Article 8(2)(c)(iv) of the ICC Statute fail to specify any judicial guarantees whatsoever. The ad hoc criminal tribunals have been equally silent on this issue. Instead, it is necessary to have reference to the Additional Protocols of 1977 as reflecting international human rights law and, indeed, to human rights law itself.[79] When considering what is 'generally recognized' as indispensable it is, after all, much better to examine what states have agreed on in international instruments with broad acceptance, rather than individual legal systems. In the particular context of internal armed conflict, then, one must look initially to Article 6(2) of Additional Protocol II. It states that:

> No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
> the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
> no one shall be convicted of an offence except on the basis of individual penal responsibility;
> no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by the law for the imposition of a lighter penalty, the offender shall benefit thereby;
> anyone charged with an offence is presumed innocent until proved guilty according to law;
> anyone charged with an offence shall have the right to be tried in his presence;
> no one shall be compelled to testify against himself or to confess guilt.

The ICRC Commentaries to the Additional Protocols indicate that Article 6 serves to outline the guarantees contained within common Article 3. It is therefore stated

76 See de Than and Shorts, *International Criminal Law*, 165; Eve La Haye, 'Sentencing or Execution Without Due Process' in Lee, *The International Criminal Court*, 212.

77 Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

78 De Than and Shorts, *International Criminal Law*, 165.

79 Bothe, 'War Crimes', 394-395. Fenrick, 'War Crimes', 184, describes Article 75 of Additional Protocol I as a 'usable list' of criteria.

that:

> [Common] Article 3 relies on the 'judicial guarantees which are recognized as indispensable by civilized peoples', while Article 75 [of Additional Protocol I] rightly spells out these guarantees. Thus this article, and to an even greater extent, Article 6 of Protocol II ... gives valuable indications to help explain the terms of [common] Article 3 on guarantees.[80]

It is clear, then, that Article 6(2) explains, rather than extends, common Article 3.[81] At least those guarantees mentioned in the Protocol must accordingly apply in the context of any internal armed conflict. This much is made apparent by inclusion of the phrase, 'in particular', which demonstrates that the guarantees provided in Article 6(2), paragraphs (a)-(f), are a non-exhaustive, minimum list. Additional judicial guarantees can be imported from international human rights law – Article 6 of Additional Protocol II is, after all, based to a large extent on the provisions of the 1966 International Covenant on Civil and Political Rights,[82] and the body of human rights jurisprudence regarding fair trial is extensive. The development of humanitarian law by human rights law is not novel.[83]

There is, however, a particular problem with respect to fair trial guarantees during internal armed conflict. Common Article 3 (and the ICC Statute) protect only those judicial guarantees recognised as 'indispensable'. International human rights instruments, however, treat the vast majority of judicial guarantees as derogable, and so not indispensable at all. The list enumerated in Article 6(2) of Additional Protocol II is therefore vital in terms of assuring a minimum level of protection during internal armed conflict. Of course, states are only permitted to derogate from their human rights obligations 'to the extent strictly required by the exigencies of the situation', and 'provided that such measures are not inconsistent with their other obligations under international law'.[84] Derogation from (at least) those guarantees set out in Additional Protocol II would therefore be impossible during an internal armed conflict.[85]

Drawing upon international human rights and other provisions of humanitarian law, Dörmann asserts that a number of judicial guarantees considered 'indispensable' exist beyond Article 6(2) of Additional Protocol II.[86] These include, but are not

80 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 878. See also 1396-1397 therein.

81 Dörmann, *Elements of War Crimes*, 412.

82 Sandoz, Swinarski and Zimmerman, *Commentary on the Additional Protocols*, 1397. The authors make reference only to Article 15, although several of the provisions are contained within Article 14.

83 See, for example, the development of humanitarian law regarding torture outlined above.

84 International Covenant on Civil and Political Rights, Article 4(1); European Convention on Human Rights, Article 15(1); American Convention on Human Rights, Article 27(1).

85 See further discussion in de Than and Shorts, *International Criminal Law*, 171-172; Moir, *Internal Armed Conflict*, 207-208.

86 Dörmann, *Elements of War Crimes*, 409-411. See also de Than and Shorts, *ibid.*, 168-169, offering an identical list. Dörmann, 412-438, also provides an extremely useful review of

limited to, the right to be advised of the judicial and other remedies available and time limits within which they may be exercised;[87] the right to have judgment pronounced publicly;[88] and the principle of *ne bis in idem*.[89] In addition, international human rights law assists in clarifying the meaning of the right to be afforded all necessary rights and means to defence, to include the following:[90]

> The right to be brought promptly before a judge or other officer authorised by law to exercise judicial power;[91]
> The right to proceedings before a court, in order that the court may decide without delay on the lawfulness of one's detention and order one's release;[92]
> The right to adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing;[93]
> The right to defend oneself in person or through legal assistance;[94]
> The right to be tried without undue delay;[95]
> The right to present and examine witnesses;[96]
> The right to an interpreter.[97]

All of these elements of due process, from the list in Article 6(2) of Additional Protocol II to the additional guarantees set out above are, according to the recent

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the relevant human rights jurisprudence on the individual aspects of fair trial.

87 Additional Protocol II, Article 6(3).

88 Additional Protocol I, Article 75(4)(i); International Covenant on Civil and Political Rights, Article 14(1); European Convention on Human Rights, Article 6(1); American Convention on Human Rights, Article 8(5).

89 Geneva Convention III, Article 86; Geneva Convention IV, Article 117(3); Additional Protocol I, Article 75(4)(h); International Covenant on Civil and Political Rights, Article 14(7); European Convention on Human Rights, Seventh Additional Protocol, Article 4; American Convention on Human Rights, Article 8(4).

90 Dörmann, *Elements of War Crimes*, 410; de Than and Shorts, *International Criminal Law*, 168-169.

91 International Covenant on Civil and Political Rights, Article 9(3); European Convention on Human Rights, Article 5(3); American Convention on Human Rights, Article 7(5).

92 International Covenant on Civil and Political Rights, Article 9(4); European Convention on Human Rights, Article 5(4); American Convention on Human Rights, Article 7(6).

93 International Covenant on Civil and Political Rights, Article 14(3)(b); European Convention on Human Rights, Article 6(3)(b); American Convention on Human Rights, Article 8(2)(c) and (d).

94 International Covenant on Civil and Political Rights, Article 14(3)(d); European Convention on Human Rights, Article 6(3)(c); American Convention on Human Rights, Article 8(2)(d) and (e); African Charter on Human and Peoples' Rights, Article 7(1)(c).

95 International Covenant on Civil and Political Rights, Article 14(3)(c); European Convention on Human Rights, Article 6(1); American Convention on Human Rights, Article 8(1); African Charter on Human and Peoples' Rights, Article 7(1)(d).

96 International Covenant on Civil and Political Rights, Article 14(3)(e); European Convention on Human Rights, Article 6(3)(d); American Convention on Human Rights, Article 8(2)(f); and also Additional Protocol I, Article 75(4)(g).

97 International Covenant on Civil and Political Rights, Article 14(3)(f); European Convention on Human Rights, Article 6(3)(e); American Convention on Human Rights, Article 8(2)(a).

ICRC Study, also reflective of customary international law on the matter.[98]

PrepCom's drafting of the elements for Article 8(2)(c)(iv) was heavily influenced by Article 6 of Additional Protocol II.[99] Some discussion did take place as to the desirability of specifically listing those judicial guarantees generally considered indispensable, but it was eventually decided not to.[100] This has the clear benefit of allowing the ICC to draw upon relevant (and continuing) developments in international human rights law in assessing whether or not the crime has been committed. The relevant elements of the crime accordingly require that:

> The perpetrator passed sentence or executed one or more persons.
> ...
> There was no previous judgment pronounced by a court, or the court that rendered judgment was not 'regularly constituted', that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgment did not afford all other judicial guarantees generally recognized as indispensable under international law.
> The perpetrator was aware of the absence of a previous judgment or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial.
> ...

Element 4 follows the approach of Additional Protocol II in underlining that a 'regularly constituted court', as required by common Article 3 and the ICC Statute is, in fact, simply a court that is independent and impartial.[101] This is vitally important in terms of non-state parties to internal armed conflict, who are probably unable to constitute a court 'regularly' in the context of domestic law. They nevertheless remain bound to ensure that any courts created by them are at least independent and impartial.[102]

A footnote to element 4 also provides that, with respect to both elements 4 and 5, 'the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial'. This addition reflects the view of a number of states that a single violation should not necessarily amount to a war crime.[103] As in human rights law, then, the fairness or otherwise of a trial is to be judged by reference to *all* of the relevant judicial guarantees. The Court will still be free, however, to determine that a single – serious – violation has rendered a trial unfair.[104]

Finally, it is important to note that capital punishment remains possible in terms

98 Henckaerts and Doswald-Beck, *Customary Humanitarian Law*, 352-371.

99 Dörmann, *Elements of War Crimes*, 408.

100 See Dörmann, *ibid.*, 409; de Than and Shorts, *International Criminal Law*, 167.

101 For a discussion of what precisely these terms mean, see the survey of relevant human rights jurisprudence in Dörmann, *ibid.*, 412-417.

102 See, e.g., Zimmerman, 'War Crimes', 275.

103 Dörmann, *Elements of War Crimes*, 409; de Than and Shorts, *International Criminal Law*, 167.

104 *Ibid.*

of the ICC Statute. Geneva Conventions III and IV impose a number of requirements that must be met before the death penalty can be pronounced and executed on prisoners of war or civilians.[105] Additional Protocol II goes even further in providing that, in the context of internal armed conflict reaching the relevant threshold, the death penalty must not be pronounced 'on persons who were under the age of eighteen years at the time of the offence, and shall not be carried out on pregnant women or mothers of young children.' Neither common Article 3 nor Article 8(2)(c)(iv) of the Statute contain such a prohibition.[106] The European Court of Human Rights has, however, held that the imposition of the death penalty upon an individual who had not received a fair trial would be impermissible *per se*,[107] and that it may also constitute inhuman treatment.[108]

105 Geneva Convention III, Articles 100, 101 and 107; Geneva Convention IV, Articles 74 and 75.

106 See Zimmerman, 'War Crimes', 275; de Than and Shorts, *International Criminal Law*, 172-173.

107 *Öcalan* v. *Turkey* (Application No. 46221/99), ECHR Judgment of 12 March 2003, paragraph 204.

108 *Ibid*., paragraph 207. See also *Söering* v. *United Kingdom*, ECHR Series A, Volume 161, Judgment of 7 July 1989.

Chapter 26

Displacement of Civilians as a War Crime Other than a Violation of Common Article 3 in Internal Armed Conflicts

Lindsay Moir

Introduction

Although Article 8(2)(e)(viii) of the Statute may appear partially similar to Article 8(2)(b)(viii), which deals with the transfer by an occupying power of parts of its own civilian population into occupied territory or the deportation or transfer of all or part of the population of the occupied territory, as another war crime in international armed conflicts, occupation is not a possibility in the context of internal armed conflict. The provision could not, therefore, simply be repeated.[1] The text of Article 8(2)(e)(viii) is, instead, based directly on Article 17(1) of Additional Protocol II, which provides that, 'The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand'.[2]

Elements of the War Crime of Displacement of Civilians

The displacement of civilians has become a relatively common feature of modern internal armed conflict.[3] It is therefore important to distinguish lawful acts of displacement, from unlawful. The ICTY, for example, has discussed the issue of ethnic cleansing, including sexual assaults as ethnic cleansing in 'an effort to displace civilians'.[4] It offered no guidance, however, regarding the particular elements of the

1 Bothe, 'War Crimes', 423, and Zimmerman, 'War Crimes', 281, describe Article 8(2)(b)(viii) and (e)(viii) as either 'parallel' or 'related'. Kittichaisaree, *International Criminal Law*, 203, however, argues that Article 8(2)(e)(viii) is the only war crime in (e) with 'no comparable provision in Article 8(2)(b)'.

2 Zimmerman suggests, *ibid*., 281, that Article 17 was itself based upon Article 49 of Geneva Convention IV, providing in paragraph 2 that, 'the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand'. The second sentence of Article 17(1) further requires that, 'Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.' Dörmann, *Elements of War Crimes*, 475, sees this as an 'additional element for determining the lawfulness of evacuation'. Special provision for children is made in Article 4(3)(e) of Additional Protocol II.

3 Zimmerman, *ibid*.

4 *Prosecutor* v. *Radovan Karadžic & Ratko Mladić*, Review of the Indictments Pursuant

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 639-641.

crime.[5] In the context of the ICC Statute, they have now been specified as follows:

> The perpetrator ordered a displacement of a civilian population.
> Such order was not justified by the security of the civilians involved or by military necessity.
> The perpetrator was in a position to effect such displacement by giving such order.
> ...

A. The requirement of an order to displace

A number of issues arise from these elements. First, and reflecting the provisions of the Statute, it is evident that the crime is committed by the individual *ordering* the displacement rather than those carrying out the displacement. Of course, displacement does not occur simply because an order is given, but those involved in carrying out the order may incur criminal responsibility for their participation in the crime under Article 25 of the Statute.[6]

In addition, the requirement that displacement be ordered means that only those acts specifically aimed at the removal of a civilian population will be criminal (at least in the context of Article 8(2)(e)(viii)). Orders which may lead to displacement only indirectly are not, accordingly, covered by this particular provision.[7] As a further corollary, and in conformity with element 3 of Articles 8(2)(b)(xii) and (e)(x), element 3 requires that the perpetrator of the offence actually had sufficient authority – either *de jure* or *de facto* – to give the order and for that to result in the commission of the act.[8]

B. The target group: 'civilian population' or 'one or more persons'

Secondly, element 1 refers to the displacement of 'a civilian population'. This contrasts slightly with the language of the Statute, which refers to 'the' civilian population, and can probably be taken to indicate that the removal of the entire civilian population is not required.[9] There is, nonetheless, a minimum threshold that must be reached in order for an order to be criminal in this context. Thus, Zimmerman and Dörmann point to the differences between element 1 of this crime, element 1 of Article 8(2)(a)(vii)-1, which refers to the deportation or transfer of 'one or more persons', and Article 17(2) of Additional Protocol II, which refers simply to 'civilians',

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to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, paragraphs 60-64. Zimmerman, *ibid.*, argues that similar policies may be employed in order to deprive guerrilla fighters of the support of the local population.

5 See also Dörmann, *Elements of War Crimes*, 473.

6 Dörmann, *ibid.*, 472; Zimmerman, 'War Crimes', 281.

7 See Zimmerman, *ibid.*, where he gives the example of starving the civilian population out of an area. Such acts might, however, still be criminal under Article 8(2)(e)(iii) or (xii).

8 Dörmann, *Elements of War Crimes*, 473; Eve La Haye, 'Displacing Civilians' in Lee, *The International Criminal Court*, 215-216.

9 Dörmann, *ibid.*, 472-473.

as evidence of the fact that a single displacement will not amount to this offence.[10] Quite where the ICC will choose to draw the line remains to be seen.

C. Reasons for displacement: only protection of civilian population or also for military necessity?

Thirdly, although not specified by the elements of the crime, the Statute itself is clear that displacement must be ordered for reasons related to the conflict. This, of course, means that displacement as a result of, for example, natural disasters or disease epidemics do not constitute criminal offences.[11] Nor do displacements ordered – even as a direct consequence of the armed conflict – where this is required either to protect the civilian population from danger, or for reasons of military necessity. Finally, as is the case for Article 8(2)(b)(xiii) and (e)(xii), the phrase 'military necessity' is used in the elements of the crime rather than 'imperative military reasons'.[12] Again, however, this change is insignificant as PrepCom believed the terms to be essentially synonymous.[13]

Conclusions

It is clear, then, that the war crime of displacement of civilians in internal armed conflicts is distinct from both the grave breach of deportation or forcible transfer, as set out in the Geneva Conventions, and the war crime of 'transfer by an occupying power of parts of its own civilian population into occupied territory or the deportation or transfer of all or part of the population of the occupied territory' applicable during international armed conflicts. The essential elements are, first, that in those crimes an order of displacement is not a legal requirement that the Prosecutor must prove, and, secondly, that military necessity does not justify effecting a displacement of civilians.

The war crime of displacement of civilians in internal armed conflicts is also distinct from deportation or forcible transfer as a crime against humanity. In the context of both crimes, deportation or forcible transfer is prohibited in areas under control of a party or in situations of combat, provided that the acts are part of a widespread or systematic attack against the civilian population, and are not otherwise justified under the laws of war.[14] Again, however, the requirement of 'ordering' is not an element of the crime against humanity.[15]

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10 *Ibid*., 472; Zimmerman, 'War Crimes', 281. Article 17(2) of Additional Protocol II prohibits civilians from being compelled to leave their own territory for reasons connected with the conflict, a situation that Zimmerman feels can be brought within the jurisdiction of Article 8(2)(e)(viii). This must be correct, as nothing within the terms of the Statute or Elements suggests that displacement cannot involve the crossing of territorial boundaries.

11 Zimmerman, *ibid*., 282; Dörmann, *Elements of War Crimes*, 475.

12 See the discussion of Article 8(2)(b)(xiii) in Chapter 21 above.

13 La Haye, 'Displacing Civilians', 216.

14 See *Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač*, Decision on Several Motions Challenging Jurisdiction, Case IT-06-90-PT, 19 March 2007.

15 These issues are properly addressed in another paper included in this Blishchenko Memorial Volume on "Whether Crimes Against Humanity are backdoor War Crimes".

Section 10

Crimes against Humanity and the Crime of Aggression

Chapter 27

Whether Crimes against Humanity Are Backdoor War Crimes*

José Doria

I. Crimes against humanity, as the crimes of crimes in controversies

One of the essential features of the notion of crimes against humanity is its state of constant codification that has spanned centuries. This is to a degree reflective of the controversies that arose from its inception and throughout its historic development. Even today crimes against humanity continue to be somehow "enigmatic and capricious" giving "food" to the imagination of thoughtful legislators, diplomats, scholars, judges, prosecutors, defence counsel and students alike.

Indeed there are not many other offences recognized under international law that have had such a remarkable path full of ambiguities, and controversies.

Of course the persistence of these controversies is not only due to the absence of any specific agreement codifying crimes against humanity, as is the case with genocide,[1] the laws or customs of war[2] and the grave breaches of the Geneva Conventions[3] and other violations of its Additional Protocols.[4] It has also to do with their com-

* The views expresses herein are solely those of the author and do not necessarily reflect those of the Office of the Prosecutor or those of the United Nations.

1 See "Convention on the Prevention and Punishment of the Crime of Genocide", adopted 9 December 1948 in UN GA Res 260(III)A, 78 *UNTS* 277 (entered into force 12 January 1951) (hereinafter '*Genocide Convention*').

2 See "1899 Convention with Respect to the Laws and Customs of War on Land, and Regulations Respecting the Laws and Customs of War on Land". Text reprinted in D. Schindler & J. Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, The Hague, Martinus Nihjoff, 1988, at 69-93.

3 See "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field", opened for signature 12 August 1949, 75 *UNTS* 31 (hereinafter '*Geneva Convention I*') *(article 49)*; "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea", opened for signature 12 August 1949, 75 *UNTS* 85 (hereinafter '*Geneva Convention II*') (Article 50); "Geneva Convention Relative to the Treatment of Civilians in War", opened for signature 12 August 1949, 75 *UNTS* 135 (hereinafter '*Geneva Convention III*') (Article 129)*;* "Geneva Convention Relative to the Treatment of Prisoners of War", opened for signature 12 August 1949, 75 *UNTS* 287 (hereinafter '*Geneva Convention IV*') (Article 146).

4 See "Protocol Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of International Armed Conflicts", (Protocol I), 12 Dec 1977, 1125 *UNTS* 3 (1979) (hereinafter '*Additional Protocol I*'); "Protocol Additional to the

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plexity which can again be traced back to explain to a certain extent the absence of an international codification act.

A. The Roots of Crimes against Humanity

It is generally agreed that the father of the notion of crimes against humanity of the modern era is Russia. It was indeed Russia that in 1868 after having invented itself a new type of bullets that explode inside the body of a person causing unnecessary and irreparable wounds to the victim, and being thus outraged by the predictable tragic consequences of its invention and those other inventions that might come in the future, proposed for the first time in history to convene general principles of law to set limits at which "the necessities of war ought to yield to the requirements of humanity" and the dictates of public conscience.[5] It was also Russia that in 1874 convened the Brussels Conference and proposed the Brussels Declaration[6] containing an expanded set of laws or customs of law for the agreement of the sovereign states of the world. As the Brussels Declaration was not made a treaty, it was Russia again that came back twenty five years later to the same issue and convened the 1899 and 1907 Hague Conferences[7] in which it proposed to adopt an expanded version of the Brussels Declaration regulating the conduct of hostilities as a treaty.

The *Martens Clause* that incorporates the essence of both crimes against humanity and the laws and customs of war,[8] belongs again to Russia, and was named in its honor after the name of its Representative to those Conferences Fyodor Fyodorovic de Martens through whom Russia formulated and proposed it for inclusion in the Conventions.[9] Despite its undoubted importance, the clause has remained contro-

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Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of Non-International Armed Conflicts", (Protocol II), 12 Dec 1977, 1125 *UNTS* 609 (1979) (hereinafter '*Additional Protocol II*').

5 See Text of "St Petersburg Declaration Renouncing the use, in time of war of explosive projectiles under 400 grammes weight." Saint Petersburg, 11 December 1868. Text reprinted in D. Schindler & J. Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions,* at102.

6 See "Brussels Declaration concerning the laws and customs of war", 27 August 1874, Text reprinted in D. Schindler & J. Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions,* at 22-34.

7 See about these Conferences in see F. Kalshoven (ed.), *The Centennial of the First International Peace Conference; Reports and Conclusions, The Hague, Kluwer,* 2000. The texts of the acts adopted at the 1899 and 1907 Hague Peace Conferences are reprinted in D. Schindler & J. Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions,* at 50 *et seq*.

8 See *Prosecutor v. Martić*, Case IT-95-11-R61, Review of the Indictment Pursuant to Rule 61, 13 March 1996, para. 13 (the ICTY trial chamber noting "the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare . . . emanate from the elementary considerations of humanity (which also derive from the 'Martens clause') which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.").

9 The 1899 *Martens Clause* read: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection

versial until today,[10] and has perhaps set the path for the controversies surroundings crimes against humanity in general.

B. Controversies in the Interpretation of Crimes against Humanity

Some of the controversies that arose around the notion of crimes against humanity at different periods of its development will be recalled here as matter of illustration.

i. Drafting the Charter of the Nuremberg Tribunal

Perhaps it is worth remembering that during the drafting process of the Nuremberg Charter, among the various controversies that arose, one related to the need for a link to an armed conflict and to war crimes, before prosecutions of inhuman acts committed against civilians could be carried out. France and England suggested that a link was not necessary at least for the murder type crimes against humanity, whereas Russia and the US insisted that this should be a requirement for both types of crimes against humanity (inhuman acts and persecutions).[11]

This controversy became reflected in the differences between the texts of the Charter of the Nuremberg Tribunal in English and French, on the one side (both types of crimes against humanity were divided with a semicolon), and in Russian, on the other side (where a comma was included).

Obviously the difference in punctuation was not simply grammatical or stylistic. In the English and French texts of the Charter, the semicolon implied that the nexus

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and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. In the 1907 formulation, "population" was replaced by 'inhabitants' ; 'international law' by 'laws of nations'; "requirements" by "dictates". This clause has since been incorporated in slightly reformulated ways in a number of international treaties such as the 1949 Geneva Conventions (common Article 63/62/142/158); Article 1(2) of Additional Protocol I; Preamble of Additional Protocol II.

It has also been cited in international decisions, and international declarations. But more importantly for the purposes of the present research the clause has served as the only credible legal foundation on which the international community based its intention of prosecuting crimes committed by Hitler against his own co-citizens, formulated as crimes against humanity.

10 For example, it is not clear whether the clause was intended to refer to already existing rules of law, or to those that are supposed to be established in the future. In this author's opinion, although the clause should be viewed as intended to cover both situations (existing and future situations), most importantly, however, it reflects what its plain language says, i.e. that acts that are not covered by existing norms of international law, *do not become for that only reason permissible*, unless they are not contrary to the laws of humanity and dictates of public conscience. See an overview of the controversies around specifically the Martens clause in Theodor Meron, 'The Martens Clause, Principles of Humanity and Dictates of Public Conscience', 94 *Am. J. Int'l. L.*, 2000, at 78; Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', *International Review of the Red Cross*, No. 317, Mar.-Apr. 1997, 125.

11 See a detailed review of some of these controversies in Matthew Lippman, 'International Law and Human Rights Edition: Crimes Against Humanity', 17 *Boston College Third World L. J.*, 1997, 171, at 177-189.

to an armed conflict applied only to persecutions, thus excluding the inhuman acts. The issue was solved only after an additional Protocol to the London Charter was adopted on 6 October 1945 in Nuremberg[12] specifically requiring the amendment of the French and English texts to conform to the text of the original in Russian.[13]

ii. Drafting the Statutes of the *ad hoc* Tribunals

47 years after Nuremberg, with the adoption of the statutes of the *ad hoc* tribunals in 1993, the saga around the interpretation of the definition of crimes against humanity continued.

If the issue of the link to an armed conflict caused no problems at the ICTY, (the Statute itself provided for such a link)[14] the same could not be said in relation to the *discriminatory* grounds on political, racial and religious basis that is traditionally included in the definition of crimes against humanity. The controversy arose essentially because under the ICTR Statute the discriminatory grounds were clearly defined as a requirement for both types of crimes against humanity (inhuman acts and persecutions).[15] This led some Defence Counsel to seek a ruling implying that the element of "discriminatory grounds" in crimes against humanity was a general

12 See "Protocol to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal", October 6, 1945, reprinted in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Tribunals*, (1945), at 429, Document LXI.

13 The changes in contents are better seen from the French text that has changed not only grammatically but also stylistically: "…la meurtre, ….la deportation... et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant *la guerre; ou bien* les persecutions pour des motifs politiques, raciaux ou religieux, commises a la suite de tout crime rentrant dans la competence du Tribunal international ou s'y rattachant, *que ces persecutions aient constitue* ou non une violation du droit interne du pays ou elles ont ete perpetrees."

After the amendment this is how the text was drafted: "…la meurtre, ….la deportation... et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant *la guerre, ou bien* les persecutions pour des motifs politiques, raciaux ou religieux, *lorsque ces actes* ou persecutions, *qu'ils aient constitue* ou non une violation du droit interne du pays ou ils ont ete perpetres, ont ete commis a la suite de tout *crime* rentrant dans la competence du Tribunal, ou en liaison avec ce crime." See *The Charter and Judgment of the Nuremberg Tribunal: History and Analysis* (Memorandum Submitted by the UN Secretary-General), 66 (1949) (emphasis added).

14 The Appeals Chamber in *Tadić* Jurisdiction Decision rightly noted that "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law." See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal, 2 October 1995, para. 141. This was reflected in the definition of crimes against humanity incorporated in the Statute of the ICTR which contains no such jurisdictional requirement.

15 See Article 3 of the Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994, by UN SC resolution 955 (1994).

customary law requirement that also applied in the context of the ICTY Statute, despite the fact that it was there restricted to persecutory acts only.[16]

The *Tadić* Trial Chamber initially agreed with the Defence that this was a requirement for both persecutions and inhuman acts,[17] however, at the Appeals level, that decision was overturned.[18]

iii. Drafting the Rome Statute of the ICC

Among the controversies that arose during the drafting of the ICC Statute[19] one relates to the type of acts that can amount to the crime of persecution if committed with the requisite discriminatory intent.

The ICTY jurisprudence has firmly established that provided that the person acted with the requisite specific intent to discriminate, *any* unlawful act would make him effectively guilty of the crime of persecution.[20] In the ICC Statute, however, a *prima facie* restrictive provision was included to the effect that in order to hold someone responsible for the crime of persecution under Article 7(1)(h), this crime must be perpetrated in connection "with any act referred to in this paragraph or any crime within the jurisdiction of the Court."

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16 See Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia adopted 25 May 1993, by UN SC resolution 827 (1993).

17 See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Opinion and Judgement, 7 May 1997,para. 652, (noting that "Significantly, discriminatory intent as an additional requirement for all crimes against humanity was not included in the Statute of this International Tribunal as it was in the Statute for the International Tribunal for Rwanda, the latter of which has, on this very point, recently been criticised. Nevertheless, because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the *Report of the Secretary-General*, and since several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis, the Trial Chamber adopts the requirement of discriminatory intent for all crimes against humanity under Article 5. Factually, the inclusion of this additional requirement that the inhumane acts must be taken on discriminatory grounds is satisfied by the evidence discussed above that the attack on the civilian population was conducted against only the non-Serb portion of the population because they were non-Serbs.").

18 See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 305 (hereinafter *Tadić* Appeal Judgement), (noting that "The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.").

19 There were many other controversies though; a brief summary is given in A. Cassese, "Crimes Against Humanity", in A. Cassese *et al.* (eds.), *The Rome Statute of the ICC, A Commentary*, Oxford University Press, 2002, 353, at 373-377.

20 See *Prosecutor v. Tihomir Blaškić*, Trial Judgement, Case IT-95-14-T, 3 March 2000, para. 235 (the Trial Chamber noting that: "It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of human beings, for example, attacks on property.").

While this provision seems to indicate what it *prima facie* indicates (namely that the underlying acts of persecutions are restricted to those listed as crimes or other crimes against humanity in the Statute) this author is nonetheless of the view that one should not run too quickly to interpretations that put the ICC Statute at odds with existing customary international law as some commentators would appear doing,[21] unless this is the only possible conclusion.

It is true that if a negative restrictive interpretation prevailed a difficult question would arise as to whether this requirement is part of customary law or is a new law. As the Appeals Chamber noted in the *Kupreškić et al.* case, international law does not necessarily require that the underlying act of persecution amounts to a war crime or crime against humanity. Therefore, any act even if not punishable as a war crime or crime against humanity can amount to persecution provided that it results in egregious violation of fundamental human rights and was part of the widespread and systematic attack against the civilian population.[22]

However, the same provision can too be read in a way that does not contradict with existing customary law. Since Article 7 (1)(h) requires that the underlying act be a crime against humanity in particular, one of such crimes would be the "other inhuman acts". Other inhuman acts according to Article 7(1)(k) are *any* "acts of a similar character [to those listed in Article 7(1), from (a) to (j)] intentionally causing great suffering or serious injury to body or to mental or physical health".

Therefore, even acts not specifically listed as punishable crimes against humanity would effectively become such under the ICC Statute as "other inhuman acts" (if they are of a similar character as those listed), for the purpose of underlying acts of persecution too. Indeed if these acts are considered by the Court as meeting the requirements of "other inhuman acts", as acts similar to those punishable under the ICC Statute, and a person is convicted for them, it is difficult to argue that such person cannot be convicted for them as acts of persecution too, if the requisite specific intent is also present.

II. The Relationship between Crimes against Humanity and War Crimes

Discussions about the contents of crimes against humanity have remained ever evolving over the years. While most of the controversies reviewed above have referred to one particular aspect of the codification of crimes against humanity, one such controversy has remained almost the same in essence since the inception of crimes against humanity, despite the time that has elapsed, and requires a careful analysis.

21 See A. Cassese, "Crimes Against Humanity", at 376.

22 See *Prosecutor v. Mirjan Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgement, 14 January 2000, para. 614 (noting that: "The Trial Chamber is thus bolstered in its conclusion that persecution can consist of the deprivation of a wide variety of rights. A persecutory act need not be prohibited explicitly either in Article 5 or elsewhere in the Statute. Similarly, whether or not such acts are legal under national laws is irrelevant. It is well -known that the Nazis passed many discriminatory laws through the available constitutional and legislative channels which were subsequently enforced by their judiciary. This does not detract from the fact that these laws were contrary to international legal standards. The Trial Chamber therefore rejects the Defence submission that persecution should not include acts which are legal under national laws.").

This is the issue of the specific relationship between crimes against humanity and war crimes.[23] For this controversy, it can be rightly said that the circumstances and emphasis have changed, but the problem continues the same.

From the outset, it should be noted that this problem has had three doctrinal and codification dimensions:

– One has a *general character* (prosecution of crimes against humanity committed in foreign countries as a *policy issue* (how to reconcile the sovereignty of states with the need to prosecute), and;
– Two have a more *special character* (prosecution of crimes against humanity as a *technical issue* (how to reconcile this new type of crimes with the definition of war crimes under existing laws and customs of war).

The controversy as a policy issue:

Regarding the need to criminalize internal atrocities as crimes against humanity, the policy question to date is:

Whether or not the international community is entitled punish horrible acts that fall within the domestic competence of every state, no matter how repulsing they are in the eyes of all good thinking people, (pre-WWII trials discussion)

The controversy as a technical issue:

The technical issues that present themselves in terms of the legality of such prosecutions from a law of war perspective are twofold:

i) Whether or not courts of law are entitled to punish horrible acts, not prohibited as such by the laws of war, no matter how repulsing they are (Geneva type crimes against humanity) (WWII trials- era discussion);
ii) Whether or not courts of law are entitled to punish not only Geneva type acts but also Hague type acts as crimes against humanity, and if so under which conditions (modern discussions)?

These dimensions are considered below.

23 This controversy should be distinguished from the broader one reviewed above that concerns the connection between crimes against humanity and an armed conflict, although they are related. In this late controversy, the issue is whether crimes against can only be committed during wars (like war crimes) or also in peace time. Customary law establishes that crimes against humanity can be committed either in times of war or peace. However, the historic reasons behind the controversy will be discussed further in this chapter, as part of the narrower review – the object of this chapter which is the following: once there is an armed conflict, whether crimes against humanity can only be those also found to be war crimes under the laws or customs or war or not. At the time of writing of this paper the issues had been raised in the ICTY, but a final Appeal ruling has not been adopted yet. See discussion *infra.*

A. Internal Atrocities as Internationally Punishable Acts: Policy Issues

Should the international community punish horrible acts that fall within the domestic competence of every state or not? (Pre-WWII trials discussions)

The problem of the relationship between crimes against humanity and war crimes has presented itself initially as an issue of the legal foundations for a right to punish crimes committed by foreigners against their own co-citizens in the absence of a valid basis of jurisdiction at the time. Without such a basis countries thought that it would amount to an impermissible interference within the internal affairs of states contrary to law, risking to shake with the entire building of international law of the time. However, faced with the appalling horrors committed against civilians in foreign states, the international community increasingly searched for a valid legal basis to intervene in defence of the victims in such cases.

i. *The Martens' principles of humanity as a valid legal basis*

When in 1899, Russia proposed the Martens clause, the wisdom of introducing such a provision, perhaps did not become immediately self-evident to all. However, when in 1915 the Ottoman Empire engaged in a wholesale massacre of Armenian and Greek minorities in the country, that technically could not be considered as war crimes as the acts were committed against Turkey's own minorities, not against enemy civilians, the Allies (Great Britain, France, and Russia) had to rely on the Martens' "laws of humanity" to justify their interference in what appeared to be an internal affair of Turkey, calling it "crimes against humanity and civilization".

On 24 May 1915, they issued a joint declaration condemning "the connivance and often assistance of Ottoman authorities" in the massacres, and vowed to "hold personally responsible ... all members of the Ottoman government and those of their agents who are implicated in such massacres."[24]

However in 1919 at the end of WWI the US rejected the Martens' 'principles of humanity' as a valid basis of prosecutions in a draft initially proposed by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,[25] alleging that a Court of law is supposed to address only "existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity."[26] This American position prevailed and as a result

24 See Vahkn N. Dadrian, 'The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or Punish the Crimes', 29 *University of West Los Angeles L. Rev.*, 1998, 43, at 57.

25 The Commission found that the German Empire and her Allies were responsible for "outrages of every description committed" "against the laws and customs of war and... the laws of humanity" and submitted a proposal to punish not only for war crimes but also for violations of the principles of humanity. See 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14 *Am. J. Int'l L.*, 1920, 95, at 96.

26 *See* 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', at 127, 144.

the 1919 Treaty of Versailles excluded any reference to "crimes against humanity" in Articles 228-30.[27]

ii. Martens' principles of humanity plus a war connection

Making the brief excursion above into pre-WWII history is important to understand why the US has insisted on a war connection for crimes against humanity in the Charter of the Nuremberg Tribunal in 1945. The US did not feel that the Martens clause was capable of standing alone as a valid legal basis to justify such interference within a country's domestic affairs.

The Americans divided the issue of the need to prosecute perpetrators of internal atrocities into two aspects: substantively, the issue was about the need to recognize the atrocities committed against German civilians before the war as atrocious and abominable by all standards, and therefore prohibited according to the Martens Clause, however, there was a second procedural aspect, which concerned finding a legal basis to intervene.

Therefore, in the eyes of the Americans, the Martens clause did not carry the same weight as the laws and customs of war and was not capable of standing alone as a binding source of law for the purpose of conducting international prosecution, unless peace time atrocities were somehow proved to be connected to an armed conflict, as preparatory acts to the aggressive war.

Justice Robert H. Jackson, the US Representative to the International Conference on Military Trials, spoke of the need to punish the Nazi's persecutions of civilians in Germany since 1933 which involved their murder, torture, persecutions on racial, political and religious grounds and destruction of their property. All such acts according to him were criminal by all standards generally accepted in all civilized nations. In order to make a link with the war, Justice Jackson argued that these acts bypassed the sovereign prerogatives of the Reich as they were intended to prepare its aggressive war, and as such were contrary to the Martens clause.[28]

Justice Robert H. Jackson argued further on the need for a war connection that "it has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business. …The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war."[29] "…We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state. Without substantially this definition, we would not think we had any part in the prosecution

27 See 'Treaty of Versailles', June 28, 1919, reprinted in 13 *Am. J. Int'l L.*, (Supp. 1920), at 151; 16 *Am. J. Int'l L.* (Supp. 1922), at 207.

28 "Report to the President by Mr. Justice Jackson", June 6, 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, 42, at 48-51.

29 "Minutes of Conference Session", July 23, 1945, in *Report of Robert H. Jackson*, 328, at 331 (Document XLIV) (1945).

of those things which I agree with the Attorney-General are absolutely necessary in this case."[30]

This American position was eventually incorporated into the Charter of the Nuremberg Tribunal.

Therefore, as it can be seen from this analysis as a matter of policy there was never an intention to make prosecution of crimes against humanity dependant upon the existence of a legal basis to prosecute the same acts as war crimes as such. Rather, the link to an armed conflict and to war crimes was viewed solely as a jurisdictional and procedural one enabling countries to intervene in affairs that were considered internal at the time.

Otherwise, the ingredients of these crimes were felt to be independent from those of war crimes, because of their distinct legal basis; for war crimes the ingredients were those provided in the laws of war, whereas for crimes against humanity, the ingredients were those that could be spelt out from the Martens clause, which is relevant only when the acts in question against civilians "condemnable by all standards of civilized nations" are not for some technical reasons prohibited by the already existing positive norms.

As it was recognized in the British Memorandum to the London Conference, the atrocities committed by Nazis against its own nationals were, "neither "war crimes" in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful." However punishing them was in the interests of postwar security and necessary for the rehabilitation of the German peoples. As such it was a declared policy of the United Nations too.[31]

B. Legitimacy of Punishment of Acts Committed in Combat Situations, not Specifically Prohibited by the Laws of War

1. Whether or not courts of law should abstain from punishing horrible acts, not prohibited as such by the laws of war (Geneva type crimes against humanity) (WWII trials- era discussion)

In August 1946, in the small town of Lunenburg, Germany, a war crimes trial in the British sector took place. This was the case of *Japsen and others*[32] accused of inhuman acts against 300 to 400 inmates of the Neuengamme Concentration Camp, murdered in April 1945, just days before German capitulation and freedom. The victims were mostly French and Russians, but there were also some Dutch, Belgians, Polish and German political prisoners.

Counsel for the accused argued their clients should be set free since the prosecution had failed to prove that the victims were enemy nationals, and since acts

30 "Minutes of Conference Session", July 23, 1945, at 333.

31 "Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General", January 22, 1945, in *Report of Robert H. Jackson*, 2, at 5-6, (Document I).

32 See *Proceedings of a War Crimes Trial held at Lunenburg, Germany, on 13 August 1946, upon the Trial of Gustav Alfred Jepsen, Joachim Frederic Freitag, and Otto Muller* (hereinafter *Jepsen et al.* case).

against nationals were not considered war crimes.[33] The Judge Advocate General summarized the Defence position in this way:

> "*Now the first question of facts which falls for your determination is whether or not these unfortunate persons, whom I have hitherto called prisoners, were Allied nationals, internees of concentration camps. Whoever was to blame for the grim fate which overtook them so tragically near the date of their liberation, it cannot be doubted that they were the victims of circumstances which are very horrible to contemplate. Whether they were allied nationals or not, whatever person and whatever system subjected them to these appalling horrors must be condemned by the conscience of all right thinking people. That is not our concern. We are concerned here to enforce international law. It is an offence against international law either to kill or to ill-treat the nationals of the country with which you are at war. This is the essence of the allegations made against these three prisoners. If the victims of this Lunenburg disaster were German nationals, if they were Jews subject to the German State, their fate is no less horrible then if they were allied nationals and the feelings which their fate arouses may be no less strong; but it does not happen to be a matter within our jurisdiction. It may or may not, or have been an offence in German municipal law, to treat them in the way it has been our misfortune to hear about during the past few days, but unless those victims were allied nationals we in this Court and as a Court are not concerned officially with their fate.*"[34]

It was exactly to avoid this type of trial scenario that the Allied powers had to have recourse to the concept of crimes against humanity. Since the concept of crimes against humanity was based on the Martens clause, crimes against humanity even if committed in a war time situation, were not subordinated to the conditions imposed by the laws of war. In particular the requirement that the victims of atrocities be enemy nationals was not applicable to crimes against humanity.

Could it be said that crimes against humanity were introduced to circumvent otherwise not prohibited acts? The answer is no, because the Martens clause stands for the proposition that whatever is not prohibited does not become permissible for this only reason, unless the act is not contrary to elementary principles of humanity and the dictates of public conscience.

Provided that the acts are unlawful by all standards of civilized nations, they will be punished as crimes against humanity even if technically they are not prohibited by the laws of war.

Here we should note that even though in 1949 the Geneva Conventions were adopted to protect victims of war 'in the hands' of a party to the conflict, the concept of crimes against humanity preserved its independence since the concept of victims of war in the Geneva Conventions followed the ordinary rationale of the laws of war, i.e. that wars are fought against enemy nationals and not own nationals. Where barbaric acts are wantonly committed, with no discernible purpose of war, in particular, against own nationals of the state of the perpetrator, these acts become crimes against humanity, and the laws of war are often helpless since they were not intended for irrational (by all standards of civilized nations) acts that shock the public conscience.

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33 *Jepsen et al.* case, pp. 221, 222.

34 *Jepsen et al*. case, p. 237.

2. Whether or not courts of law are entitled to punish not only Geneva type acts but also Hague type acts as crimes against humanity, and if so under which conditions? (Modern discussions)

Whereas during WWII trials the question was often whether or not courts of law were entitled to try Geneva law type acts as crimes against humanity even when these acts failed to meet the requirements of the laws of war for war crimes, modern discussions instead focus on whether or not the concept of crimes against humanity is applicable to Hague law type acts too. If so, whether or not the concept would still preserve its autonomy from the laws of war for conduct of hostilities and its requirements.[35]

In the presently ongoing *Gotovina et al* case[36] at the ICTY, the Defence Counsel raised a number of jurisdictional issues pertaining to the application of the concept of crimes against humanity in conduct of hostilities situations. Namely the Defence Counsel objects to the application of the concept of crimes against humanity in combat situations as an independent concept. Defence Counsel requires as a minimum that the application of the concept in conduct of hostilities situations is subordinated to the application of the relevant law, so that only acts considered as war crimes under Hague law can be considered crimes against humanity too.

Counsel hoped that in this way a situation that is not a war crime under that law could be considered as a crime against humanity either. Basically what the Defence Counsel says is that a crime against humanity exists only if there is a corresponding war crime. The Defence Counsel argued that this should be so because, in his view, the laws of war act as *lex specialis* to crimes against humanity.[37]

i. *Crimes against humanity that can be committed in combat situations*

The discussion about the possible application of the concept of crimes against humanity to Hague law type acts requires finding out first, which acts regarded as crimes against humanity are potentially applicable to conduct of hostilities' type situations. These are murder, extermination, deportations, persecutions and other inhumane acts.

In principle, in no time during the historical development of the concept of crimes against humanity including during the *travaux préparatoires* of the Nuremberg Charter, was there ever any intention to limit the application of the concept to Geneva type acts as the *Gotovina* Defence Counsel have argued.

Although the situations that were held in mind were first of all those numerous and easily identifiable concerning persons in custody of the Nazis in concentration camps, there is nothing that can suggest that the concept was limited to such situations.

35 See for example L.C. Green, 'Grave breaches or crimes against humanity', 8 *United States Air Force Academy J. of Legal Studies,* 1997, at 19.

36 See *Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač*, Case IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007 (hereinafter *Gotovina et al.* Decision on Jurisdiction).

37 See *Gotovina et al.* Decision on Jurisdiction, paras. 24, 26.

To the extent that acts like murder, extermination, deportations, persecutions and other inhuman acts were included in the definition of crimes against humanity, there is nothing that can preclude the application of the notion to Hague type acts since these acts can be committed without the victim being in custody of the perpetrator.[38] In addition, as the Trial Chamber in *Gotovina et al.* has now discovered, the reference to "*any*" civilian population in the definition of crimes against humanity is a broad one, and can also be interpreted to be intended to cover both victims in occupied territory, as those "within the borders of the state of the perpetrator".[39]

ii. *Why crimes against humanity are not back door war crimes*

As much in cases of Geneva type acts as it is in cases of Hague type acts, the *first but not the sole* criterion is whether or not the act considered as a crime against humanity is also viewed as a crime under the laws of war.[40] If the act is not viewed as a war crime, the next question is whether this is due to absence of codification, or due to a justification or excuse provided by the positive norms of the laws of war.

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38 Certainly the *Gotovina* Defence's theory of "matching" (according to which valid crimes against humanity are only those that match relevant war crimes), would imply that the Defence Counsel's only concern are the crimes against humanity of deportations or forcible transfers and persecutions that they views as not applicable in combat situations, since they are never charged as Hague type law acts in international armed conflicts. However, Counsel for *Gotovina* are cognizant that "forcible transfers" can be charged as Hague type war crimes in internal armed conflicts, and that crimes against humanity apply irrespective of the characterization of the armed conflict. To minimize this problem, the Defence Counsel have tried to put forward a disingenuous new theory according to which the war crime of forcible transfer in internal armed conflict and Common Article 3 war crimes are restricted to the same Geneva type acts with its requirement of being "in the hands of", even when applied in internal conflicts. However, the jurisprudence of both the *ad hoc* tribunals and that of the ICJ clearly attests to the fact that there is no such requirement. For this only reason, (i.e. that the crime against humanity of deportation or forcible transfers "match" the corresponding war crime of forcible transfers in internal conflicts, for which the requirement "in the hands of" does not apply), the Defence positions could be dismissed. However, the discussion below will also prove that the "matching" theory itself is unsupported.

39 *Gotovina et al.* Decision on Jurisdiction, para. 56. The *Gotovina* Defence Counsel have in the meanwhile appealed the Trial Chamber Decision and have alleged that "any" refers to nationality only. The Appeal is still pending at the time of writing of this paper. See *Defendant Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction rendered 19 March 2007, by Trial Chamber I*, 3 April 2007 ("Appeal Brief").

40 It is important to keep in mind that there is no requirement for the acts charged as crimes against humanity necessarily to "match" any adopted definitions of war crimes. This is so because while war crimes are based on the concept of "protected victims", and as a result the same act may be prohibited, justified or not prohibited (as opposed to being permissible), crimes against humanity are based on the concept of "attack on *any* civilian population", and in '*any* context'. As a result, prohibited and no prohibited acts under the laws of war, may automatically become covered as crimes against humanity, if the prosecution is able to prove all the relevant ingredients for these crimes.. Only acts duly "justified" under the laws of war, under certain conditions (for example, when there is reason to believe that proportionality applies) may not amount to crimes against humanity.

It is only when the act is expressly excused or justified by the positive laws of war, rather than when it is not prohibited, that the laws of war can take precedence, because this is in essence what the Martens clause says: namely the absence of prohibition does not make an act against civilians which is otherwise contrary to principles of humanity and dictates of public conscience permissible.

Therefore, the relevant criterion is proof of codification of a justification or excuse of actions resulting in violent collateral damage against civilians, rather than absence of it, irrespective of the circumstances under which this damage results against them (in occupation or in a combat zone).[41] The International Criminal Law, the International Human rights law and the International Humanitarian Law are not based on the Lotus principle,[42] but the Martens clause.

Therefore, once a violent act is not prohibited or justified by the laws of war, the criterion of its legitimacy becomes solely the *Martens clause* i.e. its lawfulness in the light of the principles of humanity and the dictates of public conscience, and not whether it was rightly or wrongly charged as Geneva law type act instead of Hague type act (and vice versa) for purposes of crimes against humanity. There is no such "matching" requirement recognized under international law. Crimes against humanity in certain circumstances do match with war crimes, but yet go further than that and cover any act meeting its ingredients, and which run against the dictates of public conscience.

Otherwise explained, an act of violence accidentally touching on civilians which is justified or excused under the laws of war cannot in principle become unlawful under the construct of crimes against humanity.[43] However, an act which is not expressly prohibited nor justified under the laws of war will be a crime against humanity if the relevant *circumstantial* elements are present and the presumed perpetrator acted with the requisite *mens rea*.[44]

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41 In a combat zone, there is virtually only one valid ground on which an attack directed against military objectives may result in civilian casualties (when this is a lawful collateral damage or injury resulting from of an attack directed at military objectives that respects proportionality). Targeted attack on civilians is prohibited and can never be justified or excused on any ground. See Articles 51, 52, 57, 85, Additional Protocol I; Article 13 Additional Protocol II.

42 The *Lotus* principle used in inter-state relations stands for the proposition that everything is allowed to a sovereign state, which is not prohibited by specific positive norms of international law. The principle was articulated in 1927, by the Permanent Court of International Justice in the *SS Lotus* case, when it held that "Restriction upon the Independence of States cannot …be presumed", and that International Law leaves to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules." See "*SS Lotus (France v. Turkey)*", 1927 *P.C.I.J* (Ser A) No. 10, at 18.

43 See *Prosecutor v. Stanislav Galić*, Case IT-98-29-T, Trial Judgement, 5 December 2003, para. 144 (the Trial Chamber noting that it "accepts that when considering the general requirements of Article 5, the body of laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been target as such.").

44 In deportation or forcible transfers, for example, as defined in international humanitarian law, the condition of the victim being on a territory "under occupation", is a *circumstantial* element required for it to qualify as a grave breach of the Geneva Conventions, since the victim must be "in the hands" of the perpetrator. However, being "in the hands of" is not a specific circumstantial element required by any crime against humanity, although this is

It is therefore through this criterion that the Defence position in *Gotovina et al.* case can be reviewed. For example, deportations or forcible transfers of civilians through acts of terror intended to achieve the ethnic cleansing of an area will necessarily be a crime against humanity.[45] The fact that the laws of war do not specifically prohibit forcible transfers of civilians using this type of methods does not mean that these methods (forcible transfer through acts of terror) are allowed. Being as such contrary to any discernible purpose of war and targeting mainly civilians with the result that they are made forcibly to leave their normal places of residence, these acts of terror become crimes against humanity if they are part of a conduct involving the commission of multiple acts of the same nature, and the perpetrator had the requisite *mens rea* for the crime of forcible transfer as a crime against humanity.

What the defence Counsel seems to leave out in the discussion about the contents of crimes against humanity and deportation, in particular, is the requirement of a pattern of *similar illegal* conduct and *unlawfulness* for deportation that the prosecution still needs to prove. The criteria of *unlawfulness* would certainly encompass situations where one is required to find out whether an attack forcing people to flee was a lawful one against a military objective or not, and whether the resulting injury to civilians was collateral and proportionate to the military advantage anticipated or not. But then, this is the prosecution's job to prove whatever allegations it makes and this should not bother the defence team. As the Trial Chamber correctly stated, the allegations of the prosecution, be they correct or not, do not prevent, in anyway, the defence team from bringing whatever defences or *alibis* it has, including those based on "lawfulness of the attack on military objectives" in the result of which civilians were made unintentionally collaterally to flee.[46]

Therefore, normal military people fighting normal wars will always survive any charges of crimes against humanity, irrespective of whether they are based on con-

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presumed in certain types of crimes against humanity such as rape, or enslavement. But not in others, such as forcible transfers, or persecutions. Arguably the use of the disjunctive terms "deportation" or "forcible transfer" may also be interpreted as a rule intended to cover any circumstances of unlawful displacement of civilians. In addition, being "in the hands of" an adversary is not a requirement for displacement of civilians in internal conflicts either. The requirement in the law of internal conflicts is that the victim was "not taking a direct part in hostilities", and as such, the requirement would cover combat situations.

45 The *Gotovina* Defence's main argument was that deportation or forcible transfer could not be applied to Hague law type situations since these require that a person is "in the hands" of a party to the conflict under the laws of war, which is a technical requirement belonging to Geneva Law. The *Gotovina* Defence suggested that these acts should more properly be charged as unlawful attacks on civilians rather than as deportations, or forcible transfers because there is no corresponding crime of deportation or forcible transfers in the Hague law. In view of the criterion stated above, this argument is of course misplaced, and the Trial Chamber was right in dismissing it. In particular, as we noted, there is no "matching requirement" under international law. Crimes against humanity work on the basis of their own circumstantial ingredients and are independent and separate from war crimes that also have their specific and different circumstantial elements. The fact that in certain cases some of these circumstantial elements match in both cases does not translate into a new rule of international law. See *Gotovina et al.* Decision on Jurisdiction, paras. 26-28; 43, 45, 46; 54, 56; 65.

46 *Gotovina et al.* Decision on Jurisdiction, paras. 26-28.

duct of hostilities situations or on situations of occupation, due to the fact that a single attack even if it caused excessive and disproportionate damage to civilian property or injury to civilians, must still be seen under crimes against humanity, in the context of the *overall pattern* of conduct involving the multiple commission of similar acts. Where this pattern is missing, the acts would only be charged to the maximum as war crimes.

The burden of proof of a crime against humanity is higher than that for a war crime. Good commanders need to fear charges of war crimes, not crimes against humanity, and it does not matter whether crimes against humanity charges match Geneva law type acts or Hague law type acts under the laws of war.

Chapter 28

The Crime of Aggression and the International Criminal Court

Roger S. Clark

Introduction

In Article 5, paragraph 1 of the Rome Statute of the International Criminal Court,[1] "the crime of aggression" is listed as one of the four "crimes within the jurisdiction of the Court". Article 5, paragraph 2 of the Statute provides, however, that:

> [t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[2]

Resolution F of the Final Act of the Rome Conference instructed the Preparatory Commission for the Court ("PrepCom") to "prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime".[3] These proposals, for a "definition" and "conditions", were to be submitted "to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute".[4] "Definition" refers to the substantive "criminal law" issues.

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1 Rome Statute of the International Criminal Court, art. 5 (1), U.N. Doc. A/CONF.183/9 (1998) ("Rome Statute").

2 *Id.,* art. 5(2). Arts 121 and 123 deal with amendments, the first of which may not be made until seven years after the entry into force of the Statute. (Some essential machinery provisions of an "institutional" nature may be changed earlier and by a simplified procedure under art. 122.) Art. 121 contemplates amendments agreed upon at regular meetings of the Assembly of States Parties; art. 123 deals with Review Conferences to consider amendments. The first Review Conference must take place seven years after the entry of the Statute into force. *Id.*, art. 123 (1).

3 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, para. 7, U.N. Doc. A/CONF.183/10 (1998), at 8-9. The Assembly of States Parties, in which all States Parties are represented and at which other States may be non-voting observers, is the governing body of the Court.

4 *Id.* Somewhat unrealistically, the Final Act had instructed the Preparatory Commission

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 661–699.

"Conditions" relates to the vexed question of the relationship between what the ICC might do in the case of an individual accused and whatever antecedent action needs to be taken in a political or other organ of the United Nations, in particular the Security Council, or in its absence, the General Assembly or the International Court of Justice.[5]

The PrepCom was not successful in finalizing "proposals" before it expired in 2002. Its last work-products on aggression were a Discussion paper proposed by the last Coordinator of the PrepCom's Working Group on the Crime of Aggression, which consisted of a rolling text with a number of options,[6] and a proposal for the creation of a working group of the Assembly of States Parties, open to all states (not only those who are parties to the Statute),[7] to carry the work forward. At its first session, the Assembly of States Parties duly created a Special Working Group on the Crime of Aggression, open to all states.[8] The 2002 Coordinator's draft has provided the basis for subsequent discussions. The main substantive work since 2002 has taken place at two informal inter-sessional meetings of the Special Working Group held at the Liechtenstein Institute on Self-Determination at the Woodrow Wilson

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to submit the proposals on aggression to the Assembly at a Review Conference. Since the first Review Conference is to take place seven years after the entry into force of the Statute (art. 123), i.e., in 2009, and the PrepCom expired in 2002 with the conclusion of the first meeting of the Assembly of State Parties (Resolution F, para. 8), there was always an obvious gap of several years between the two events.

5 Most of the proposals before the PrepCom rolled up these two kinds of issues. Bosnia and Herzegovina, New Zealand and Romania made a valiant effort to distinguish the two (and to support a role for the ICJ) by submitting separate papers on them. *See* U.N. Doc. PCNICC/2001/WGCA/DP.1 (Conditions under which the Court shall exercise jurisdiction with respect to the crime of aggression) and PCNICC/2001/WGCA/DP.2 (Definition of aggression). There are some good discussions of the PrepCom debates by insiders in The International Criminal Court and the Crime of Aggression (Mauro Politi & Giuseppe Nesi eds., 2004).

6 Discussion paper proposed by the Coordinator; Part I, Definition of the crime of aggression and conditions for the exercise of jurisdiction; Part II, Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court), UN. Doc. PCNICC/WGCA/RT.1/Rev.2 (2002). Part I had five articles. The first three dealt with the "definition" and the last two with the "conditions". A footnote to Part II explains that the elements which it contains "are drawn from a proposal by Samoa and were not thoroughly discussed". The delegation of Samoa had insisted in the last two of the ten meetings of the PrepCom in which aggression was discussed that some effort, at least, should be devoted to the mandate in the Final Act of Rome to produce Elements of the crime of aggression. *See* Elements of the Crime of Aggression – Proposal Submitted by Samoa, U.N. Doc. PCNICC/2002/WGCA/DP.4. For the PrepCom Coordinator's analysis of the issues, *see* Silvia A. Fernandez de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 Fordham Int'l L.J. 589 (2002); de Gurmendi, *An Insider's View*, in Politi & Nesi eds., *supra* note 5 at 175.

7 U.N. Doc. PCNICC/2002/WGCA/L.2/Rev.1, Draft report of the Working Group - Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression.

8 ICC-ASP/1/Res.1 (2002).

School, Princeton University, New Jersey, in 2004[9] and 2005.[10] This chapter attempts an assessment of these developments.[11] The most lively current issues are both procedural and substantive.

As to the procedural issues, Article 5 (2) is not a great example of the drafter's art. What exactly must be done to bring the provision on aggression into force is hotly debated. This issue will be discussed in Part II of this chapter.

On substance: Conceptualising the crime of aggression faces some fundamental political challenges, given the rather unclear and untested limits to, and interplay between, the roles, under the United Nations Charter, of the Security Council, and other United Nations organs, in maintaining international peace and security. I shall discuss some of those issues, which fit the rubric "conditions under which the Court shall exercise jurisdiction", in Part III below. Part IV considers some basic definitional issues, including the relevance of the General Assembly's 1974 Definition of Aggression.[12] A final substantive challenge is how to apply to aggression the conceptual structure contained in the "general part" of the Rome Statute, as utilized in the Elements of Crimes ("the Elements") concluded by the PrepCom in the middle of 2000.[13] In particular, can the crime of aggression be conceptualised, like other crimes

9 Report of the inter-sessional meeting of the Special Working Group on the Crime of Aggression, 21-23 June 2004, Doc. ICC-ASP/3/25 (2004) ("2004 Special Working Group Report"). The Group's Chair is the very able Ambassador of Liechtenstein to the U.N., Christian Wenaweser.

10 Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, 13-15 June 2005, Doc. ICC-ASP/4/SWGCA/INF.1 (2005) ("2005 Special Working Group Report").

11 A particularly useful paper before the PrepCom was the Secretariat's Historical review of developments relating to aggression, U.N. Doc. PCNICC/2002/WGCA/L.1 and Add.1. The document analyses the work of the Nuremberg Tribunal, that of the American and French tribunals established pursuant to Control Council Law No. 10 and the Tokyo Tribunal. It then turns to precedents concerning aggression and the use of force in general in the Security Council, the General Assembly and the International Court of Justice. Another helpful document is U.N. Doc. PCNICC/1999/INF/2, Compilation of proposals on the crime of aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999). Post-1999 documents will be mentioned as appropriate in what follows.

12 G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 24, U.N. Doc. A/9631 (1975).

13 Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized draft text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2. The Elements were approved at the first meeting of the Assembly of States Parties to the Rome Statute held in New York, 3-10 September 2002. On the Elements in general, *see* The International Criminal Court: Elements of Crimes and Rules of Evidence and Procedure (Roy Lee et al., eds., 2001); Kriangsak Kittichaisaree, International Criminal Law (2001); Mauro Politi, *Elements of Crimes*, in The Rome Statute of the International Criminal Court, Vol. I, 443 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); Knut Döermann, Louise Doswald-Beck & Robert Kolb, Elements of War Crimes under the Rome Statute of the International criminal Court: Sources and Commentary (2002); and Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Crim. L. Forum 291 (2001).

within the jurisdiction of the Court, in terms of "mental" elements and "material" elements, terms to be found (but not fully explicated) in Article 30 of the Rome Statute?[14] If it can, what are the implications of this? Several matters addressed in the "general part" of the Rome Statute need careful examination before they are applied without modification to the crime of aggression. In short, the crime of aggression has to be fitted within the structure of the Statute that was adopted in Rome. How is this to be done? This is the subject of Part V of the discussion.

Two decisions made in the process of drafting the Rome Statute had substantial and pervasive implications for conceptualising all the crimes within the jurisdiction of the ICC. The two decisions, to have an expansive "general part" in the Statute, and to have "Elements" drafted later, need some explication at the outset, in this Introduction, so that their significance to the later part of the argument is clear. The Special Working Group on Aggression is struggling with how to accommodate these items.

The first relevant decision was that there should be a "general part" part of the Statute, devoted like typical European (and modern American) Criminal Codes to at least some of the general principles that cut across particular crimes. It was agreed, notably, that there should be a generalized structure for the mental and non-mental elements of the offences. Hence Part 3 of the Statute (Articles 22-33) headed "General Principles of Criminal Law". Especially significant, as I have noted,[15] is Article 30, which insists that "unless otherwise provided", the "material elements" of an offence must be "committed with intent and knowledge". Included also in that part of the Statute is Article 25 on "individual criminal responsibility" which deals, in particular, with attempts and with the liability of secondary actors, those other than the primary actor who may incur criminal responsibility because of their relationship to the crime. Part 3 also includes Article 28, which governs another theory of liability for commanders and other superiors ("command responsibility").[16] Other Part

14 Art. 30 is headed "*Mental* element" and reads:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the *material elements* are committed *with intent and knowledge*.
> 2. For the purposes of this article, a person has intent where:
> (a) In relation to *conduct*, that person means to engage in the conduct;
> (b) In relation to a *consequence*, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a *circumstance* exists or a *consequence* will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

I have italicised the key words that relate to the "mental" and "material" structure adopted by the drafters of the general part. While "intent" and "knowledge" are defined, "conduct", "consequence" and "circumstance" are left to the resourcefulness of the commentators and the judges. Nonetheless, these material and mental elements should also provide a basis for the structure of the crime of aggression.

15 *Id*.

16 The special part provisions in penal codes tend to be drafted with the primary actor/perpetrator in mind and to leave to the general part the liability of others. This is reflected in para. 8 of the General Introduction to the ICC Elements of Crimes, *supra* note 13, which reads:

> As used in the Elements of crimes, the term "perpetrator" is neutral as to guilt or

3 provisions include Article 31 on "Grounds for excluding criminal responsibility", Article 32 ("Mistake of fact and mistake of law") and Article 33 ("Superior orders and prescription of law").

Such an expansive "general part" has not been attained before in international practice. While earlier constituent instruments of tribunals, such as those at Nuremberg and Tokyo and for Former Yugoslavia and Rwanda, addressed issues of complicity and of the irrelevance of official capacity, they did not contain a general part which addressed issues such as the nature of mental and physical elements, that is to say, the basic conceptual structure of offences. The International Law Commission's Draft Statute which provided the starting point on the road to Rome had no general part at all.[17] The Preparatory Committee that preceded Rome and the Rome Conference itself worked diligently on agreeing to so much of the general part as a consensus negotiation would allow.[18]

As we shall see,[19] both what is included and what is not included has some important implications in the ultimate analysis of the crime of aggression. A general part provides a set of rules that must either be accepted by default for each special part crime or expressly or impliedly rejected by the drafters in a particular instance.[20]

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innocence. The elements, including the appropriate mental elements, apply, *mutatis mutandis,* to all whose criminal responsibility may fall under articles 25 and 28 of the Statute.

17 Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Draft Statute for an International Criminal Court, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994). *But see* the Commission's related 1996 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, at 9, U.N. Doc. A/51/10 (1996). Art. 2 thereof dealt with the individual responsibility of a person who intentionally commits one of the crimes other than aggression; orders the commission; fails to prevent or suppress in certain circumstances; knowingly aids, abets or otherwise assists directly and substantially; directly participates in planning or conspiring in; or directly and publicly incites another to commit such a crime which in fact occurs. It also criminalized attempts. Aggression had its own regime, not covered by the general provision. *See infra* at notes 119-20. The "definitions" of the crimes in the "special part" of both the Draft Statute and the Draft Code were rudimentary compared with what was finally included in the Rome Statute.

18 *See generally,* Per Saland, *International Criminal Law Principles,* in The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results 189 (Roy Lee ed., 1999).

19 *Infra* Part V, at notes 102-41.

20 It should be noted that the view expressed in the text does not seem to be shared by some of the members of the Special Working Group. *See*, e.g., this comment in the 2005 Special Working Group Report, *supra* note 10 at 10:

> Some participants were of the opinion that, for the sake of clarity, a provision specifically indicating that article 33 did not apply to the crime of aggression merited inclusion. Others, however, opined that, as in the case of many other provisions of the Statute which were not always applicable to all the crimes, there was no need to refer specifically to its non-applicability to the crime of aggression. It would be the role of the Court to make a determination as to whether an article would apply in specific cases.

I would argue that the principle of legality points in the direction of having the drafters make those choices, not leaving the Court to make it up on its own.

The matter is clearest with Article 30 which begins with the phrase "unless otherwise provided", but is equally applicable to other articles in Part 3. They constitute the first round of the bidding in each concrete instance. Contextual and other methods of documentary construction then follow and may or may not result in a conclusion that the default rules should be rejected. Some hard choices have to be made in drafting the crime of aggression if the issues are not simply to be tossed in the lap of the Court with no guidance on how to deal with them.

Article 9 of the Rome Statute, added late in the process at the insistence of the United States,[21] was a further significant decision in the drafting of the Rome Statute with implications for the crime of aggression. It provides, rather tersely:

> (1) Elements of Crimes shall assist the Court in the interpretation of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
> (2) [This deals with amendments, which may be proposed by any State Party, by a majority of the judges or by the Prosecutor and adopted in the same way as the original Elements.]
> (3) The Elements of Crimes and amendments thereto shall be consistent with this Statute.[22]

I doubt that anyone involved in the process had a completely clear perception of what is meant by "Elements of Crime". Since the concept was a new one in international practice, like much else in the Rome Statute, it could have whatever meaning the traffic would bear.

That said, texts on Criminal Law typically use the term "elements" (the lowercase is deliberate) as a basic concept that is apparently not necessary to define. I understand "elements" to be the building blocks that fit together to constitute "a crime". A prosecutor who fails to establish any one of those elements has failed to overcome the "presumption of innocence"[23] or failed to meet the "onus ... to prove the guilt of the accused".[24] I do not believe that it is possible to escape the close rela-

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21 In a consensus negotiation, one major player may achieve its way if it is determined enough. In spite of the initial scepticism of most participants, drafting The Elements turned out to be a salutary exercise which resulted in the clarification of many points in both the special and the general parts of the Statute.

22 Rome Statute, art. 9. It will be up to the judges ultimately, in application of art. 9 (3), to decide whether any particular item in the Elements as adopted by the Assembly of States Parties (including the Elements of Aggression) is compatible with the Statute, but no doubt they will give substantial deference to the work of the PrepCom and the Assembly of States Parties.

23 Rome Statute, art. 66 (heading).

24 Rome Statute, art. 66, para. 2. *See also* Rome Statute, art. 67 (1) (i) (right of accused not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal). I believe that the grounds for exclusion of responsibility in the Rome Statute are governed by this burden of proof provision and, indeed, that they are "elements" of the crimes (or perhaps more accurately that their absence is). For an example of such usage, *see* Model Penal Code, § 1.13, discussed in Clark, *supra* note 13 at 305 n.44 (definition of "element of an offense" includes such conduct, attendant circumstances or result as "negatives an excuse or justification [for forbidden conduct]").

tionship between elements and the burden of proof, or for that matter, the standard of proof beyond reasonable doubt.[25]

Article 30 of the Rome Statute is headed "Mental element". It contemplates that "unless otherwise provided" there is no criminal responsibility in the absence of "intent and knowledge"[26] in respect of what Article 30 calls "material elements".[27] The ultimate adoption of the "intent and knowledge" standard as a default rule, after considerable debate, meant the rejection, as a general matter, of responsibility based on what various legal systems call (with not necessarily consistent meaning) "negligence", "*dolus eventualis*", and "recklessness".[28] Nevertheless, variants on some of those themes crept back into at least two articles in the Statute.[29]

A careful examination of the structure of Article 30[30] convinced those who participated in the drafting of the Elements that the authors of the Rome Statute had in mind three types of material elements that might be present[31] in a particular crime. The three are "conduct", "consequences" and "circumstances". The crime of aggression can be seen in this way: there is criminal responsibility when an actor engages in certain conduct associated with consequences in certain circumstances that are legally relevant.

"Conduct" normally refers to an act or omission and a "consequence" is the result of such conduct. But there is, in everyday speech and in legal usage, some overlap between conduct and consequence. "Circumstance" is more difficult to understand and there is little in the preparatory work to explain what the drafters of Article 30

25 Rome Statute, art. 66 (3).

26 I have tried to come to terms elsewhere with the difficult notion of "intent *and* knowledge" which seems to be derived from French and German law but is unintelligible to most common law lawyers, Clark, *supra* note 13 at 302, n. 37. I doubt that anything significant turns on the problem in the present context.

27 Drafts of the Statute had consistently used the term "physical elements"; the word "material" was substituted in the Rome Drafting Committee at a very late stage, evidently with no intention of changing the meaning. Pre-Rome drafts of the Statute had also contained efforts at a separate definition of non-mental elements, variously described with language such as "actus reus (act and/or omission)", "physical elements of crime", "omission", "conduct" and "act". "Causation" was even addressed at one point, though specifically in relation to omissions, rather than in general. The whole effort to draft a separate article dealing with physical/material elements failed and art. 30 was left as the vehicle to hint at what was meant by the non-mental elements to which the mental ones applied. Naturally, mental elements make no sense in a vacuum – there must be an attitude as to something in the material world! *See also supra* note 13 on defences.

28 *See* Clark, *supra* note 24 at 299-303.

29 *E.g.*, in Rome Statute art. 28, the responsibility of military commanders for crimes committed by forces under their control is based on a kind of negligence; the responsibility of non-military superiors is a kind of recklessness or *dolus eventualis* liability. Superior orders, in art. 33, has a concept that some things are "manifestly unlawful" which appears to entail a variety of negligence.

30 *See* the italicised words, *supra* note 15.

31 There seems to be no logical reason why every crime will necessarily have each of the three. Thus the crimes of declaring that no quarter will be given, Rome Statute, art. 8 (2) (b) (xii), or employing poison or poisoned weapons, art. 8 (2) (b) (xvii), may (fortuitously) take place in situations where no one is hurt. There are conduct and circumstance elements but not what we would normally class as consequences.

had in mind. Yet the concept is a crucial one in any legal system. We tend to "know it when we see it". If a person kills a living being, that killing cannot be murder unless the being is a *human* one. That the deceased is human is a circumstance element. In theft, that the property which the perpetrator took *belonged to another* is a circumstance element. It will be noted that in such cases, criminal responsibility does not turn on whether or not the accused did (or failed to do) something that brought the circumstance about. The issue is what he or she did in light of that circumstance (and often knowledge about it). A circumstance is a (legally) crucial factor in the environment in which the actor operates. International criminal law is rife with circumstance elements. Did the events take place in an armed conflict? Was the victim protected by one of the Geneva Conventions? Was the victim *hors de combat*? Some of these questions, as we discovered in drafting the Elements, raise excruciatingly difficult issues of mistake of fact and mistake of law, variants on which may also need to be faced in respect of the crime of aggression.[32] To anticipate,[33] a basic element, aggression *by a state*, is at the heart of the crime of aggression as currently conceived[34] and the crime must be built around that. That element seems to be either a consequence or a circumstance element.

It should be added that, in drafting the Elements, the relevant PrepCom Working Group slowly evolved a sub-category of "circumstances" which is not specifically mentioned in Article 30. These are called "contextual circumstances" in the Elements. In practice, the sub-category included only three items in the Elements: a manifest pattern of similar conduct, in the case of genocide; a widespread or systematic attack against a civilian population, in the case of crimes against humanity; and an armed conflict, in the case of war crimes.[35] Perhaps the act of aggression by a State which, as I just noted, is an element of the crime of aggression by an individual, as currently defined in the negotiations, can be classified as a "contextual circumstance".[36]

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32 On mistakes in general, *see* Otto Triffterer, Article 32, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article 561 (Otto Triffterer ed., 1999); Neil Boister, *Reflections on the relationship between the duty to educate in humanitarian law and the absence of a defence of mistake of law in the Rome Statute of the International Criminal Court*, in International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey 32 (R.M. Burchill, N.D. White & J. Morris eds., 2005); Clark, *supra* note 13 at 308-12.

33 *See further, infra* notes 57 and 89.

34 Moreover, the existence of the element may be conclusively determined by a body other than the ICC itself. I do not exclude the possibility that the Special Working Group on Aggression, or the Assembly of States Parties itself, may conclude that the present structure is misconceived and start again. *See id.*

35 *See, e.g.,* the usage of the "contextual circumstances" in The Elements, *supra* note 14, art. 6 (a) (4) (genocide by killing); art. 7 (1) (a) (2) (crime of humanity of murder); and art. 8 (2) (a) (i) (4) (war crime of wilful killing). Personally, I found the usage redundant but harmless. However described, these are (circumstance) elements, as I explain the term in the text; they must be proved by the prosecution.

36 Paragraph 7 of the general introduction to the Elements embodies the propositions discussed in the preceding paragraphs. It reads as follows:

> 7. The elements of crimes are generally structured in accordance with the following principles:

I. How is the "provision" on aggression to be "adopted"? Ambiguity in Articles 121 and 123 of the Rome Statute

Exactly how Articles 121 and 123 of the Rome Statute play out in respect of aggression is a fundamental issue of interpretation that was not addressed during the PrepCom but which has taken on considerable importance at the Special Working Group.[37] It is not clear from the language of the Statute what procedure has to be followed in order for the Court to exercise its jurisdiction over the crime of aggression. Article 5 (2) speaks of a "provision" on aggression to be "adopted in accordance with Articles 121 and 123". Article 121 relates to "Amendments" and Article 123, headed "Review of the Statute", contemplates Review Conferences which are to "consider any amendments to this Statute". In essence, these two have the same effect, the relevant provisions of Article 121 being incorporated by reference in Article 123. Notably, Article 121 provides:

> 3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
> 4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after the instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
> 5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State

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– As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
– When required, a particular mental element is listed after the affected conduct, consequence or circumstance;
– Contextual circumstances are listed last.

The Elements, *supra* note 13.

37 Professor Otto Triffterer suggested at an early stage, however, that Articles 121 and 123 might not apply in their entirety to aggression. He argued that:

> ...the work to be done according to article 5 para. 2 does not fall under the time limit set out in articles 121 and 123. As soon as the work assigned to the Preparatory Commission in the Final Act of the Rome Conference is completed, the Assembly of States Parties can and should vote on elements defining aggression and the conditions for the *exercise* of the jurisdiction over these crimes. The reference in article 5 para. 2 to articles 121 and 123, therefore, is limited to the *ways of adoption* mentioned therein but not to the time limit contained in these articles.

Otto Triffterer, *Preliminary Remarks*, in Triffterer ed., *supra* note 33 at 40 (italics in original). Resolution F of the Rome Conference, adopted contemporaneously with the Rome Statute, speaks of the provision being submitted to a "Review Conference", the first of which would take place seven years after the treaty came into force, *supra* note 3. As a practical matter, the ASP's continuity resolution, *supra* note 9, refers to a Review Conference and the Special Working Group is proceeding in the hope of having a draft ready for a 2009 Review Conference. *See* 2005 Special Working Group Report, *supra* note 11 at 16.

> Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Some general interpretative questions may be asked. What is the effect of the phrase "in accordance with" as used in Article 5 (2)? Does it mean that all of Article 121 applies in the same manner as it would if aggression were being added as an "amendment" to the Statute? Note that Article 5 (2) does not use the noun "amendment"; it uses the verb "is adopted". What is meant by "is adopted"? Given the reference to Articles 121 and 123, the provision on aggression must be an "amendment" for some purposes. However, is it an "amendment" *to Article 5*? "Amendment" normally implies that something is being changed or altered. One could hardly say that it is necessary to change the wording of Article 5 in order to fulfil the expectations of the drafters. Does it need to be "applied" rather than "amended'? Is the provision on aggression something in the nature of a "completion" of, rather than an amendment to, Article 5 or even to the Statute as a whole? It is filling an anticipated gap rather than changing something in the Statute?

Perhaps these general questions point in the direction of suggesting which of three possible interpretations of Article 121 (and thus of Article 123) as applied to Article 5 (2) is the most plausible.

The first possibility is simply that, once the Assembly of States Parties has agreed upon the relevant language, it is binding on all parties. Bear in mind Article 5 (2)'s words "is adopted". Article 121 (3) provides that "The *adoption* of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties". (Author's italics.) "Adoption" is being used here, as it is typically in modern treaty practice, to speak of agreement on a text – which will then be sent to capitals to decide upon ratification. But how does that apply to Article 5 (2)? That provision says nothing about ratification or acceptance; it, like Article 121, paragraph 3, merely refers to adoption. Could it be, then, that "adoption" means the same thing in both Article 5 (2) and Article 121 (3) – acceptance by the Assembly of States Parties? Could "adoption" in this way be all that is required? It is notable also that the drafters of the Statute had contemplated that some amendments could become applicable to all parties merely upon adoption by the Assembly or a Review Conference. Article 122[38] deals with certain "Amendments to provisions of an institutional nature". Such amendments come into force thus:

> 2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.[39]

38 *See generally,* Roger S. Clark, *Article 122,* in Triffterer ed., *supra* note 32 at 1273.

39 Rome Statute, art. 122 (4). Here the word "amendment" is used, but all that is required is "adoption". Notice that, as is the case with art. 121 (3), a two-thirds majority of all States Parties is required, not just those participating in the vote.

Could it be that this provided the model for Article 5 (2)? The last sentence, clarifying the result (and the time frame) was perhaps forgotten in the excitement of the final days of the Rome Conference. Nothing more than agreement in the Assembly or a Review Conference is required for "amendments" under Article 122 (2). Textually, this may be all that is required under Article 121. Defining aggression is certainly more politically significant than making the "technical" changes with which Article 122 deals, but nevertheless, as in the case of those changes, the question is making the Court's jurisdiction functional.

A second possibility is that Article 121 (3)'s "adoption" has to be accompanied by the procedure of paragraph 4, which reads:

> Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.[40]

If this applies, then the provision would have no effect for anyone until the seven-eighths is reached and then it would apply to all States Parties to the Statute, including those that do not ratify it.[41] It is the normal rule for amendments to the Statute. This interpretation perhaps requires that the provision on aggression be treated as "an amendment" to the Statute, but not as an amendment *to Article 5*.

A third possibility is suggested by the words "except as provided in paragraph 5" which appear in paragraph 4. Paragraph 5 establishes a different procedure for "[a]ny amendment to Articles 5, 6, 7 and 8" of the Statute. It says that:

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.[42]

If this provision applies, then the practical result is starkly different: the crime of aggression would be applicable only on the territory or to the nationals of States that accept it (see the second sentence).[43] It would, on the other hand, apply to each State when it accepted (subject to the time requirement). It would be the proper procedure if the aggression provision can be characterized as an amendment to Article 5.[44] But,

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40 Rome Statute, art. 121, para. 4.

41 A State Party in the objecting one-eighth has a right of withdrawal from the Statute under Rome Statute art. 121, para. 6.

42 Rome Statute, art. 121, para. 5.

43 There is a potential anomaly here between Parties and non-Parties to the Statute. A Party, by not accepting the crime of aggression, could preclude application of it to both its territory and its citizens; a non-Party might find its citizens before the Court for what they did on the territory of a Party accepting the provision. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l L. 12, 20 (1999).

44 The discussion of paragraph 5 in the 2005 Report of the Special Working Group suggests a fourth way to approach the problem, one which involves reaching out beyond interpret-

once again, is it a fulfilment of, rather an amendment to, the article?[45]

The preparatory work[46] on Articles 5 and 121 is far from conclusive on this crucial point of the applicable procedure.[47] It is, however, worth rehearsing for what light it does shine on the matter.

The ultimate compromise that included aggression in the Statute, subject to

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ing the text to creating a new solution:

> The view was expressed that, if anything, an "opt out" approach was preferable to the "opt in" approach reflected in article 121, paragraph 5. In this connection, reference was made to the "opt out" clause contained in article 124, with some States repeating their criticism of that provision. The view was expressed that an "opt out" provision would provide for a more unified legal regime than an "opt in" approach.

2005 Special Working Group Report, *supra* note 10 at 6. This would presumably require an art. 121 (4) amendment to the Statute to achieve a reverse art. 121 (5) solution. Combining all possibilities often has an attraction to the diplomatic mind, so this may not be beyond the realms of possibility. Note the following, *id.*: "It was also suggested that it might be feasible to combine paragraphs 4 and 5 of article 121; it was argued, however, that those two paragraphs were incompatible." It is perhaps a nice question whether art. 121 (5) can be amended by an art. 121 (4) procedure.

45 Yet another ambiguous model is art. 8 (2) (b) (xx) which deals with certain prohibited methods of warfare, namely "employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, in violation of the international law of armed conflict". *See generally* Roger S. Clark, *The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which Are Inherently Indiscriminate,* in Humanitarian Law: Challenges 259 (John Carey, William V. Dunlap & R. John Pritchard eds., 2004). The use of such items will be included as an offence, "provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123". Notice the specific use of the word "amendment" here, but the absence of the word "adopted" (as used in art. 5 (2)). This provision, which has its history in attempts to include the use or threat of use of nuclear weapons as crimes within the jurisdiction of the Court, arguably involves an amendment to art. 8 and thus invokes art. 121 (3) and (5). One could argue, to the contrary, that placing, say, anti-personnel mines in an annex is not an amendment *to art. 8* – it is a completion or a fulfillment of it – so that art. 121 (4) applies. What are the "relevant provisions set forth in articles 121 and 123"?

46 Art. 32 of the Vienna Convention on the Law of Treaties permits recourse to the preparatory work to confirm the meaning resulting from the application of art. 31 ("ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"), or where the meaning is "ambiguous or obscure".

47 The most definitive accounts of the negotiations at Rome by some of those closely involved do not even mention the issue. Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results 79, 81-85 (Roy Lee ed., 1999); Manoush H. Arsanjani, *The Rome Statute of the International Criminal Court,* 93 Am. J. Int'l L. 22, 29-30 (1999); Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court*: *The Negotiating Process,* 93 Am. J. Int'l L. 2 (1999). Then-Ambassador Kirsch, Chair of the Committee of the Whole in Rome, and Mr. Holmes, his right-hand person there, state at p.10 n. 30 that art. 5 "includes the crime of aggression but specifies that the court shall not exercise jurisdiction over the crime of aggression until a definition of aggression and the applicable preconditions are settled on in a review conference, in accordance with the amendment procedures of the statute." Ah, yes, but which procedures?

later elaboration, was foreshadowed in a proposal from the Non-Aligned Countries introduced on Bastille Day, late in the Rome Conference. It read:

> 1. Add a new sub-paragraph (d) to article 5, as follows:
> (d) The crime of aggression.
> 2. Add a new article 5 quinquies, reading:
> The Preparatory Commission shall elaborate the definition and elements of the crime of aggression and recommend its adoption to the Assembly of States Parties. The International Criminal Court shall not exercise its jurisdiction with regard to this crime until such a definition has been adopted. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the Statute.[48]

Note that the word "amendment" does not appear, and that the words "in accordance with the Statute" in the third sentence of the "new article" are reminiscent of the expository style of the Delphic Oracle.

Meanwhile, the head of the Samoan Delegation, Ambassador Tuiloma Neroni Slade, as Coordinator of the negotiations on the Final Clauses, had forwarded his final document to the Committee of the Whole on 11 July.[49] At that point, paragraph 4 of Article 121 was essentially in its final shape, except that the Coordinator had bracketed five-sixths and seven-eighths as options for bringing an amendment into force. He had been unable to resolve this.[50] What is now paragraph 5 had emerged from his efforts in the following form:

> [5. Any amendment to article 5 shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance [, unless the Assembly or the Conference has decided that the amendment shall come into force for all States Parties once it has been accepted by [5/6] [7/8] of them.]][51]

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48 U.N. Doc. A/CONF.183/C.1/L.59 and Corr. 1 (14 July 1998).

49 U.N. Doc. A/CONF. 183/C.1/L.61 and Corr. 1 (11 July 1998) (the higher number than the Non-Aligned document of a later date seems to be a quirk of the bureaucratic process). The dynamics of the timetable to enable the Conference to end as scheduled on 17 July meant that the numerous negotiating groups to which pieces of the draft had been delegated had to report back to the Committee of the Whole around this date. As was the case with the Final Clauses, this meant that some issues would still be unresolved and reported in bracketed language. The Bureau of the Committee of the Whole presented the ultimate package containing its best resolution of all remaining issues in a document dated 16 July which most delegations did not see until early in the morning of the 17th.

50 The Bureau of the Committee of the Whole apparently accepted the wish of one or more of the major powers for the higher number.

51 At the time what is now art. 121 was being negotiated, all of what became arts. 5-8 was contained in draft art. 5 (which was being negotiated in a different group). The Bureau of the Committee of the Whole made the split into what is now arts. 5-8 some time in the last days of the Conference. On the last night in Rome, art. 121 (5) contained a reference only to amendments to art. 5. The Chair of the Committee of the Whole later corrected what he said was a "technical error" and the paragraph now refers to arts 5, 6, 7 and 8. *See generally*, Roger S. Clark, *Article 121*, in Commentary on the Rome Statute of the

The brackets around the whole paragraph recognized that many participants (probably most of them) did not want to distinguish between different kinds of amendment. Paragraph 4 on that view would apply to all except those technical amendments covered by the simplified procedure in Article 122 (2). The internal brackets within the draft for paragraph 5 reflected a fallback position of leaving it to the Assembly to decide whether or not a particular amendment would apply to all.[52] The Coordinator's draft had been vigorously negotiated against the backdrop of the debate on the inclusion or exclusion of aggression and nuclear weapons in the Statute. Those who wanted them in (even if later) wanted more flexible amendment procedures; those opposed wanted to close the door for as long as possible. No one negotiating the Final Clauses could know, at that point, a week before the end of the Diplomatic Conference, what would happen with these items.[53] Since the Non-Aligned compromise on aggression had not yet been presented, it is not surprising that the group working on the Final Clauses did not consider it.[54]

International Criminal Court: Observers' Notes, Article by Article (Otto Triffterer ed., 2d ed. 2005).

52 An option providing that amendments done by a Review Conference to art. 5 would apply only to those who accepted them was contained in draft art. 111 of the Statute forwarded by the PrepCom to Rome in U.N. Doc. A/CONF.183.2 (1998). Modifications that led ultimately to the addition of the simplified procedure of what is now art. 122 and to the Coordinator's heavily bracketed draft for art. 121 (5), *supra* at note 51, were introduced by Switzerland in U.N. Doc. A/CONF.183/C.1/L.24, dated 29 June 1998. The PrepCom provision had a bracketed number of ten parties as the minimum number for an amendment to art. 5 to come into force. The Swiss proposal did not distinguish between art. 5 and other amendments. It provided generally that:

> When adopting an amendment, the Assembly of States Parties shall decide whether the amendment shall enter into force for all States Parties once it has been accepted by [five sixths] of them or whether it shall enter into force only with regard to States Parties which shall have accepted it. In the latter case, the Assembly may also specify how many States Parties must have accepted the amendment before it enters into force for any of them.

In informal negotiations, the distinction between para. 4 and para. 5 amendments was insisted upon by some, but the ten States minimum from the PrepCom and the option for a minimum in the Swiss proposal were omitted.

53 Nuclear weapons were ultimately not included in the Statute and, in a deal with the devil, neither were other weapons of mass destruction. *See* Kirsch & Holmes, *supra* note 47 at p.11 n.32.

54 For the sake of completeness, other statements espousing a position not found in the Reports of the Special Working Group should be mentioned. The PrepCom Coordinator seems to have elided art. 121 paragraphs 4 and 5 when she wrote the following:

> An amendment would have to be voted in favor by a two-third majority of States Parties at a review conference to be convened seven years after the entry into force of the Statute. This amendment will enter into force only if it is ratified by seven-eighths of them, but, even then, it will not enter into force in respect of those who have not accepted the amendment. (Footnotes referring to art. 121 omitted.)

Silvia A. Fernandez de Gurmendi, Fordham Int'l L. J., *supra* note 6, at 604. To the same effect is David J Scheffer, *Staying the Course with the International Criminal Court*, 35 Cornell Int'l L. J. 47 (2002):

> Any amendment including an actionable crime of aggression would have to achieve ratification by seven-eighths of all States Parties, which is a very high bar. If the

Some preparatory work is especially edifying. This lot hardly fits that category. The crucial last-minute decisions on the "package" by the Bureau of the Committee of the Whole were not accompanied by any explanation. What perhaps emerges from this story is the determination of many players to have aggression as one of the crimes on which the ICC would have jurisdiction, one of what the preamble to the Statute calls "the most serious crimes of concern to the international community as a whole". As such, the history probably points in the direction of either the first or second interpretations of Article 5 (2). A way has to be found for the crime to apply, like the other crimes within the jurisdiction of the Court, in a "unified legal regime",[55] to all and not only to those who agree specifically to the provision on aggression.[56] Otherwise, the States most likely to commit aggression may simply opt out.

United States were to be a State Party prior to such an amendment, it could "opt out" of the crime of aggression pursuant to the Article 121 (5) right for States Parties.

Id., at 83. A footnote after the first of these sentences refers to art. 121 (6) which deals with withdrawal by a party objecting to amendments achieved pursuant to art. 121 (4). It is plainly inapposite to the point made in the sentence. These two comments from the last PrepCom Coordinator and the Head of the U.S. delegation to Rome treat paras. 4 and 5 of art. 121 as *cumulative* rather than as disjunctive *alternatives* applying to different types of amendment. They seem to be flatly contradictory to the plain meaning of the article and find no support in the preparatory work discussed above. Another major player at Rome, the Head of the Norwegian delegation, writes that "[s]uch an amendment would require adoption through a particularly qualified majority (7/8) at the Assembly of States Parties to the Statute." Rolf Einar Fife, *Criminalizing individuals for acts of aggression committed by States*, in Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide 53, 56 (Morten Bergsmo ed., 2003). This confuses the (2/3) vote required for adoption at the Assembly (or more probably a Review Conference) with that required for ratification or acceptance.

55 2005 Special Working Group Report, *supra* note 11 at 5. Nicolaos Strapatsas has a thoughtful 2005 paper, *Analysis of the amendment rules applicable to the inclusion of the "crime of aggression" into the ICC Statute,* published by the Committee for Effective International Criminal Law, in which he suggests some creative ways out of the dilemma discussed above. He suggests that the Review Conference has a formal choice which it can exercise as a drafting matter. Thus, aggression could be placed in art. 5 (2) by an amendment to that provision, thereby invoking art. 121 (5); or it could be done, say, by making a new art. 8 bis, thereby invoking art. 121 (4). On drafting technique, *see also infra* note 103. I have a nagging suspicion that some would regard the Strapatsas solution as collapsing form with substance.

56 There is the further question of what to do about those who become parties to the Statute after the provision on aggression becomes applicable. If it applies to all existing parties, it ought in principle to apply to future ones as well. If existing ones can choose whether or not to become parties, then future ones should also have that choice. Article 40 (5) of the Vienna Convention on the Law of Treaties has a puzzling default rule that appears to give subsequent parties to an amended multilateral treaty power to choose whether to become a party to the amendments or not. Parties to the United Nations Charter and the constituent treaties of other international organizations take the treaty as amended. That is surely the result that should be sought here. The issues are carefully canvassed in Jutta F. Bertram-Nothnagel, *Some Thoughts about the Question if a State which is becoming a Party to the Rome Statute of the International Criminal Court after the Adoption of the provision on the Crime of Aggression May Choose not to be Bound by that Provision* (unpublished paper circulated at the 2005 meeting of the Special Working Group on the Crime of Aggression, on file with the author).

II. "Conditions for the exercise of jurisdiction" in the Coordinator's final paper: The role of the Security Council or other UN organs

Articles 4 and 5 of the Coordinator's draft sought to deal with what Article 5, paragraph 2 of the Rome Statute calls the "conditions under which the Court shall exercise jurisdiction with respect to the crime". Although they are treated last in Part I of the Coordinator's paper, application of their procedures is a "condition" or "precondition" to the exercise of jurisdiction by the Court. Moreover – and there is no way to escape this, in the current posture of the draft – the procedures require that, in some if not all cases, an entity other than the ICC determine a crucial element of the offence.[57] This has drastic effects on the structure of the offence. Hence, I discuss the conditions first.

Article 4 of the Coordinator's paper[58] requires that when a Prosecutor intends to proceed with an investigation in respect of a crime of aggression, "the Court"[59] shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no such determination exists, the Court is to give the Security Council an opportunity to make such a determination. Some of the participants in the negotiation, notably the permanent five mem-

57 There is no question in my mind that, as the proposals were drafted by the Coordinator, the determination by a U.N. organ that there was an "act of aggression" is conclusive on the Court. That "act" is an element of the offence. I have not yet seen any drafts to this effect, but some members of the PrepCom and of the Special Working Group have floated the idea that those determinations may be something less than conclusive. *See* Ioana Gabriela Stancu (Romanian representative in the negotiations), *Defining the Crime of Aggression or Redefining Aggression?* in Politi & Nesi eds., *supra* note 5 at 87, 89:

> The determination of the existence of an act of aggression should be considered as a precondition for exercising the ICC's jurisdiction over the crime, that means as a procedural or preliminary condition, which should not affect the independence of the Court in determining the guilt or the innocence of the accused.

See also the comment in 2005 Special Working Group Report, *supra* note 10 at 13: "It was contended that such a determination should only be procedural and not binding on the Court. If it were binding it would have a drastic impact on the rights of the accused." It might be possible, for example, to regard the determination as somewhat like a referral under art. 13 (b) of the Statute, a procedural condition but not binding on the substantive merits of the charge. Or, it might be regarded as creating some kind of evidentiary presumption that the defence must rebut. The former may not be acceptable to some States. I believe the latter would suffer the fatal flaw of conflicting with art. 67 (1) (i) of the Statute which gives the accused the right "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." There may be other ways to structure a "procedural" determination. The strongest proponents of having the Court make its own findings have been Greece and Portugal. *See* Proposal submitted by Greece and Portugal, U.N. Doc. PCNICC/2000/WGCA/DP.5. The paper states, at p.3, that: "According to the Greek/Portuguese proposal, any decision taken by the Security Council under Article 39 of the Charter of the United Nations that there has indeed been aggression by a State against another State has to be taken into account by the Court." I am not sure how strong "has to be taken into account" is meant to be. *See also infra* note 89.

58 *Supra* note 6.

59 Presumably a three-judge Pre-Trial Chamber as contemplated for significant determinations in Rome Statute arts 39 (2) and 57, but this should probably be clarified in the articles to be added to the Statute.

bers of the Security Council, would stop there, taking the position that the Security Council's role is exclusive under Chapter VII of the Charter. If the Council fails to act, that is the end of the matter. Others disagree strongly about exclusivity.[60] The current draft, in Article 5,[61] allows for a range of possibilities: the ICC may go ahead and make the determination itself; it may ask the General Assembly to make a recommendation;[62] it may ask the General Assembly[63] or the Security Council[64]

60 The argument that the Security Council does not have exclusive power in this area gains substantial support from the advisory opinion of the International Court of Justice, Certain Expenses of the United Nations, 1962 I.C.J. 151. The Court stressed that the Security Council has *primary* responsibility which does not preclude some other organ (or organs) from having secondary responsibility. This was, of course, the argument behind the adoption of the Uniting for Peace Resolution, G.A. Res. 377A (V) 1950 which gives a role to the General Assembly where the Security Council is stalemated by the use of the veto. *See generally,* the discussion of the United States initiative leading to Res. 377A (V) in [1950] U.N.Y.B. 181-95. *But see* Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 Suffolk Transnat'l L. Rev. 1, 14 (2001) (arguing that, while the Security Council's responsibility to maintain peace and security under art. 24 of the Charter is primary not exclusive, its "prerogative to determine the existence of an act of aggression under Article 39, however, is exclusive.") In the 2005 World Summit Outcome document, the General Assembly reaffirms in para. 80 the primary responsibility of the Security Council in the maintenance of peace and security. It goes on to "note the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter."

61 Coordinator's paper, *supra* note 6, art. 5.

62 *Note* G.A. Res. 498 (V) of February 1, 1951, U.N. GAOR, 5th Sess., Supp. No. 20A at 1, U.N. Doc. A/1775/Add.1 (1951), in which the General Assembly "Finds that the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, had itself engaged in aggression in Korea". As the Secretariat's Historical review indicates, there is significant practice on the part of the General Assembly in making determinations that aggression has occurred. *See* U.N. Doc. PCNICC/2002/WGCA/L.1, *supra* note 11 at 123 (China and North Korea in Korea), 124-25 (South Africa in Namibia), 125 (South Africa in Angola, Botswana, Lesotho, Mozambique, Seychelles, Swaziland, Zambia and Zimbabwe), 126 (Portugal in Guinea-Bissau and Cape Verde), 126 (Israel in Iraq, Lebanon, Palestine and Syria), 128 (Yugoslavia and Croatia in Bosnia and Herzegovina). This practice might reasonably be regarded, in terms of the Vienna Convention on the Law of Treaties art. 31 (3) (b), as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and thus relevant to the interpretation of the Charter.

63 The General Assembly has power under art. 96 of the Charter to ask for the Court's opinion on "any legal question".

64 The reference to the Security Council's similar power in the Charter art. 96 is based on a Proposal from the Netherlands, contained in U.N. Doc. PCNICC/2002/WGCA/DP.1 of 17 April 2002. Controversially, the proposal refers to "the Security Council acting on the vote of any nine members". The procedural language is based on the precedent contained in the Uniting for Peace Resolution, G.A. Res. 377A (V) (1950) which provides for the calling of a special session of the General Assembly "with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to maintain or restore international peace and security". The "vote of any nine members" formula seeks to avoid the veto by classifying the matter as procedural under art. 27 (2) of the Charter, as opposed to substantive. There are those who believe that a request for

to request an advisory opinion from the International Court of Justice. Or it may proceed if it ascertains that the International Court of Justice has made a finding in contentious proceedings that an act of aggression has been committed by the State concerned.[65]

Whether agreement can ever be reached on some or all of these is a matter of speculation. It must be stressed, though, that the Coordinator's draft has several alternatives, the fundamental feature of which is that the element of "aggression" by a state may well, in at least some cases, be decided elsewhere than in the ICC itself, most likely in a political organ of the United Nations. There is likely to be a division of labour. The structure of the offence must come to terms with this, whether the decision is always made in the United Nations, or whether it is made there only some of the time. The only way to avoid the determination of a United Nations organ that an "act of aggression" has occurred from being conclusive is to re-draft the provision in such a way that it is merely procedural or preliminary.

III. The "definition" as contained in the Coordinator's final paper

The three articles comprising a definition in the Coordinator's final paper are so important that I reproduce the precise text here:

> '1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.
> Option 1: Add "such as, in particular, a war of aggression or an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".
> Option 2: Add "and amounts to a war of aggression or constitutes an act which has

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an advisory opinion is, contrary to the Dutch proposal, subject to the veto, but the point has never been determined definitively. In the Namibia Advisory Proceedings, requested by the Security Council, the Court held that a resolution could be validly adopted in the Security Council notwithstanding the abstention of a permanent member, but the present point did not arise. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16.

65 The ICJ has never made a specific finding that an act of aggression has occurred, but there is some discussion of the General Assembly's definition of aggression in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, 1986 I.C.J. 104. The Court regarded at least some aspects of G.A. Res. 3314 as reflective of customary law. In Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), the proceedings in which are continuing, the Congo makes allegations of armed aggression. For an excellent discussion of some of the I.C.J.'s relevant decisions, *see* Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?* 16 Indiana Int'l & Comp. L. Rev (2005). Stein suggests that it might be possible to obtain an advisory opinion from the Court on the exclusivity question.

the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".
Option 3: Neither of the above.
2. For the purposes of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned.
Option 1: Add "in accordance with paragraphs 4 and 5".
Option 2: Add "subject to a prior determination by the Security Council of the United Nations".
3. The provisions of articles 25, paragraph 3, 28 and 33 of the Statute do not apply to the crime of aggression.

Article 1 of the Coordinator's draft – the core conduct of the crime

Article 1 of the draft begins with the words "For the purpose of the present Statute" which are a variant of the comparable words in Articles 6, 7, and 8 defining the other crimes within the jurisdiction of the Court.[66] There may be other contexts in which "aggression" or the "crime of aggression" has a wider meaning,[67] but this is the one to be used to assess criminal responsibility under the Rome Statute. The Discussion paper then introduces the drafting convention that distinguishes between an "act of aggression" committed by a state[68] and the "crime of aggression" for which there is individual criminal responsibility.

The crime, as is so often emphasized in the literature and in the debates, is to be a "leadership" crime. This finds its first expression in the reference to the person's "being in a position effectively to exercise control over or to direct the political or military action of a State". This is a material element of some sort, either a "conduct" element or a "circumstance" element. The essence of it is that the perpetrator placed himself (or allowed himself to be placed) in a defined role. The word "effectively" carries two points on its back. One is the situation of the mere figurehead head of state (if there be such) who has no influence at all on events. That person commits no offence.[69] "Effectively" also deals with the problem raised by the I.G. Farben and Krupp cases decided by United States Military Tribunals at Nuremberg pursuant to

66 Articles 6, 7 and 8 of the Rome Statute in fact read "this" rather than "the present". For efforts to come closer to the structure of arts 6-8, *see infra* at notes 122-29.

67 Domestic law might have a wider offence; the law of state responsibility might eventually conclude that some wrongful acts by states amount to "crimes" for which there is state responsibility. The Coordinator's proposal is neutral on what epithet is to be used to describe the state's actions – the important point is that it comes within the description of an "act of aggression".

68 The Coordinator's draft speaks of "the State concerned". G.A. Res. 3314, which provides the basis for this part of the analysis, has an "Explanatory note" following its first article which says that "'State'...[i]ncludes the concept of group of States where appropriate". Aggressions are often group efforts.

69 Note that this is not a question of immunity. Article 27 of the Rome Statute is emphatic that there is no exemption from criminal responsibility for an official, including a head of state. Here the crime is simply defined in such a manner as not to include some heads. The non-inclusion of the figurehead also gains some support from the use of the word "actively" to modify the verbs later in the article.

Control Council Law No. 10.[70] The accused there were industrialists who were not formally part of the Government, but very closely associated with it. The Tribunals acquitted the accused in the particular cases, but made it clear that it may be possible to convict non-governmental actors for a crime against peace.[71]

This is probably a good point to re-introduce the question of mental elements and their relationship to the material elements in Article 1 of the Coordinator's draft. The Nuremberg and Tokyo precedents certainly suggest that proof of the crime requires some kind of intent or knowledge. It will be noted that the Coordinator injected the words "intentionally and knowingly" immediately after the initial element (a "circumstance" element, I think) and before the next phrase in the text. That element describes the place of the perpetrator in the state structure. Why should the mental element not apply in principle to this first element (although it is hard to think of one involved in the leadership who does not know that he or she is so involved)? The default rule of Article 30 demands that its mental element would apply to all material elements (including this first one) "unless otherwise provided". At all events, the Special Working Group has now agreed to delete "intentionally and knowingly" from here and to let the default rule work its way.[72]

The next material element is plainly a conduct element, namely that the perpetrator "orders or participates actively in the planning, preparation or execution of an act of aggression". "Participates actively"[73] includes an understanding that there was a nexus between the perpetrator's conduct and the act of aggression. The actor must have "contributed" to the State's aggression. This does not mean that he or she must have been the sole mastermind, or even the initiator, although such a person is the easy case. There is no need for "but for" causation on the part of all the perpetrators, although there will presumably be a primary actor who has such a connection to the offence. One who comes along later (an industrialist or general for example) and supplies the know-how for an ongoing enterprise may come within the ambit of the article.[74]

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70 *See* discussion of these cases in the Secretariat's Historical review, *supra* note 11 at 46 and 50. To a similar effect is the Roechling case, decided in the French Zone of Occupation, *id.*, at 83 (Roechling's "vanity perhaps allowed him to attribute more authority to himself that he was actually entitled to").

71 The Samoan proposal for Elements of the Crime of Aggression, *supra* note 6, sought to underscore this latter point by adding language to the effect that the perpetrator "need not formally be a member of the government or military". Most of the participants thought the present wording adequate. For a proposal that supported the use of "effectively", *see* Incorporating the crime of aggression as a leadership crime into the definition - Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, U.N. Doc. PCNICC/2002/WGCA/DP.5.

72 2005 Special Working Group Report, *supra* note 10 at 11. *See also infra* at notes 122-29 (Proposals A and B)

73 On these words, *see also infra* note 126. They also probably carry some of the same freight as "effectively".

74 There is probably an analogy here with domestic law concerning the liability of secondary parties whose physical contribution to a crime, given an appropriate mental element, may be minimal. *See*, e.g., Wilcox v. Jeffrey [1951] 1 All E.R. 464 (KBD) (author of review of concert by famous saxophone player performing in breach of law concerning aliens working convicted as aider and abettor) and State *ex rel.* Attorney-General v. Tally, 102

Many of the participants in the PrepCom would have been happy if the definition stopped with the conduct in which the accused engaged connecting him to any act which is among those contemplated by Resolution 3314. A powerful group of states, however, insisted that something "more" should be involved. As a practical matter, this meant either that only some of the particular kinds of aggression listed in General Assembly resolution 3314 would be sufficient or that another type (or types) of "threshold" was indicated.

One version of such a threshold is in the Coordinator's main text: "[an act of aggression] which, by its character, gravity and scale constitutes a flagrant violation of the Charter of the United Nations".[75] I think this qualification of aggression as

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Ala. 25 (1894) (judge who ordered non-delivery of telegram that might have saved victim's life guilty of aiding an abetting). The complexity of the "objective" requirements of complicity is well captured in Albin Eser, *Individual Criminal Responsibility*, in The Rome Statute of the International Criminal Court, Vol. I, *supra* note 13 at 767, 798, 802; Kai Ambos, *Article 25,* in Triffterer ed., *supra* note 32 at 475. As the ILC's Special Rapporteur on Crimes against the Peace and Security of Mankind noted in his Eighth Report, U.N. Doc. A/CN.4/430 (1990) at 4, "Acts of complicity can be divided into two categories: physical acts (aiding, abetting, provision of means, gifts, etc.) and acts which are intellectual or moral in character (counsel, instigation, provocation, orders, threats, etc.)." The 1996 Draft Code of Crimes against the Peace and Security of Mankind, *supra* note 18, required in art. 2 (3) (d) that one who "aids, abets or otherwise assists" do so "directly and substantially". Art. 25 (3) of the Rome Statute has no precise threshold for how much contribution is needed. The "common purpose" provision in art. 25 (3) (d) may require precious little. On art. 25 (3) (d) and its relationship to the Nuremberg conspiracy theory, *see* Roger S. Clark, *The United Nations Convention against Transnational Organized Crime*, 50 Wayne L. Rev. 161, 173 n. 49 (2004). (To the extent that art. 25 (3) (d) may be regarded as a conspiracy provision, it is conspiracy as a model of group participation in a completed or attempted offence, not conspiracy as an inchoate, preparation-type offence.) *See also* the exhaustive discussion of complicity in Prosecutor v. Furundžija, Case No. IT-95-17/1-T (ICTY), Judgement of Dec. 10, 1998 at paragraphs 190-249, and discussion of "joint criminal enterprise" (substantially the same animal as "common purpose"?) in Prosecutor v. Kvoćka et al, Case No. IT-98-30/1-A, Appeals Chamber Judgement of Feb. 28, 2005, paragraphs 77-119. *Note especially,* para. 98 of Kvoćka:

> The Appeals Chamber agrees that the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed. Thus, the argument that an accused did not participate in the joint criminal enterprise because he was easily replaceable must be rejected. (Footnote omitted.)

Of course, art. 25 does not necessarily reflect exactly the previous jurisprudence. *See also infra* notes 119 and 129.

75 The German proposal from which this language was derived used the word "manifest" rather than "flagrant". *See* PCNICC/1999/DP.13, Proposal submitted by Germany. I am not sure that in modern English usage there is any clear distinction between the two. "Flagrant" might be slightly more pejorative in some contexts that "manifest". The Oxford American Dictionary, however, defines "flagrant" as "very bad and obvious" and "manifest" as "clear and unmistakable"and the standard legal dictionaries use comparable terms. Members of the German delegation and of some other delegations have suggested on occasion that the flagrant or manifest standard might also provide a framework for solving mistake questions. On mistake, *see infra* at notes 115-18. There seems to be a relationship between thinking about thresholds to weed out the marginal cases where whether or not something gives rise to state responsibility is debated and using an individual's mistake or fact or law to deal with criminal responsibility. Perhaps both

"flagrant" is also some kind of circumstance (or contextual circumstance)[76] element. Pursuant to this qualification, all aggressions are not equal. All presumably give rise to state responsibility; the "flagrant" ones, in addition, give rise to criminal responsibility for "leaders". Some hard judgment calls would be required of the ICC when it comes to applying the standard. Whether or not the standard is too vague to overcome the strictures of the principle of legality depends to some extent on how different it is in kind from comparable evaluations of conduct under domestic law, for example, that something is negligent. There are surely easy cases and hard cases; the benefit of the doubt should go to the accused in the hard cases.

The default rule of Article 30 probably imposes a knowledge requirement for this additional element (and its variants to which I shall turn shortly). I think that is probably the appropriate position from the point of view of fairness to the defence. A case can, however, be made that the qualification (circumstance) is an "objective" element, a "threshold" or "jurisdictional threshold" or a "merely jurisdictional" element[77] for which no mental element need be shown. In short, it is enough, on this line of argument, that the accused knew he was involved in an act of aggression and that aggression was illegal. Once he knows that he is in illegal territory, he takes his chances that the illegality turns out to be criminality.

It is also possible to characterize the element requiring the aggression to be flagrant another way, consistently with actions taken on The Elements. Paragraph 4 of the general introduction to The Elements[78] provides that:

> With respect to mental elements associated with elements involving value judgment, such as those using the terms "inhumane" or "severe", it is not necessary that

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approaches are needed. At first blush, one goes to a material element; the other to a mental one. It is possible, however, to read a requirement that something be flagrant or manifest as injecting along with the "material" an objective "mental" standard like negligence. Flagrant is to be determined from the point of view of the reasonable statesperson or soldier in the particular situation? Another German paper, *infra* note 84, uses the phrase "clearly without justification under international law" which seems to capture the same ideas as flagrant and manifest. Perhaps it would be an improvement in the drafting. For a good discussion of these issues, *see* Claus Kress, *The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq*, 2 J. Int'l Crim. Just. 245, 259-61 (2004). For some thoughts about liability based on negligence, *see infra* notes 118 and 136.

76 *Supra* notes 35, 36.

77 For the argument that some material elements may be merely jurisdictional and require no mental element on the part of the perpetrator, *see* Clark, *supra* note 13 at 326-27 and 330-31. The analogy is with a typical territorial jurisdiction provision. A person charged with homicide in New Jersey will not be heard to say that he thought (even reasonably) that he was in Pennsylvania at the time of the killing. Of course, the prosecution must prove the territorial element, namely in my hypothetical that the events occurred in New Jersey. But his *mens rea* as to that element is irrelevant. That the Security Council has determined the existence of an act of aggression is an element in the Coordinator's draft but the defendant's knowledge of that determination is not an issue – it is unknowable at the relevant time, although it might be highly predictable!

78 *Supra* note 13. The background to this, notably the Canadian case of R. v. Finta, [1994] 1 S.C.R. 701, 112 D.L.R. (4th) 513, is discussed in Clark, *supra* note 14 at 322-23.

> the perpetrator personally completed a particular value judgment, unless otherwise indicated.

Viewed through this lens, there is no need either that the accused completed the particular judgment. On the other hand, it would be necessary for the prosecution to show that he was aware of the underlying facts.

The Options that follow in the Coordinator's draft, if adopted, would further modify the modification of aggression as defined in Resolution 3314 and perhaps narrow its scope even further. The first version is an "illustrative" modification. It begins with the words "such as" and mentions two examples, a "war of aggression" and an "act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof". Other categories are presumably left to the imagination of the judges. The second version is exhaustive; it makes these two exclusive. In order for the crime to exist, the actions must, in addition to other elements, fit into one or both of the categories.

Both categories find a home in Resolution 3314,[79] although the term "war of aggression" goes back to the Nuremberg and Tokyo Charters.[80] "War of aggression" appears in Article 5, paragraph 2, of the Definition of Aggression as follows:

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79 *See* text at note 93 *infra* for the relevant language.

80 At Nuremberg, where the analysis was hardly enlightening, the Tribunal seemed to draw a distinction between the acquisitions of Austria and parts of Czechoslovakia which were "aggression" and the invasions of Poland and beyond that became a "war of aggression". The distinction seems to turn on actual shooting ("hostilities"? an "armed attack" in the words of art. 51 of the UN Charter?). Thousands of troops massed on the border or threats to destroy Prague from the air do not a "war" make, even if they snuff out the separate international legal personality of the victim? On the other hand, Control Council Law No. 10 included "invasions of other countries" as well as wars of aggression in its definition of crimes against peace. In at least one of the U.S. prosecutions, the Ministries Case, there was a conviction (of Keppler) for the invasions of Austria and Czechoslovakia. *See* the Secretariat's Historical Review, *supra* note 11 at 72-74. Telford Taylor, Chief Prosecutor in the Ministries Case, comments that:

> The case does establish, however, that the conquests of Austria and Bohemia and Moravia were "crimes against peace" (Judge Powers dissenting), and this holding lays at rest the notion that a great power can, with legal impunity, mass such large forces to threaten a weaker country that the latter succumbs without the necessity of a "shooting war."

Telford Taylor, *The Nuremberg Trials,* Int'l Conciliation No. 450 at 340-41 (1949).

After referring to Control Council Law No. 10, Phani Dascalopoulou-Livada, who has represented Greece in the negotiations, comments that:

> Despite the fact that the application of the notion of "war of aggression" seems to be neither workable nor desirable, we have to admit that there is need for some qualifier so as to criminalize acts which are of a certain importance.

Aggression and the ICC: Views on Certain Ideas and their Potential for a Solution, in Politi & Nesi eds., *supra* note 5 at 79, 83. For further thoughtful discussion of the "aggression threshold" question, *see* Charlotte Griffen, *Defining Aggression: Can the Use of Force Short of War Ever Meet the Threshold for the Crime of Aggression?* forthcoming in N.Z. J. Pub. & Int'l L (2005) (which contains an interesting discussion about whether the invasions of Austria and Czechoslovakia should be characterized as "war"); Phani Dascalopoulou-Livada, *The Crime of Aggression: Making Operative the Jurisdiction of the ICC – Tendencies in the PrepCom,* 96 Proc. Am. Soc'y Int'l L. 185 (2002).

'A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.'[81]

"War of aggression" is not further defined in resolution 3314 (or in the ICC Coordinator's draft). There is no indication whether it means something more than the types of uses of force listed in Resolution 3314[82] and, frankly, it seems an unhelpful concept. It has a following, though![83] Many Governments seem determined to

81 G.A. Res. 3314, *supra* note 12, art. 5 (2). The words "international responsibility" in art. 5 (2) are delightfully ambiguous. They could be referring to state responsibility, the main (only?) focus of the resolution. Or they could refer to individual criminal responsibility, thus distinguishing between broad state responsibility (for aggression) and narrower criminal responsibility (for the crime of aggression). Elizabeth Wilmshurst, who represented the UK in the negotiations for many years, insists that the latter is the case. She is a strong proponent of using the term "war of aggression" which she believes is required by customary law. *See* her *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?* in Politi & Nesi eds., *supra* note 5 at 93, 94. Julius Stone, in a book which is a scathing deconstruction of Resolution 3314, notes that:

> This curious provision appears to be a vestige, rather mangled during verbal haggling, of the much clearer provision of the Soviet draft: "Armed aggression shall be an international crime against peace entailing the political and material responsibility of States and the criminal responsibility of the persons guilty of this crime." (Paragraph 5). The Thirteen Power Draft was also clearer, though different again: "Armed aggression ... and the acts enumerated above, shall constitute crimes against international peace, giving rise to international responsibility." This latter text follows closely the Declaration ... on... Friendly Relations ... (Resol. 2625 (XXV), para. 2 following Preamble.)

Julius Stone, Conflict Through Consensus: United Nations Approaches to Aggression 206 n. 48 (1977).

82 *See infra* at note 93 (art. 3).

83 Germany (a major proponent of including the crime of aggression in the Statute), argues in a very thoughtful paper, that "... the use of the term "war" – instead of "act" – of aggression is of great significance. It clearly conveys the idea that the use of armed force must be of the utmost gravity to entail criminal responsibility under international law". Proposal submitted by Germany, U.N. Doc. PCNICC/2000/WGCA/DP.4 at 5. *See also id.,* at 6, para 22:

> It can be concluded from the foregoing analysis that the key documents of reference contain common elements suggesting a narrow concept of the crime of aggression, fully in line with what has been identified, in essence, as an aggressive, large scale armed attack on the territorial integrity of another State, clearly without justification under international law.

See also the German Prosecutor's concept of a war of aggression defined as "a massive use of force in clear violation of international law", discussed by Kress, *supra* note 75 at 255-61. Were the invasions of Austria and Czechoslovakia an "aggressive, large-scale armed attack"? Did they constitute a "massive use of force in clear violation of international law"? They were certainly aimed at the territorial integrity of the victims! One of the "key documents", Control Council Law No. 10, regarded them as a crime, even if not a "war"of aggression. *Supra* note 80. Is there a need for actual hostilities, or is it enough that there is a large-scale attack on the territorial integrity of a State? *See* Ian Brownlie, International Law and the Use of Force by States 211-12 (1963). After discussing the Nuremberg decision and noting that "The Tokyo Tribunal did not regard the Japanese occupation of Indo-China, after coercion of Vichy-France, as an aggressive war", Brownlie comments:

> It is desirable that the peaceful invasion which follows a successful threat of force should be regarded as a criminal act. It would seem unnecessary to regard the

keep it in the definition of aggression for the purposes of the ICC. Limiting the list of other flagrant aggressions to occupations and (purported)[84] annexations, on the other hand, also offends many players, especially the members of the Arab group. For them, bombing cities, in particular,[85] is just as reprehensible as these two. That group, and others, would favour Option 3 "neither of the above" (and, for that matter, the removal of any modifiers of Resolution 3314 including the requirement that the acts be flagrant).

Article 2 of the Coordinator's draft and herein of the General Assembly's Definition of Aggression

I turn to Article 2 of the Coordinator's draft which deals with the meaning of "act of aggression". It has two items in it, a reference to General Assembly resolution 3314, the Definition of Aggression,[86] as the basis for analysis, and a requirement that an act of aggression must be "determined to have been committed". Let me put the "determined to have been committed" item out of the way first, since I have already said most of what can be said about it.[87] The options in the Coordinator's draft include that the determination be made either exclusively by the Security Council, or by the melange of possibilities, including the ICC itself, that I discussed earlier.[88] I am comfortable with calling this predetermination a "precondition" or a "condition" and the Samoan draft Elements suggest a formula for this:

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fortuitous circumstance of resistance by the victim as a condition of responsibility a crime against peace.

In light of the material in notes 77-83, it is hard to accept that "war of aggression" is the relevant standard under customary law, or that it has any clear meaning. The concept of "war" is itself mysterious and highly contextual. Many domestic cases involve the interpretation of life insurance policies with exceptions for death in war. Others are germane to particular domestic constitutional or statutory provisions that apply in war-time. "War" as an international law concept was once associated with inter-state conflict (including "declarations" of war). Then came "civil wars" to which the term "war of aggression" is currently inapplicable, but this may not always be so. The rules of armed conflict, as in the Hague treaties, once applied to international armed conflict, but much of their content has since been expanded to cover non-international armed conflict. As used in art. 8 of the Rome Statute "war crimes" include those in non-international armed conflict. Is there any relevance by analogy of the usage in art. 2 of the Geneva Conventions which apply "to all cases of declared war or of any other armed conflict" between the parties and "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets no armed resistance"?

84 G.A. Res. 3314, *supra* note 12, art. 5 (3) says that "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful".

85 An example of art. 3 (b) of the Definition, *supra* note 12, and text *infra* at note 93.

86 *Supra* note 12.

87 *Supra* Part III.

88 *Supra* at notes 58-65.

> In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ has determined the existence of the act of aggression....[89]

Now consider the substantive law of the Coordinator's draft Article 2 which turns on an "act of aggression" meaning an act referred to in Resolution 3314. Resolution 3314 demands some quite detailed exegesis at this point.

Article 2 of Resolution 3314 provides that the first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression. The Security Council may, however, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.[90] The use of the term *prima facie* and the references to the Security Council and the Charter would seem to suggest that, at the very least, a State could defend its acts on the basis of assorted justifications. It might contend that it was acting in exercise of the inherent right of individual or collective self defence enshrined in Article 51 of the Charter. It might claim to be acting to rescue its nationals trapped in a dysfunctional state. It might claim to be engaged in a humanitarian intervention authorized by the Security Council. It might claim to be acting unilaterally for humanitarian purposes in circumstances where no Security Council action is necessary. I give the examples, not to suggest that any particular one is necessarily "good" in law, but to indicate a range of possibilities. The Security Council, it seems, has the power to accept or reject such responses, either generally or in specific cases, and even according to no principled standards at all. It can even decide not to make a determination as to something that factually and legally fits the category – because of its lack of gravity, or for any other reason, good or bad.

The International Court of Justice has, at best, a limited power of judicial review over the Security Council's actions.[91] The main restraint precluding it from engaging in unbridled power is the understanding of its members that they are constrained by the purposes and principles of the Charter. This approach of permitting a State to justify its actions, which is the only way the resolution as a whole makes sense, has to take account of the troublesome words of Article 5 (1) of the Definition: "No consid-

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89 Discussion paper proposed by the Coordinator, Part II, *supra* note 6. The "act" (as determined) is also a material ("circumstance" or "consequence") element of the crime as it is currently drafted. *Supra* note 57. It is surely possible, as a drafting matter, to de-couple the two. The "determination" could serve merely as a precondition, while the existence of the material element could be decided by the Court itself. Someone needs to test the political waters with some concrete language.

90 The Rome Statute, art. 17 (d) also contains power for the ICC itself to determine that a case is "inadmissible" where "it is not of sufficient gravity to justify further action by the Court". Rules permitting the dismissal of criminal cases on de minimis grounds are also to be found in domestic law.

91 Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. US/Libyan Arab Jamahiriya v. UK), Provisional Measures, 1992 I.C.J. 3. *See generally,* Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 Int'l & Comp. L. Q.55 (1994).

eration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression".

Notwithstanding these words, the Security Council can take a wide range of considerations into account, surely. If the force is justified, it is not aggression. What has to be justified, surely, is the use of force. If all else fails, the Council can avoid making a determination and fudge the issue altogether. I see no real barrier in Article 5 (1) to an understanding that use of force is normally unlawful, but may be justified or even "excused" as de minimis.[92]

Article 3 of the Definition states that "any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:"

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by the armed forces of a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
> (g) The sending by or on behalf of a State of armed bands, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[93]

Nonetheless, all is at large: Article 4 adds that "[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter".[94] The existence of Article 4 complicates matters when it comes to applying the words of the Coordinator's final draft,

92 I am speaking here of the Security Council's justifying in the sense of denying state responsibility. The Rome Statute speaks of "grounds for the exclusion of responsibility" in relation to individual criminality, carefully avoiding the standard terminology of "excuses" and "justifications" as too controversial and confusing. *See* arts. 31, 32 and 33. For the purposes of individual criminal responsibility, one may concede that there was an act of aggression that could not be "justified" in the Security Council but still insist that the accused is excluded from personal responsibility in the ICC.

93 *Supra* note 12, art. 3.

94 *Id.*, art. 4.

Article 2,[95] which speaks of "an act referred to" in Resolution 3314. Resolution 3314 does have a specific list, but it also contemplates "other" not enumerated acts providing the foundation for a finding that there is an "act of aggression".

To complete the picture, Article 6 says that nothing in the Definition is to be construed as enlarging or diminishing the Charter;[96] Article 7 saves the right to self determination;[97] and Article 8 adds that in their interpretation and application the other articles "are interrelated and each provision should be construed in the context of the other provisions".[98] Applying these provisions in the criminal context presents some challenges! It is all very indeterminate.

It will be recalled that the Coordinator's draft[99] incorporates Res. 3314 by reference. Some of the earlier drafts from the ILC included that resolution verbatim as part of the definition.[100] Taking all the 3314 language, including the (standardless?) references to the Security Council's discretion, fits awkwardly in a penal definition. The point is less obvious, but nonetheless real, when the incorporation is by reference. I am not quite sure how sacrosanct the specific reference to Resolution 3314 will ultimately prove to be. Until now, many States have insisted on its inclusion. On the other hand, the Report of the Special Working Group in 2005 contains these words:

> There was extensive discussion of whether the definition of the crime of aggression should be generic or specific (i.e. accompanied by a list such as that contained in United Nations General Assembly resolution 3314 (XXIX)). There was a considerable preference for a generic approach.[101]

"Generic" might include what the Coordinator did in incorporating a general reference to 3314 (given the indeterminacy created by its Articles 2 and 4) or it might mean a total elimination of all reference to it. A "specific" list might be crafted using some or all of the items in Article 3 of the resolution. Removing any actual reference to the resolution in a "generic" provision will not, of course, prevent the parties to any cases from relying on its provisions in their arguments. Whatever is done, the references in 3314 to the Security Council's broad discretion create some problems for criminal drafting.

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95 *Supra* note 6.

96 G.A. Res. 3314, *supra* note 12, art. 6.

97 *Id.*, art. 7. A number of Arab states have insisted throughout the negotiations that the crime of aggression can occur not only against a state, but also by "depriving other peoples of their rights to self-determination, freedom and independence". *See*, e.g., the use of that phrase in Proposal submitted by Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, the Sudan, the Syrian Arab Republic and Yemen, U.N. Doc. PCNICC/1999/DP.11.

98 *Id.*, art. 8.

99 *Supra* note 6.

100 *See*, e.g., 1991 Draft Code of Crimes Against the Peace and Security of Mankind art. 15 (aggression), [1991] II (2) Y.B. Int'l L Comm'n 94, 95 (text of the draft articles provisionally adopted by the Commission on first reading).

101 2005 Special Working Group Report, *supra* note 10 at 14.

IV. Article 3 of the Coordinator's draft – trumping some of the general principles

Article 3 of the Coordinator's final draft, asserted that "[t]he provisions of articles 25, paragraph 3, 28 and 33 of the Statute do not apply to the crime of aggression". There is a general question here that is now receiving the attention it deserves at the Special Working Group. The crime of aggression has to be fitted within the structure of the Rome Statute, both as a matter of drafting technique and of substance. I am concerned here mostly with substance.[102] Thus, as I have suggested earlier,[103] another "precondition" probably needs to be added to Article 12 dealing specifically with "determination" of the act of aggression. The crime of aggression will presumably be fitted alongside the descriptions of the other three crimes which are contained in Part 2 of the Rome Statute.[104] Part 2 also deals with jurisdiction and admissibility and careful thought needs to be given to whether any of the other provisions on jurisdiction and admissibility also need modification.

Tentatively, the Special Working Group is agreed that provisions such as Articles 17 (issues of admissibility), 18 (preliminary rulings regarding admissibility) and 19 (challenges to the jurisdiction of the Court or the admissibility of a case) can be applied to the crime of aggression without amendment.[105] Moreover, the provision on aggression would be prospective in nature; making this clear might entail some clarifying language in Article 11 of the Statute which deals with jurisdiction *ratione temporis*.[106] Some possibilities for referral to the Security Council for a determination that there has been an act of aggression, or by a request that the Council seek an advisory opinion from the International Court of Justice on that subject, might amount to a modification of the deferral provisions in Article 16. The drafting of whatever option is finally chosen will need careful correlation with that article.

The most pressing problems, though, relate to the general part of the Statute and this is what the Coordinator's draft Article 3 addressed.

The general principles of criminal law contained in Part 3 of the Statute are, as

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102 Drafting technique was discussed at the 2004 meeting of the Special Working Group. "A strong preference was voiced for the integration in the Statute of the definition of aggression and the conditions for exercising the Court's jurisdiction over the crime, thus dispensing with the notion of having a separate instrument for that purpose." Moreover, "the provisions could either stand on their own within the Statute or they could be split and integrated into different provisions of the existing text". 2004 Special Working Group Report, *supra* note 9 at 344-45. *See also infra* note 104.

103 *Supra* note 89.

104 Professor Otto Triffterer has suggested to me that arts 9 and 10 of the Rome Statute could be combined, thus freeing up art. 9 for the crime of aggression. Article 10 is the only article in the Statute without a heading. The "stand alone" approach, *supra* note 102, might perhaps be accommodated in this way.

105 2004 Special Working Group Report, *supra* note 9 at 345-46. *See also id.* at 346 (principle of *ne bis in idem* would apply, but some modification of language might be necessary in art. 20 (3)); 2005 Special Working Group Report, *supra* note 10 at 11 (no major concerns about applicability of Statute provisions on national security, arts. 57 (3), 72, 93 (4) and 99 (5); some doubts, apparently not widely shared, on art. 73 concerning third party information or documents).

106 2004 Special Working Group Report, *supra* note *9* at 342-43.

I have suggested,[107] default rules that apply unless expressly or impliedly excluded. Good drafting practice would indicate that the issue whether to exclude them at certain points should be faced as the "provision" for the crime of aggression is finalized.

A premise of the current paper, and this is consistent with the Coordinator's final draft, and with the subsequent discussion in the Special Working Group,[108] is that the framework of Articles 30 (mental and material elements)[109] and 32 (mistake of fact or mistake of law) should obviously apply. The same I believe is true of Article 31 (grounds for excluding criminal responsibility)[110] as indeed the general provisions in Articles 22-24,[111] 26,[112] 27[113] and 29.[114]

The requirement of knowledge opens up the possibility of a mistake "defence" or "ground for the exclusion of responsibility" under Article 32 of the Statute. Article 32 is difficult to explain, but its plain language demonstrates that it permits defences based on mistakes both of fact and of law (and ones of mixed fact and law for that matter).[115] It is the obverse of Article 30.

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107 *Supra* at note 20. (Not everyone agrees!)

108 *See* 2005 Special Working Group Report, *supra* note 10 at 11 (deletion of "intentionally and knowingly" from Coordinator's draft, in accordance with default rule of art. 30). *See also* as to this, 2004 Special Working Group Report, *supra* note 10 at 349. The draft Elements, *supra* note 7, Part II of Coordinator's Draft, include mental elements out of an abundance of caution. They can also be removed in accordance with this decision.

109 An alert reader will notice that I have used the structure of art. 30 at many points in the preceding discussion. The Samoan draft Elements, *supra* note 6, follow the example of The Elements and refer only to what common law lawyers would call the prosecution's "*prima facie* case," the positive elements that must be proven by the prosecution before there is a "case to answer". *See* statement in general introduction to The Elements, *supra* note 14 at 5, that "Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime". Many of those who worked on drafting The Elements, *supra* note 13, believed that the grounds for excluding responsibility (or the absence thereof) are also "elements" of the offences (typically "circumstance" or "conduct" elements and their accompanying mental elements); there was simply a tacit understanding not to pursue the drafting at that point.

110 *See* 2004 Special Working Group Report, *supra* note 9 at 349 ("no particular difficulty posed by [the] application [of art. 31] to the crime of aggression"). *See also infra* note 142.

111 Nullem crimen sine lege (art. 22); nulla poena sine lege (art. 23); non-retroactivity ratione personae (art. 24).

112 Exclusion of jurisdiction over persons under eighteen.

113 Irrelevance of official capacity.

114 Non-applicability of statute of limitations.

115 Article 32 reads:

> 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33 [which deals with superior orders].

Mistake of law cases are notoriously difficult in all legal systems. Mohamed Elewa Badar, *Mens Rea – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*, 5 Int'l Crim. L. Rev. 203 (2005) makes an enormously

One who is mistaken lacks the intent and knowledge required as a mental element in Article 30. Consider some potential cases:

Case 1: Accused, a general who executed an invasion, says that he was lied to by the politicians and the leaders in the intelligence community. He believed that he was responding pre-emptively to an imminent massive attack. In fact the intelligence reports on the ground demonstrated that no such attack was threatened.
His mistake arguably means that he lacks the "mental element" (knowledge or intent) "required by the crime", to use the words of Article 32. I am thinking here just of the factual side of things. He was simply mistaken as to the fundamental nature of what he was doing, although there may be some potential "mistake of law" variants on this hypothetical.

Case 2: A general knows that aggression is a crime within the jurisdiction of the ICC and knows the basic facts concerning the campaign which he is asked lead. He doubts the legality of the campaign and consults the Legal Advisers to the Ministry of Foreign Affairs and Defence concerning the application of international law, specifically General Assembly Resolution 3314, to these facts. Both render reasoned opinions concluding that there would be no aggression as a matter of law and he goes ahead, believing in their expertise. Later, the ICC concludes that the advice was legally wrong.

Does that general have a mistake of law defence under Article 32?[116] Does his mistake mean that he lacks the necessary mental element for the offence? The paradigm cases in domestic law where a defence that could arguably be categorized as a mistake of law "works" are those involving a circumstance element,[117] as it appears the "act of aggression" is. In common law terms, there is at least a jury question in the hypothetical.[118] I believe that, especially given the current structure of the offence,

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useful comparative study of the problem with some helpful references to ICTY and ICTR jurisprudence. I think, though, that the author underestimates the extent to which the drafters of Rome Statute art. 30 tried to get away from national systems and thus "general principles". The plain words of art. 30 and 32 are the obvious starting point (as was understood during the drafting of The Elements) and the comparative material is helpful but very "subsidiary" under the "applicable law" in Rome Statute art. 21 (1) subpara.(c). *See also supra* note 28.

116 The facts in the hypothetical no doubt support a plea of mitigation, but what I am concerned here is whether complete exoneration is possible.

117 Clark, *supra* note 13 at 309-11.

118 Real life is perhaps even more confusing. In the run up to the 2003 invasion of Iraq, Admiral Sir Michael Boyce, Chief of the British Defence Staff, sought a statement from the Government's legal advisers that the war was legal. The Attorney-General ultimately provided a 337 word statement to the House of Lords that the UK and the US could rely on a revival of the Security Council resolutions that authorized the first Gulf War. There was vigorous debate on the issue among the academic community, in the press and, it seems, within the Government. No definitive evaluation seems to have been sought from the Defence Ministry's lawyers and the Deputy Legal Adviser of the Foreign Office (one of the most prominent members of the British team that negotiated the Rome Statute) resigned, stating:

> I cannot in good conscience go along with advice within the office or to the public or Parliament – which asserts the legitimacy of military action without such a

the mental element and mistake provisions of the Statute are crucial for fairness to the accused. Whether they can carry enough is something on which reasonable minds might differ, but they obviously apply and do require careful attention.

On the other hand, given that, by its very nature, the crime of aggression is a leadership crime involving purposive activity, there is a serious question whether the structure of Article 25 (3)[119] (individual criminal responsibility) (particularly subparagraphs (a) to (d)), Article 28 (responsibility of commanders and other superiors) and Article 33 (superior orders and prescription of law) "fits" it. The Coordinator suggested accordingly, that it be defined so as to exclude any residual effect of those pro-

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resolution, particularly since an unlawful use of force on such a scale amounts to the crime of aggression; nor can I agree with such action in circumstances which are so detrimental to the international order and the rule of law.

Quoted in Philippe Sands, Lawless World: America and the Making and Breaking of Global Rules 189 (2005). Should the Chief of the Defence Staff have sought more advice? Can he rely on the Attorney-General? Should he have followed the academic debate reported in the press? What of the responsibility of the Attorney-General himself (especially since he apparently had earlier doubts which he expressed in a lengthy opinion to the Prime Minister on 7 March 2003 at http://www.guardian.co.uk/Iraq/Story/0,2763,1471659,00.html)? What of the Prime Minister (himself legally trained)? Article 32 is a necessary safeguard for the "innocent" but is hardly a carte blanche to rely on disingenuous advice. "In most cases, the claim of mistake of law will not be credible when made by top-level functionaries who perpetrated a crime against peace." Yoram Dinstein, War, Aggression And Self-Defence 134 (1988). Applying art. 30's "intent and knowledge" standard to mistakes means that negligence or recklessness as to the credibility of the advice is not sufficient for criminal responsibility. *See supra* at note 29. There are those who would suggest that, given the inevitable stakes in human life involved in the awesome decision to start a war, a more vigorous standard should be applied! At some point, those rendering legal advice which is tendentious or unsupportable become part of the leadership, or aiders and abettors, or part of a group acting with a "common purpose" for the purposes of individual responsibility. *See generally,* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees,* 43 Colum. J. Transnat'l L. 811, 855 (2005) (Paust is discussing war crimes, but the point is of more general application). The United States justification for the attack on Iraq concentrated more on pushing for an expanded notion of the right to strike preemptively. That argument received little credence among the academic community and possibly raises similar "mistake" issues. For a creative discussion of the "imminence" requirement in national and international law of self defence, *see* Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 Arizona L. Rev. 213 (2004).

119 Rome Statute art. 25 provides in para. 1 that the Court shall have jurisdiction over natural persons. Para. 2 provides that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute. Para. (4) reads: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law". Each of these is compatible with the proposed provision on aggression. Para. 3, subparas (a) to (d), deal with variations on the principle that one can commit a crime either individually or jointly. If a reference to art. 25 (3) is retained, subpara. (d) on "a group of persons acting with a common purpose" may have significant application to the crime of aggression. Care will be needed to ensure that the net is not cast too wide beyond the leadership. On subpara. (d), *see supra* note 74. Subpara. (e) makes it an offence to "directly and publicly incite others to commit genocide" and subpara. (f) deals with attempts. All of para. 3, in short, except subpara. (e) which is unique to genocide, raises issues with respect to the proposed provision on aggression. (There does not seem to be any disposition to make incitement to aggression an inchoate crime in its own right.)

visions. These all have caused intense debate at the Special Working Group.

Article 25 (3), subparagraphs (a) to (d), deal in quite complex detail with what is often called "accomplice" liability, "secondary parties" or "complicity". In total, they attach criminal responsibility not only to the perpetrator who personally commits the offence, but also to those who "order", "solicit", "induce", "aid", "abet", "otherwise assist", or contribute to the commission "by a group of persons acting with a common purpose". The crime of aggression as formulated at Nuremberg and now by the PrepCom Coordinator has its own set of verbs and nouns: "orders" and "participates" on the verb front, and the nouns "planning", "preparation", "initiation" or "execution". One or other would seem destined for deletion.

Defining the crime of aggression to exclude the application of a general part on complicity applicable to other crimes goes well back in the work of the International Law Commission on its Draft Code of Crimes against the Peace and Security of Mankind.[120] The Commentary to the Commission's final word on the subject in 1996 reads:

> Article 2, paragraph 2, deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3 indicates the various manners in which the role of the individual in the commission of the crime gives rise to responsibility: he shall be responsible if he committed the act which constitutes the crime; if he attempted to commit the act; if he failed to prevent the commission of the act; if he incited the commission of the act; if he participated in the planning of the act; if he was an accomplice in its commission. In relation to the crime of aggression, it was not necessary to indicate these different forms of participation which entail the responsibility of the individual, because the definition of the crime of aggression in article 16 already provides all the elements necessary to establish the responsibility. According to that article, an individual is responsible for the crime of aggression when, as a leader or organizer, he orders or actively participates in the planning, preparation, initiation or waging of aggression committed by a State. The crime of aggression has particular features which distinguish it from other offences under the Code. Aggression can be committed only by individuals who are agents of the State and who use their power to give orders and the means it makes available in order to commit this crime. All the situations listed in paragraph 3 which would have application in relation to the crime of aggression are already found in the definition of that crime contained in article 16. Hence the reason to have a separate paragraph for the crime of aggression in article 2.'[121]

120 At a time when the crime of *apartheid* was a separate crime within the Draft Code of Crimes against the Peace and Security of Mankind, there was an interesting discussion about the application of a general complicity provision to it and to the crime against peace. Some ILC members thought that applying general complicity notions in the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* had widened the scope of the Convention unduly. Others thought a general article could be devised which would deal adequately with aggression and *apartheid. See* Report of the International Law Commission on the work of its forty-second session, 1 May-20 July 1990, U.N. GAOR, 42nd Sess., Supp. No 10 at 19, U.N. Doc. A/45/10 (1990).

121 Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, at 20-21, U.N. Doc. A/51/10

The Coordinator's final paper had followed this model and, indeed, most of the ILC language. At the 2004 meeting of the Special Working Group, this became controversial. The Report of that meeting recorded:

> (a) There was agreement:
> That aggression was a crime characterized by being committed by those in a position of leadership;
> That there was a broad overlap of article 25, paragraph 3, with the proposed definition of the coordinator. Nonetheless, different conclusions were derived as to what should be done as a result:
> – Exclude article 25, paragraph 3 from being applicable to the crime of aggression, or
> – Retain, article 25, paragraph 3, as applicable to the crime of aggression, either in its entirety or partially....[122]

At the 2005 session of the Special Working Group, two alternative proposals emerged for dealing with the matter. Both involved re-working the opening words ("the chapeau") of the Coordinator's draft and adding an additional subparagraph to Article 25. Each sought to make the drafting of the provision closer to that of Articles 6 to 8. The proposals were:

> Proposal A
> *Definition, paragraph 1:*
> "For the purpose of the present Statute, a person commits a 'crime of aggression' when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person participates actively in an act of aggression ..."

(1996). *See also* the commentary on art. 16 ("crime of aggression"), *id.,* at 83:

> The perpetrators of an act of aggression are to be found only in the categories of individuals who have the necessary authority or power to be in a position potentially to play a decisive role in committing aggression. These are the individuals whom article 16 designates as "leaders" or "organizers", an expression that was taken from the Nurnberg Charter. These terms must be understood in the broad sense, i.e. as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nurnberg Tribunal....

Art. 16 of the final ILC Draft provided that:

> An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

The key term "aggression committed by a State" is left indeterminate. The whole definition is "rather circular and disappointing" according to Antonio Cassese, International Criminal Law 112 (2003). One might apply the same criticism to the Coordinator's draft (given the ultimate indeterminacy of G.A. Res. 3314 and the role of the Security Council) and to all the other efforts that have come before the PrepCom and the Special Working Group. Is this inevitable, given the role of a political organ? Could the definition be made more precise if the Court was the body to determine if an act of aggression occurred? (Many participants, however, do not seem to want more detail even in that case.)

122 2004 Special Committee Report, *supra* note 9 at 349.

Article 25, paragraph 3
Insert a new subparagraph (d) bis:
"In respect of the crime of aggression, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a position effectively to exercise control over or to direct the political or military action of a State".

See also Elements of Crimes, paragraph 8 of the general introduction.[123]

Proposal B
Definition, paragraph 1:
"For the purpose of this Statute, 'crime of aggression' means engaging a State, when being in a position effectively to exercise control over or to direct the political or military action of that State, in [...collective/State act]".

Article 25
Insert a new paragraph 3 bis
"In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment".

(Article 25, paragraph 3, does apply to the crime of aggression.)

The main feature of the two proposals is that they strip from the Coordinator's draft the reference to "orders" and to "planning, preparation, initiation or execution".[124] They take as given that these are all covered by Article 25 (3).[125] It is still

123 Paragraph 8 of the general introduction to The Elements, *supra* note 13, reads:

> As used in the Elements of crimes, the term "perpetrator" is neutral as to guilt of innocence. The elements, including the appropriate mental elements, apply *mutatis mutandis* to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.

It is addressed to the fact that the definitions of crimes in the Rome Statute and in the Elements refer to the "primary" perpetrator and leave to the general part of the Statute how to deal with "secondary" players. Useful United States proposals for "elements" dealing with secondary parties were before the PrepCom in U.N. Doc. PCNICC/1999/DP.4/Add.3 but were not taken up.

124 They also delete the words "intentionally and knowingly" from the draft. Para. 51 of the 2005 Special Working Group Report, *supra* note 10, reads:

> After recalling the discussion on the use of "intentionally and knowingly" in the preliminary definition, as reflected in paragraph 55 of the 2004 report, the participants agreed that article 30 was a default rule which should apply unless otherwise stated. Consequently, the relevant phrase in the chapeau of the Coordinator's proposal could be deleted.

See also supra note 108 (deletion of mental elements from Elements of Aggression).

125 Not everybody was convinced that the "given" was sound and fears were expressed that not everything in the Coordinator's draft had been captured. One "concern was the need for greater precision on how the proposed rewordings would deal with planning and preparation as possible parts of the crime of aggression; in particular, the query was raised whether planning and preparation going back a decade or more would be adequately covered by the proposed rewordings." 2005 Special Working Group Report, *supra* note 10 at 15

necessary to have a conduct element to connect the perpetrator to the act of aggression by a State. Proposal A retains the words "participates actively"[126] to capture this. Proposal B is more radical. It seeks to find totally new language. "Engages" was characterized by its sponsors as deriving from the law of state responsibility.[127] It is underlined to make the point that it is a "placeholder" until a more appropriate term emerges.[128] My impression is that "engages" might be interpreted to require more of a nexus between the actor and the act of aggression than "participates" would. It might, for example, be read to require a "but for" causal connection, whereas the notion of participation may be somewhat softer.[129] More work is undoubtedly to come on these proposals.

Article 25 (3) of the Rome Statute also deals with attempts[130] to commit the crimes within the jurisdiction of the Court. Attempts were not prosecutable under the Nuremberg and Tokyo Charters. They are, however, included in the Rome Statute in respect of genocide, crimes against humanity and war crimes. Should there be liability under the Rome Statute for attempts at aggression?

Resolution 3314 does not contemplate an "attempted aggression" by a State. Either the invasion, etc., takes place, or it does not.[131] One can perhaps posit such

126 A cryptic comment in the 2005 Special Working Group Report, *supra* note 10 at 15, asserts that "As regards the definition suggested in proposal A, preference was voiced for the deletion of 'actively', which would possibly address the issue of omission". Perhaps "actively" is adequately covered by the requirement of "being in a position effectively to exercise control over...."

127 The closest usage I have been able to find is in a case involving the application of the Vienna Convention on Consular Relations, where the I.C.J. used the word thus:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be ... whereas the Governor of Arizona is under the obligation to act in conformity with the international obligations of the United States....

LaGrand Case (Germany v. U.S.), Provisional Measures, 1999 I.C.J. 9, at 16. This usage seems to be somewhat unusual. (At issue was the execution by the State of Arizona of a German citizen who had not been afforded his rights under the Vienna Convention. The Governor had the power to grant or refuse a stay or clemency, which he declined to exercise.) The French text reads: "... la responsabilité internationale d'un Etat est engageé par l'action des organes et autorités compétents agissant dans cet Etat...." I am not sure how well the word works in other languages. The I.C.J.'s usage is not quite the same as in the 2005 Special Working Group draft since the reference is to engaging state responsibility rather than engaging "the state".

128 2005 Special Working Group Report, *supra* note 10 at 15.

129 *Supra* note 74. This may not be an ultimate problem. Once art. 25 (3) is applied, it is clear that the definition applies to the primary perpetrator (and "but for" may be necessary for him or her) while those whose responsibility turns on art. 25 (3) may have a more tenuous connection. *Id.*

130 Rome Statute, art. 25 (3) (f) catches a person who:

> Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

131 *See also* Kittichaisaree, *supra* note 13 at 220.

an attempt where troops are massed at the border but bombed into oblivion before they can move. Such unlikely cases for prosecution aside, the kind of attempts that would be contemplated are those where the actor tries to contribute to the "planning, preparation, initiation or waging" of an aggression that takes place, but he or she fails in the effort to contribute. I am inclined to think that liability might be appropriate for attempts in some cases of the individual who tries to contribute, but fails. The Special Working Group's discussion has so far been inconclusive.[132]

I believe that Article 28 of the Statute, on the responsibility of commanders and other superiors, is inapposite to the crime of aggression for the following reasons. Once again, the argument starts with the proposition that aggression is universally regarded as a "leadership" crime.[133] Article 28 is a leadership provision also which connects military and other superiors to what those under their control do. It is applicable to each of the other three crimes under the jurisdiction of the Court, which do not in their own texts make such connections.[134] Since the definition of aggression will have such a specific set of connectors,[135] the general provision is trumped by the specific and this should be made clear by an exception. This is not, however, a view unanimously shared in the Special Working Group:

> Most participants shared the view that article 28 was not applicable by virtue of both the essence and the nature of the crime; aggression as reflected in the Statute

132 The essence of the debate is captured in this paragraph from the 2005 Special Working Group Report, *supra* note 10 at 15:

> In relation to the "attempt" to commit the crime of aggression, it was stressed that subparagraph (f) would relate only to the attempt by an individual to participate in the collective act and not to the collective act *per se*. It was noted that the attempted collective act itself could, however, be covered by the chapeau of the definition. According to another view, although an attempt by a State to commit an act of aggression merited penalization, in practice it would be difficult since the act of aggression was a circumstance element of the individual crime. While the view was expressed that penalizing an attempt to commit an act of aggression was desirable, it was also said that this would prove impossible in the case of a provision requiring a predetermination of such an act by a body other than the Court.

It does take a stretch of the imagination to contemplate a determination by the Security Council that an attempted aggression has occurred, but the determination could be left to the Court. The nearest equivalent in Security Council usage is art. 39 of U.N. Charter's "threat to the peace". Some ILC drafts included threats of aggression (a somewhat narrower concept) as a crime, *see* 1991 Draft Code *supra* note 100, art. 16. A case can certainly made for criminalization in such cases, but there does not seem to be any current disposition to make such threats an ICC offence. The Statute of the Iraqi Special Tribunal lists as an offence within the jurisdiction of the Tribunal "[t]he abuse of position and the pursuit of policies that may lead to *the threat of war* or the use of armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended." (Italics added.) Was there a threat of war at some relevant time against, say, Saudi Arabia?

133 *Supra* at notes 70-72.

134 In particular instances, art. 25 and art. 28 may be used as alternative ways to charge the superior with genocide, crimes against humanity or war crimes.

135 Either the "leadership" words in the ILC's formulations and the Coordinator's draft, or the proposals for additions to art. 25 (3) in the 2005 Special Working Group Report, *supra* text at note 123.

> was a leadership crime. However, there was no agreement as to whether non-applicability needed to be reflected in the Statute.[136]

I am not quite so confident about Article 33, although I believe that the Coordinator's draft was probably right in excluding it also. This is the controversial superior orders provision in the Statute. Superior orders is a defence in situations where the accused was under a legal obligation to obey, did not know the order was unlawful, and the order was not manifestly unlawful.[137] Article 33's defence appears to be limited to war crimes.[138] There is no particular policy reason for extending the availability of the defence to aggression. Moreover, in the case of genuine mistakes, Article 32's framework for dealing with mistake[139] seems to provide adequate protection for superiors. The reporter's summary of the inconclusive discussion of the matter in the Special Working Group captures the flavour of the debate:

> 44. A number of participants considered that article 33 was applicable to the crime of aggression and favoured its retention in order to allay the concern that some perpetrators might evade prosecution. This would not, however, affect the leadership trait inherent in the crime of aggression. It was noted that exclusion of article 33 might have the effect of actually broadening the scope of application of the provision.
> 45. According to a different view, article 33 would not be applicable to the crime of aggression, which was a leadership crime and hence not applicable to mid- or lower-level individuals. Some participants were of the opinion that, for the sake of clarity, a provision specifically indicating that article 33 did not apply to the crime of aggression merited inclusion. Others, however, opined that, as in the case of many other provisions of the Statute that were not always applicable to all the crimes, there was no need to refer specifically to its non-applica-

136 2005 Special Working Group Report, *supra* note 10 at 10. There may also be a question of the appropriate mental element for the leadership crime lurking here. I have inferred from the current approach that most participants favour the application of art. 30's intent and knowledge requirement. Applying art. 28 would open up the possibility of a negligence approach (military leaders) or one based on some kind of recklessness (non-military leaders). Should a leader be responsible for aggression on the basis of a gross failure to pay attention or recklessness as to what is going on? Perhaps a policy decision one way or the other should be stated expressly. The clearest precedents for using a negligence test are in respect of war crimes, In re Yamashita, 327 U.S. 1 (1946); The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East (R. John Pritchard ed., with Sonia Maganua Zaide, 22 vols., 1981).

137 The drafting leaves something to be desired, although this was a function of the tortuous process rather than the incompetence of the drafters. *See* Clark, *supra* note 13 at 332-34. Indeed, there is debate about whether the article should be regarded as (a) excluding or (b) permitting the "defence". "Manifestly unlawful" seems to be judged by a reasonable statesperson standard: would the reasonable statesperson in the circumstances understand that this was unlawful?

138 Para. (2) of art. 33 says that "For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful." *See* Kittichaisaree, *supra* note 13 at 268.

139 *Supra* at notes 115-18.

bility to the crime of aggression. It would be the role of the Court to make a determination as to whether an article would apply in specific cases.

46. It was suggested that the crime of aggression should be incorporated in paragraph 2.[140] On the other hand, some caution was urged in light of the fact that paragraph 2 referred to acts that were clearly directed against the civilian population, which was not necessarily the case when a crime of aggression was committed.'[141]

In short, this too has yet to be resolved by the Special Working Group.

Conclusion

The effort to draft an appropriate provision on aggression for the ICC Statute is far from fruition. It is extremely heartening that there is now a substantial focus on the "technical", criminal law, aspects of the endeavour. Achieving the long-awaited political breakthrough on the "conditions of exercise" will not be sufficient if basic principles of responsibility in Part 3 of the Rome Statute are not addressed – and it is significant that this is now happening! I have tried to suggest many of the issues that are currently on the table at the meetings of the Special Working Group. There are also difficult questions of whether, notwithstanding the prior determination by the United Nations organ of the existence of an act of aggression, the accused may raise, as a defence, state responsibility arguments such as that the action could be justified as legitimate self defence by the state.[142] There might also be questions such as newly discovered evidence, the examination of which might be compelled by the need to render justice in the particular case. Should these be spelled out, or can they safely be left to the judges to "work it out"?

140 Para. 2 asserts that: "For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

141 2005 Special Working Group Report, *supra* note 10 at 10.

142 At both Nuremberg and Tokyo, the Tribunals accepted without much ado that the accused were entitled to raise such issues. The defence claims were denied on the merits. *See* Nuremberg discussion of the invasion of Norway, summarized in the Secretariat's Historical review, *supra* note 11 at 22-23, and Tokyo discussion of the Japanese claim to be acting in self defence in attacking France, the Netherlands, Great Britain and the United States, *id.*, at 99. Fife, *supra* note 59 at 67, has a sensitive discussion of the Norwegian case. Art. 31 (3) permits the Court to consider a ground for excluding criminal responsibility other than those specifically mentioned in art. 31 (1). It provides a vehicle for such an exercise "where such a ground is derived from applicable law as set forth in article 21."

Section 11

Modes of Liability before the ICC

Chapter 29

The Doctrine of Command Responsibility

Charles Garraway

I. Introduction

Article 28 of the Statute of the International Criminal Court[1] deals with command responsibility. It reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command or control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
> (i) The superior either knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; and
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[2]

1 The Statute of the International Criminal Court (ICC Statute)(with corrections) can be found in The Laws of Armed Conflict (D Schindler and J Toman Eds.), 4th Ed. (2004), Martinus Nijhoff, at p.1309.

2 Article 28, ICC Statute, Schindler & Toman, *op. cit.*, footnote 1 at p.1328.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 703–727.

It is fair to say that it is not the easiest of articles to understand and was the result of detailed and difficult negotiations. It seeks to draw together the developments over fifty years and to present them as a coherent whole. In order to understand the text, it is necessary to look back to see how the doctrine of command responsibility has developed over history. The International Criminal Court Statute is a stage in a development process that may still have some way to go.

The doctrine of command responsibility goes back to the dawn of time, though it has taken several different forms. By tradition, the commander was always responsible for the success or failure of his mission. Whether it was the Roman General returning in triumph to the Capitol in Rome with his captives and other trophies carried in solemn procession or whether it was Admiral Byng, shot on his own quarterdeck "pour encourager les autres" after his failure to defeat the French at Minorca,[3] command carried its own rewards and consequences. It was Sun Tzū himself who wrote in 500 B.C.:

> Now an army is exposed to six several calamities, not arising from natural causes, but from faults for which the general is responsible. These are: (1) Flight; (2) insubordination; (3) collapse; (4) ruin; (5) disorganization; (6) rout.[4]

However, although, as in the case of Admiral Byng, this was sometimes presented with a veneer of legality, the doctrine was primarily one of accountability rather than criminal responsibility. Some vestiges of this remain in the traditional naval concept that a Captain is responsible for his ship, almost regardless of his own culpability. Thus, in the case of HMS Nottingham, which ran aground in the South Pacific in July 2002, the Captain was held responsible for the navigational error made by his crew even though he had only just returned to his ship by helicopter from a shore visit and had no part in the actual decision making.[5]

Nevertheless, despite the concentration on accountability, from the earliest days there was also an understanding that it was the responsibility of the commander to control his subordinates. In his Introduction to his translation of Sun Tzū, Lionel Giles quotes from a biography of Sun Tzu by Ssū-ma Ch'ien:

> His *Art of War* brought him to the notice of Ho Lu, King of Wu. Ho Lu said to him: I have carefully perused your 13 chapters. May I submit your theory of managing soldiers to a slight test? – Sun Tzū replied: You may. – Ho Lu asked: May the test be applied to women? – The answer was again in the affirmative, so arrangements were made to bring 180 ladies out of the Palace. Sun Tzū divided them into two companies, and placed one of the King's favourite concubines at the head of each. He then bade them all take spears in their hands, and addressed them thus: I presume you know the difference between front and back, right hand and left hand?

3 For an account of this incident, see the National Maritime Museum website at http://www.nmm.ac.uk/server/show/conWebDoc.17907.

4 Sun Tzū on the Art of War, translated by Lionel Giles, Graham Brash Ltd, Singapore, 1988 at p.105.

5 See the BBC News report at http://news.bbc.co.uk/2/hi/uk_news/england/hampshire/dorset/3098902.stm.

> – The girls replied: Yes. – Sun Tzū went on: When I say "Eyes front," you must look straight ahead. When I say "Right turn," you must face towards your right hand. When I say "About turn," you must face round towards the back. – Again the girls assented. The words of command having been thus explained, he set up the halberds and battle-axes in order to begin the drill. Then, to the sound of drums, he gave the order "Right turn". But the girls only burst out laughing. Sun Tzū said: If words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame. – So he started drilling them again, and this time gave the order "Left turn," whereupon the girls once more burst into fits of laughter. Sun Tzū said: If words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame. But if his orders *are* clear, and the soldiers nevertheless disobey, then it is the fault of their officers. – So saying, he ordered the leaders of the two companies to be beheaded.

Following this somewhat drastic action, the drill was repeated "with perfect accuracy and precision".[6] Even in that far off age, it was recognized that responsibility is not absolute but it is necessary to ascertain the correct level at which responsibility stops and accountability begins.

The responsibility of commanders for the acts of their subordinates is reflected down the ages in national codes. Perhaps one of the most significant of these national codes was that of Charles VII of Orleans issued in 1439, which stated:

> The King orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offense, according to these ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense as if he had committed it himself and be punished in the same way as the offender would have been.[7]

It was only with the advent of what is now known as "international criminal justice" that the doctrine of command responsibility as a legal concept began to come into focus. In particular, the advent of the International Criminal Tribunals for the Former Yugoslavia and Rwanda[8] and the International Criminal Court itself[9] with their con-

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6 Giles, *op cit.*, footnote 4, at p.xi.

7 See Charles VII's Ordinance, "Ordonnances des Roi de France de la Troisièmme Race" cited in Theodor Meron, Henry's Laws and Shakespeare's Wars, 1993, Cambridge, CUP, at p.149, footnote 40. A fuller history of the early foundations of the principle of command responsibility can be found in L C Green, Command Responsibility in International Humanitarian Law, Transnational Law and Contemporary Problems, Vol.5, Number 2 (Fall 1995) 319, at pp.320ff.

8 Established by UN Security Council Resolutions 827 of 25 May 1993 and 955 of 8 November 1994 respectively. The Statutes of the Tribunals can be found at 32 ILM (1993) at p.1192 (Yugoslavia) and 33 ILM (1994) at p.1602 (Rwanda).

9 See footnote 1.

centration on "the most serious crimes of concern to the international community as a whole"[10] has led to renewed interest in the doctrine of command responsibility. At the same time, such matters as Abu Ghraib and the allegations of ill treatment at Guantanamo[11] have led to demands that there should be accountability amongst the political leadership for offences, even where there may only be an indirect correlation, if any at all, between the political decisions taken and the acts committed. The tension is thus being renewed between the doctrine of command responsibility, as a legal concept, and that of political accountability, a matter best left within the political sphere.

Command – or, as it is often now referred to, superior – responsibility is an evolving doctrine. It has benefited from detailed scrutiny by both academics and international tribunals over the last few years. The negotiations over Article 28 of the International Criminal Court Statute[12] reflected much of that scrutiny and the final text, though perhaps more convoluted than it needed to be is an illustration of the progress made. It may, however, also indicate the areas that still need consideration – and, possibly resolution.

II. Command Responsibility and the Two World Wars

In order to understand the modern concept of command responsibility, it is necessary to go back at least to the end of the First World War. At the Treaty of Versailles, the Allies sought to indict the Kaiser for "a supreme offense against international morality and the sanctity of treaties."[13] The 1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War called for the establishment of a High Tribunal. It found two "classes of culpable acts":

> (a) Acts which provoked the world war and accompanied its inception. Violations of the laws and customs of war and the laws of humanity[14]

In addition, it advised charges against different categories of persons. These categories included :

> ... all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of States, who ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention

10 Preamble, ICC Statute, Schindler & Toman, *op. cit.*, footnote 1, p.1314.

11 See, for example, Human Rights Watch Report, Getting Away with Torture – Command Responsibility for the U.S. Abuse of Detainees. April 2005, accessed at http://www.hrw.org/reports/2005/us0405/

12 See footnote 2.

13 Article 227 Treaty of Versailles, 28 June 1919, Treaties and Other International Agreements of the United States of America 1776-1949, Vol.2 (Multilateral 1918-1930), Department of State Publication 8441, May 1969, p.43, at p.136.

14 Documents on Prisoners of War (Howard Levie Ed.), Naval War College, International Law Studies, Vol. 60 (1979), at p.161.

> should constitute a defence for the actual perpetrators).[15]

It will be noted that this phraseology covers both positive acts ("ordered") and negative omissions ("abstained from preventing or repressing").

However, there was a general reluctance to proceed on what was seen as an expansive view of the laws of war. The United States and Japan led the opposition. The Japanese delegation, in particular dissented from prosecuting

> ... highly placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war [feeling] some hesitation [in admitting] a criminal liability where the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing acts in violation of the laws and customs of war.[16]

In fact, the result of these efforts was minimal. Although the Allies submitted a list of 896 alleged war criminals to the German authorities, only twelve were eventually tried before the German Supreme Court in Leipzig. None of these trials involved command responsibility in its more abstract form though Major Benno Crusius was convicted of ordering the execution of wounded French prisoners of war. Also convicted was Captain Emil Muller who was charged with maintaining such bad conditions at his prison camp that hundreds of men died.[17]

Early in World War II, a decision was taken to bring to justice those enemy personnel responsible for war crimes. The 1942 Declaration of St James stated:

> The Allies place among their principal war aims the punishment, through the channel of organized justice, of those guilty for these crimes whether they have ordered them, perpetrated them or participated in them.[18]

This seems to refer back to the United States and Japanese objections in 1919 in that it requires some positive involvement in the commission of the crimes. This attitude was reflected in the London Charter itself that established the Tribunal where it stated in Article 6:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[19]

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15 *Ibid*, at p.162

16 Morris Greenspan, The Modern Law of Land Warfare, University of California Press, 1959, at p.478 (note 286).

17 See Hays Parks, Command Responsibility for War Crimes, Military Law Review, Vol. 62 (1973), at pp.12-13.

18 See Marjorie M. Whiteman, 11 Digest of International Law (1968) at p.874.

19 See Treaties and Other International Agreements of the United States of America 1776-1949, Vol.3 (Multilateral 1931-1945), Department of State Publication 8484, November 1969, p.1238, at p.1242.

Similarly in Article 7, it stated:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[20]

The requirement here was for "participation", an active phraseology.

In so far as the Nuremberg trial itself was concerned, this was a matter of little difficulty. There was an extensive paper trail. Field Marshal Keitel, for example:

> ... signed an order that civilians suspected of offenses against troops should be shot without trial, and that prosecution of German soldiers for offenses against civilians was unnecessary.[21]

Similarly, Dr Kaltenbrunner,

> ... was aware of conditions in concentration camps. He had undoubtedly visited Mauthausen, and witnesses testified that he had seen prisoners killed by the various methods of execution, hanging, shooting in the back of the neck, and gassing, as part of a demonstration. Kaltenbrunner himself ordered the execution of prisoners in those camps and his office was used to transmit to the camps execution orders which originated in Himmler's office. At the end of the war Kaltenbrunner participated in the arrangements for the evacuation of inmates of concentration camps, and the liquidation of many of them, to prevent them from being liberated by the Allied armies.[22]

After the Tribunal had made findings of fact of that nature, it was not too difficult for it to go on to find the accused guilty as principals based on their active participation.

However, matters were not so simple in the Far East. General Yamashita was the commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines from 1943 until the Japanese surrender. He was originally tried before a United States Military Commission, charged with having:

> ... unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he ... thereby violated the laws of war.[23]

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20 *Ibid*.

21 Judgment of the Nuremberg Tribunal, 41 American Journal of International Law, 1947, p.172 at p.283.

22 *Ibid*, at p.284.

23 *United States of America v. Tomoyuki Yamashita*, printed in Levie, *op. cit.*, footnote 14, at p.294.

The alleged atrocities were clearly defined as:

> Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war;
> Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives;
> Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of worship, hospitals, public buildings, and educational institutions.[24]

Here, the charge was one of omission, not commission. The question was well posited by Chief Justice Stone when the case reached The United States Supreme Court. He asked:

> ... whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of ... violations of the law of war ... and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[25]

The initial argument before the Military Commission was over whether General Yamashita had effective control and, after holding that he had, the Commission ruled that he "failed to provide effective control of [his] troops as was required by the circumstances."[26] However, it also said:

> Clearly assignment to command military troops is accompanied by broad authority and heavy responsibility ... It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[27]

Two points are noteworthy here. First, command responsibility is not a matter of strict liability. As was later pointed out in the High Command Case,[28] involving senior officers in the German High Command, there is a requirement for some sort

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24 *Ibid,* at p.295. For a fuller account of the facts on which the Yamashita indictment was based, see Parks, *op. cit.*, note 17, at p.22-29.

25 See Levie, *op. cit.*, footnote 14, at p.320.

26 *Ibid*, at p.297.

27 *Ibid*, at p.296.

28 The German High Command Trial, Trial of Wilhelm von Leeb and Thirteen Others, United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Case No.72, Vol.XII, at p.1.

of "personal dereliction". The United States Military Tribunal in that case stated:

> Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure properly to supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal act amounting to a wanton immoral disregard of the action of his subordinates amounting to acquiescence.[29]

Second, the Military Commission in Yamashita appreciated that not every dereliction of duty by a Commander necessarily involves criminal liability. An interesting case in this regard is that of Brigadier General Jacob H Smith of the United States who was court-martialed in 1902, coincidentally also in the Philippines. He is alleged to have given the following oral instructions to a Major Waller:

> I want no prisoners. I wish you to kill and burn; the more you kill and burn the better you will please me.

In fact the orders were never carried out and the court, in admonishing General Smith added a rider that:

> The court is thus lenient in view of the undisputed evidence that the accused did not mean everything that his unexplained language implied; that his subordinates did not gather such a meaning; and that the orders were never executed in such sense, notwithstanding that a desperate struggle was being conducted with a cruel and savage foe.

President Roosevelt, in confirming the sentence also directed that General Smith be administratively retired from the active list, saying:

> Loose and violent talk by an officer of high rank is always likely to excite to wrong-doing those among his subordinates whose wills are weak or whose passions are strong.

Major Waller was himself tried for the execution of certain native bearers and guides without proper trial. However, it was not alleged that his conduct resulted from General Smith's orders.[30]

III. The Cold War Period

The principles of command responsibility derived from the Yamashita case were incorporated into both the British and United States Manuals. The United States Manual, FM 27-10, states:

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29 *Ibid*, at p.76.

30 For a full account of this case, see John Bassett Moore, A Digest of International Law, Vol.7 (1906) at pp.187-190.

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.[31]

Thus the doctrine of command responsibility was fully accepted as an integral part of international law both with regard to positive acts and to omissions to act. However, two questions remained which would require further clarification, in particular as to when the responsibility of the commander attached and the nature of the "should have known" test. It was the latter question that attracted most of the academic debate. However, the Cold War had meant that the buds of international justice that had appeared at Nuremberg and Tokyo were not to flower for another fifty years in practical form. Cases such as Eichmann in Israel were concerned primarily with the actions of the accused as a principal. In the Eichmann Case, the Israel Supreme Court found that:

> ... it has been proved with unchallengeable certainty that [Eichmann] took his place not only among those who were active in, but also those who activated the implementation of the "Final Solution." ..... The appellant was no petty killer in this undertaking, but took a leading part and had a central and decisive role.[32]

There was no need to examine his responsibility as a commander for omissions as his acts were sufficient to secure his conviction.

In the United States, the My Lai massacre in March 1968 led to a number of trials including that of Lieutenant Calley,[33] the senior officer on the ground that day. Again in his case, the issue was one of direct responsibility for the actual killings. However, in the trial of his superior, Captain Medina, the issue of command responsibility did arise. Initially, Medina was charged with premeditated murder on the basis that he had given the order on which Lt Calley claimed to have acted. However, the prosecution having failed to prove the necessary intent, the charge was reduced to involuntary manslaughter. Colonel Howard, the military judge, in his

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31 US Department of the Army Field Manual, The Law of Land Warfare, 1956 (FM 27-10)(as revised), para.501. Similar wording is to be found in the 1958 British Manual, The Law of War on Land, being Part III of the Manual of Military Law, London, Her Majesty's Stationery Office, 1958, at para.631.

32 *Attorney General of the Government of Israel v. Adolph Eichmann*, Supreme Court of Israel, 36 International Law Reports, 277 at p.340.

33 *United States v. First Lieutenant William L Calley Jr.*, 46 CMR (1973) 1131.

charge to the jury said:

> ... a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or about to commit atrocities.[34]

He then listed four elements that required proof. Amongst these was:

> 2. That [the Vietnamese] deaths resulted from the omission of the accused in failing to exercise control over subordinates subject to his command after having gained knowledge that his subordinates were killing non-combatants, in or at the village of My Lai ...;[35]

These instructions are interesting in that Colonel Howard departed from FM 27-10 in two respects. First, he required that the subordinates were "in the process of committing or [were] about to commit" crimes. In FM 27-10, the test was "are about to commit or have committed". The responsibility of Captain Medina for past crimes was not mentioned. This may have been because, on the way the case was presented, this did not arise. However, it was alleged that Captain Medina had confessed that he "... subsequently knew of the massacre, but decided to hush it up instead of taking steps to punish or report its perpetration or those responsible therefore.[36] Second, Colonel Howard required "actual knowledge". It was, as he put it, "essential that he know that his subordinates are in the process of committing atrocities or about to commit atrocities". The FM 27-10 standard of "actual knowledge, or should have knowledge, through reports received by him or through other means" has also been watered down.

Although no other officers were convicted as a result of My Lai, Major General Koster, who was the Divisional Commander, was subject to a number of administrative sanctions. In his memorandum of explanation to the Secretary of Defense, the Secretary of the Army Stanley Resor stated:

> In my view General Koster, although free of personal culpability with respect to the murders themselves, is personally responsible for the inadequacy of subsequent investigations, despite whatever other failures may have been ascribed to his subordinates.

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34 Joseph Goldstein, The My Lai Massacre and Its Cover up: Beyond the Reach of Law?, New York Free Press , 1976, at p.467.

35 *Ibid*, p.468.

36 See Green, *op.cit.*, footnote 7, at p.353.

> A commander is not, of course, personally responsible for all criminal acts of his subordinates. In reviewing General Koster's case, I have also excluded as a basis for administrative action the isolated acts or omissions of subordinates. But a commander clearly must be held responsible for those matters which he knows to be of serious import, and with respect to which he assumes personal charge. Any other conclusion would render meaningless and unenforceable the concepts of great command responsibility accompanying senior positions of authority.
> There is no single area of administration of the Army in which strict concepts of command liability need more to be enforced than with respect to vigorous investigations of alleged misconduct ... General Koster may not have deliberately allowed an inadequate investigation to occur, but he did let it happen, and he had ample resources to prevent it from happening.[37]

This is an example of where command "responsibility" was enforced even though a decision had been made that there was no command "liability" in the criminal sense. It is in accordance with the Yamashita principles which see criminal liability as only the top end of command responsibility and recognize that other forms of sanction may be appropriate.

The Calley and Medina Cases were prior to the adoption of Additional Protocol I in 1977.[38] In the original drafts put before the Diplomatic Conference, the ICRC had sought to cover both the issues of superior orders and command responsibility. The final draft text included a provision on superior orders but this failed to gain the necessary two thirds majority for inclusion in the adopted text.[39] However, the provisions on command responsibility were more successful. Article 86(2) reads:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[40]

This provision sought to codify the principle of command responsibility under international law. First, it applies again only where the subordinate "was committing or was going to commit" crimes. It does not cover past crimes. Secondly, it includes the "should have knowledge" standard but interprets it to mean "... had information which should have enabled [the commander] to conclude in the circumstances at the time" that crimes were being or were about to be committed. This confirmed the

37 *Koster v. United States*, (1982) 685 F.2d 407.

38 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Additional Protocol I), in Documents on the Laws of War, Adam Roberts and Richard Guelff (eds), 3rd Ed. 2000, Oxford, OUP, at p.422.

39 See Charles Garraway, Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied, International Review of the Red Cross, Vol.81, No.836, p.785 at pp.789-790.

40 Article 86(2), Additional Protocol I, in Roberts and Guelff, *op. cit.*, note 38, at p.472.

Yamashita principle that actual knowledge was not required, contrary to the views expressed in the Medina Case by Col Howard.

However, whilst Article 86 deals with "Failure to Act", Article 87 deals specifically with "Duty of Commander". Unlike Article 86(2) which lays down a general principal, all three subsections of Article 87 refer to the responsibility of "The High Contracting Parties and (the) Parties to the conflict". Article 87(3) in particular states:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[41]

Here, there is a responsibility placed on the Parties to "require commanders" to act if the commander is aware that "subordinates or other persons under his control are going to commit or have committed" crimes. Past offences are now covered but the responsibility seems to be on the State to introduce legislation and this only applies where there is actual knowledge. Imputed knowledge is not enough.

IV. Post Cold War Developments

After the fall of the Berlin Wall and the end of the Cold War, the collapse of the federal structure of Yugoslavia led to bitter ethnic conflict between the different groupings in that country. At the same time, ethnic rivalries in Rwanda led to the massacre of hundreds of thousands of people in a short space of time. In reaction, the International Criminal Tribunals for the Former Yugoslavia and Rwanda were established by the United Nations Security Council.[42] Article 7(3) of the ICTY Statute reads:

> The fact that [crimes were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[43]

Similar language appears in Article 6(3) of the Statute of the Rwanda Tribunal.[44] This goes back to the standard prior to Additional Protocol I and reflects the tone of FM27-10 and the Yamashita principles in their earlier form. Again the test is "knew

41 Article 87, Additional Protocol I, *ibid.*

42 See footnote 8

43 Article 7(3), Statute of the International Criminal Tribunal for the Former Yugoslavia, 32 ILM (1993) 1192 at p.1194.

44 Article 6(3), Statute of the International Criminal Tribunal for Rwanda, 33 ILM (1994) 1602, at p.1604.

or had reason to know" and the temporal jurisdiction is where "the subordinate was about to commit such acts or had done so" (future and past tenses).

The early cases at the Yugoslav Tribunal in particular were of comparatively low level individuals such as prison guards (Tadić)[45] and members of execution squads (Erdemović).[46] It was only as the Tribunal began to find its feet that more senior accused were handed over and command responsibility became an issue. Although the situation was different with the Rwanda Tribunal where senior personnel were in custody almost from the start, most were charged as principals rather than as commanders *per se*. It was thus several years before the Tribunals began to examine the doctrine in detail. In the meantime negotiations had already started on a Statute for an International Criminal Court, negotiations which culminated in the adoption of the International Criminal Court Statute on 17 July 1998.[47]

A number of points need to be made when looking at Article 28 of the Statute.

First, the article distinguishes between "[a] military commander or person effectively acting as a military commander" who commands "forces" and other superior/subordinate relationships. It had been accepted since the end of World War II that the principles of the doctrine of command responsibility applied as well to civilian superiors but it was unclear exactly how. There is a difference between military commanders who have the power to issue orders and to enforce obedience by disciplinary sanction and civilian superiors whose relationship with their subordinates is normally of an entirely different nature. This difference is reflected in Article 28 by requiring, in the case of the civilian superior, a somewhat different set of elements, particularly with regard to knowledge. How exactly the differing requirements will be interpreted is one of the issues that will be left up to the Court itself. Despite pressure from the United States delegation, the Elements of Crimes do not deal with the different types of responsibility but only with the offences themselves.[48]

Secondly, Article 28 confirms that command responsibility is not limited to cases where the commander/superior has actual knowledge. In the case of a military commander with forces under command, the requirement is that he "knew or, owing to the circumstances at the time, should have known" about the crimes. In all other cases, which would include crimes committed by civilian subordinates of military commanders, the superior must have known of "or consciously disregarded information which clearly indicated" the crimes. This seems to be a stricter standard requiring a willful refusal to consider information. Nevertheless, it still falls short of actual knowledge.

Thirdly, it is necessary that the subordinates "were committing or about to commit" crimes (present and future). This ties in with the wording of Article 86 of Additional Protocol I[49] and moves away from that adopted for the two *ad hoc* Tribunals, which in turn was reflective of the Nuremberg provisions.

Fourth, a clear link is drawn between the responsibility of the commander

45 *Prosecutor v. Duško Tadić*, ICTY Case No. IT-94-1.

46 *Prosecutor v. Dražan Erdemović*, ICTY Case No. IT-96-22.

47 See footnote 1.

48 Printed in The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence (Roy Lee Ed.), Transnational Publishers, 2001, at p.735.

49 See footnote 40.

and the commission of the crimes. The superior "shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command or control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces" (my emphasis). Under the old Yamashita doctrine, it would theoretically have been possible for a commander to have been convicted on the basis of crimes committed by forces under his effective command and control, even if he only gained knowledge of them after the event and they derived from acts in defiance of his direct orders, if he took no action against the perpetrators. Such a case would not fall within the ambit of Article 28.

The leading case on command responsibility before the Yugoslav Tribunal remains the Ćelebići case.[50] This case arose out of events in 1992 when forces consisting of Bosnian Muslims and Bosnian Croats took control of villages around the Konjic municipality in Central Bosnia. The villages were populated predominantly by Bosnian Serbs. Those people detained during these operations were held in a former Yugoslav Army facility in the village of Ćelebići. There, detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhuman treatment.[51]

The four accused, Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, represented all levels of authority. Delalić was alleged to be the coordinator of the Bosnian Muslim forces in the area and later to have been the Commander of the First Tactical Group of the Bosnian Army. As such, it was alleged that he had authority over the Ćelebići Camp. Mucić was found to be the Commander of the Ćelebići Camp and Delić his Deputy Commander. Landžo was a guard at the Camp. The Trial Chamber – and later the Appeals Chamber – had to look at both personal responsibility for crimes under Article 7(1) of the Tribunal's Statute[52] and also command responsibility under Article 7(3).[53]

The Appeals Chamber examined command responsibility from a number of different angles and, in particular, carried out a detailed examination of the various texts up to and including Article 28 of the International Criminal Court Statute. The effect was to come up with a jurisprudence that can apply to both the Tribunals and to the International Criminal Court itself though recognizing that the International Criminal Court operates under a different Statute with different wording.

The Chamber initially examined the degree of control required. They acknowledged that, in modern conflicts, formal command chains may not exist and, in any event, are difficult to establish. They thus based themselves on a test of "effective con-

50 *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, ICTY Case No. IT-96-21. The Appeals Chamber judgment of 20 February 2001 can be found at 40 ILM (2001) 626.

51 For a full account of the background facts, see the judgment of the Trial Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* ICTY Case No. IT-96-21-T, Trial Chamber, 16 November 1998, at paras.120-157.

52 Article 7(1) reads: "A person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." See 32 ILM (1993) 1192 at p.1194.

53 See footnote 43.

trol" which they then defined:

> The concept of effective control over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[54]

In reaching this conclusion, the Chamber rejected an argument by the Prosecutor that "substantial influence" was sufficient.[55]

The Chamber also looked at the question of knowledge, confirming that "command responsibility is not a form of strict liability"[56], as had been stated decades earlier in the Yamashita decision. It sought to define the phrase "knew or had reason to know" in Article 7(3) of the Statute by holding, in agreement with the Trial Chamber, that:

> [A superior] .....may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes ...., or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[57]

The Trial Chamber, in language supported by the Appeals Chamber had expanded this in saying that a superior can be held criminally responsible:

> ... only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further enquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.[58]

In language reminiscent of that contained in Article 28 of the International Criminal Court Statute, the Appeals Chamber also said:

> Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not there-

54 Para. 256, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* 40 ILM(2001)626 at p.680.

55 Para.266, *ibid*. at p.683.

56 Para.239, *ibid*, at p.677.

57 Paras.223 and 241, *ibid*, at pp.673 and 677 respectively.

58 Paras.236 and 241, *ibid*, at pp.676 and 677 respectively.

> fore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of a duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability."[59]

Later cases built on the Ćelebići decision without altering its fundamental principles.[60]

It should be noted that the Ćelebići case did not deal with the temporal issue and the difference between the Yugoslav Tribunal Statute (future and past crimes) and the International Criminal Court Statute (present and future crimes). That issue arose in the Hadžihasanović Case which was to cause both the Trial Chamber and the Appeals Chamber considerable difficulty.[61] The problem arose in the case of one of the co-accused, Amir Kubura. He was charged in Count 1 with command responsibility for, *inter alia*, the Dusina killings in the Zenica municipality that took place on 26 January 1993. Counts 5 and 6 also charged him with destruction and plunder of property, *inter alia* in Dusina, again in January 1993. The significance of these dates was that Kubura only took up his position as acting commander of the 7th Muslim Mountain Brigade of the Bosnian Army 3rd Corps on 1 April 1993. It followed that Counts 1, 5 and 6 all referred, in part at least, to events that had occurred prior to his assumption of command. What the Tribunal were asked to consider therefore is the duties of a subsequent commander.

The Prosecution argued that it was the duty of Kubura, where it came to his knowledge (or he should have known) after the event of the crimes committed, to take steps to punish the perpetrators. It was irrelevant in this situation that he had no knowledge of the crimes, nor could have been expected to have had such knowledge, prior to the events, nor even that he was not in command at the time. That merely excused him from the obligation to prevent the crimes but not from the obligation to punish the perpetrators.

A strict reading of Article 7(3) of the Yugoslav Tribunal Statute[62] would seem to support the Prosecution case and so the defence were forced to adopt a rather narrow

59 Para.226, *ibid*, at p.673.

60 See, for example, *Prosecutor v. Tihomir Blaškić,* ICTY Case No. IT-95-14 and *Prosecutor v. Radislav Krstić,* ICTY Case No. IT-98-33.

61 *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, ICTY Case No. IT-01-47.

62 See footnote 43.

argument. As expressed in the judgement, this was that:

> ... as a matter of principle, there is no basis in conventional or customary law for holding a commander criminally responsible for the acts of persons who were not his subordinates when they committed the acts. In their submission, the express terms of Article 7(3) of the Statute require that an accused be the superior when the subordinate commits the offence. They submit that a finding to the contrary of what the practice shows would have far reaching consequences, in that any superior who had effective control over the perpetrators months or years after the offences were committed could be held criminally liable for not punishing the perpetrators. The proper person to be prosecuted is the commander who had effective control over the perpetrator at the time the offences were committed, and who failed to prevent or to punish the crimes.[63]

It should be noted that, on the facts of this case, the issue related to the responsibility of the superior who took over his position AFTER the offences were committed and did not concern the more general issue of the commander who only obtained knowledge of the offences after their commission.

The Trial Chamber took a pragmatic approach. In their view, under the Defence position, where the crimes only came to light after the change of command, it might not be possible to proceed against the original commander if there was no reason for him to know that they were being or had been committed by his subordinates. His liability to take action would end upon his relinquishment of command but would not be transferred to the new superior. However, the Tribunal seemed to take the view that there must be somebody in the chain of command who could be held responsible. In order to fill the gap, they therefore decided that command responsibility did arise in the case of the superior who assumed command after the events which formed the subject matter of the indictment though they agreed that it would be a matter of degree as to when liability attached, depending partly on the length of time that elapsed between the events and the assumption of command. They did not seek to define how one might define that length of time.

The Appeals Chamber took a different view by a majority of three to two. The majority, consisting of Judges Meron, Pocar and Guney, faced with the clear wording of the ICTY Statute, stated that:

> ... it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committed.[64]

They observed that there was no prior State practice or *opinio juris* to support the proposition that a commander could be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordi-

63 *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, (Hadžihasanović Decision)*, ICTY Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, para.41.

64 *Ibid*, para.44.

nate. For support, they went outside the Statute and looked specifically at the wording of Article 28 of the International Criminal Court Statute[65] and Article 86 of Additional Protocol I.[66] They held that:

> ... this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred. In case of doubt, criminal responsibility cannot be found to exist, thereby preserving full respect for the principle of legality.[67]

There were, however, powerful dissenting opinions given by the minority, Judge Shahabuddeen and Judge Hunt. Judge Shahabuddeen examined closely the arguments given by the majority and sought to counter them. For example, he pointed out:

> ... if there is no case in which it was held that command responsibility does not extend to acts committed by subordinates before the commander assumed his command, it has nevertheless to be recognized that there is no case which affirmed the opposite.[68]

He then asked, in a manner similar to the Trial Chamber, "What then is to be done?"[69]

His conclusions arose from a fresh examination of the doctrine of command responsibility as it existed at the time. This examination began with Additional Protocol I, as had the majority, but by using the rules of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties,[70] he held that to deny the applicability of the doctrine of command responsibility in this area would "collide with the object and purpose of the relevant provisions of Protocol I".[71] He therefore started from the principle that it should apply and sought to see whether any of the relevant texts were at variance with this conclusion.

Article 28 of the International Criminal Court Statute[72] clearly did provide an alternative conclusion but Judge Shahabuddeen argued that the text "should not be taken as an exhaustive statement of customary international law on the subject". In his view, "if [a particular] situation is omitted from the texts in question, it does not follow that it is not penalised under customary international law".[73] He thus held that Article 28 was reflective of customary international law, in so far as it went, but that one could go beyond it. In relation to Additional Protocol I, he followed the line

65 See footnote 2

66 See footnote 40.

67 *Hadžihasanović Decision*, *op. cit.*, footnote 63, para.51.

68 *Ibid*, Partial Dissenting Opinion of Judge Shahabuddeen, para.7.

69 *Ibid*.

70 Printed in Basic Documents in International Law (Ian Brownlie Ed.), 5th Ed. (2002), at p.270.

71 *Hadžihasanović Decision, op. cit.*, footnote 63, Partial Dissenting Opinion of Judge Shahabuddeen, para.15.

72 See footnote 2.

73 *Hadžihasanović Decision*, *op. cit.*, footnote 63, Partial Dissenting Opinion of Judge Shahabuddeen, para.20.

taken by the International Committee of the Red Cross Commentary on Additional Protocol I and held that it was necessary to read Article 86[74] together with Article 87.[75] He conceded, however, that the latter was addressed to States and to Parties to the conflict. In his view, by the reading the two Articles together, it was possible to bring together the differing strands and produce a solution which was consistent with the earlier versions of the doctrine as reflected in the United States Manual FM 27-10.[76] He also pointed out the specific terms of Article 7(3) of the Yugoslav Tribunal Statute itself,[77] stating:

> Insofar as the provision refers to a case in which the commander knew or had reason to know that the subordinate was committing or about to commit a crime, the superior/subordinate relationship obviously exists at the time of the commission of the act. However, there is no necessity for such coincidence where the crime has been committed: the provision speaks of a case in which the subordinate "had done" the act – words (including their equivalent) which do not occur in some of the texts previously examined. In such a case, there may but need not be a coincidence of the superior/subordinate relationship with the commission of the act. What, however, has to be simultaneous is the discovery by the commander and the existence of the superior/subordinate relationship.[78]

Judge Shahabuddeen also dealt with a separate issue. The doctrine of command responsibility has traditionally involved a form of responsibility for the actual crimes committed. Thus, if a commander was charged with the crime against humanity of murder, he would be convicted of that crime whether it was as a principal or as a commander. Judge Shahabuddeen challenged that, stating:

> The position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatever in the *actus reus*." No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.[79]

He went on to draw a distinction between direct responsibility and command responsibility stating:

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74 See footnote 40.

75 See footnote 41.

76 See footnote 31.

77 See footnote 43.

78 *Hadžihasanović Decision*, *op. cit.*, footnote 63, Partial Dissenting Opinion of Judge Shahabuddeen, para.28.

79 *Ibid*, para.32.

> Command responsibility imposes responsibility on a commander for failure to take corrective action in respect of a crime committed by another; it does not make the commander party to the crime committed by that other.[80]

Judge Hunt, in his dissenting judgement, found authority in the principles laid down in the United Kingdom and United States Manuals.[81] He went back to the principles derived from the Yamashita case and held that:

> ... the absence of State practice supporting the criminal responsibility of the superior in the factual situation in question in this appeal is irrelevant where that situation falls reasonably within the principle which has been accepted as customary international law.[82]

He also argued that the interpretation of Article 86 of Additional Protocol I,[83] adopted by the majority, would, in his opinion:

> ... leave a gaping hole in the protection which international humanitarian law seeks to provide for the victims of the crimes committed contrary to that law.[84]

Like Judge Shahabuddeen , he considered this unacceptable and, in support, cited the Kordic judgment where the Trial Chamber said, albeit *obiter*:

> Persons who assume command after the commission [of the crime] are under the same duty to punish.[85]

In relation to Article 28 of the International Criminal Court Statute[86] he drew attention to the report of the Working Group on General Principles of Criminal Law,[87] which in relation to the then identical text stated:

> The Working Group draws the attention of the Drafting Committee to the fact that the text of this article was the subject of extensive negotiations and represents quite delicate compromises.[88]

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80 *Ibid*, para.33.

81 See footnote 31.

82 *Hadžihasanović Decision*, *op. cit.*, footnote 63, Separate and Partially Dissenting Opinion of Judge David Hunt, para.13.

83 See footnote 40.

84 *Hadžihasanović Decision*, *op. cit.*, footnote 63, Separate and Partially Dissenting Opinion of Judge David Hunt, para.22.

85 *Ibid*, para.23, quoting from para.446 of the Judgment of the Trial Chamber delivered in *Prosecutor v. Kordić & Čerkez*, ICTY Case No. IT-95-14/2-T, on 26 February 2001.

86 See footnote 2.

87 During the Rome Conference, a number of working groups were established to deal with particular key issues.

88 *Hadžihasanović Decision*, *op. cit.*, footnote 63, Separate and Partially Dissenting Opinion of Judge David Hunt, para.31, quoting from UN document A/Conf.183/C.1/WGGP/L.4/Add.1 dated 29 June 1998.

As such he found Article 28 of "very limited value" in determining the customary international law at the time relevant to the case at hand.[89]

The most surprising element of the judgements in the Appeals Chamber is perhaps their vehemence. Both sides seemed to be arguing as much on principle as on law, particularly in the dissenting judgements where the Judges seemed to be concerned as much as anything with filling what they perceived to be a "gap" in the law. But was that approach necessary or indeed helpful?

V. The Current Position

The initial doctrine of command responsibility, as propounded during and after the Yamashita case, was very wide. It arose in respect of crimes that were about to be committed or had been committed; it was sufficient that the commander "should have known" of them, whether he had actual knowledge or not; his duty was to prevent and/or punish. In Yamashita a full reading of the judgment gives the clear impression that the Tribunal was satisfied that Yamashita had actual knowledge and his duty as a commander to "discover the standard of conduct of his troops" and his means of knowledge were just further circumstantial evidence supporting that conclusion.

It follows that some of the principles were in fact *obiter*. Furthermore, no attempt was made by the Commission to distinguish between those examples of command responsibility which would justify criminal action and those which would attract other sanctions. Over the last sixty years, there have been attempts in the criminal sphere to try to nuance the wide statements made in Yamashita in order to develop a doctrine that is perhaps fairer and less broadly based.

The standard of knowledge has remained although it has been more narrowly defined so that it is now closer to "willful blindness". A commander who failed to read a solitary report on atrocities contained in a mass of paperwork is unlikely to be convicted though one who consistently claimed to have overlooked such reports may have a harder time. Similarly, the concerns over command influence in the disciplinary process expressed under human rights law[90] have meant that it is no longer possible to require a commander to "punish" as he may have no power to do so. He must, however, where appropriate refer matters to the relevant authorities for action, even though he may not subsequently be responsible if no action is taken.

The most complex area is still that of the commander who gains knowledge of crimes after they had occurred. If a direct line can be drawn between his actions (or omissions) and the crimes, then it may be possible for him to be charged with those crimes as a principal. But if not, what is the position? Is it fair that such a commander should be convicted of crimes of which he had no knowledge? Is there a difference between the commander who was in command at the time that the crimes were committed, even though unaware of them, and a subsequent commander who

89 *Ibid*, para.32.

90 The lead case before the European Court of Human Rights was *Findlay v. United Kingdom,* (1997) 24 EHRR 221. An account of some of the reforms introduced as a result of that case can be found in Ann Lyon, After Findlay: A Consideration of Some Aspects of the Military Justice System, 1998 Criminal Law Review at p.109.

learns of the offences after he has taken command? Greenwood, in his critique of the Hadžihasanović Case, considers that such a distinction may be justifiable. He argues:

> To convict a commander, who neither knew or had reason to know that troops under his command were about to commit such offences, of the serious charges of failing to punish them when he learned afterwards what they had done, is already a harsh rule. It can be defended in the case of a commander who was in command at the time at which the offences were committed, because, even if he knew nothing about these offences, it can be argued that, had he run his command properly, the members of that command would not have behaved in this way. In such a case, there is a causal connection (albeit, perhaps, a tenuous one) between the commander's actions and inaction, and the commission of the offences by his subordinates. That rationale does not apply, however, to a commander who assumes command only after the relevant offences have been committed.[91]

However, even this seems to impose almost a strict liability test on a commander and it may not be necessary. As has already been pointed out, there appears to have been a distinction drawn in Additional Protocol I between the responsibility of the commander for offences that were about to be or being committed and those that had been committed.

It can be argued that, under international law, the doctrine of command responsibility applies where a commander knows or should have knowledge of crimes being or about to be committed. Where the commander knows of crimes that have been committed, it is the responsibility of the State to take action under national law. It is right to say that this distinction between Articles 86 and 87 of Additional Protocol I is not to be found in the Commentary of the International Committee of the Red Cross.[92] This is not surprising as it would appear that Article 87 was not in the original Red Cross draft but was inserted following an amendment.[93]

The International Committee of the Red Cross would be anxious that the traditional doctrine should not be seen to be watered down. However, it would seem to make sense as, despite the views of Judge Shahabudeen, under international law, command responsibility continues to reflect responsibility for the crimes themselves. There ought to be a difference between the commander who fails to prevent crimes which he had the ability to prevent and the commander who had no part in the crimes but only learns of them afterwards. If the latter fails to take appropriate action, then it should be his failure in such a duty that should be reflected in any proceedings rather than direct responsibility for the crimes themselves.

Such an approach is reflected in the original Crimes and Elements for Trials by Military Commission,[94] where the United States authorities have sought to

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91 Christopher Greenwood, Command Responsibility and the *Hadžhasanović Decision,* 2 Journal of International Criminal Justice (2004) 598 at p.603.

92 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Y Sandoz, C Swinarski &B Zimmermann Eds.), 1987, ICRC, Geneva.

93 *Ibid*, para.3551 at p.1018.

94 Department of Defense, Military Commission Instruction No.2 dated 30 April 2003, accessed at www.pentagon.gov/news/May2003/d20030430milcominstno2.pdf .

divide command responsibility into two parts. In the first, "Command/Superior Responsibility – Perpetrating", dealing with the situation where subordinates were committing offences, the comment states:

> A commander ... charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.[95]

In the second part, "Command/Superior Responsibility – Misprision", where the offences happened in the past, the comment states:

> A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged with the substantive offense as a principal. Such commander or superior should be charged with the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.[96]

This mitigates the harshness of the rule as outlined by Greenwood and, at the same time, fills the gap identified by the minority in Hadžihasanović. The same "gap" is clearly identifiable in relation to Article 28 of the International Criminal Court Statute and so it should be made clear that the decision of the majority in Hadžihasanović – and the drafting of Article 28 – in no way relieves States of their responsibility under Article 87 of Additional Protocol I to "require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."[97] After imposing the "requirement", it is also the duty of the State to ensure that the requirement is enforced by disciplinary action or other appropriate means.

VI. Conclusion

However, even this will not mean that offences involve criminal liability at all levels of command. There remains, as there always has been, the difference between criminal responsibility and command responsibility in its wider meaning. Every case will depend upon its own facts but it is not uncommon for policies and command decisions to have unintended side effects. All are agreed that the events that took place in Abu Ghraib prison in Iraq during the occupation of that country and that have been the subject of so many reports[98] – and some criminal proceedings – were unaccept-

95 *Ibid*, para.6(C)(3)(b)(2).

96 *Ibid*, para.6(C)(4)(b)(2).

97 See footnote 41.

98 For a sample, see The Torture Papers, The Road to Abu Ghraib (Karen Greenberg & Joshua Dratel Eds.), Cambridge University Press, 2005.

able. Few would attempt to argue that knowledge of those specific acts which have been the subject of charges extended beyond the immediate and low level command chain, at the time the offences were being committed.

Despite the detailed Human Rights Watch Report on command responsibility,[99] that doctrine as applied to criminal proceedings may not extend much beyond the confines of Abu Ghraib itself. Indeed, it is noticeable that, at the time of writing, sanctions are already being imposed through disciplinary (as opposed to criminal) proceedings against some of the officers involved. Brigadier General Karpinski, who commanded the 800th MP Brigade, has been reprimanded, reduced in rank and relieved of command.[100] Colonel Pappas has been fined and reprimanded,[101] a course of action that effectively ends his career. Similar sanctions may follow against others.

However, of greater interest perhaps is the argument that policies and statements made by senior commanders (including politicians at the highest level) were open to interpretation by others, leading as a result to the abuses, even if there was no direct link. When Henry II declared "Will no one rid me of this troublesome priest?", he did not foresee that four of his knights would ride to Canterbury and murder Thomas Beckett in cold blood.[102]

This is not the place to conduct a detailed review of the Abu Ghraib story nor to enter into the debate on the interrogation policies apparently approved at high levels of command and government. King Henry accepted responsibility for the death of the Archbishop, not in the criminal sense but as a matter of cause and unintended effect. It may indeed be that certain interrogation policies and other decisions on matters of detention led to confusion and consequent lack of clarity in instructions at lower levels. It may indeed be that this provided the background which enabled the offences to take place. If that is so, then it is right that there should be some form of accountability. However, that accountability is different from criminal responsibility in the sense that we are discussing here. Command is a hard and lonely task. As was said by the Military Tribunal in the Yamashita case itself:

> It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape.[103]

Command responsibility is an exception to the criminal rules on individual responsibility. It imposes an additional responsibility on a commander beyond those that

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99 See footnote 11.

100 See Associated Press report, Army Demotes General in Prison Scandal, 6 May 2005, accessed at http://www.military.com/NewsContent/0,13319,FL_demoted_050605,00.html.

101 See R. Jeffrey Smith, Abu Ghraib Officer Gets Reprimand, Non-Court-Martial Punishment for Dereliction of Duty Includes Fine, Washington Post 12 May 2005, p. A16.

102 For an account of the turbulent relationship between King Henry II and his Archbishop of Canterbury see Mike Ibeji, Becket, the Church and Henry II, at http://www.bbc.co.uk/history/state/church_reformation/becket_01.shtml.

103 *Trial of General Tomoyuki Yamashita,* Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Vol. IV, London HMSO, 1948, at p.35.

would involve him as a principal in the offence. It is perhaps a sign of the times that there is an increased reluctance at the highest levels of command and government to accept accountability. The resignation of Lord Carrington from the British Government at the time of the Falklands invasion is a shining example of a senior politician accepting ultimate responsibility even though no personal blame could be attributed to him.[104]

More recent examples have shown politicians seeking to cling to office even when it had become clear that there was personal responsibility for actions committed by subordinates. The apparent narrowing of the limits of command responsibility may have disappointed those who, in Greenwood's phrase, "see a broad concept of command responsibility as essential to the enforcement of international humanitarian law".[105] However, criminal law has its limitations and it should not be used as a substitute for accountability.

The International Criminal Court has a major role to play, particularly in bringing to account those commanders whose role can only be met by criminal sanction. However, it is the fear of some, particularly in the United States, that it will go further and seek to act in cases which go beyond criminal responsibility, extending its reach to those areas where disciplinary action or political accountability is more appropriate. The Court must be careful not to allow itself to be used in this way. It was President Truman who announced that "The buck stops here."[106] If more people in senior positions in all walks of life were prepared to echo those words, there might be less pressure to introduce the criminal law into areas where it is perhaps ill advised to go.

104 Lord Carrington was the Foreign Secretary at the time of the invasion of the Falkland Islands by Argentine forces in 1982. He took personal responsibility for the failure of the Foreign Office to foresee the invasion and resigned along with his junior Ministers.

105 Greenwood, *op. cit.*, footnote 91, at p.605.

106 The sign to that effect which sat upon the President's desk can be seen at the Truman Presidential Library in Independence, Missouri.

Chapter 30

The Transposition of Military Commander's Discretion onto International Criminal Responsibility for Military Commanders: An Increasing Legal-Political Dilemma within International Criminal Justice

Geert-Jan Alexander Knoops

I. Introduction: Pitfalls and Dangers of *Real Politik* Pressures to Prosecute Military Commanders

Criminal trials either at a domestic level or before international criminal courts whereby military commanders are held accountable for (international) crimes conducted by their subordinates is an emerging topic of perennial concern. The criminal prosecutions against military commanders after World War II before the Nuremberg and Tokyo Tribunals as well as the prosecution of military authorities before the ICTY and ICTR tried to set precedents on the doctrine of "command responsibility." Yet, it should be questioned whether these and other international criminal accountability mechanisms are the product of a proper legal policy, framed on a thorough assessment of legal principles, and not merely an exponent of *real politik* pressured by world public opinion.[1] Certainly, as evidenced by the criminal prosecutions of individual low ranking US soldiers for the Abu Graibh events, one cannot say that the (international) legal community pursues a consistent legal policy as to holding senior military officers accountable for criminal offences. Principles of fairness encompass also the preservation of the principle of equity in that criminal prosecutions are not conducted on a selective and arbitrary basis. In the context of prosecuting military commanders, the necessity to uphold standards of fairness is aptly formulated by Justice Murphy of the US Supreme Court in his dissent in the Yamashita case:

> An uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit.[2]

Fairness and a dispassionate approach are therefore of eminent importance in the face of public pressures for retribution of military commanders in the criminal law sense commanders in the criminal law sense. At the same time, superior responsi-

1 See also M. Cherif Bassiouni, Preface, *International Criminal Evidence* (Richard May and Marieke Wierda, eds.) (2002).

2 See *Re Yamashita,* 327 U.S.1, per J. Murphy, at 41, 1946.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 729-740.

bility, at least before international and internationalized criminal courts, remains (in addition to the doctrine of joint criminal enterprise) an important prosecutorial tool even with respect to prosecuting peacekeepers.[3] Notably, little attention is paid to the question whether and how military commanders' discretion in the exercise of their military duties, if existing and accepted, interrelates with holding military commanders criminally responsible either before national or international courts. This article examines this interrelationship, particularly whether and how international criminal responsibility for military commanders can be vested in the presence of military commanders' discretion.

II. The Role of Military Commanders' Discretion within International Law: The Approach of the Israeli Supreme Court

A. Introduction

Philosophical justifications may provide the moral context for developing the normative framework of superior responsibility. Moreover, the legitimacy of the latter doctrine depends largely on notions of morality and global as well as local conceptions of truth and justice. In order to advance a justified theory on superior responsibility, an orientation on and integration of the notion of military commanders' doctrine seems required. This key question is thus whether the prevailing doctrine of superior responsibility accommodates or should accommodate such discretion.

B. Military Commanders' Discretion: Jurisprudential Boundaries Promulgated by the Israeli Supreme Court

As will become apparent, the aspect of military commanders' discretion manifests within military operations and may contextualize norms of international humanitarian law. Several decisions of the Israeli Supreme Court give an account hereof. Two judgments merit special attention.

i. The Case of *Physicians for Human Rights et al. v. Commander of the IDF Forces in The Gaza Strip*[4]

This case concerned a petition of four human rights organizations, claiming that harm had been caused to the local civilian population in Rafah as a result of military operations, i.e., demolition of houses and injuries caused to civilians. The petitioners requested, among other things, that a full investigation be made into an incident in which a number of residents were killed when a crowd of protesting civilians was shelled whilst seeking an order to prohibit the shelling of civilians, even when among

3 See for charging an accused for both forms of responsibility, Daryl A. Mundis, Current Developments at the Ad Hoc International Criminal Tribunals, 1 JICJ, 204-25 (2003); Geert-Jan Alexander Knoops, *The Prosecution and Defense of Peacekeepers under International Criminal Law* 127-161 (2004).

4 See *Physicians for Human Rights et al. v. Commander of the IDF Forces in The Gaza Strip* Judgment of May 30, 2004, Case No. HCJ 4764/04..

them are armed combatants who do not pose an immediate threat to life.[5]

The antagonistic position of military commanders in this area clearly emerges when considering the response of IDF (Israeli Defense Forces) in this case. In paragraph 9 of the judgment it reads that the IDF argued, *inter alia*, that a court should exercise caution in its judicial review of actions of the security authorities as these actions lie at the outer limits of the reach of the judiciary." In addressing this dispute, the Israeli Supreme Court, in its judgment of May 30, 2005, promulgated the following principles:

1. The Supreme Court reiterates the notion it delineated in previous case law, namely that "Clearly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders."[6]
2. In keeping with the first principle, the Supreme Court states in paragraph 17 that it has no power to "review the wisdom of the decision to take military action" but is constrained only to review the legality of military operations. As a consequence, the commander's military operational assessment of a particular situation as such falls outside prosecutorial and judicial scrutiny.
3. This approach is enunciated and specified in the Court's observation that "with regard to issues of military concern, we do not stand in the stead of the military commander and we do not substitute our discretion for his own. That is his expertise (...)."[7]

ii. The Case of *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*

A second judgment of the Israeli Supreme Court merits attention, i.e., that of *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*.[8] Faced with the situation wherein the Commander of the IDF forces in Judea and Samaria issued orders to take possession of plots of land in the area of Judea and Samaria and the question whether this seizure was legal in view of the establishment of a security fence on the land, the Supreme court rendered the following guidelines on the discretionary powers of military commanders:

1. The Supreme Court, as a basic tenet holds that "We, Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours."[9]
2. In this regard, the Israeli Supreme Court arrives at a fundamental notion in order to judicially assess the conduct of military commanders by saying that

5 *Ibid,* para. 7.

6 *Ibid*, para. 16; referring to its judgment in *Baroke v. Minister of Defence,* Case No. HCJ 3114/02, para. 16.

7 *Ibid,* para. 17.

8 See *Beit Sourik Village Council v. The Governement of Israel and the Commander of the IDF Forces in the West Bank* Judgment of June 30, 2004, Case No. HCJ 2056/04.

9 *Ibid.,* para. 46.

judges – when called upon to value the commander's military conduct – are virtually only to be able to determine "whether a reasonable military commander would have (...) acted as this commander"[10] whereby "it is obvious that a court cannot 'slip into the shoes' of the deciding military official."[11]
The court relies on its earlier decision in *AGA v. Commander of the IDF Forces* in which the Israeli Supreme Court stated its approach – repeated in the judgment discussed above – that it does not "substitute the security consideration of the military commander with our own security considerations" and as a consequence that it "shall not substitute the discretion of the commander with our own discretion."[12]

3. As a result, the boundaries of this form of judicial review, as the court sees it, are premised on a "zone of reasonableness" in that the military commander's discretion should fall within the "zone of reasonableness."[13]
4. Within this judicial system of review of military commander's discretion, the Supreme Court is mindful as to how a dispute on military-professional questions, including those on compliance with the principle of proportionality, should be approached. In the *Beit Sourik Village* Judgment, the Court cited its ruling in *Amira v. Defense Minister* where it was held that "in such a dispute regarding military professional questions, in which the Court has no well founded knowledge of its own, the witness of respondents [i.e., the opinion of the military commander who is responsible for the preservation of security; GJK] shall benefit from the assumption that his professional reasons are sincere reasons."[14]
Accordingly, the Supreme Court promulgates an evidentiary criterion, which is meant to endorse the aforementioned assumption namely that "Very convincing evidence is necessary in order to negate this assumption."[15]

iii. Conclusions

In sum, the *Beit Sourik Village* Judgment of the Israeli Supreme court, in examining the contrasting military interests and dilemmas, special weight is given to the following three key notions:

(a) The (expert) opinion of the military commander himself should be placed at the foundation of the judicial review of the legality of the action or conduct at stake;[16]
(b) Such judicial review "does not examine the wisdom of the decision to engage in military activity";[17] such review is, however, confined to the premise that the judges should not "substitute our discretion for that of the military commanders,

10 *Ibid.*
11 *Ibid.*
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*, para. 47; see also *Amira v. Defense Minister,* Case No. HCJ 258/79, para. 92.
15 *Ibid.*
16 *Ibid.*, para. 47.
17 *Ibid.,* para. 48.

as far as it concerns military considerations. That is his expertise. We examine the results on the plane of the humanitarian law. That is our expertise."[18]

(c) Within the judicial review limitations on this subject, another limitation arises namely the "zone of reasonableness," that is to say whether a reasonable military commander would have acted as this military commander did.

These two judgments of the Israeli Supreme Court are thus exponents of an approach that reflects a balancing operation between military-operational interests and legal-political interests. However, the question as to whether this balancing operation is to be addressed differently when it concerns the (international) criminal law responsibilities of military commanders as such is not yet answered. The next paragraph will touch upon this subject, elaborating on the principles of the before-mentioned paragraphs.

III. International Criminal Law Implications of Military Commanders' Discretion

A. The Approach of the ICTY Prosecutor

The issue of military commanders' discretion *vis-à-vis* their responsibility or liability of military commanders under international criminal law arose in a report submitted to the ICTY Prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia (FRY). The committee specifically investigated the NATO bombing campaign against the FRY from 24 March 1999 to 9 June in view of the question whether or not there was a sufficient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing[19] of, *inter alia,* the Chinese embassy in Belgrade and the Serbian Radio/TV Station "RTS" in April 1999.

As to the matter of the controversy between military commanders discretion, and (international) criminal liabilities of military commanders, the committee and subsequently the ICTY-Prosecutor – by adopting it – formulated the following relevant criteria or guidelines:

1. In the first place, paragraph 29 of this report elaborates on the tension between international military law and the tasks of military commanders during military operations and acknowledges that military commanders also within the framework of enforcing international military law "must have some range of discretion to determine which available resources shall be used and how they shall be used." From this discretionary authority necessarily emerges the primary role of the military commander's personal assessment of the situation at hand. Of significance is that the report of the ICTY furthermore confirms that "precautionary measures" and the interpretation of these measures also could be based on and derive from earlier incidents (see paragraph 29).
2. Second the ICTY prosecutor concludes in paragraph 50 of the report – con-

18 *Ibid.*

19 See report NATO bombing campaign against the FRY, http//www.un/org/icty/pressreal/nato061300.htm, para. 3-4.

> fronted with the question to which extent a military commander is obliged to expose his own forces to danger *vis-à-vis* civilian objects – that this has to be resolved on a case by case basis, and the answers might differ depending on the background and values of the commander. In view of the various backgrounds of the military commanders, the differing degrees of combat experience or national military histories, the report holds that the criterion has to be that of a "reasonable military commander."

B. Implications for the International Criminal Law Liability of Military Commanders

i. Military Commanders' Discretion and "Ordering"

The question merits attention as to the potential judicial cross-fertilization between military discretionary powers and criminal liabilities of military commanders under the jurisprudence of the *ad hoc* tribunals.

In *Prosecutor v. Blaškić*, the ICTY Appeals Chamber in its judgment of 29 July 2004[20] was called upon to assess the requisite level of *mens rea* required for "ordering." It was specifically confronted with the question whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the [ICTY] Statute, and if so, how it should be defined.[21] Having examined the approaches taken by national jurisdictions with respect to the requisite *mens rea* for recklessness,[22] the Appeals Chamber concluded that the Trial Chamber had erred in articulating the applicable *mens rea* for ordering as follows:

> Any person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) so as to incur responsibility for having ordered, planned or incited the commitment of crimes.[23]

The Trial Chamber, in holding that the *mens rea* for ordering is lower than direct intent, was incorrect and the Appeals Chamber held that the correct legal standard must be one in which the accused has an "awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard."[24] Hence, the Appeals Chamber held that:

> [A] person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.[25]

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20 *Prosecutor v. Blaškić*, Case No. IT-95-14-T-A.

21 *Ibid.*, para. 32.

22 *Ibid.*, para. 24-29.

23 Para. 40

24 Para. 41.

25 Para. 42.

Thus, two criteria arise in the context of "ordering" pursuant to Article 7(1) of the ICTY Statute:

- an awareness of the substantial likelihood that a crime will be committed, and
- the acceptance of that risk, i.e., the volitional element.

These criteria may shed light on the interrelationship between military commanders' discretionary power and international criminal law liabilities of commanders. This holds especially true in view of the reasoning of the ICTY Appeals Chamber in paragraph 41 that any lesser standard could impose criminal liability for military commanders with regard to virtually any order, because there is always a possibility that violations could occur during the course of military operations.

Can it be said that the acknowledgment within national and international law of the predominance of military discretionary power as to military operational decisions could increase the burden of proof of the above mentioned criteria under (a) and (b)?

Perhaps that the mentioned NATO bombing campaign's report adopted by the ICTY Prosecutor could give some guidance as to this question. Paragraph 28 of this report addresses the liability of military commanders in relation to disproportionate attacks on civilian targets or civilians, especially the aspect of the requisite *mens rea*. In this regard, the ICTY prosecution articulates the view that this *mens rea* should be that of "intention or recklessness, not simply negligence." Importantly, the ICTY prosecutor holds that in order to assess this level of *mens rea*, it should be kept in mind that:

> Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.[26]

Attention should be drawn to the words "some range of discretion" which clearly elaborates on the factor of military commanders' discretionary powers. Apparently, the military operational obligations and responsibilities of military commanders form a relevant factor to determine the requisite level of *mens rea* in that it may increase the burden of proof on the part of the prosecution to establish the criteria under (a) and (b) or the existence of "recklessness."

Logically, the predominance of military commanders' discretionary powers may not always be in accordance with the legal-political denominators of commanders' criminal responsibility. Yet, this dilemma or controversy can not be resolved without answering the following question. To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to

26 Para. 29, report.

civilian objects?[27] The ICTY Prosecutor in paragraph 50 of said report answers this question as follows:

> The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the "reasonable military commander.

Notably, the latter criterion fits within the view of the Israeli Supreme Court as analysed above. It is thus fair to say that the assessment of criminal liability of military commanders for "ordering" should take into account the special factor of military commanders' discretion.

ii. Military Commanders' Discretion and Superior Responsibility

Another question is whether military commanders' discretion, as analysed above, may have a certain impact on the doctrine of superior responsibility under international criminal law. In order to establish criminal liability on a superior responsibility theory, the following criteria must be fulfilled:

(i) an offence was committed;
(ii) there was a superior-subordinate relationship;
(iii) the superior knew or had reason to know that the subordinate was about to commit the offence or had done so; and
(iv) the superior failed to take the necessary and reasonable measures to prevent the offence or to punish the principal offenders thereof.[28]

In particular, the knowledge requirement under (iii), sometimes also referred to as the *mens rea* condition, merits attention in the context of military commanders' discretion. It should be borne in mind that within the jurisprudence of the ICTY, different views were expressed as to the meaning of this *mens rea* element. The *Celebici* Trial Chamber interpreted "had reason to know" as meaning that:

> [a] superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indi-

27 See para. 49, report.

28 See *Prosecutor v. Delalić et al.,* Case No. IT-96-21-A, ICTY Appeal Chambers Judgment, 20 February 2001, paras. 189-198, 225-226, 238-239, 256, 263.

> cated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.[29]

The *Blaskić* Trial Chamber, however, held that this criterion should be interpreted as meaning:

> [i]f a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.[30]

Ultimately, the ICTY Appeals Chamber opted for the interpretation given by the *Celebici* Trial Chamber deciding that superior responsibility should not be tantamount to a form of strict liability.[31]

Importantly, the Appeals Chamber in paragraph 226 articulated the *mens rea* criterion for superior responsibility in rather strict terms:

> Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information.
>
> The point here should not be that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates [sic] actions will necessarily result in criminal liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however, noted that although a commander's failure to remain apprised [sic] of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.[32]

This *mens rea* approach *vis-à-vis* military commanders is certainly appealing from the perspective of the phenomenon of military commanders' discretion. If this *mens rea* approach is to reflect the reality that military commanders have specific duties to

29 *Prosecutor v. Delalić et al.*, *supra* note 29, para. 393.

30 *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment of 3 March 2000, para. 332.

31 Appeals Chamber Judgment, *supra* note 29, para. 239.

32 See Appeals Chamber Judgment, *supra* note 29.

gather information as part of their military responsibility,[33] the question arises as to how this reality may fit within the other reality, namely that of the subject of military commanders' discretion.

In other words, does the *mens rea* criterion as set forth by the ICTY Appeals Chamber in the *Celebici* case permit the military commander any military-operational discretionary power to remain appraised of his subordinates' action, and if so, to which extent? In this regard two observations should be made that could shed light on this question:

1. As to the proof of the *mens rea* criterion, the Appeals Chamber held that the prosecution must demonstrate that "information of a general nature was available to the superior that would have put him or her on notice of offences committed by subordinates."[34] This information need not be conclusive that crimes were committed, but rather "[i]t is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates."[35] Accordingly, there is a duty on commanders to investigate upon being informed of the possibility that such offences were committed.[36]
2. Regarding the form of evidence which may trigger the commanders' duty to investigate the behaviour of his subordinates, the Appeals Chamber held that written as well as oral reports filed with the commander could initiate this duty whereby it is not relevant whether or not such information was disseminated via an official channel. It is even not required that the information expressly stated that crimes were committed or were about to be committed by subordinates.[37]

Hence, it seems that the abovementioned two guidelines under (1) and (2) imply that the military commander will retain some discretion in determining what type of information is sufficient to activate his duty to investigate his or her subordinates' behaviour.[38] The observation that at the least the commander is to be put on further inquiry by the information, inevitably calls for an assessment of certain information from both a military-operational and a legal perspective. A military commander has to balance these perspectives in every circumstances depending on the facts of the situation at hand, which is sometimes also referred to as the "commander on scene"-element.

An example; military commander A receives information that a certain platoon under his command is likely to interrogate five members of rebellion factions about

33 See also Article 28(1) of the ICC Statute.

34 Paragraph 241.

35 Paragraph 236.

36 Paragraph 239.

37 *Prosecutor v. Delalić et al., supra* note 29, para. 238.

38 See Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in *International Criminal Law Developments in the Case Law of the ICTY* 260 (Gideon Boas and William A. Schabas, eds., 2003). The author refers in this context to the "considerable discretion" the Trial Chamber will retain in determining what type of information is sufficient to trigger the *mens rea* criterion.

an upcoming attack on the commander's unit which interrogations (according to this information) may contravene the norms of the Geneva Convention III. At the same time, Commander A is aware of the fact that this platoon is in great danger by this upcoming attack (on which also information exists) and that these interrogations may prevent loss of human (military) lives. Commander A thus decides not to intervene by further inquiring into the information that the platoon leader is about to interrogate these rebels in order to retrieve information concerning details about the upcoming attack on his forces.

This example shows that military commanders' discretion may contradict the *mens rea* standard as set forth by the ICTY Appeals Chamber when strictly applied without being mindful to military operational discretionary aspects which may underlie the question whether to inquire into subordinates' actions.

C. Military Commanders' Discretion under the ICC Statute

The question merits attention whether the above analysis will remain valid in view of the Statute of the International Criminal Court (ICC) under which the court became operative as of July 1, 2002. Article 28 of the Statute establishes superior responsibility for commanders and other superiors and specifically states in section (a)(i) that such responsibility will attach where a military commander "knew or, *owing to the circumstances at the time* [emphasis added; GJK], should have known that the forces were committing or about to commit such crimes." The words "owing to the circumstances at the time" may suggest a form of discretionary power on part of the military commander.

On the other hand, the negligence standard of "should have known" in Article 28(a) of the ICC Statute has the potential to expand the concept of superior responsibility beyond the parameters set by the ICTY.[39] This observation may justify the conclusion that military commanders' discretion under the ICC regime may perhaps be interpreted in a narrower way in the practice of the ICC compared to the jurisprudence of the Israeli Supreme Court as well as the ICTY. It should be borne in mind that Article 28 of the ICC Statute is framed as such that it allows superior responsibility to be qualified as a crime of omission, i.e., a failure to exercise control properly.[40] Accepting superior responsibility as a separate crime of omission, would seem to leave little discretion to the military commanders. After all, it is not difficult with hindsight to interpret the behaviour of military commanders as a failure to exercise control properly in the examples given in the above paragraphs.

In sum and by way of preliminary conclusion, absent any case law from the ICC judges on this specific area, it can be said that under Article 28 of the ICC Statute the concept of superior responsibility could perhaps be perceived as providing for a more restricted approach on the element of military commanders' discretion and thus creating a less strong argument for military commanders to refute a criminal liability based upon superior responsibility.

39 See E. van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law* 223 (2003).

40 *Ibid.*

IV. Conclusions and Recommendations

This analysis shows that the imposition of superior responsibility on military commanders provokes several questions of legal-political nature. First, it appeals to military commanders' discretion in general and secondly it positions the *mens rea* element within a legal-political dilemma, namely the choice a military commander sometimes has to make between military operational goals and responsibilities, such as forced protection, on the one hand and legal responsibilities on the other hand.

The doctrine of superior responsibility is nowadays a well-established principle of customary international law, reinforced by domestic and international case law. Yet, within these liability theories, little attention has been paid to another principle pertaining to military commanders' responsibility, namely that of military commanders' discretion. The latter concept is predominantly developed, or at least acknowledged, in case law of the Israeli Supreme Court. To some extent it is also accepted by the ICTY Chief Prosecutor as envisaged by the mentioned report on the NATO bombing campaign.

Several conclusions regarding the scope of international criminal responsibility of military commanders *vis-à-vis* military commanders discretion emerge:

1. Military commanders' discretion is an exponent of the fact that military operational parameters and tasks can only be met when the operational commander, and not the lawyer, has the final saying on military issues on the battlefield.
2. Military commanders' discretion may contravene principles and purposes of international criminal responsibility for military commanders, such as those developed by the ICTY. In particular the *mens rea* element both for "ordering" and "superior responsibility" can collide with military commanders' discretion.
3. When assessing the requisite *mens rea* level for "ordering" or "superior responsibility," the element of military commanders' discretion should be seen as an additional factor, among the various others, in order to charge military commanders for both acts of commission and omission.

It is to be hoped that this proposed factor will play a role within judicial activism which can increasingly be detected in the area of establishing military commanders' criminal responsibility for international crimes. It is tenable that, considering the rationale of military commanders' discretion, judicial scrutiny regarding this factor may endorse the notion set forth by Justice Murphy in his dissenting opinion to the Yamashita case.[41]

41 See paragraph 1 of this chapter.

Section 12

Defences before the ICC

Chapter 31

Official Capacity and Immunity of an Accused before the International Criminal Court

Eric David

1. Article 27 of the Rome Statute of the International Criminal Court (the "Statute") states that the perpetrator of a crime provided for by the Statute (aggression or international humanitarian law [IHL] crime, Statute, Art. 5-8) cannot successfully claim that he acted in his official capacity as a State agent or that he has an immunity barring prosecution before the ICC:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elective representative or a government shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27 makes a previously implicit distinction more explicit (**I.**) and excludes immunities which concern only those States bound by the Statute (**II.**).

I. An Explicit Distinction between Exception on the Merits and Procedural Exception

2. For the first time to the author's knowledge, a source of international law source the Statute dismisses two radically different defences. Section 1 of Article 27 describes an objection based on the merits (Art. 27, § 1) whereas Section 2 describes an objection based on procedural grounds (Art. 27, § 2). The Statute makes a clear distinction between the two objections and expressly bars both.

The objection on the merits described in Section 1 is based on the notion that the crime has been committed on behalf of the State by a designated agent. As a State official, the perpetrator is the arm or instrument of the State; therefore, he is considered as a mere executant and is exempt from criminal irresponsibility for his actions. The crime is attributable only to the State and it alone should bear responsibility for the crime. The defence is relevant to the *merits* of the case because the issue

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arises during the consideration of the accused's culpability for the crime charged.

3. The procedural plea described in Section 2 is based on the function of the agent. As a representative of the State, the perpetrator is protected from criminal process by immunities generally granted to any person apt to represent the State at the international level (head of State, head of government, minister for Foreign affairs, or diplomatic agent). The plea is of a procedural nature because it can be raised *in limine litis* as a bar to the proceedings entirely.

4. Since the trials at Nuremberg it has been repeatedly affirmed that State responsibility will not preclude individual responsibility. For example, Article 58 of the Articles on the Responsibility of States for Internationally Wrongful Acts [1], expressly ensures that the Statute does not affect questions of individual responsibility under international law for persons acting on behalf of a State. Reciprocally, Section 4 of Article 25 of the Statute as well as Article 4 of the International Law Commission (ILC)'s Draft Code on Crimes against the Peace and Security of Mankind expressly provide that issues of individual responsibility do not affect questions of State responsibility under international law.

The Statute appears to be the first international instrument to distinguish and dismiss both of these objections to prosecution:

– the crime committed for and on the behalf of the State does not suppress or mitigate the criminal responsibility of the perpetrator; the Statute adopts and adheres to the rationale expressed in the Nuremberg Judgment where the Tribunal stated:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[2]

– that the crime be committed by an incumbent or, *a fortiori*, a former State official does not exempt the author from the criminal jurisdiction of the ICC

There has been no distinction between these two objections in previous statutes, such as the Charter of the International Military Tribunal (see Articles 7 and 6), the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (see Articles 7, § 2 and Article 6, § 2), the Draft Codes of Crimes against the Peace and Security of Mankind (see for example Article 7 of ILC's 1996 Draft Code), the UN Conventions on the Punishment and Prevention of Genocide (9 Dec. 1948, Art. IV) and the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (26 Nov. 1968, Art. II). These texts generally refer only to the objection based on the merits and one should go back to the Nuremberg Judgment[3] and to the works of the ILC on the "Nuremberg

1 A/RES. 56/83, 12 Dec. 2001.

2 *Proceedings of the Trials of German Major War Criminals*, H.M.S.O., London, 1950, Part. 22, p. 447.

3 *Proceedings ..., op. cit.*, note 2, p. 447.

Principles" (1950)[4] to observe that, in fact, they covered both objections[5]

By expressly rejecting the defence in its two aspects, the Statute has the merit to make its meaning perfectly plain, as shown hereafter.

5. The Charter of Nuremberg stated in Article 7:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them responsibility or mitigating punishment.

This provision was ambiguous because it appeared to only encompass the objection on the merits, criminal **irresponsibility** of the person who acts on the behalf of the State, and not the procedural plea of **immunity** as a bar to the prosecution. However, when applied by the Nuremberg Tribunal, the provision encompassed both aspects of the objection.

In his report to the US President, Justice Jackson who led the prosecution in Nuremberg did not distinguish between the criminal irresponsibility and the immunity from criminal process. Quoting "the obsolete doctrine that a head of state is immune from legal liability," he wrote:

> There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'.
>
> With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility.[6]

By saying that "a head of state is immune from legal liability" and by referring, at the same time, to the "doctrine of immunity of a head of state" and to the "official irresponsibility", the author clearly confused two different ideas.

4 *Ybk. ILC 1949*, pp. 206 et 212.

5 More details *in* E. David, *Eléments de droit pénal international*, Presses univ. Bruxelles, 2005, §§ 1.69-1.70.

6 Report to the President by Justice Robert H. Jackson, 6 June 1945, *in* Jackson, R.H.., *International Conference on Military Trials, London 1945*, Washington, 1949, pp. 46-47.

6. It is greatly to the credit of the Nuremberg judges that both objections were clearly distinguished and equally rejected. The judges stated that:

> The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[7]

Despite the language of Article 7, the judges rejected both objections. A defence based on procedural immunity was rejected as evidenced by the following statement: "The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings" (emphasis added). A defence based on the perpetrators status as a State official or on the official nature of his acts was also excluded as evidenced by the following language: "The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings" (emphasis added)[8]

7. Despite the subsequent judicial clarification of the ambiguity of Article 7 of the Nuremberg Charter, the statutes of the later international criminal tribunals have adopted wording similar to that of the Charter itself instead of building on the clarity offered by the judges.[9] Exceptionally, only the ICC Statute has distinguished between the two objections (*supra* § 1).

8. The ILC followed the model of the Nuremberg Statute. The ILC recognised the principle according to which the official position of a foreign State agent (head of State or minister) was not a ground for justification if the agent committed a crime against peace, a war crime or a crime against humanity. The ILC said this in the Nuremberg Principles and in its different draft codes of crimes against the peace and security of mankind adopted in 1951 (Art. 3), 1954 (Art. 3), 1991 (Art. 13) and 1996 (Art. 7). These texts are sufficiently important to be recalled here, *in extenso*:

– 1951 Draft Codes of Crimes against the Peace and Security of Mankind, Art. 3:

> The fact that a person acted as a Head of State or responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code.[10]

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7 *Proceedings ..., op. cit.*, note 2, p. 447.

8 The French text is clearer: "Les auteurs de ces actes ne peuvent invoquer leur qualité officielle pour se soustraire à la procédure normale ou se mettre à l'abri du châtiment." (Emphasis added).

9 Charter of the IMT for the Far East (1946), Art. 6; ICTY Statute (1993), Art. 7 § 2; ICTR Statute (1994), Art. 6 § 2 ; Statute of the Special Court for Sierra Leone (2000), Art. 6 § 2.

10 *Ybk. ILC 1951*, II, p. 137.

– 1954 Draft Codes of Crimes against the Peace and Security of Mankind, Art. 3:

> The fact that a person acted as a Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.[11]

– 1991 Draft Codes of Crimes against the Peace and Security of Mankind, Art. 13:

> The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as a head of State or Government, does not relieve him of criminal responsibility."[12]

– 1996 Draft Codes of Crimes against the Peace and Security of Mankind, Art. 7:

> The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as a head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."[13]

Apart from some minor details of wording, there has been little change in the text since 1951.

9. In spite of this ambiguous wording, the ILC's works did not leave any doubt about the fact that the objection covered, at the same time, the merits and the procedure, *i.e.*, the removal of the official position as an excuse or a ground for justification included criminal **irresponsibility** as well as criminal **immunity** of the State agent.

10. As early as 1949, the time of the debates on the Nuremberg principles, G. Scelle had proposed an amendment to the draft text which, according to its wording, seemed confined to the substantive objection based on the official position of the accused. The draft text discussed in the Commission read:

> The official position of an individual as Head of State or responsible official does not free him from responsibility or mitigate punishment.[14]

The amended text proposed by G. Scelle was the following:

> The office of head of state, ruler or civil servant, does not confer any immunity in penal matters nor mitigate responsibility.[15]

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11 *Ybk. ILC 1954*, II, p. 152.
12 *Ybk. ILC 1991*, II, 2, p. 95.
13 *Ybk. ILC 1996*, II, 2, p. 26.
14 *Ybk. ILC 1949*, p. 183, n. 9.
15 *Ibid.*, p. 206.

The merit of G. Scelle's text was that it covered more clearly both aspects of the objection founded on the official capacity of the accused: the immunity issue *stricto sensu* of the agent and the substantive responsibility issue. The amendment was, however, rejected because it was contended that it was consistent with the Commission's language and therefore redundant:

> The Chairman said that that paragraph corresponded to paragraph 3 provisionally adopted by the Commission, according to which the official position of a Head of State or responsible civil servant did not confer any immunity in penal matters nor mitigate responsibility.[16]

In other words, the Commission immediately considered that the wording of the rule, rejecting any objection based on the official capacity of the accused, covered the substantive responsibility questions as well as any argument drawn from the procedural immunity of the State agent.

11. The position of the Commission did not change. In 1996, the Commission specifically noted that high officials who committed crimes against the peace and security of mankind could not escape responsibility because of their official position:

> It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke **the sovereignty of the State** and to **hide behind the immunity that is conferred on them by virtue of their positions** particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.[17] (Emphasis added)

The Commission further stated:

> Art. 7 [of the draft Code] is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. [...] As further recognised by the Nuremberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence [...].[18](Emphasis added)

The ILC concluded with a sentence that corresponded exactly with the distinction between the objection based on the official position of the perpetrator as a State agent, namely the *ratione personae* defence, and the procedural plea based on the

16 *Ibid.*, p. 212.

17 *Ybk. ILC 1996*, II, 2, p. 27.

18 *Ibid.*

ratione personae immunity of the author of the crime:

> It would be paradoxical to prevent an individual from invoking his official position to **avoid responsibility** for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[19] (Emphasis added)

12. One must be grateful to the drafters of the ICC Statute for having explicitly rejected the substantive objection, as well as the procedural plea, based on the official position of the perpetrator of the crime.

II. The Exclusion of a Procedural Plea Confined to the States Directly or Indirectly Bound by the ICC Statute

13. The ICC Statute binds those States that have accepted it by ratification, acceptation, approbation or adhesion.[20] Pursuant to the relativity principle of treaties, [21] the Statute has no effect on States not parties to the Statute.

It should be noted that the expression "States bound by the Statute" can include States that have recognised the jurisdiction of the ICC.[22] The Statute can also bind those States which, are concerned by a decision of the Security Council, to refer to the ICC a situation where crimes proscribed by the Statute may have been committed.[23] In this last case, all member States of the UN, in compliance with Art. 25 and 103 of the UN Charter, can be bound by the Statute.

Save contrary indication hereafter, the expression "States bound by the Statute" includes these three categories of States referred to above.

14. The removal of criminal immunity provided for by the ICC Statute can occur in three situations:
- in the case of prosecution started before the ICC (*A.*);
- in the case of a request for transferring a person claimed by the ICC (*B.*);
- in the case of prosecution started in a State (bound by the Statute) according to the complementarity principle (*C.*).

A. Immunity from prosecution before the ICC

15. Under the Statute, the ICC has jurisdiction over crimes listed in Articles .5 to 8 that are committed:
- by anyone on the **territory** of a State bound by the Statute (Art. 12, § 2, a; Art. 12, § 3; Art. 13, b); and
- anywhere by a **national** of a State bound by the Statute (Art. 12, § 2, a; Art. 12, § 3; Art. 13, b) (on condition that, in the case provided for by Art. 13, b, the crime be linked to the situation referred to the ICC by the Security Council).

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19 *Ibid.*

20 Article 125.

21 Vienna Convention on the Law of Treaties, Article 34..

22 Article 12, Section 3.

23 Article 13(b).

Since Art. 27, § 2, removes immunity from criminal jurisdiction of any person subject to the competence of the ICC in accordance with Art. 5-8 combined with para. 2 or 3 of Art. 12 or with the *littera* b of Art. 13, it can be said that in these cases no immunity can protect an accused against the jurisdiction of the ICC.

16. This conclusion is, however, to be tempered for the nationals of States not bound to the Statute with respect to the exceptions set forth in Art. 98. Under Art. 98, the ICC cannot request a State bound to the Statute to surrender a person who is entitled to an immunity provided for by international rules binding the requested State if this person is a representative of a third State. Art. 98 reads:

> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

17. Art. 98, § 1, is specifically concerned with leaders and diplomats of the "third States". According to an ordinary and reasonable interpretation of this provision combined with Art. 27 ("Irrelevance of Official Capacity"), "third States" are non parties to the Statute[24] which have not accepted the jurisdiction of the Court.[25]

The principle expressed in Article 98 is echoed in the Negotiated Relationship Agreement of 4 October 2004 concluded between the ICC and the UN in respect of UN agents. Under Article 19 of he Agreement, if the ICC wishes to exercise jurisdiction over a person enjoying any UN privileges or immunities, the UN will assist by, *inter* alia, waiving them so that the ICC may exercise such jurisdiction. Without this Agreement, the immunity of UN officials would prevail given the conventional character of the Statute.

18. By referring to "obligations under international agreements" and to "the consent of a sending State", Art. 98, § 2 addresses, more particularly, persons protected by headquarters agreements concluded between the origin State of the foreign forces and the host State of these forces (the SoFA – Status of Forces Agreements – and the SoMA – Status of Missions Agreements).

19. In other words, if the person sought by the Court is the agent of a third State to the Statute and if this person enjoys immunity from criminal process in the relations

24 P. Gaeta, "Official Capacity and Immunities", *in The Rome Statute of the International Criminal Court: A Commentary*, A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), Oxford Univ. Press, 2002, Vol. I, pp. 993 s.

25 *Ibid.*, p. 995.

between the requested State and the third State to the Statute, Art. 98 of the Statute gives primacy to the immunity over the exclusion of this immunity provided for in Art. 27, § 2, because the holder is either an official representative of a third State (Art. 98, § 1) or a national of a third State bound with the requested State by a headquarters agreement (Art. 98, § 2).[26] Under these circumstances, the requested State is not obliged to surrender the person sought to the ICC

The fact that crime was committed on the territory of a State bound by the Statute is of no consequence if the alleged perpetrator is an agent of a third State. Although the Court has jurisdiction for this crime under Article 12, § 2, a, Article 98 appears as a *lex specialis* prohibiting the State Party to surrender the person (protected by immunity) to the Court if the third State refuses the transfer.

20. Supposing, however, that the requested State decides to ignore the immunity of the person sought and surrenders him/her to the Court, can the latter exercise its jurisdiction? And what about if, by any chance or any other way (*e.g.*, a voluntary rendition), the person sought appears before the ICC while the national State would not have waived his/her immunity

The jurisdiction of the Court can be upheld since the Statute does not provide for any express prohibition in such a case: if the crime has been committed on the territory of a State bound to the Statute, the Court is competent (art. 12, § 2, a). If the immunity enjoyed by the alleged perpetrator is opposable to the requested State, this does not imply that the immunity is also opposable to the Court. In the *Yerodia* case, the ICJ observed that Art. 27, § 2, excluded the immunity of a person before the ICC; the ICJ did not reserve situations where the ICC could not exercise its jurisdiction.

Even if the argument is not quite significant, the jurisdiction of the ICC can be grounded in the fight against impunity on which the Statute is based (preamble, para. 4-6) and general international law,[27] the peremptory character of the obligation to suppress IHL crimes,[28] and thus its primacy over any procedural plea, and the numerous sources rejecting this penal immunity in case of IHL crimes,[29] in spite of the refusal of the ICJ to see in those sources

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26 G. M. Danilenko., "ICC Statute and Third States", *ibid.*, II, p. 1886.

27 See a.o., for genocide, Convention on the Crime of Genocide, 9 December 1948, Art. I and VI ; *Application of the Convention on Genocide, ICJ Rep. 1996*, p. 616, § 31 ; for crimes against humanity, A/Res. 3074 (XXVIII), 3 Dec. 1973, § 1 ; for war crimes, Geneva Conventions of 12 Aug. 1949, Common Art. 49/50/129/146 ; for the three categories of crimes, Draft Code of Crimes against the Peace and Security of Mankind, Art. 9 ; also see the numerous resolutions of the Security Council calling to fight against impunity in various situations : S/Res. 1468, §§ 6-7, 1529, § 7, 1543, § 8, etc ; for a more exhaustive list, E. David, *Eléments ..., op. cit.*, § 11.35.

28 On the recognition by the ICJ that the prohibition of genocide is a "*jus cogens*" rule, *Armed Activities in Congo, RDC v. Rwanda*, 3 Feb. 2006, *ICJ Rep. 2006*, § 64; also see sep. op. Dugard, *ibid.,* § 11.

29 *Contra Arrest Warrant case*, *ICJ, Rep. 2002*, § 58; for a criticism of this part of the judgement and the development of those points, see. E. David, "Règles de compétence en droit interne belge et régime de complémentarité, y compris les règles d'immunités après l'adoption de la loi du 29 mars 2004", *in La Belgique et la Cour pénale internationale: complémentarité et coopération*, Actes du colloque du 17 mai 2004, Bruxelles, Bruylant et SPF Justice, 2005, pp. 82 ss.

> any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity[30]

Conversely, it can be argued that the ICC is not outside general international law; Art. 21, § 1, b, obliges the Court to apply it. Immunity from criminal jurisdiction of State representatives is a part of general international law and, according to the ICJ, there is no exception to the customary immunity of a high State representative in case of IHL crimes.[31] Therefore, it is also possible to contend that, with respect to the spirit of Art. 98, the immunity of the official of a State not bound by the Statute is opposable to the ICC, despite the terms of Art. 27, § 2.

B. Immunity in case of a request by the ICC for surrender of a person sought

21. While immunity from criminal process gives the alleged perpetrator of an IHL crime legal protection against a suit brought against him in a foreign State, this immunity does not prevent the ICC from requesting this State to surrender the person for prosecution (Art. 58-59).

If the requested State is bound by the Statute and the case is admissible (Art. 89, § 2, and Art. 95), the requested State must grant the surrender irrespective of the immunity of the person sought according to its general obligation to cooperate with the ICC (Art. 86), combined with the exclusion of immunity (Art. 27, § 2), subject, however, to its obligations issuing from Art. 98 (*supra* §§ 16 ff.). In other words, the conventional nature of the Statute implies that the removal of the immunity only applies between the ICC and the States bound by the Statute, but not between the ICC and third States.

22. This conclusion could, however, be questioned in the name of the requirements of the fight against impunity (Statute, preamble, para. 4-6, and *supra* § 20).

Furthermore, if the crimes were committed during a war between the State party and the State of the person sought by the Court (State not bound by the Statute) and if the war leads to the conclusion that the agreements set down in Art. 98 are terminated or suspended because of a fundamental change of circumstances (1969 Vienna Convention on the Law of Treaties, Art. 62) resulting of the armed conflict, the immunity from prosecution set down by these agreements would not be any longer opposable to the State of the place of the crime.

23. Similarly, when the Security Council, under Art. 13, b, refers the ICC a situation where crimes proscribed by the Statute have been committed, the combination of Art. 25 and 103 of the UN Charter with Art. 27 of the Statute should remove the obstacle of immunity in Art. 98. Subject to a contrary decision of the Security Council, the requested State should surrender the person sought to the Court regardless of whether the State concerned by the surrender or by the crime is bound by the Statute.

A commentator goes further:

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30 *Arrest Warrant case, ICJ Rep. 2002*, § 58.

31 *Ibid.*

> Parties to the Rome Statute can argue [...] that in all cases under the ICC's jurisdiction, immunity could be denied to officials of any country, **irrespective of whether his or her country has ratified the Rome Statute**. Whether such a claim prevails will depend on the subsequent practice and reaction of third States. [32] (Emphasis added)

24. In order to avoid any risk of surrender of their citizens to the Court, the United States has concluded agreements with a number of States.[33] In the light of Art. 98, these agreements would be useless if they only covered American citizens enjoying immunity on the territory of the requested State. However, the scope of the agreements is wider and applies to all American citizens.

Although these agreements have been rightly criticised, they are not necessarily incompatible with the Statute. Under the agreements, the United States has committed itself to directly prosecute its nationals who participate in crimes proscribed by the Statute.[34] If the United States upholds this commitment, then the effect of the sprit of the Statute will be maintained.

C. Immunity from criminal process with respect to the principle of complementarity in a State bound by the Statute

25. According to Articles 1 and 17 of the Statute, the jurisdiction of the ICC is complementary to the jurisdiction of national courts. In other words, the ICC can judge the alleged perpetrator of an IHL crime only if this person is not prosecuted in the State where he/she can be found. Therefore, if this State refrains from prosecuting the alleged perpetrators, then, and only then, has the Court jurisdiction to take cognisance of the crime.

Even if Art. 1 and 17 do not formally oblige the States bound by the Statute to prosecute perpetrators of the enumerated crimes, the preamble of the Statute (para. 4-6) and general international law oblige States to take action[35] each time this is possible under the circumstances of the case.[36]

26. With respect to these principles, can the penal immunity of an accused bar a prosecution started in a State bound by the Statute for a proscribed crime?

The spirit of the complementarity principle should bar the penal immunity

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32 *Ibid.*, p. 1887.

33 On this question see, E. David, *La Cour pénale internationale*, *RCADI, 2005*, t. 313, pp. 442-446.

34 *Ibid.*, pp. 445-446.

35 See a.o., for genocide, Convention on the Crime of Genocide, 9 December 1948, Art. I and VI ;*Application of the Convention on Genocide, CIJ, Rec. 1996*, p. 616, § 31 ; for crimes against humanity, A/Rés. 3074 (XXVIII), 3 Dec. 1973, § 1 ; for war crimes, Geneva Conventions of 12 Aug. 1949, Common Art. 49/50/129/146 ; for the three categories of crimes, Draft Code of crimes against the Peace and Security of Mankind, Art. 9 ; see also the numerous resolutions of the Security Council calling to fight against impunity in various situations : S/Rés. 1468, §§ 6-7, 1529, § 7, 1543, § 8, etc ; for a more exhaustive list see, E. David, *Eléments ...*, *op. cit.*, § 11.35.

36 E. David, *La Cour pénale internationale*, *op.cit.* , p. 350.

of persons indicted for crimes provided for by the ICC Statute. In its Counter-Memorial in the *Arrest Warrant case (Yerodia)*, Belgium argued;

> If the immunity of the members of foreign governments were not removed for the prosecution of the crimes set down in the Statute, the principle of complementarity would be unnecessary in most cases. Insofar as the jurisdiction of the ICC is limited to the 'most serious crimes' (Art. 1) and presenting a certain magnitude (Art. 6, 7 (1) and 8 (1)), these crimes consequently are mostly imputable to the highest State authorities. If these authorities could argue the immunity traditionally recognised for the members of foreign governments, they would only be subject to prosecution in their State of origin and the subsidiary role of the Court would be effective only under this hypothesis. Conversely, the other States could never prosecute these crimes and the role of the Court, rather than being complementary, would become principal – which does not correspond to the intention of the authors of the Statute.[37]

The Court was so insensible to the argument that it did not even answer it! The Court held that customary international law did not confirm the lack of immunity of an incumbent Minister for Foreign Affairs prosecuted for IHL crimes since practice was insufficient. Consequently, customary immunity from criminal process enjoyed by a Minister for Foreign Affairs continued to protect him against judicial suits brought before foreign courts as long as he was in office, even if the facts attributed to him were IHL crimes. The ICJ did not take into account Belgium's opposition of this rule of absolute immunity or its subjection to a recognition of the official position of its holder by the forum State or the numerous other reasons already mentioned in favour of the removal of the immunity (*supra* § 20).

27. It must however be observed that the Court only dealt with immunity for IHL crimes in the light of **customary** international law. The complementarity principle arises from the Statute so the principle proceeds from **conventional** international law which is not affected by the ICJ judgment. Thus, it can be argued that immunity does not bar penal prosecution in the court of a State bound by the Statute against the holder of a penal immunity, if the latter has committed a crime proscribed by the Statute and is a citizen of a State bound by the Statute.

28. However, if the State bound by the Statute refuses to prosecute this person because of immunity, and if the national State, also bound by the Statute, does not prosecute the person either, the case can come before the ICC in compliance with Art. 12 or 13 of the Statute.

29. The issue is less clear where the crime has been committed on the territory of a State bound by the Statute and the alleged perpetrator is a national of a third State. Even if Art. 98 of the Statute (*supra* § 16) only concerns "a request for surrender or assistance" and not penal prosecution *stricto sensu*, the spirit of the provision suggests

37 ICJ, *Arrest Warrant of 11 April 2000 (DRC v. Belgium), Counter Memorial of the Kingdom of Belgium*, 28 Sept. 2001, § 3.5.32 (3), pp. 139-140 (multigr.).

that the person could not be prosecuted by the judicial authorities of the State bound by the Statute.

This conclusion can, of course, be discussed (*supra* § 22) and there are good arguments *pro* and *contra* the jurisdiction of the court entrusted with the case. The answer would be easier if a rule of conventional international law excluding immunity applied to the case (*e.g.*, 1948 Convention, Art. IV; 1968 Convention, Art. II, *supra* § 4).

Conclusions

30. The ICC Statute rightly distinguishes and removes both the substantive objection available to the perpetrator of a crime proscribed by the Statute and committed in his/her official capacity (Art. 27, § 1) and the procedural plea enjoyed by the alleged perpetrator as a State representative (Art. 27, § 2).

The removal of these objections only concerns the nationals of States bound by the Statute, but if a situation is referred to the ICC by the Security Council (Art. 13, b), the removal of the objections could extend to the nationals of all UN member States involved in this situation.

If the immunity of a third State representative can prevent his/her prosecution before a domestic court or his/her surrender to the ICC for crimes set down in the Statute, it can be upheld that the *Yerodia* precedent should not necessarily be an insurmountable obstacle. As a reminder, the ICJ judgement only concerned international customary law, while prosecution of these crimes on the basis of the complementarity principle established by the ICC Statute would be a matter for conventional international law. It is true that Art. 98 of the Statute tends to weaken the argument but it does not wipe it out. More especially, in case of a prosecution before a domestic court or surrender to the Court, the requirements of immunity must always be subordinated to a careful consideration of the requirements of the fight against impunity.

31. We can try to synthesise the different situations in the following table. In each case we shall check if a person enjoying immunity from criminal jurisdiction keeps this immunity in case of prosecution for a crime set down in the Statute.

	Crime committed by the national of a State bound by the Statute	Crime committed by the national of a third State on the territory of a State bound by the Statute	Crime committed by the national of a third State on the territory of a State not bound by the Statute
The author is prosecuted in his/her own State	No international law immunity in the home State		
The author is prosecuted in a foreign State bound by the Statute	No immunity by virtue of the spirit of Art. 1 and 17 (requirement of complementarity) combined with Art. 27, § 2	Immunity according to the spirit of Art. 98	Immunity according to the *Arrest Warrant case* precedent
The author is prosecuted before the ICC	No immunity (Art. 27, § 2)	No immunity (Art. 27, § 2) but questionable on the basis of the spirit of Art. 98	No jurisdiction of the ICC
The author is prosecuted in a foreign State not bound by the Statute	Immunity according to the *Arrest Warrant case* precedent		

Chapter 32

Self-Defence and State of Necessity in the Statute of the ICC

Eric David

Introduction

1. When a person is prosecuted before the International Criminal Court (ICC) for a crime referred to in the Statute (Art. 5-8), he/she can invoke different defences. In particular, the accused can assert self-defence as a ground for precluding criminal responsibility. Art. 31, § 1, of the Statute states:

> In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
> [...]
> c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for accomplishing a military mission against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.[1]

The language of this paragraph only refers to self-defence, but when the text mentions the defence of "property which is essential for accomplishing a military mission," it tends to extend the objection to the more general concept of necessity. Both notions are actually sufficiently close such that one can say that in general criminal law necessity is the genus and self-defence the species.[2]

2. Self-defence can be invoked in the context of interstate relationships, as well as individual ones. In both cases, self-defence refers to the right of a State or of a person to use force in order to repulse an armed attack or violent acts undertaken against this State or this person by, respectively, one or several other States (UN Charter,

1 For an in-depth analysis of this provision, see " L'article 31, § 1, c, du Statut de la Cour pénale internationale ", Workshop organised by the Consultative Commission of International Humanitarian Law of the Belgian Red Cross (French-speaking section), *RBDI*, 2000, pp. 355-488 (hereafter, "'L'article 31, § 1, c', *loc. cit.*").

2 C. Hennau and J. Verhaegen, *Droit pénal général*, Bruxelles, Bruylant, 1995, p. 193.

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 ISBN 978 90 04 16308 9. pp. 757-777.

Art. 51) or one or several other persons (*e.g.*, Belgian Criminal code, Art. 416-417). Whether State or individual, the victim can use self-defence only in a manner proportionate to the attack that he/she suffers.[3]

3. Like the plea of self-defence, the defence of necessity applies to interstate and individual relationships. In both cases, necessity justifies, subject to some conditions, the unlawful behaviour adopted by a State or a person in order to safeguard an interest superior to the one protected by the violated norm.. Concerning a State, the defence of necessity refers to the protection of "an essential interest against a grave and imminent peril" (Draft Articles of the International Law Commission [ILC] on State Responsibility, Art. 25, § 1, a).[4] Concerning an individual, the defence of necessity is used to evoke the protection of a value superior to the one the violation of which is criminalised by law[5].

4. Since the text of Art. 31, § 1, c of the ICC Statute itself provides that it only concerns grounds for justification proper to individual relationship, self-defence and necessity will be analysed only from this perspective, however, before we do so we will also briefly analyse these concepts in the context of interstate relationship.

The crimes referred to in the Statute (Art. 5-8: aggression, genocide, crimes against humanity and war crimes) are often committed by State organs such as armed forces or political leaders. During the ILC's work on the Draft Code of Crimes Against the Peace and Security of Mankind, P. Reuter rightly observed "that most, if not all, of the crimes covered [by the Draft Code] were State crimes in the first place."[6] This situation can lead to a "*concours de responsabilités*."[7] Therefore, an analysis of the defences of self-defence and necessity must consider the way in which these defences work when applied to States.

5. Let us begin with an examination of the plea of self-defence as this is the main object of Art. 31, § 1, c, (I.). We will then move to an analysis of the wider concept of necessity (II.).

I. Self-defence

6. According to Art. 31, § 1, c, self-defence is a ground for justification or for precluding criminal responsibility for crimes set out in the Statute. The provision is nothing less than surprising: to say that a genocide or a crime against humanity could find some justification through self-defence is at least strange, if not absurd,

3 For States, see *Military Activities in Nicaragua*, *ICJ Rep. 1996*, p. 94, § 176; advisory op., *Legality of the threat or use of nuclear weapons ICJ Rep. 1996*, p. 245, § 41 ; for individuals, C. Hennau and J. Verhaegen, *op. cit.*, pp. 192 ss.

4 A/Rés. 56/83, 12 Dec. 2001, annex.

5 J. Messinne, *in* Sénat de Belgique, *Ann. Parl.*, 1-147, 9 déc. 1997 ; also, C. Hennau and J. Verhaegen, *op. cit.*, pp. 178 ss.

6 *Cfr.* P. Reuter *in Ybk. ILC 1987*, I, p. 41.

7 J. Salmon and P. Klein, *in* "L'article 31, § 1, c", *loc. cit.*, p. 364 ; see also, A. Pellet and S. Szurek, *ibid.*, p. 405.

unless we give the States credit for a dark sense of humour. Nevertheless, we shall consider how the self-defence concept has been dealt with by the ILC (A.) and then examine the extent of this objection in the Statute of the ICC (B.).

A. The work of the ILC

7. The ILC's work on the Draft Code of Crimes against the Peace and Security of Mankind (the "Draft Code") shows that it did not favour a provision allowing an accused to assert a plea of self-defence to excuse or justify such crimes. This stands in stark contrast to the provision adopted in the ICC Statute.

Many of the members of ILC questioned the legitimacy of allowing an accused to plead self-defence to justify such crimes. Their comments on this point are notable, so constant and coherent as they are.

C. Tomuschat doubted "whether an act characterised as an offence against the peace and security of mankind could ever be justified on the ground of self-defence. In particular, military activities undertaken in response to aggression by another State did not normally constitute such an offence, but war crimes could never be justified by Article 51 of the Charter of the United Nations."[8]

Y. G. Barsegov wondered "how could there be self-defence in the case of aggression, recourse to nuclear weapons or genocide?"[9]

C. Rodrigues could not "imagine self-defence as justifying any of the acts to be listed in the draft code."[10]

P. Sreenivas Rao "rejected self-defence as a proper exception to the application of the code."[11]

For B. Graefrath "there was no need for a clause on individual self-defence, since the question of self-defence could hardly arise in connection with the offences covered by the present code."[12]

A. J. Jacovides urged "the restoration of the article, which provided that, subject to the qualifications expressly stated, 'no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind."[13]

F. M. Hayes agreed "with other members of the Commission ... that self-defence did not seem an appropriate exception where offence against the peace and security of mankind were concerned."[14]

F. X. Njenga "could not see how self-defence by an individual could possibly justify the commission of a crime against humanity."[15]

According to L. Solari Tudela, "an offence against the peace and security of mankind was, by its nature, one that could not be excused on grounds of self-defence."[16]

8 *Ybk. ILC 1987*, I, p. 9.
9 *Ibid.*, p. 14.
10 *Ibid.*, p. 16.
11 *Ibid.*, p. 17
12 *Ibid.*, p. 21.
13 *Ibid.*, p. 23.
14 *Ibid.*, p. 24.
15 *Ibid.*, p. 25.
16 *Ibid.*, p. 26.

A. Yankov observed that "[s]elf-defence and state of necessity could not also be invoked as exceptions in the case of offences under consideration."[17]

J. Shi doubted whether self-defence could be an exception "[I]n the case of aggression, in view of the provisions of Article 51 of the Charter of the United Nations [...] There was also some question as to whether self-defence could be admitted as a defence in respect of crimes against humanity. For the sake of consistency and accuracy, self-defence should be omitted from the list."[18]

G. Eiriksson considered that "the concept of self-defence was to be ruled out: in the case of aggression, it fell outside the scope of the definition itself and, in other cases, it should not be admitted as an exception."[19]

C. Sepulveda Guttierez "found draft article 9 [the provision relating to defences] difficult to accept in its present form."[20]

S. C. McCaffrey accepted self-defence "only in very limited circumstances", referring to the case of "a leader of State A [who] ordered an armed attack on State B in the exercise of the right of self-defence under Article 51 of the Charter of the United Nations."[21] L. Diaz Gonzàlez was of the same opinion.[22]

8. At the conclusion of the (limited) debate, the Special Rapporteur, D. Thiam, admitted that "exceptions to the principle of responsibility [...] could not apply to crimes against humanity in general, but only in war crimes."[23]

9. One would have hoped that States would comment also on this particular point. However this did not happen. Some States only said that if the Draft Code dealt with penalties, it should also deal with defences[24] or, at least some defences[25]. Some States felt that the issue should be left to the court's consideration.[26] The U.K., however, observed that it was: "difficult to conceive of 'blanket defences' which will adequately cover the circumstances of each and every crime set out in part two [of the Draft Code]."[27] Belgium noted that,"[i]t would appear difficult to apply the concept of defences, as provided for under draft article 14, to crimes against the peace and security of mankind."[28]

10. In the end, the ILC decided to keep a provision on the defences generally. Some members of the ILC's working group felt that the Draft Code should include a provision specifically dealing with self-defence. As a compromise solution between the

17 *Ibid.*, p. 28.
18 *Ibid.*, p. 33.
19 *Ibid.*, p. 34.
20 *Ibid.*, p. 38.
21 *Ibid.*, p. 44.
22 *Ibid.*, p. 56.
23 *Ibid.*, p. 62.
24 Australia, Switzerland, *ibid.*, 1993, II, 1, pp. 64, 107.
25 Austria, *ibid.*, p. 67.
26 Belarus, *ibid.*, p. 69.
27 *Ibid.*, p. 100.
28 *Ibid.*, p. 71.

supporters of a provision on self-defence and the opponents, it was decided to provide for a "general clause" which would mention no justification in particular, "and would leave it to the court to determine the admissibility of defences under the general principles of law on defences, in the light of the character of each crime."[29]

11. Such is the meaning of the Draft Code adopted in 1996.[30] In its comments, the ILC observed that neither the Statute nor the judgement of the Nuremberg IMT nor the international humanitarian law (IHL) conventions have recognised any "defences to crimes against peace, war crimes or crimes against humanity."[31] Finally, the ILC only referred to the cases of aggression and war crimes.[32] In cases of aggression, the ILC rightly observed that an individual's right to self-defence was subject to the existence of a State self-defence pursuant to Art. 51 of the UN Charter. We shall see, however, that it is impossible that a fact labelled as an aggression could be called self-defence (*infra* §§ 25 ff.).

Concerning war crimes, the ILC simply observed that self-defence had been "recognised as a possible defence" in only one trial after the second World War.[33] However, the recognition was merely theoretical *obiter dictum* of the General Advocate and this did not prevent the accused (Willi Tessmann) from being condemned to capital punishment.[34]

12. In conclusion, we observe that the ILC was very reticent to the idea that self-defence could ever constitute a defence against a crime against the peace and security of mankind. The only case in which the Commission was prepared to allow a plea of self-defence was the use of force by a State against another State where certain conditions were met, *i.e.*, when the latter committed an aggression against the former.

B. The extent of self-defence in Art. 31, § 1, c

13. In light of the ILC's position, Art. 31, § 1, c, is a rather surprising provision. This is particularly so when one considers that the law of State responsibility views the crimes of aggression and IHL as *jus cogens* violations which cannot be justified by self-defence or necessity.[35] Consequently, it would be illogical to allow individuals to exonerate themselves from criminal responsibility for the reasons in Art. 31, § 1, c, while the States for whom they act could not do so.[36]

However, this did not prevent the Roma Diplomatic Conference from adopt-

29 *Ibid.*, 1991, I, p. 202.

30 Art. 14 : "The competent court shall determine the admissibility of defences in accordance with the general principles of law in the light of the character of each crime."

31 *Ybk. ILC 1996*, II, 2, p. 39.

32 *Ibid.*, p. 40.

33 *Ibid.*

34 www.ess.uwe.ac.uk./WCC/warcrimcon.htm.

35 ILC draft articles on State responsibility, art. 26 combined with art. 21, 24 and 25, *in* A/Rés. 56/83, 12 Dec. 2001, annex ; see also J. Salmon and P. Klein, A. Pellet and S. Szurek, G. Abi-Saab and L. Condorelli, *in* "L'article 31, § 1, c", *loc. cit.*, pp. 372, 405, 406.

36 J. Salmon and P. Klein, *ibid.*, p. 373.

ing a provision which, according to rumours, arose from a proposition presented by Israel and/or the US. The documents of the Conference simply say that:

> the text of this provision was the subject of extensive negotiations and represents quite delicate compromises.[37]

One cannot but regret the lack of access to the session recordings of the discussions relating to the provision.

In fact, it seems that many delegations at the Conference were conscious of the unacceptable character of the provision but, in order to avoid a failure of the Conference because of this text, accepted it and worded it in such a way that it should remain useless, particularly, by setting forth strict conditions for its application, and thanks to the life-buoy that Art. 21 of the Statute was supposed to be [38] as it will be seen hereafter.

We shall examine, firstly, the conditions of application of the provision (1.), and secondly, its applicability to the crimes referred to in the Statute (2.).

i. The Conditions of Application of Art. 31, § 1, c

14. The plea of self-defence will preclude responsibility if the following conditions exist: (a) the act taken in self-defence is reasonable and proportionate to the degree of danger threatening the person who resorts to self-defence, (b) the use of force constituting the threatened danger is imminent and unlawful, and (c) self-defence complies with Art. 21 of the Statute.

a. A reasonable and proportionate self-defence

15. That self-defence be proportionate and reasonable is a classic condition of self-defence (*supra* § 2). The problem – and it is not small – is that it is difficult to see how a fact constituting, *a priori*, a crime of genocide or a crime against humanity can be reasonable and proportionate![39] If an ordinary crime is not reasonable, then, what about genocide and crimes against humanity? Both of these crimes are the epitome of what is unreasonable. How can the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (Genocide Convention, Art. II; ICC Statute, Art. 6) become reasonable in the name of self-defence? How can murder, extermination, enslavement, deportation, torture, rape, etc, "committed as part of a widespread or systematic attack directed against any civilian population" (Statute, Art. 7) be assimilated to a reasonable behaviour justified by self-defence? Such facts cannot belong to any admissible rationality in a world founded on the rules of the UN Charter.

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37 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July 1998, Official Records, Doc. ONU A/CONF.183/13 (vol. III), Documents of the Committee of the Whole, p. 256.

38 G. Dive, *in* "L'article 31, § 1, c", *loc. cit.*, p. 479.

39 N. Keizer (but with some hesitations) and G. Rona, *in* "L'article 31, § 1, c" *loc. cit.*, pp. 444, 446-447.

16. The criteria of proportionality and reasonableness could, however, apply to aggression or war crimes, even if, as it will be seen later, it is technically impossible to justify these facts by self-defence (*infra* §§ 32 ff.).

b. An imminent and unlawful use of force

17. By definition, self-defence is a lawful response to an unlawful use of force. In this regard, the criterion of unlawfulness does not raise any difficulty: the victim of an unlawful use of force can defend him/herself because this use of force is an **actual** use of force. For instance, in domestic law, if a person breaks into a house, the lawful occupant of the house can use force to repel the intruder.

However, Art. 31, § 1, c) goes further by saying that an **imminent** use of force is sufficient! This criterion of imminence raises a juridical and a factual difficulty.

18. The juridical difficulty comes from the fact that it is impossible to assess the lawfulness of an act before it has been committed. For example, under domestic law, when a person attacks another person or forcibly enters another's home, the wrongfulness of the fact is exemplified by the attack itself or the forced entry. The judge can evaluate the plea of self-defence in these situations by considering whether the attacker initiated the assault or forced entry into the victim's home. Such a control requires the existence of a real and actual fact, not an hypothetical, potential one, perhaps even, merely probable or possible.

If one accepts the criterion of imminence (as adopted under Art. 31 § 1, c, of the ICC Statute) in the domestic context, how could the judge assess the reality of the danger run by the alleged victim: an uncalled-for word, a clumsy movement, a funny look would be sufficient to ground an offence against the author of this word, of this movement or of this look? It seems evident that the threat would lose any objectivity and the judge would be unable to assess its reality. In other words, the criterion of imminence contradicts the ground of self-defence. Supposing that self-defence could play some role for precluding criminal responsibility in the crimes referred to in the Statute – we shall see that this is not the case – self-defence could in no way be justified by an imminent use of force because it would be impossible to assess its lawfulness as long as force has not been used.

19. The factual difficulty of the criterion of imminence resides in the fact that it constitutes a Pandora's box apt to ground all abuses: the subjective appraisal by the **possible** victim alone that he/she will be attacked would justify a crime set out by the Statute. To admit a genocide crime or a crime against humanity or a war crime in the name of a mere belief (i.e. the purported imminence) which is, by definition, impossible to check, is a blank cheque to justify the worse crimes.

20. The criterion of imminence conceals another difficulty in the hypothesis of a resort to force in order to justify an aggression referred to in Art. 5 of the Statute. Let us consider an alleged act of aggression justified by self-defence – *quod non* (*infra* §§ 25 ff.). The criterion of imminence would allow anticipatory self-defence such that the first use of force in the name of preventive self-defence would erase the qualification of aggression which, according to the definition of aggression adopted by the

UNGA,[40] should be assigned to this use of force. This hypothesis assumes that preventive self-defence is recognised in international law, a position that is supported only by a minority.[41] The texts certainly do not support this position. Art. 51 of the Charter allows self-defence only "if an armed attack occurs against a Member of the United Nations [...]."[42] The definition of aggression in Art. 2, limits the plea of self-defence to "the first use of force by a State in contravention of the Charter" and only the Security Council may reverse the presumption and decide that there is no aggression.

The criterion of imminence is thus contrary to positive law, and in particular, to the law of the UN Charter. With respect to Art. 103 of the latter, the Charter has primacy over the Statute and the criterion of imminence can under no circumstance justify an "aggression" that its author would call "self-defence".

c. Self-defence under Art. 21, § 3, of the Statute

21. Art. 21, § 3, of the Statute compels the ICC to apply the Statute in a manner compatible with human rights. Here also, it seems difficult to imagine that one can assert a plea of self-defence to a crime committed in violation of International Humanitarian Law without necessarily violating human rights.[43] This applies in particular to the non-derogable rights such as the right to life, the prohibition of torture, and the prohibition of inhumane and degrading treatments (as defined in international treaties such as the European Convention on Human Rights, Art. 15; International Covenant on Civil and Political Rights, art. 4; American Convention on Human Rights, Art. 27).

22. In conclusion, if self-defence must be reasonable and proportionate, self-defence cannot justify a genocide crime or a crime against humanity because of the definition of these crimes. Even if these criteria could be a ground for an aggression or a war crime, they could certainly not justify such facts if they were committed in order to meet an unlawful use of force which would be imminent and not actual: on the one hand, it is difficult to consider an act which has not yet been committed as a wrongful act: on the other hand, even if an imminent use of force was unlawful according to international law, one does not see how the judge could assess the criterion of imminence.

We now turn to a consideration of whether an actual and unlawful use of force could justify, in the name of self-defence, one of the crimes referred to in the Statute.

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40 A/Res. 3314 (XXIX), 14 Dec. 1974.

41 See the commentary of the ILC on art. 34 of the former Draft Articles on State Responsibility, *Ann. CDI*, 1980, II, 2nd part, p. 57.

42 *Military Activities in Nicaragua*, *ICJ Rep. 1996*, p. 103.

43 G. Rona, *in* "L'article 31, § 1, c", *loc. cit.*, pp. 446-447.

ii. The Applicability of Self-Defence to the Crimes referred to in the Statute

23. Rather strangely, outside the workshop held on this question by the IHL Commission of the French-speaking part of the Belgian Red Cross,[44] the authors have generally examined this provision as a classic ground for justification without really taking into consideration the very particular nature of the crimes referred to in the Statute.[45] However, it is difficult to ignore the gravity of the crimes concerned by this ground for justification. It is against this background that we shall examine the relevance of this defence for each of the crimes referred to in the Statute.

a. Aggression

24. Although aggression remains a potential crime under the Statute, it is a crime which the ICC will be able to judge only once it is clearly defined (Art. 5, 121 and 123).

25. In the interim, we can consider the definition adopted by the United Nations General Assembly in 1974. The General Assembly defined the crime of aggression as "the first use of force by a State" against another State (Definition of Aggression, Art. 1-2[46]). Accordingly, the State initiating the attack commits an "aggression" which, apart from a wave of the wand or a conjuring trick, cannot qualify as "self-defence" since self-defence is, by definition, a response to an aggression.[47] Of course, the Security Council – but only the Security Council – can reverse the presumption of aggression which applies to a first use of force (Definition of Aggression, Art. 2). Since this competence is reserved to the Security Council, Art. 31, §1, c, loses any autonomy and cannot be a defence against aggression. As nothing in the text provides that Art. 31, §1, c, in a case of aggression would cover the hypothesis of a new qualification by the Security Council, this provision appears to have little utility or even function in the case of aggression.

The only hypothetical situation where Art. 31, §1, c, could play some role is in case of the so-called anticipatory self-defence, but we have just seen that this hypothesis must be excluded in the present state of positive law.

26. In short, in view of the very restrictive meaning of aggression and self-defence in international law (pending a new definition by the Assembly of the States that are party to the Statute of the ICC), it is, presently, legally impossible to "justify" an aggression on the basis of self-defence. Only the Security Council could say that a

44 "L'article 31, § 1, c", *loc. cit.*, pp. 355 ss.

45 *E.g.*, A. Eser, *in* O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, pp. 548-550 ; K. Ambos, "Other Grounds for Excluding Criminal Responsibility", *in The Rome Statute of the International Criminal Court: A Commentary*, A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), Oxford Univ. Press, 2002, I, pp. 1031-1035.

46 A/Res. 3314 (XXIX), 14 Dec. 1974.

47 *Military Activities in Nicaragua*, *ICJ Rep. 1996*, p. 103 ; J. Salmon and P. Klein, *in* "L'article 31, § 1, c", *loc. cit.*, pp. 366-367.

use of force presumed to be an aggression is not an aggression under the circumstances. This competence is exclusive to the Council: Art. 2 of the definition adopted by the UNGA did not confer such a competence on a State or to a judge.

Furthermore, it is not certain that the Security Council would present the first use of force by a State as a case of "self-defence". The Security Council could also legitimate this use of force through the necessities of the maintenance of peace and international security without invoking self-defence as it has done for various coercive humanitarian interventions authorised during the recent past.[48]

In any case, as self-defence only exists as a response to an aggression and as any other application of self-defence requires a qualification by the Security Council, Art. 31, §1, c, would be of no use for charges for the crime of aggression.

27. A footnote to the draft Art. 31, §1, c, which had been transmitted to the Committee of the Whole of the Roma Conference by the Working Group on General principles of Criminal Law, stated that this provision, "only applies to action by individuals during an armed conflict. It is not intended to apply to the use of force by States, which is governed by international law."[49] This explanation makes the meaning of Art. 31, §1, c, more obscure. If the provision does not apply to the use of force by States (through individuals), would it mean that the crime of aggression set forth by the Statute does not correspond with aggression defined by international law? But then what crime are we talking about? An ordinary assault? This would not make sense since the Statute only addresses "the most serious crimes of international concern" (Art. 1 and 5) and it is for these crimes that Art. 31, §1, provides grounds of justification. In so far as this footnote is unclear, it cannot affect the previous conclusion, that is, that Art. 31, §1, c, is legally inapt to justify a crime of aggression given the way in which it must be defined.

iii. Genocide and Crimes against Humanity

28. As noted by doctrine, State self-defence falls within the scope of *jus contra bellum* and cannot justify facts belonging to *jus in bello* and human rights.[50] To some extent, this is also stated by the second phrase of the *littera* c of Art. 31, §1:[51] participation to a defensive operation "shall not in itself constitute a ground for excluding criminal responsibility" in the crimes set out by the Statute. The provision provides, nevertheless, that beyond this general hypothesis, self-defence could excuse these crimes, in particular, genocide and war crimes.

29. This position is untenable. Genocide is characterised by a particular "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (Statute, Art. 6). One cannot pretend to defend one's life by endeavouring to destroy

48 *E.g.*, for Bosnia-Herzegovina, S/Res. 770, 13 Aug. 1992, § 2 ; S/Res. 816, 31 March 1993, §§ 1 ss.; etc ; for an exhaustive list, E. David, *Droit des organisations internationales*, Presses univ. de Bruxelles, 2004, 16e éd., pp. 294-304.

49 United Nations Diplomatic Conference ..., *op. cit.*, p. 256.

50 J. Salmon and P. Klein, "L'article 31, § 1, c", *loc. cit.*, pp. 366-367.

51 A. Andries, A. and J. Verhaegen, *ibid.*, p. 428.

this group.[52] As previously seen (*supra* §15), one would have to be "very good" to succeed in construing a genocide as an act of self-defence answering the criteria required by Art. 31, §1, c, that is, to be reasonable and proportionate.

The same conclusion must also be drawn for a crime against humanity. This crime is, by definition, committed in the context of an attack directed massively against a "civilian population" (Art. 7, §1). It is difficult to characterise such an attack as a reasonable and proportionate act of self-defence, save to give the words a meaning that they do not have. This point had been recalled by most members of the ILC in 1987 when they prepared the draft code of crimes against the peace and security of mankind (*supra* § 7).

Crimes against humanity and genocide, exclude by definition, their assimilation with acts of self-defence.

30. However, does a hypothesis not exist where a crime committed in the context of a genocide or a crime against humanity could be justified by self-defence? Some elements of the definition of these crimes must be recalled.

Genocide and crimes against humanity are crimes of a massive character in that they involve the perpetration of a high number of crimes. This massive character is, in principle, inherent in the case of genocide to the notion of destroying "in whole or in part, a national, ethnical, racial or religious group, as such" (Genocide Convention, Art. II; ICC Statute, art. 6). Although it is less the number of the victims than their "substantial" proportion[53] with regard to the group considered which matters, the number of victims reached, will be at least, hundreds or thousands persons.[54] A crime against humanity also presents a massive character because it requires a "widespread or systematic attack directed against any civilian population" (ICC Statute, Art. 7, § 1). Such an attack implies "the *multiple* commission" (emphasis added) of crimes enumerated as crimes against humanity (*ibid.*, Art. 7, § 2, a).

Against this background of massive crimes, even isolated crimes can be assimilated into crimes of genocide or crimes against humanity[55] if they are committed in the context of a widespread or systematic attack directed against the civilian population[56] or are committed with a discriminatory intent to destroy a particular group.[57]

This kind of situation generally arises in an armed conflict or where there are internal tensions. It is clear that the victims can defend themselves against persons

52 G. Abi-Saab and L. Condorelli, *in* "L'article 31, § 1, c" *loc. cit.*, p. 406 ; M. Deyra and C. Chabanon, *ibid.*, pp. 413 ss. ; G. Rona, *ibid.*, p. 446 ; D. Vandermeerch, *ibid.*, p. 453.

53 ICTY, case IT-99-36-T, *R. Brotanin*, 1st Sept. 2004, § 974.

54 The UNGA did not hesitate to call "genocide" the massacres of Sabra and Chatila (between 700 and 1500 victims), A/Rés. 37/123 D, 16 décembre 1982, § 2, 123-0-22, while the Palestinian population of these camps represented a weak percentage of the Palestinian population in Lebanon.

55 *Rapport CDI*, 1989, p. 147, § 147 ; *ibid.*, 1996, Doc. ONU A/51/10, pp. 114 and 116 ; ICTY, case IT-95-13-R61, *Vukovar Hospital*, 3 April 1996, § 30; *id.*, case IT-94-1-T, *Tadić Judgement,* 7 May 1997, §§ 644-647 ; *id.*, case IT-95-16-T, *Kupreskic*, 14 Jan. 2000, § 550.

56 *Id.*, case IT-95-14-T, *Blaškić* 3 March 2000, §§ 198-202; *id.*, case IT-96-23 and 23/1-T, *Kunarac et al.* 22 Febr. 2001, § 431.

57 See the Elements of crimes adopted by the Assembly of States parties to the ICC Statute, 9 Sept. 2002, Art. 6-7.

who have nothing to do with persons directly or indirectly responsible of a genocide or a crime against humanity. Might one then not consider that the crimes committed by the victims of the ... victims would be an example of application of the self-defence referred to in Art. 31, § 1, c?

The answer is negative for a very simple reason: persons who do not participate in the genocide or crimes against humanity but commit a crime to repel an attack are not guilty of genocide or a crime against humanity because they do not have the requisite *mens rea* (intent to destroy, in whole or in part, a population or intent to participate to an attack against a civilian population). Their "crimes" constitute acts of self-defence which are governed by the **general principles** of ordinary criminal law. Therefore since the persons lack the requisite *mens rea*, acts committed in self-defence do not appear as a crime of genocide or a crime against humanity. Since from the outset these acts are not crimes of genocide or crimes against humanity, there is no need for them to lose their character in order to be excused under Art. 31, § 1, c.[58]

Thus, this hypothesis is not covered by Art. 31, § 1, c, as a ground for precluding criminal responsibility about crimes referred to in Art. 6 and 7 of the Statute.

31. What if a person, having committed crimes of genocide and crimes against humanity, commits crimes to defend him/herself against the victims of his/her crimes? If these crimes are related to the IHL crimes committed by this person, they could not be justified by self-defence because they would be part of criminal complex crime characterised by a "unité de réalisation"[59] where the crimes of genocide or the crimes against humanity prevail.

However, if these facts are totally independent of IHL crimes (*e.g.*, they are committed at another time), then they get an autonomy which make them similar to the previous case (*supra* § 30): they can be excused in conformity with ordinary criminal law, but as they were not, *ab initio*, IHL crimes, they would not be covered by Art. 31, § 1, c, and of course, they would also not excuse IHL crimes committed previously by their author.

iv. War Crimes

32. War crimes attract the same remarks, but with some nuances.

A war crime is a crime committed in an armed conflict.[60] In an armed conflict, there is a presumption that an act of war is justified if it is consistent with the applicable law, such as the law of armed conflicts or IHL considered *lato sensu.*[61] It does not matter that the act is committed in self-defence or is of a purely offensive nature

58 S. Szurek and A. Andries, *in* "L'article 31, § 1, c", *loc. cit.*, p. 478.

59 F. Tulkens and M. van de Kerchove, *Introduction au droit pénal*, Kluwer éd. jurid. Belgique, 1999, p. 314.

60 On the link between the crime and the armed conflict, see ICTY, case IT-23 et 23/1-A, *Kunarac et al.*, 12 June 2002, §§ 58 ss. ; ICTR, case ICTR-97-20-T, *Semanza*, 15 May 2003, §§ 518 ss. ; *id.*, case ICTR-96-3-A, *Rutaganda*, 26 May 2003, §§ 570 ss.

61 *Cfr.* E. David, *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, 3e éd., §§ 1.24-1.28.

(*e.g.*, to take an enemy position or to bomb a military objective outside any self-defence). The act is lawful so long as it is accomplished in accordance with the IHL rules. In his fourth report on the draft code of crimes against the peace and security of mankind, the Special Rapporteur, D. Thiam, rightly wrote:

> When hostilities have broken out, [...] one cannot speak of self-defence between the combatants, because the attack unfortunately becomes as legitimate as the defence as long as the 'the laws and customs of war' are respected.[62]

When an act of war grossly violates IHL, this act can fall under the list of war crimes provided for in the 1949 Geneva Conventions (GC) or in the 1977 first Additional Protocol (AP) or in other instruments. It does not matter that the act is committed during an offensive or a defensive action if the act meets the elements of a war crime. For example, regardless of whether or not they are committed in self-defence, torturing prisoners, attacking civilians, deploying gases and starving civilians are war crimes (ICC Statute, Art. 8, § 2, a, ii; Art. 8, § 2, b, i; Art. 8, § 2, b, i, xviii, xxv).

33. The ICTY Chambers have sometimes hesitated when faced with use of self-defence. One Chamber, correctly, excluded the plea of self-defence in a case of gross violations of IHL because "military operations in self-defence do not provide a justification for serious violations of international humanitarian law."[63] Other Chambers have failed to take a clear position on this issue and leave the door open to this defence under such circumstances.[64]

In the context of self-defence it is important to recall a fundamental difference between the criminal rules of the law of armed conflicts and the criminal rules applicable in peace situations in order to avoid the transposition, with too much haste, of rules that are only applicable in peace time, to situations of war. During an armed conflict criminal offences under ordinary penal law, which are the exception in peace time, become the rule. In an armed conflict, the participants are allowed to, under some conditions, kill, wound, capture persons and cause losses to enemy objects. By contrast, in times of peace such facts constitute criminal offences. A war may legitimise facts that are criminalised during a time of peace. The situation of an armed conflict or war, is, however, an exceptional circumstance and, as with every exception, legitimisation of acts that are otherwise criminal should be interpreted restrictively. It is imperative that these acts scrupulously respect the rules of war time. If not, they should remain criminal.

If the border between lawful and unlawful, or between criminal and non-criminal is lower in war time than in peace time, it is logical to think that defences admissible in peace time are no longer admissible in war time.[65] To recognise self-defence as a defence, in war time like in peace time is tantamount to the legalisation of everything, including worse war crimes. Such is not, of course, the meaning of IHL

62 *Ybk. ILC 1986*, II, 1, p. 81.

63 ICTY,case IT-96-14/2-T, *Kordić et al.*, 26 Febr. 2001, § 452.

64 *Cfr.* ICTY, case IT-97-24-T, *Stakić*, 31 July 2003, §§ 153-154 ; *id.*, case IT-95-14-A, *Blaškić* 29 July 2004, § 427.

65 *Cfr.* E. David, *Principes ..., op. cit.*, §§ 4.14 ss.

which results from two contradictory necessities: military necessities and humanitarian necessities. Since IHL is the intersection of these two concepts, it would be out of the question to introduce military necessities (such as self-defence) other than the ones provided for by IHL itself. Now no IHL rule provides for self-defence as a defence for war crimes.

34. These observations concern international armed conflicts as well as internal armed conflicts. It is true that in an internal armed conflict, any war act is offensive to the laws of the opponent – government or insurgents. However, an act that violates domestic law but complies with international humanitarian law will not be considered a war crime. If not, the fact could appear as a war crime. As this is an IHL matter, self-defence does not play any role. Such are the reasons why the ground for defence provided by Art. 31, §1, c, is not coherent with IHL philosophy.

36. Doctrine has, however, postulated hypotheses where a fact *a priori* considered a "war crime" could be justified with regard to self-defence.

Taking inspiration from another author, let us consider the following example: the use of protective emblems by soldiers to undertake a sabotage operation behind enemy lines as the only means of saving an important cultural object targeted by adverse shootings.[66] As this operation causes losses in the opponent camp, it becomes a perfidy criminalised by Art. 85, § 3, f, of AP I. Could it be excused or justified under the circumstances? The answer is negative because IHL does not provide any exception to the prohibition of perfidy.

38. Another example we can consider is as follows: M. Ogiso, a member of the ILC, asked if a plea of self-defence was available to "soldiers of an occupation force who killed innocent civilians in the face of an imminent peril to their life."[67] The hypothetical example does not illustrate what the author suggests: if these civilians are killed because they attacked the occupation force, they are not "innocent civilians"; by attacking the soldiers, these civilians lose their immunity of civilians[68] and become legitimate targets. The death of the civilians is justified, not because the soldiers must defend themselves, but because the attacking civilians have now attracted combatant status.

If these civilians are really "innocent" and if their death results from an attack undertaken by the occupation force, then, from two things one: if the civilians have not been attacked as such, their death would result from incidental losses; in so far as these losses are acceptable with regard to IHL, in particular, under Art. 51, § 5, b, of AP I, there would be no war crime; if, on the opposite, the death of these civilians results from a deliberate attack directed against them or from a total disregard for precautions in the attack, the fact remains a war crime pursuant to Art. 85, § 3, a or b, of AP I. Self-defence does not play a role in any of these (hypothetical) situations.

39. Let us consider a more isolated situation where a civilian attacks an enemy

66 *Cfr.* N. Keizer, *in* "L'article 31, § 1, c", *loc. cit.*, p. 443.

67 *ILC Ybk 1987*, I, p. 39.

68 E. David, *Principes ..., op. cit.*, §§ 2.17 ss.

soldier for reasons unrelated to the conflict and the soldier kills the civilian in self-defence. In this case, the killing of the civilian is no longer a war act because it has no relationship with the armed conflict. However, in the context of an armed conflict, such a conclusion should be approached with some caution. If the killing is considered as an ordinary crime, Art. 31, §1, c, is useless: one shall apply the defences of general criminal law and self-defence is a part of it (*supra* § 2). The problem in the application of Art. 31, § 1, c, arises only if the situation is characterised as a war crime. Is it the case? According to the jurisprudence of the International Tribunals, the existence of a war crime requires the following conditions:

– the crime is linked with the armed conflict;[69]
– the conflict has "played a substantial role in the perpetrator's ability to commit" the crime; and
– the crime serves the ultimate goal of a military campaign.[70]

It is not clear that these conditions are met in the hypothetical situation here. The death of the civilian is, arguably, reasonable and proportionate to the threat posed to the soldier. Under such circumstances, one could conclude that self-defence defeats the criminality of the impugned act and precludes criminal responsibility of the soldier for an alleged "war crime".

40. This example remains very theoretical. In general, acts of violence committed in an armed conflict are directly linked to the conflict and it is only with regard to IHL that one must assess if a war crime has been committed. In such a context, self-defence does not play a role.

Thus, let us consider the situation where civilians attack enemy soldiers during an armed conflict and the evidence is consistent with the elements for a war crime, namely, that

> the conflict "has played a substantial role in the perpetrator's ability" to carry out the attack, and,
> the attack serves the ultimate goal of the military campaign against the enemy (*supra* § 39).

In this case, it is not necessary to invoke self-defence to justify civilian deaths (or other losses) by the soldiers because the civilians lose their status as civilian and are treated as combatants (PA I, Art. 51, § 3; PA II, Art. 13, § 3). These combatant civilians can then be fought in defensive as well as in offensive actions "for such time as they take a direct part in hostilities" (*ibid.*). There is no longer a question of a war crime and the objection grounded on self-defence is no longer applicable.

41. States practice, rather scant, indicated some distrust about Art. 31, §1, c. In Germany, the statement of the reasons of the law containing an international criminal law code does not criticise this article but specifies that its transposition in German law would be "superfluous". On the one hand it states:

69 ICTR, case ICTR-96-3-A, *Rutaganda*, 26 May 2003, §§ 570 ss.
70 ICTY, case IT-96-23 et 23/1-A, *Kunarac et al.*, 12 June 2002, §§ 58-59.

> la jurisprudence des tribunaux allemands rejette elle aussi le caractère nécessaire de la légitime défense en cas de disproportion manifeste entre l'intérêt défendu et l'intérêt agressé;

on the other hand, and more especially it states,

> une réglementation spéciale pourrait facilement entraîner des problèmes lors de l'application juridique et laisser en outre émerger l'impression erronée que les actes incriminés par le code de droit pénal international [génocide, crimes contre l'humanité, crimes de guerre] seraient par principe susceptibles d'être justifiés par la légitime défense.[71]

When ratifying the Statute, New Zealand made the following interpretative statement:

> The Government of New Zealand further notes that international humanitarian law applies equally to aggressor and defender states and its application in a particular context is not dependent on a determination of whether or not a state is acting in self-defence. In this respect it refers to paragraphs 40-42 of the Advisory Opinion in the *Nuclear Weapons Case*.

In summary, the plea of self-defence set out in Art. 31, § 1, c, cannot be a defence for a crime of genocide or a crime against humanity.

Self-defence cannot justify an act of aggression, since the re-qualification of an act held *a priori* to be an act of aggression into an act of self-defence can only be done by the Security Council.

Concerning war crimes, self-defence might be a defence only for an act **not** tied with the armed conflict. However, in this case the crime supposedly committed in self-defence would not be a war crime and Art. 31, § 1, c, would not apply. Conversely, if the act can be characterised as a war crime (because linked with the armed conflict), then, pursuant to ILH, self-defence is never a defence.

II. Necessity

43. If self-defence provided for in Art. 31, §1, c, is not a defence for the crimes set out in Art. 5-8 of the Statute, one may ask whether this defence should not be interpreted as referring to distress (referred to in Art. 24 of the ILC Articles on State responsibility – to protect one's life or the lives of other persons entrusted to one's care) or to military necessities (referred to in Art. 25 of the ILC Articles on State responsibility – to defend "property which is essential for accomplishing a military mission") (Art. 31, § 1, c).

The words "distress" or "necessity" do not appear at *littera* c, of Art. 31, § 1. The word "necessity" only appears in *littera* d) of Art. 31, § 1, a provision which relates to duress. This confusion is hardly surprising. In his 5th report on the Draft Code of Crimes against the Peace and Security of Mankind, the Special Rapporteur, D.

71 www.iuscrim.mpg.de/forsch/legaltext/VStGBfrz.pdf.

Thiam, said:

> As to coercion, state of necessity and *force majeure*, although those terms were sometimes differentiated in internal law, there was no essential differences between them and they were sometimes merged or used one in place of another.[72]

D. Thiam was quite conscious of the difference which exists between both concepts, particularly under French and German law. He observed however that the jurisprudence and doctrine of some States had a tendency to confuse them.[73]

44. Let us focus specifically on a hypothetical situation in which Art. 31, §1, c, would refer to distress or necessity. From this perspective, Art. 31, §1, c, would contradict the classic rule according to which no necessity can justify or excuse a crime against peace, a war crime or crime against humanity. Thus, the UNGA Definition of Aggression states:

> No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. (Art. 5, § 1) [74]

In a similar way, the instruments protecting human rights totally exclude the suspension of the most fundamental rights and liberties (in particular, right to life, prohibition of torture) even "in a time of war or public emergency threatening the life of the nation" (European Convention on Human Rights, Art. 15; International Covenant relating to Civil and Political Rights, Art. 4; American Convention on Human Rights, Art. 27; 1984 UN Torture Convention, Art. 2, § 2; UNGA Declaration on Forced Disappearances, A/Res. 47/133, 18 Dec. 1992, Art. 7; OAS Convention on Forced Disappearance of Persons, 9 June 1994, Art. X).

45. In the particular case of war crimes, it is difficult to see how the serious violation of rules especially conceived for the most extreme situation of war could find some ground for justification in elements – the necessity to fight the enemy – which have already been taken into account to establish the crime. This is *a fortiori* the case because the 1949 Geneva Conventions (common Art. 1) and the 1st Additional Protocol (Art. 1, § 1) contain wordings which tend to reinforce the absolute character of their prohibitions. These instruments compel States parties "to respect and to ensure respect" for these texts. Common Art. 3 enunciates obligations which are to be applied "at any time and in any place."[75] With these pleonastic formulae (it is useless to say that a convention must be respected; this is the essence of any agreement: *pacta sunt servanda*, Vienna Convention on the law of treaties, Art. 26), States wanted to insist on the non-derogable character of those instruments.

72 *Ybk. ILC 1987*, I, p. 7.

73 *Ibid.*, II, part 1, pp. 7-8.

74 A/Res. 3314 (XXIX, 14 Dec. 1974.

75 For more details, E. David, *Principes ..., op. cit.*, §§ 1.29-1.39.

46. That does not mean that IHL completely ignores necessity. IHL has integrated the concept in a number of provisions where States can escape their obligations in the name of "imperative necessities of security" or "imperative military reasons".[76] However, apart from these clearly defined cases, there is no place for a further application of necessity as a ground for justification.

The ILC has clearly stated the point in its draft articles on State responsibility.[77] The fact that the draft concerns only States and not individuals does not affect the principle because war crimes committed by State agents engage State responsibility as much as criminal individual responsibility of the authors (*cfr. supra* § 13).

47. There is, however, a judgement that is, to the knowledge of this writer, unique. It concludes that necessity can exclude criminal responsibility of the author of a war crime. The ICTY Trial Chamber considered a case – the *Orić* case – involving pillage committed by some Muslim Bosnians of Srebrenica who took livestock from Serb farms in the surroundings. The accused was prosecuted as a superior officer for having not taken the measures necessary to prevent and suppress these acts. He invoked the plea of necessity, arguing that it was impossible for the inhabitants of the Srebrenica enclave to survive if they had not acted in this way.

The Trial Chamber accepted the argument. It did so after considering that the plea of necessity was a part of customary international law and that the conditions required for admitting the defence (imminent threat, serious and non reparable damage to life, only way to avoid the damage, act non disproportionate to the threat, situation not attributable to the agent who invokes necessity) [78] were fulfilled *in casu*. In particular, the Chamber observed that "the existence of a defence of necessity was an established principle [...] in customary international law at the time the crime of plunder [...] are [*sic*] alleged to have been committed."[79]

It is useless to check if "customary international law" provides for, or not, the conditions mentioned by the Chamber. What must be checked is whether "customary international law" really accepts necessity as a ground for justification of an IHL crime.

48. Under the present state of international law, necessity is explicitly recognised only for States (ILC Draft Articles on State Responsibility, Art. 25). For crimes under international law and, in particular, for IHL crimes, the Chamber was unable to invoke any rule to justify the existence of such a defence. One ignores on which basis the Chamber grounded its reasoning to assert in such a categorical way without the shade of one source that necessity was a part of the criminal law applicable to the IHL violations.

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76 For examples, *ibid.*, § 4.23 and ref.

77 See the commentaries of the ILC on the provisions devoted to necessity in the Draft Articles on State Responsibility adopted in the 1st phase (art. 33) and in the 2nd phase (art. 25), *Ann. CDI*, 1980, II, 2e partie, p. 45 ; *Rapport CDI*, 2001, Doc. ONU A/56/10, p. 219.

78 ICTY, case IT-03-68, *Orić*, oral decision, 8 June 2005, transcript of the hearing recording, p. 9027, http://www.un.org/icty/transe68/050608IT.htm.

79 *Ibid.*

The Trial Chamber's decision appears to be a mere regurgitation of concepts inherent in internal criminal law without any evidence that these concepts also exist in international criminal law – apart from the disputable Art. 31, § 1, c, that the Chamber would have been better inspired to mention rather than to affirm a principle that the Chamber can only draw from "its hat". It is, indeed, tempting to transpose systematically in international criminal law, principles which are inherent to internal criminal law, but it is to snap one's fingers at IHL specificities.

As already mentioned (*supra* § 33), IHL is at the centre of two conflicting demands (parallelogram of forces) where military necessities oppose humanitarian necessities. To admit, according to the situations, necessities other than the ones on which IHL is built, challenges the very essence of IHL in spite of its nearly absolute character (*supra* § 45). The ICJ did not say anything else when it described the GC law as "intransgressible principles of customary international law."[80] To maintain that such principles could be ignored in some circumstances cannot be done by a simple jurisprudential assertion. Therefore, the *Orić* decision is not a significant precedent.

49. This is not to imply that the judge may not take the circumstances of the crime into account. If necessity cannot preclude the guilt of the author of an IHL crime, it can, on the other hand, be a mitigating circumstance for the author of the crime. Still, a mitigating circumstance is not a circumstance precluding responsibility.

50. One immediately understands the danger represented by Art. 31, §1, c. This provision may be read as justifying the unjustifiable and as depriving penal competences of any meaning because it is easy for an accused to argue a vital necessity to justify, more especially, a war crime. This is perhaps less true for genocide and crimes against humanity which are presumed to be "manifestly unlawful" (ICC Statute, Art. 33, § 2), but, for war crimes, the door is now open to all abuses!

51. As it is doubtful that the authors of the Statute intended to establish crimes destined to remain dead letter (except for a limited time as in the case of aggression and war crimes after special declaration of a State party, ICC Statute, Art. 5, 121, 123-124) and as the text must be interpreted in an effective way according to a classic principle of legal interpretation, one must conclude that the state of necessity implicitly referred to in the Statute as a ground for precluding responsibility should be interpreted in a very restrictive way and in accordance with Art. 21, § 3. This states that the application and the interpretation of the Statute "must be consistent with internationally recognized human rights" (*supra* § 21). This means, for instance, that necessity or distress could never justify the torture of a person to obtain confession, even if it is alleged that this could save others. No exception can be invoked to justify any suspension of the rule (*supra* § 44).

52. Some States have distanced themselves, expressly or implicitly, from Art. 31, § 1, c. Belgium, when ratifying the Statute, on 28 June 2000, made an interpretative statement tending to exclude any challenge of the fundamental rules of IHL, generally and in the particular case of the ICC:

80 *Lawfulness of the Threat or Use of Nuclear Weapons, ICJ Rep. 1996*, p. 257, § 79.

> Pursuant to article 21, paragraph 1 (b) of the Statute and having regard to the rules of international humanitarian law which may not be derogated from, the Belgian Government considers that article 31, paragraph 1 (c), of the Statute can be applied and interpreted only in conformity with those rules.[81]

In a similar vein, but without mentioning Art. 31, § 1, c, Colombia ratified the Statute and declared that:

> the provisions of the Statute must be applied and interpreted in a manner consistent with the provisions of international humanitarian law and, consequently, that nothing in the Statute affects the rights and obligations embodied in the norms of international humanitarian law, especially those set forth in article 3 common to the four Geneva Conventions and in Protocols I and II Additional thereto.[82]

In the same general way, Egypt affirmed, when signing the Statute (that it had not yet ratified in July 2006):

> the importance of the Statute being interpreted and applied in conformity with the general principles and fundamental rights which are universally recognized and accepted by the whole international community and with the principles, purposes and provisions of the Charter of the United Nations and the general principles and rules of international law and international humanitarian law.

Egypt further declared:

> that it shall interpret and apply the references that appear in the Statute of the Court to fundamental rights and international standards on the understanding that such references refer to the fundamental rights and internationally recognized norms and standards which are accepted by the international community as a whole.

Conclusions

53. Art. 31, § 1, c, is vain, useless and dangerous. Vain and useless because one must deploy treasures of imagination to try to find only one example where the provision could apply. Dangerous because, read a little too fast, the provision could lead to the challenge of the most fundamental rules of IHL, including those that prohibit aggression. This point had been widely stressed in a workshop dedicated to the analysis of this provision by the IHL Commission of the French-speaking section of the Belgian Red Cross.[83]

The way in which the crimes of genocide and crime against humanity are defined, as well as the criteria of reasonableness and proportionality that the defence must fulfil pursuant to Art. 31, § 1, c, immediately exclude these crimes from the

81 *MB*, 1st Dec. 2000.

82 untreaty.un.org/FRENCH/bible/frenchinternetbible/partI/chapterXVIII/treaty10.asp.

83 J. Verhaegen, R. Remacle, A. Andries, G. Dive, N. Keizer, *in* "L'article 31, § 1, c", *loc. cit.*, pp. 482-483.

scope of the provision.

In view of the present definition of aggression and given the fact that it is legally impossible for a judge or a State to reverse the presumption of aggression which attaches to the State that first attacks another State, the same conclusion must also be drawn: Art. 31, § 1, c, cannot be a ground for justification.

As for a war crime, the fact that it, by definition, must be linked to an armed conflict excludes the possibility that it can find some ground for justification in self-defence: either there is a war act in accordance with IHL and one cannot speak of war crime, or there is a war crime and IHL does not provide any justification grounded on self-defence or necessity, save the cases where IHL itself refers to one.

The only example of self-defence that we could imagine is a crime not linked with the armed conflict and committed by a person to repel an attack, but if that is the case, the crime is not a war crime but an ordinary crime; thus, it is covered not by Art. 31, § 1, c, but by the general principles of penal law. Consequently, even in this example, Art. 31, § 1, c, has no object.

Chapter 33

The Diverging Position of Criminal Law Defences before the ICTY and the ICC: Contemporary Developments

Geert-Jan Alexander Knoops

I. Introduction: The lack of cohesion relating to the admissibility of defenses before international and hybrid criminal tribunals

The position of criminal law defenses under international criminal law was until 1998 controversial, not to say ambiguous. Until 1998 no serious efforts for any form of codification was administered by the international community. For instance, the 1948 Genocide Convention only addressed the subject matter of defenses in Article IV, speaking of the immunity of Head of State and simply providing that this defense can not be invoked in case of a genocide charge. Moreover, it can be observed that the defenses of duress and superior orders are absent in the Genocide Convention. Similarly the Anti-Apartheid Convention is silent on these defenses, whereas the 1984 Torture Convention, in Article 2, bans the defense of superior orders explicitly as a potential excuse to torturous behaviour. These exclusions seem all in line with the Charter of the International Military Tribunal in Nuremberg which specifically outlawed the defense of obedience to superior orders,[1] while omitting to address self-defence, duress, mental insanity and diminished responsibility. The same counts for the Statutes of the ICTY and ICTR which in Articles 7(4) and 6(4) respectively only say that superior orders might be taken into account as mitigating factor. The 2002 Statute of the Special Court for Sierra Leone (SCSL) adopted the same approach.

It is thus fair to say that the international community until 1998 did not structurally reflect on the position of criminal law defenses within international criminal law. In June 1998, the ICC Statute codified in Article 31 a non-exhaustive list of "grounds for excluding criminal responsibility" without differentiating between justifications and excuses. Importantly, for the first time in legal history, the defenses of self-defence, mental disease, intoxication, duress and necessity were specifically included as legal mechanisms which could relieve the accused from criminal responsibility for certain international crimes.

This chapter will focus on the contrasting position of the defenses at the level of the ICC on the one hand and their different position within the Statute and case law of the ICTY on the other hand. From the moment the ICC became operative, i.e., on 1 July 2002, various international and internationalized criminal tribunals

1 See Article 8 of this Charter.

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 ISBN 978 90 04 16308 9. pp. 779–794.

were already functioning without having an uniform system as to the admissibility of criminal law defenses. The question that will be examined in this Chapter is whether this lack of cohesion conforms to fair trial principles applicable within international criminal law.

II. Criminal law defenses within the laws of the ICC and ICTY compared

In order to address the question how these legal systematic divergences can best be solved, this section first provides a short overview of the position of criminal law defenses within the laws of the ICC and ICTY.

A. The defense of heads of states' immunity

Article 7 of the ICTY Statute and Article 6 of the ICTR Statute, follow the 1996 Draft Code of Crimes (Article 7) in that it says that the official position of any accused person, whether as Head of State or Government, shall not relieve such person of criminal responsibility nor mitigate punishment. Article 27 of the ICC Statute reaffirms the existing customary international law by detailing the non-applicability of procedural and substantive immunities. Noticeably, Article 27(1) of the ICC Statute enumerates several official positions which are subjected to an exclusion of the defense of immunity.[2] Section 1 of Article 27 emphasizes that an official capacity does not exempt a person from criminal responsibility whereas Article 27 section 2 of the ICC Statute stresses that such capacity can not amount to any jurisdictional immunity.

The former element of Article 27 reflects the current view of international and internationalized criminal courts. For instance, before the Special Court for Sierra Leone, the issue of immunity of Heads of State was addressed in the proceedings against Charles Taylor. On 31 May 2004, the Appeals Chamber of the Special Court for Sierra Leone held that Charles Taylor did not enjoy any immunity from prosecution by the Special Court despite his position as serving Head of State of Liberia at the time the criminal proceedings were initiated against him.[3]

Importantly, jurisdictional immunity should not be mixed with immunity from criminal responsibility. In the *Arrest Warrant case* of 2002, the International Court of Justice, holding that Belgium had to comply with immunity from jurisdiction enjoyed by the incumbent Foreign Minister of Congo who was charged with war crimes, clearly stressed that jurisdictional immunity and immunity from criminal responsibility are two distinct subjects. While the former is procedural in nature, the latter is a matter of substantive law. Despite that jurisdictional immunity may prevent prosecution for a certain time, it can never exculpate an individual from criminal responsibility for alleged international crimes.[4]

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2 See M. Cherif Bassiouni, I International Criminal Law (1999).

3 See *Prosecutor v. Charles Taylor*, SCSL Appeals Chamber judgment 31 May, 2004, Case No. SCSL-03-01.

4 See Case Concerning the Arrest Warrant of 11 April 2000 (*Congo v. Belgium*), 2002, 41 International Legal Materials , 536, 551, 557 (2002); see also Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 252-253 (2005).

B. Superior orders

Both the Statutes of the ICTY and ICTR in Articles 7(4) and 6(4) respectively exclude the defense of superior orders, without any exception to a specific crime. It only allows the invocation of this defense with regard to a potential mitigation of punishment. The ICTY Appeals Chamber, in the *Erdemović* case, has formulated its position *vis-à-vis* this defense as follows: "We subscribe to the view that obedience to superior orders does not amount to a defense per se but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defenses of duress or mistake of fact are made about."[5]

The majority of the Appeals Chamber justices therefore held that this defense does not qualify as a fully fledged defense but could only operate within international criminal proceedings as part of another defense or a conglomerate of factual circumstances which all have to affect *mens rea* on part of the accused.

Article 33 of the ICC Statute, however, follows a different approach by allowing this defense presupposed that three conditions, mentioned in its section 1 under (a) (b) (c), are cumulatively met. Yet, section 2 of Article 33 excludes this defense with respect to genocide and crimes against humanity, even if the accused was under legal obligation to obey orders of his Government or his superior. Thus, an order to commit genocide or to participate in this crime may be considered, *eo ipso,* as manifestly illegal as set forth by Article 33(2) of the ICC Statute. The same counts for crimes against humanity. This means that, in spite of the exclusion of this defence before the ICTY/ICTR, the accused could still be exonerated for a war crimes charge because the accused acted upon superior orders.

Under the ICC regime, superior orders could still play a relevant role when it concerns genocide and crimes against humanity charges. By virtue of Rule 145(2)(a)(i), it is arguable that the ICC might take this defense in consideration as a potential mitigating circumstance. In this regard, the approach of Prof. Dinstein lends support for this view. This scholar argues that the fact "that a defendant acted in obedience to superior orders cannot constitute a defence *per se* but is a factual element which may be taken into account – in conjunction with other circumstances – within the compass of an admissible defence based on lack of *mens rea* (specifically duress or mistake)."[6] Hence, with respect to genocide charges as well as crimes against humanity, the defense of obedience to superior orders in combination with, for instance, a defense on the basis of duress, diminishing the level of *mens rea*, could potentially lead to mitigation of the sentence.

C. The defense of duress

The defense of duress is not codified within the ICTY or ICTR Statute. Until its incorporation in Article 31(1)(d) of the ICC Statute, it has been a rather controversial

5 See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ICTY Appeals Chamber Judgment, 17 October 1997, para. 333.

6 See Dinstein, *supra* note 5 at 251. He also refers to the majority judgment of the ICTY Appeals Chamber in the *Erdemović* Case, Case No. IT-96-22-A in which the approach of Prof. Dinstein was adopted.

defense within international criminal proceedings.

Close reading of the judgment of the U.S. military tribunal in the mentioned *Einsatzgruppen* case,[7] learns that the defense of superior orders was excluded due to the absence of compulsion or duress. As noticed above, obedience to superior orders as such does not amount to insurmountable moral choice. The difference between superior orders and duress is that the former defense may be invoked without the presence of any threats to life or limb, whereas the latter defense can only be raised when someone is compelled to commit a crime due to a threat to his or her life or that to another person. Contrary to the defense of superior orders, a person acting under duress has actually no realistic moral choice. The centre piece of this defense is therefore the establishment of the absence of a realistic moral choice in that the choice normally available to the defendant was morally and mentally affected to such a level that the defendant, in all reasonableness, did not have a choice but to commit a certain crime.[8]

Notwithstanding the fact that this view was accepted by the ICTY Trial Chamber judgment of 29 November 1996 in *Prosecutor v. Erdemović*, the ICTY Appeals Chamber, in its judgment of 7 October 1997, held that duress is not admissible as a defense to crimes against humanity or war crimes whereby the lives of innocent civilians are taken.[9]

Therefore, the ICTY Appeals Chamber advances the view that this defense can not be pleaded against the crime of genocide or participation in this crime. In the *Blaškić* case, a similar approach was adopted by ICTY judges holding that "Duress, where established, does mitigate the criminal responsibility of the accused when he had no choice or moral freedom in committing the crime. This must consequently entail the passing of a lighter sentence if he cannot be completely exonerated of responsibility. The Trial Chamber points out that over the period covered by the present indictment Tihomir Blaškić did not act under duress whilst in his post. Accordingly he does not enjoy any mitigating circumstances."[10]

By contrast, Article 31(1) (d) the ICC Statute takes the approach that the defense of duress is admissible even when it concerns international crimes resulting in the taking of lives of innocent civilians. However, the condition must be met that the accused acts necessarily and reasonably to avoid a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person and, secondly, the accused did not intend to cause a greater harm than the one sought to be avoided. In the event of a genocide charge, it is questionable whether these conditions can ever be met; especially the standard of proportionality (the element of "provided that the person does not intend to cause a greater harm than the one thought to be avoided") seems difficult to comply with in the event of genocide.

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7 *United States v. Ohlendorf et al. (Einsatzgruppen* Trial) 1948, 4 Law Reports of the Trials of the War Criminals, London 1949, 411.

8 See also Dinstein, *supra* note 5 (2005) at 246.

9 *Prosecutor v. Erdemović*, ICTY Appeals Chamber Decision of 7 October 1997, Case No. IT-96-22-A, para. 373; see also *Prosecutor v. Tihomir Blaškić,* ICTY Trial Chamber Judgment, 3 March 2000, Case No. IT-95-14.

10 *Prosecutor v. Blaškić*, Case No. IT-95-14, ICTY Trial Chamber Judgment of 3 March 2000, para. 769.

After all, when a crime involves innocent civilians, it is controversial to balance one life against another. According to Judge Cassese, in his dissenting opinion to the ICTY Appeals Chamber judgment of 7 October 1997, in *Prosecutor v. Erdemović*, the situation may change when the innocent civilians would in any event be killed. Such a situation therefore could perhaps give leeway to invoking the defense of duress in the event of war crimes or crimes against humanity.[11]

From the history of Article 31(1)(d) of the ICC Statute and the use of the words "imminent death or bodily harm" follows that only physical threats can amount to an overwhelming mental pressure in order to successfully rely on duress.[12] For this defence to be admissible, no special relationship between the person threatened and the accused is required. However, realistically the requisite mental pressure may be more overwhelming in the event the threatened victim belongs to the inner circle of the accused.

Yet, the qualification of duress as an excuse in that overwhelming external circumstances cause a mental pressure such that no reasonable person could resist it, seems not contrary to the notion that war crimes, crimes against humanity and genocide can never be justified.[13] The nature of duress being not a justification but rather an excuse, to be scrutinized on an individual basis is not contrary to the principle of individual criminal responsibility.

When it concerns the evidentiary burden to establish duress the ICTY case law shows a rather strict and high threshold for the accused even when advancing mitigation of punishment. Illustrative for this is the ICTY case of *Prosecutor v. Mrdja,* in which the ICTY addressed the claim of the accused that he acted under duress and superior orders. The Court rejected it saying:

> With respect to duress, the Defence argues that Darko Mrdja would have been killed or, at the very least, suffered serious consequences, had he not carried out the orders of his superiors. In support of this argument, the Defence relies only upon the oral statement made by Darko Mrdja during the sentencing hearing. The Trial Chamber is not persuaded on the basis of this evidence that Darko Mrdja indeed acted under threat. The Defence also asserts that, in the light of Professor Gallwitz's Report and against the backdrop of hatred prevailing at the material time, a person as young and of such low rank as Darko Mrdja could not have opposed the orders he received. The Trial Chamber does not rule out that those circumstances may have had some influence on the criminal behaviour of Darko Mrdja, although it does not accept that they were such that Darko Mrdja, even taking account of his age and low rank, would have had no alternative but to participate in the massacre of around 200 civilians. The absence of any convincing evidence of any meaningful sign that Darko Mrdja wanted to dissociate himself from the massacre at the time

11 See also Antonio Cassese, International Criminal Law 246-251(2003); see for a different opinion, Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, at 247-248.

12 See also Cassese, *supra* note 12 at 246.

13 See Kai Ambos (2002) Other Grounds for Excluding Criminal Responsibility, The Rome Statute of The International Criminal Courts, A Commentary, Volume I, Oxford University Press (A. Cassese, P. Gaeta, J.R.W.D. Jones, eds.).

> of its commission prevents the Trial Chamber from accepting duress as a mitigating circumstance.
>
> As to the related issue of superior orders, Article 7(4) of the Statute states that "[t]he fact that an accused person acted pursuant to an order of a government or of a superior [...] may be considered in mitigation of punishment if the Tribunal determines that justice so requires." The Trial Chamber notes that the Prosecution does not contest the fact that Darko Mrdja acted in furtherance of his superiors' orders. The Trial Chamber has already stated that there is no evidence that the orders were accompanied by threats causing duress. Moreover, the orders were so manifestly unlawful that Darko Mrdja must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity. The fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment.
>
> In conclusion, the Trial Chamber dismisses the Defence's submissions with respect to duress and superior orders."[14]

As to the question whether duress can be extended to the protection of third persons, the Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm to the ICTY judgment in *Prosecutor v. Simić, Tadić , Zarić*, of 17 October 2003 merits attention. Judge Lindholm held that:

> While I agree with the finding of the Majority that Miroslav Tadic had the *actus reus* and the *mens rea* of an aider and abettor of the crime of persecutions through deportation, after having heard the testimony of Miroslav Tadic and taken into consideration all other relevant evidence, I am convinced that Miroslav Tadic was acting in a situation of duress when he took part in the deportation of the above-mentioned non-Serb civilians to Croatia.
>
> (...) In their Joint Separate Opinion, Judge McDonald and Judge Vohrah quoted the United Nations War Crimes Commission ("UNWCC") when referring to the requirements of duress under customary international law:
>
> > "The general view seems therefore to be that duress may prove a defence if (a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil."
>
> The UNWCC had reviewed about 2.000 decisions of post-World War II international military case-law stemming from military tribunals of nine nations before it stated that the above-mentioned three requirements have to be met for duress to constitute a defence for a violation of international humanitarian law, and I am satisfied that this definition is part of international customary law. Although these requirements do not explicitly refer to situations in which a person commits a criminal act in order to preserve *another person* from an immediate danger both serious and irreparable, I am persuaded that such action is covered by the concept of duress

14 *Prosecutor v. Darko Mrdja*, Case No. IT-02-59, ICTY Judgment of 31 March 2004, paras. 66-68.

> as set out in the above-mentioned definition. With regard to the first requirement, the UNWCC speaks of an "immediate danger both serious and reparable", without specifying that such danger has to refer to legal values of the person who commits an act under duress, and not to a third person. I am convinced that such legal values of a third person must be equally protected, as no valid reason can be put forward to make a distinction between the protected legal values of the person acting under duress and those of a third person.[15]

This opinion shows that the defence of duress does encounter different views within the ICTY.

D. The defence of necessity

The defence of necessity deals with an accused who is faced with a choice of evils, leading to a decision in favour of the lesser evil; the incriminating qualification of the act is superseded by the fact that the accused intends to protect a higher legal norm. The norm sought to protect should be of higher value as the norm violated.

In short, in the event of duress the external pressure stems from an individual, whereas in the event of necessity, this results from natural, objective causes, rather than from another person.[16]

The objective character of necessity abstracted from (subjective) threats or compulsion of a third party is aptly reflected in the following ICTY judgments.

In the case of *Prosecutor v. Zlatko Aleksovski*, the appellant raised a necessity defence, which was dismissed by the Appeals Chamber.[17] The judges held that:

> What the Appellant is in effect submitting is that the *mistreatment* the detainees suffered – not the fact of detention, with which he was not charged – should have been interpreted by the Trial Chamber as somehow having been justified by the assertion that they would have suffered even more had they not been treated the way they were while in detention. The Appellant does not and cannot argue, in the present case, that he was faced with only two options, namely, mistreating the detainees or freeing them. The Appellant, faced with the actual choice of mistreating the detainees or not, was convicted for choosing the former. This was intimated from the Bench when during the oral hearings on 9 February 2000, the counsel for the Appellant was asked:
>
> ... you said the accused chose a lesser evil, presumably as against the greater evil , but wouldn't it be open to him to have chosen no evil at all? Wouldn't that have been an option to him?"[18]

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15 Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm to the ICTY judgment in *Prosecutor v. Simić, Tadić, Zarić*, of 17 October 2003, Case No. IT-95-9, paras. 16, 18 and 19.

16 See Antonio Cassese, International Criminal Law at 242-243 (2003).

17 *Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1, ICTY Appeals Chamber Judgment of 24 March 2000, para. 54.

18 *Prosecutor v. Zlatko Aleksovski,* , Case No. IT-95-14/1, ICTY Appeals Chamber Judgment of 24 March 2000, para. 54

In the case of *Prosecutor v. Hadzihasanović, Alagić and Kubura,*[19] Judge David Hunt, relying on the Krupp trial,[20] reasoned that:

> In the *Krupp* trial, the defendants raised a defence of necessity, claiming that, in order to meet the production quotas imposed upon them as industrialists by the authorities, it was necessary to employ prisoners of war, forced labour and concentration camp inmates. The Tribunal accepted the availability of such a defence where it is shown that the acts charged were done "to avoid an evil both serious and irreparable", there "was no other adequate means of escape" and the remedy was "not disproportioned to the evil", and that it could apply if the existence of a tyrannical and oppressive régime is assumed. The Tribunal, however, denied its application to the facts of that case because the defendants were not acting under compulsion or coercion but with an "ardent desire to employ forced labour". In accepting the availability of such a defence, the Tribunal expressly recognised that it was applying an existing principle of law to a new situation when it said :
>
> > "As the prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an overloaded lifeboat; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nuremberg Trials of industrialists is novel."[21]

The necessity defense seems therefore restricted to few situations.

E. Military necessity

The defense of military necessity can be seen as a *specialis* of necessity. Similar to necessity it relates to a choice of evils, namely between military and humanitarian interest and is likewise to be distinguished from duress. Military necessity implies a deliberate choice to negate a norm of international humanitarian law. Doctrinally, it may be an admissible defence even when it concerns a war crime charge and could be invoked on the basis of Article 31(2) of the ICC Statute.[22] The difference between necessity as discussed before and military necessity is that the latter is affiliated with

19 *Prosecutor v. Hadzihasanović, Alagić and Kubura,* Case No. IT-01-47, ICTY Appeals Chamber Decision, (Separate and partially dissenting opinion of Judge David Hunt), *Command Responsibility Appeal*, 16 July 2003, para. 4.

20 Law Reports of Trials of War Criminals (United Nations War Crimes Commission, 1949), *United States v. Alfred Krupp et al*, Vol X, 69.

21 *Prosecutor v. Hadzihasanović, Alagić and Kubura,* Case No. IT-01-47, ICTY Appeals Chamber Decision, 16 July 2003, para. 4 (Separate and partially dissenting opinion of Judge David Hunt) (hereafter, *Command Responsibility Appeal.*.

22 See William A. Schabas, An Introduction to the International Criminal Court 88-92 (2001); see also E. Van Sliedregt, The Criminal Responsibility of Individuals for Violation of International Humanitarian Law, T.M.C. Asser Press, 18 and 228 (2003).

a specific interest of the State to the particular armed conflict. As a result, this type of defense is only available to individuals acting as instruments of the State.

Yet, the ICC Statute does not mention this defense explicitly in Article 31(1), although it indirectly appears in Article 8(2) sub (a) (iv) and sub (e) (xii) of the Statute. The latter provision defines destruction of property as a war crime when it is not justified by military necessity. Furthermore, close reading of the *travaux préparatoires* of the ICC Statute learn that this defense could be admitted as one of these special defenses, meant in Article 31(3).

However, notwithstanding the indirect reference in the Statute of the ICC to military necessity and its potential relevance to the destruction of property, it is not clear that this defense as such could exonerate an accused when the killing of innocent civilians is at stake.[23]

Likewise, the ICTY Statute refers to military necessity in Article 2(d) speaking of an extensive instruction and appropriation of property, not justified by military necessity. However, military necessity as such was until now never accepted by the ICTY judges.[24]

The burden for the accused to successfully raise military necessity follows in specific from the ICTY judgment in the *Brotanin* case stressing that the need for destruction must be absolute. The Court held that "the prohibition of destruction of property situated in occupied territory is subject to an important reservation. It does not apply in cases "where such destruction is rendered absolutely necessary by military operations."[25]

This threshold was also underlined in *Prosecutor v. Naletilić and Martinović*.[26]

> The Chamber considers that two types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory when the destruction was not absolutely necessary by military operations.

From the *Blaškić* judgment it is made clear that military necessity can only serve as an excuse instead of a justification. The ICTY Appeal Chamber judges held that:

> Before determining the scope of the term "civilian population," the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which "(t(argeting civilians or civilian property is an offence when not justified by military necessity." The Appeals

23 See Antonio Cassese, International Criminal Law 230 (2003).

24 See *Prosecutor v. Strugar,* Case No. IT-01-42, ICTY Trial Chamber Judgment of 31 January 2005, para. 2; *Prosecutor v. Orić*, Case No. IT-03-68, ICTY Trial Chamber Judgment of 30 June 2006; *Prosecutor v. Jokić*, Case No. IT-01-42/1, ICTY Appeals Chamber Judgment, 30 August 2005, para. 4.

25 *Prosecutor v. Brotanin*, Case No. IT-99-36, ICTY Trial Chamber Judgment of 1 September 2004, para. 588.

26 *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34, ICTY Trial Chamber Judgment of 31 March 2003.

> Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.[27]

F. Self-defense

Notwithstanding the fact that self defense is not incorporated in the ICTR and ICTY Statutes as a defense, it was acknowledged by the ICTY in the *Kordić and Čerkez* case.[28] This ICTY judgment adopts self-defense holding that:

> The notion of 'self-defence' may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack. The Trial Chamber notes that the Statute of the International Tribunal does not provide for self-defence as a ground for excluding criminal responsibility. "Defences" however form part of the general principles of criminal law which the International Tribunal must take into account in deciding the cases before it.[29]

In paragraph 450 of this judgment, the ICTY relies on Article 31(1)(c) of the ICC-Statute. Noticeably the ICTY judges contemplated the casuistic nature of self-defense:

> Of particular relevance to this case is the last sentence of the above provision to the effect that the involvement of a person in a "defensive operation" does not "in itself" constitute a ground for excluding criminal responsibility. It is therefore clear that any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to each charge. The Trial Chamber will have regard to this condition when deciding whether the defence of self-defence applies to any of the charges. The Trial Chamber, however, would emphasise that military operations in self-defence do not provide a justification for serious violations of international humanitarian law.[30]

In the *Kordić and Čerkez case*, the defense argued that the Bosnian Croats, acted in self defense against aggressive actions of Muslim forces. The ICTY Trial Chamber, relying on Article 31 (1)(c) of the ICC Statute, ruled that military defensive operations in self-defense do not provide a justification for serious violations of international humanitarian law.[31]

Indeed, self–defense has been elevated to a codified defense by the drafters of

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27 *Prosecutor v. Blaškić,* Case No. IT-95-14, Appeals Judgment, 29 July 2004.

28 *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2.

29 *Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2, Judgment 26 February 2001, para. 449.

30 *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Judgment 26 February 2001, para. 452.

31 See *Prosecutor v. Kordić and Čerkez* Judgment ICTY 26 February 2001, Case No. IT-95-14/2-T, para. 452.

the Rome Statute, namely in Article 31(1) (c); this provision, reflecting a rule of customary international law,[32] codifies the admissibility of self-defense also within the context of war crimes. The promulgation of this provision also aims at military actions out of force protection.[33]

The acceptance within the ICC Statute of self-defense in the event of war crimes is a novelty, in so far the defensive actions aim at defending property, which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission.[34] It is questionable whether this expansion of the concept of self-defense has support in customary international law.[35] The reference to war crimes indicates that this type of self-defense seems not admissible with respect to a charge of genocide or crimes against humanity.[36]

G. The self-defense of intoxication

i. General remarks

No contemporary precedents are available with regard to the defense of self-intoxication.[37] In the event of war crimes, not though in case of a charge of genocide, voluntary intoxication as a defense was admitted in 1947 by the British Military Court in *United Kingdom v. Yamamoto Chusaburo*.[38] Based on the reasoning of this court, it could be questioned whether an accused, intoxicated by medicine or alcohol, has the special intent required for the crime of genocide.

The drafters of the Rome Statute have taken the same approach in Article 31 (1)(b). Yet, this defense as a plea to international crimes, will practically be restricted to low ranking officers and soldiers and not easy to military and political leaders who are charged with such crimes. Furthermore, the protracted nature of genocide and crimes against humanity will probably exclude the defense of intoxication due to the exception as mentioned in Article 31(1)(b): "the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime (...)." It seems not unlikely, though, that an intoxication defense can erase the special knowledge element as required for crimes against humanity.

The consequence of a successful invocation of the defense of intoxication, may thus be that the accused is personally exonerated due to the absence of the requisite mental element, although the burden rests on the accused to show that there was no voluntary intoxication.

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32 See Cassese, *supra* note 12 at 230.

33 See Dinstein, *supra* note 12 at 249.

34 See Article 31(1)(c) ICC Statute.

35 See Cassese, *supra* note 12 at 230; the author opines that customary law does not cover this eventuality.

36 See Cassese, *supra* note 12 at 222-224.

37 See Dinstein, *supra* note 5 at 249.

38 *Trial of Yamamoto Chusaburo*, Case No. 20, British Military Court, Kuala Lumpur, 30 Jan. – 1 Feb. 1946, see Law Reports of Trials of War Criminals, Selected and prepared by the UN War Crimes Commission, Volume III, London: HMSO, 1948.

ii. ICC Statutory Intoxication-criteria

The novelty in international criminal law, namely Article 31(1) (b) of the ICC Statute, allows for the defense of intoxication if such a process has erased the accused's capacity to control his or her conduct to conform to the requirements of law. The term intoxication refers not only to intoxication by alcohol, but also to intoxication by certain drugs or medicine. Similar to mental defect, intoxication as a defence is contingent upon a destruction of the accused's capacity to control his/her conduct.

The intoxication defense fails, however, if the accused became intoxicated voluntarily; when he or she knows or disregards the risk that (as a result of the intoxication) he or she is likely to be involved in criminal behaviour. The ICC Statute is imbued with two ambiguous questions:

1. First, what is "voluntarily"? Does this also apply to a person who is addicted to some drug or alcohol, and which addiction is beyond his mental control?

2. Second, does this defense also potentially apply to military commanders and not only to individual soldiers?

Notwithstanding that the ICC was founded with the intention to prosecute mainly political as well as military leaders and policy-makers, it does not *eo ipso* exclude this defense as such for military commanders.

A. Mental defect and diminished responsibility

i. The ICTY Approach

The defense of mental defect should be clearly distinguished from that of the diminished responsibility.[39] Similar to the ICC system, the ICTY and ICTR refer to the latter defense only in its Rules of Procedure and Evidence (RPE). This latter defense implicitly falls within the ambit (although not explicitly) of Rule 67 (A) (ii) (b) of the ICTY and ICTR RPE. This Rule refers to the defense of mental disease – but not to the defense of intoxication – providing that the defense is obliged to notify the prosecution prior to the start of the trial of "(...) any special defense, including that of diminished or lack of mental responsibility." This obligation also includes providing details as to the potential expert witnesses which the accused intends to rely on for his/her defense.

Both the defense of mental disease and intoxication were determined by ICTY case law.

In *Prosecutor v. Delalić et al.,* the ICTY Trial Chamber in its judgment of 16 November 1998, rejected the defense of diminished responsibility as put forward by the accused E. Landzo, noting that, the defence did not establish the fact that, at the relevant time, the accused "was unable to distinguish between right and wrong."[40] The ICTY was led by expert witness opinions from three forensic psychiatrists who

39 Dinstein, *supra* note 5, at 248.

40 *Prosecutor v. Delalić et al.*, Case No.IT-96-21, Trial Chamber Judgment, 16 November 1998.

were called by the accused to testify on his behalf as expert witness, while in rebuttal the Prosecution examined a fourth psychiatrist from the United States who, similarly to the other experts, held fairly extensive sessions with the accused. All of the defence expert witnesses held the opinion that the accused suffered from a personality disorder. The Trial Chamber opined that the burden of proof was not met by establishing a disorder as such. As a result, a differentiation is made between suffering from a personality disorder on the one hand, and evidence relating to the inability to control the physical acts of the accused on account of abnormality of mind on the other hand (para. 1186).[41] According to the ICTY, only the latter situation may justify this defence.

In a second case, *Prosecutor v. Vasiljević*, the ICTY Trial Chamber, was called upon to try the accused, *Mitar Vasiljević*, who was charged with ten (10) counts of crimes against humanity under Article 5 of the ICTY Statute and violations of the laws on customs of war (Article 3).[42] This related to the so-called *Drina River Incident* on 7 June 1992 and the *Pionirska Street Incident* on 14 June 1992 in Visegrad, Bosnia-Herzegovina. In its judgment of 29 November 2002, the ICTY, while acquitting the accused with regard to the charges relating to the *Pionirska Street Incident*, convicted him for the *Drina River Incident.* The Trial Chamber found Vasiljević guilty of persecution and murder, as he allegedly participated in leading seven Bosnian Muslim men to the bank of the Drina River where five of them were shot dead while the other two managed to escape. As an alternative defense, the accused advocated that any sentence imposed should be mitigated due to the fact that during the incident he suffered from diminished responsibility as a result of chronic alcoholism (a reactive psychoneurosis due to intoxication and exhaustion). This argument was substantiated by three expert witnesses. Faced with this argument, the concurrence of those two defenses led the ICTY to the following findings:

1. First, the Trial Chamber reaffirmed the evidentiary standard set forth by the *Delalić* Appeals Chamber judgment[43] which held that the accused bears the onus of establishing the defense of mental disease or diminished mental responsibility (only relevant to the sentence to be imposed; and thus no ground for acquittal) on the *balance of probabilities*. This standard means that the accused must show that "more probably than not such a condition existed at the relevant time."
2. Second, the Trial Chamber held that the defense of mental disease or diminished responsibility is only admissible in two (alternative) events:
    a. in case of an impairment of the accused's capacity to appreciate the unlawfulness of or the nature of his conduct; or
    b. in case of an impairment to control his conduct in order to conform to the requirements of the law.[44]

41 *Prosecutor v. Delalić et al.*, Case No. IT-96-21, ICTY Trial Chamber Judgment of 16 November 1998.

42 *Prosecutor v. Vasiljević*, Case No. ...

43 *Prosecutor v. Delalić*, Case No. IT-96-21, ICTY Appeals Chamber Judgment 20 February, 2001, para. 590.

44 *Prosecutor v. Delalić,* Case No. IT-96-21, ICTY Trial Chamber Judgment, 16 November 1998, para 283.

The same criterion is in fact incorporated in Article 31 (1) (a) of the ICC Statute. This provision refers to a mental disease or defect that *destroys* the accused's criminal responsibility. This element excludes a partly destruction of one's mental capacity.

ii. ICC Statutory Mental Disease Criteria

As already observed earlier, Article 31 paragraph (1) sub (a) and (b) of the ICC Statute codify – as a first international criminal law instrument – the defenses of mental disease and intoxication. Article 31 paragraph 1 sub (a) (mental disease) pursues the case law set forth by the ICTY Trial Chambers (i.e., the two criteria of the *Vasiljević* case). The incorporation of the defense of mental disease or defect is also in line with the acceptance of such a defence within both common and civil law systems.[45]

As noted, it requires destruction of such mental capacity, and not merely diminishing it.[46] An open question seems to be the issue of the requisite burden of proof to establish this defense. The ICTY standard "by preponderance of probabilities" seems in line with Article 67 of the ICC Statute (which protects the accused from any reversal of the burden of proof or any onus of rebuttal).[47]

iii. The Interrelationship of and Concurrence between Mental Disease – Intoxication Defense

Concurrence of mental capacity and intoxication is not unrealistic in law practice. This was revealed in the *Vasiljević* case. The ICTY judgment can also be of use here to illustrate how these two may defenses interrelate.

In the *Vasiljević* case the defence advocated, among other things, that at the time of the *Drina River incident*, the accused's mental responsibility was significantly diminished due to chronic alcoholism. Clearly, the defense intended to argue that the defense of diminished mental responsibility was founded on intoxication, so that these defenses concurred. The ICTY concluded that the accused failed to establish the defense of diminished mental responsibility on the balance of probabilities present at the time of the Drina River incident.

These two examples show the thin line between the defenses set forth in Article 31 (1) (a) and (b). It is not unlikely that in practice the defenses of Article 31(1) (a) of the ICC Statute (mental disease) and Article 31 (1) (b) (intoxication), will be raised in combination with each other. However, in practice this application will probably be restricted to low-ranking officers and soldiers thus not to military or political leaders who are implicated in international crimes.

B. The defense of mistake of fact and law

Similarly novel is the implementation of the defence of mistake of fact and law in article 32 of the ICC Statute. Preceding Statutes of international criminal tribunals

45 See Schabas, *supra* note 23, at 89.

46 Dinstein, *supra* note 5, at 248.

47 See W. Schabas, An Introduction to the International Criminal Tribunals, Cambridge University Press 89 (2001).

were silent on the invokability thereof within the context of international crimes.[48] Both defenses are actually special *mens rea* defenses; mistake of fact or mistake of law as such does not exculpate the accused, unless it is established by a preponderance of probabilities that it erased the mental element at the time of the act.[49] To date, no precedent is available whereby an international tribunal has exonerated an accused for war crimes on the basis of either of the two defenses. Interestingly, the defense of mistake of law was advanced by the defence in the AFRC case before the SCSL in particular to refute the (war crimes) charges of conscripting of child soldiers and conducting forced marriages. This defense was fuelled by expert opinions, delivered before the Special Court for both the prosecution and defence.

In the area of child soldiers, these expert opinions indicated that prior to the period in the indictment relating to the alleged enlistment of child soldiers within the AFRC, the government of Sierra Leone and in particular its army actively endorsed a policy of recruiting children below the age of fifteen within the armed forces.

As to the charge of forced marriages, the defence expert referred to the absence of an uniform acceptance of the concept of "forced" or "arranged marriages," both in conceptual and definitional sense, within the international community.[50]

It is to be expected that the defense of mistake of law could interrelate with certain specific social-cultural phenomena, in so far as they shed light on the culpability of the accused.[51] Within the context of the defense of mistake of law, several criteria could be relevant such as the personal background of the accused, his position within society and in particular within a military or political organization as well as the question whether the values protected by the rules allegedly breached, form part and parcel of the specific society of the accused.[52]

Since the *mens rea* component is to be determined on an individual basis, a refutation thereof due to absence of criminality of the act within a certain community is therefore not unthinkable.

III. Conclusions: Towards a cohesive and equal application of international criminal law defenses

The above analysis reveals contrasting and at the same time diverging views within the international legal community, *vis-à-vis* the invokability of defenses within the realm of international criminal law and tribunals. The legal political foundation of the ICTY, i.e., a Chapter VII Security Counsel resolution, clearly transpires within the area of defenses in that a formal acknowledgement thereof is absent.[53] As observed, this is contrasted by the ICC Statute. In the absence of such a legal political framework (the ICC is a treaty-based institution), the ICC drafters were enabled to give due regard to principles of international criminal law arising from

48 See also Otto Triffterer, Commentary on the Rome Statute of the ICC 558 (1999).

49 See also Dinstein, *supra* note 5, at 24-245.

50 See *Prosecutor v. Brima et al.* Case No. SCSL-2004-16-T-607, Defense Trial Brief of 8 December 2006.

51 See also Triffterer, *supra* note 49, at 563.

52 See for the first two criteria Cassese, *supra* note 12, at 260.

53 See Article 7 of the ICTY Statute.

a fusion between common and civil law provisions on defenses, albeit "phrased along common law propositions of a rather broad and undifferentiated concept of defenses."[54] Less restrained by international and regional security and legal political interests, the ICC drafters came to a more political neutral system *vis-à-vis* defenses which is now reflected in Article 31.

Although the ICC has not yet determined the scope of Article 31 of the ICC Statute in practice, it is conceivable that it adopts a restrictive approach thereto similar to that of the ICTY. In that situation, it is questionable whether this complies with the intentions of the ICC drafters, for example in the area of duress. If, however, the ICC would advance a more extensive approach compared to that of the ICTY, this development could result in an appearance of arbitrariness in that defenses are subjected to different standards depending on which international tribunal is called upon. This may negatively impact upon the principle of equity which should also govern the applicability of defenses before international criminal tribunals.

From the perspective of the accused persons, the invokability of defenses form an essential part of the principle of a fair trial. Most defenses, such as duress, necessity, self-defense, mistake of law/fact and mental disease are legal postulations of a certain mental state of the accused. They are simply legal vocabulary to reveal that the mental state of the accused was such that, although the act constituted a criminal act, it is not reasonable to hold him or her culpable for it. The mere fact that international tribunals deal with international crimes should in itself not change this basic tenet.

After all, the principle of individual criminal responsibility requires an assessment of culpability of an individual on a basis abstracted from rigid concepts, such as the exclusion *ab initio* of the defence of duress when it concerns the killing of innocent civilians.[55] Without doubt, the interests of the victims of international crimes are to be respected. Yet, an international criminal trial primarily focuses on an assessment of personal guilt of the accused. This is not to say that the lives of civilians can or should be weighted against the interests of an accused. This is to say that the choice of the international community to have criminal trials conducted fairly implies an emphasis on the *mens rea* of the accused. As long as the justices of the ICC give due regard to the facts of each case an exclusion of criminal responsibility on basis of self-defence or duress in an individual case, does not imply that the lives of (innocent) civilians are of lesser value compared to that of the accused or his next of kin.

This premise, now that this basic tenet has been accepted by the international community evidenced by Article 31 of the ICC Statute, should be upheld and maintained without exception. In this regard it is regrettable that the drafters of the ICTY Statute did not consciously scrutinize this premise and fundamental concept. It is to be hoped that the justices of the ICC will be able to apply Article 31 of the Statute with transparency while giving due regard to fair trial principles in this area.

54 See Albin Eser, in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 539 (1999).

55 See for this exclusion *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ICTY Appeals Chamber Judgment of 7 October 1997, para. 373.

Part III

The Court at Work

Section 13

The Procedural Rules of the ICC

Chapter 34

The Rules of Procedure and Evidence and the Regulations of the Court

Silvia Fernández de Gurmendi and Håkan Friman

I. Introduction

The tension between internationalism and state sovereignty permeates many of the decisions that were taken during the negotiations of the Rome Statute and supplementary instruments. Although unprecedented, it is not surprising that States preserved for themselves the right to both elaborate and adopt the Elements of Crimes and Rules of Procedure and Evidence. It is clear that the articulation of a precise substantial and procedural regime that would govern the Court, and limit the discretion of the Prosecutor and the judges, was considered to be a prerogative of the legislative powers of sovereign States. The judges were entrusted solely with the task of drafting the Regulations necessary for the Court's routine functioning, and even these provisions require some involvement of States[1].

The Statute, Rules and Regulations establish a fairly complete, although not exhaustive, procedural scheme for the Court. The inevitable gaps, the open solutions and constructive ambiguity in some of the provisions will require the Court to assert implied powers with respect to its own procedure.

However, in light of the history of the negotiations, the possibility of asserting implied powers should be very narrowly construed when the interaction with States is at stake in order not to inadvertently affect statutory obligations or create additional ones, most particularly when developing the rules relating to the regime on cooperation and enforcement.

II. The adoption of Rules and Regulations of the Court

A. State-adopted Rules of Procedure and Evidence

The Rules of Procedure and Evidence were prepared and negotiated by State representatives gathered at the Preparatory Commission of the International Criminal Court established at the Rome Conference[2]. The Commission was open to all States

1 See article 52 paragraph 3 in accordance to which the Regulations adopted by the judges are to be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

2 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, A/CONF.183/10 (17 July 1998).

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 797–824.

signatories of the Final Act and other States which had been invited to participate in the Conference. The Rules, finalized by the Preparatory Commission were adopted at the first session of the Assembly of State Parties.

Although drafted and adopted by States the procedure for amendments of the Rules is more flexible than the one required for the Rome Statute and it grants the Court with some influence. In accordance with article 51 of the Statute, amendments may be proposed not only by States but also by the judges or the Prosecutor. Amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties. Once adopted, the amendments apply to all State Parties, including those who voted against them. Furthermore, the judges may draw up provisional rules to be applied in urgent cases.

The Regulations provide for the establishment of an Advisory Committee on Legal Texts comprised of three judges, one representative from the Office of the Prosecutor, one from the Registry and one for legal counsel who are active before the Court. The Advisory Committee shall consider and report on proposals for amendments to the Rules, Elements of Crimes and the Regulations.

B. Structure and nature of the Rules of Procedure and Evidence

The Rules are of binding nature and cover almost all matters referred to in the Rome Statute that are necessary for the operation of the Court. In underpinning the Statute, it was of paramount importance not to affect balances and compromises reached at the Rome Conference after years of negotiations. Great efforts were deployed in order not to deviate in any way from the Statute. The higher status of the Statute, expressly provided for in its article 51, paragraphs 4 and 5, is also explicitly acknowledged in an "explanatory note" to the Rules.

Only the structure of the Rules, which are divided in twelve chapters[3], deviates from the Statute as a recognition that the rigid division between the Parts of the Statute does not sufficiently take into account that several provisions contained in one part shall apply to other stages of the proceedings as well. These provisions, which concern mainly the criminal proceedings, have been gathered in Chapter 4 of the Rules, which groups in four sections the provisions relating to Evidence (Section I), Disclosure (Section II), Victims (Section III) and Miscellaneous Provisions (Section IV).

In drafting the Rules, due attention was given to those provisions of the Statute that expressly require supplementary rules as well as to other indications contained in the Reports of Working Groups of the Diplomatic Conference that referred to the need to further elaborate certain aspects of the procedures. Many of the Rules elaborated by the Preparatory Commission, however, were not contemplated in the Statute or in the negotiating reports but were considered to be necessary for the effective operation of the Court. Some of them do not relate to a specific statutory

3 The chapters are: 1) General Provisions; 2) Composition and Administration of the Court; 3) Jurisdiction and Admissibility; 4) Provisions relating to various stages of the proceedings;5) Investigations and Prosecutions; 6)Trial Procedure; 7) Penalties; 8) Appeal and Revision; 9) Offences and Misconduct against the Court; 10) Compensation to an Arrested or Convicted Person; 11) International Cooperation and Judicial Assistance; and 12) Enforcement.

provision but are intended to fill the voids and ensure a coherent and integrated regime.

C. Judge-adopted Regulations

The judges are empowered to adopt, by absolute majority, Regulations of the Court (article 52 of the Statute).[4] The Regulations represent the third-ranked statutory instrument of the Court, subject to the Statute and the Rules of Procedure and Evidence (the Rules).[5] While the Regulations of the Court are not explicitly mentioned as "applicable law" in article 21 of the Statute, they should be understood as binding due to the explicit support in the Statute and the Rules.[6]

Although the Statute may be open to criticisms for not allowing necessary flexibility,[7] one should note that the provisions of the Statute and the Rules do in fact leave considerable room for interpretation and thus for flexibility. Moreover, the ICC benefits from the experiences of the ICTY and ICTR, which also allowed the negotiating States to adopt some already tested procedural mechanisms.

The Regulations evolved from a first short draft by external experts, invited by the then Director of Common Services, and extensive comments and proposals by the judges, which were discussed in Plenary sessions during November 2003, March 2004 and May 2004. A drafting board assisted the Plenary and the judges formed working groups to deal with various issues. Representatives of the Prosecutor and the Registrar also participated in the Plenary.[8] The Plenary was held in closed sessions and, unlike the Statute and the Rules, general public consultations did not take place prior to the adoption of the Regulations.[9]

The judges of the Court adopted the Regulations at the 5th Plenary Session on 26 May 2004.[10] In accordance with the Statute, the Regulations were thereafter subject to the scrutiny of the States Parties. During the prescribed six month-period no

4 See also rule 4 on Plenary sessions.

5 See also regulation 1(1).

6 Counsel for the defence are explicitly bound by the Regulations, see rule 22(3). The binding effect of the Regulations are also underscored by the Judges in that regulation 29 provides for the issuance of orders, arguably also in the form of sanctions, in the event of non-compliance with any regulation or with an order of a Chamber issued there under.

7 E.g. Fabricio Guariglia 'The Rules of Procedure and Evidence for the International Criminal Court: A Development in International Adjudication of Individual Criminal Responsibility' in: Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford Univ. Press: Oxford 2002), at 1111-1133; David Hunt 'The International Criminal Court – High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' *Journal of International Criminal Justice* 2 (2004) 56, 61-63.

8 See article 52(2) which requires that "[t]he Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto".

9 However, so-called Public Online Hearings – the posting of specific questions on the Internet – were held by the Judges in November 2003, but only concerning two topics: defence issues and victims issues.

10 Official Document of the International Criminal Court: ICC-BD/01-01-04.

objections were submitted and, thus, the Regulations remain in force as adopted by the judges.[11]

The Regulations set forth procedures for subsequent amendments.[12] Retroactive application of an amended regulation is not allowed to the detriment of a person suspected, accused, convicted or acquitted of a crime, which follows the principle laid down for amendments of the Rules.[13] The Regulations have thereafter been amended once, although only concerning the French language version.[14]

D. The structure and nature of the Regulations

The Regulations of the Court consist of 126 regulations in nine chapters. Chapter 1 contains general provisions and Chapter 2 provisions relating to the composition and administration of the Court. Chapter 3 on court proceedings is divided into sections: 1. provisions relating to all stages of the proceedings; 2. pre-trial provisions; 3. trial provisions; and 4. provisions concerning appeals and revision. Various provisions on counsel and legal assistance are collected in Chapter 4 and presented in different sections: 1. list of counsel and duty counsel; 2. defence through counsel; 3. legal representatives of victims; and 4. legal assistance paid for by the Court. Chapter 5 addresses the participation of victims in the court proceedings and Chapter 6 detention matters. Additional provisions on cooperation and enforcement are given in Chapter 7. Chapter 8 includes certain procedural matters regarding disciplinary proceedings and Chapter 9 directs that a Code of Judicial Ethics shall be adopted.

The Regulations are relatively extensive and not only procedures but also other issues, including certain important institutional matters, are addressed. Of course the Regulations must be in full conformity with the Statute and the Rules; in case of any conflict, the higher-ranked instrument shall prevail. Clearly, experiences of the ICTY and ICTR influenced many of the provisions.[15]

In a few instances, the Rules direct that specific issues shall be addressed in the Regulations of the Court:[16] criteria and procedures for the assignment of legal assistance, appointment of judges for disciplinary proceedings, procedures for the replacement of a judge, and time limits for representations of victims in proceedings under article 15. These issues have been taken care of.[17]

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11 See Philippe Kirsch 'The International Criminal Court: A New and Necessary Institution Meriting Continued International Support' *Fordham International Law Journal* 28 (2005) 292, 304-305.

12 Regulation 6.

13 Article 51(4).

14 Amendments to the French version of regulations 29(1), 66(1), 92(3), 95(2), and 103(6), were adopted on 9 March 2005 at the 6th Plenary Session of the Judges (ICC-BD/01-01-04/Rev.01-05).

15 See also Kirsch, note 11, 304, and Hans-Peter Kaul 'Construction Site for More Justice: The International Criminal Court After Two Years' *American Journal of International Law* 99 (2005) 370, 376.

16 Rules 21(1), 26(2), 38(2) and 50(3).

17 See regulations 67-85 (counsel issues and legal assistance), 120 (selection of judges for disciplinary proceedings), 15-16 (replacement and alternate judges), and 50 (time limits for victims' representations under article 15).

Various provisions of the Regulations are of a different nature. Article 52 of the Statute refers to Regulations of the Court "necessary for its routine functioning" and many provisions relate to "house-keeping" matters. Some practical issues, which do not require detailed regulation for domestic proceedings, are addressed concerning the ICC proceedings in which lawyers with different backgrounds and experiences are operating. Examples are the very detailed provisions on the content, format and page limits of various documents submitted in the proceedings,[18] and on documents filed in appeals proceedings.[19] Other important practical matters are also addressed, such as notifications,[20] time limits,[21] broadcasting and release of transcripts of recordings,[22] electronic case management,[23] and real-time transcripts of hearings.[24]

Additionally, certain issues that are already addressed – directly or indirectly – in the Statute or the Rules would benefit from further clarifications and the Regulations offered an opportunity to do so in a coherent and unified manner. The approach was that the Court would be better served if some issues, which require an interpretation of existing provisions and would otherwise have to be made in jurisprudence, were rather resolved in advance. Some of these issues are of significant importance to the overall procedural scheme. But while clarifications were made, the judges were cautious not to restrict what they considered to be inherent powers.[25]

In line with the procedural development in the ICTY and ICTR, many of the provisions lay stress upon judicial intervention and control of the proceedings. The Regulations include measures aimed at minimizing the length of the proceedings and enhancing judicial economy in general, while at the same time respecting the applicable rights of the accused and others. Although guidance is provided in the Statute and the Rules, there will always be different views as how best to protect such rights and to balance different interests; certain provisions prompted extensive debates.[26] In this regard, the group of judges represents a microcosm of different legal

18 E.g. regulations 23, 36-38 and 50. Similarly, the ICTY and ICTR has issued detailed Practice Directions: ICTY, *Practice Direction on the Length of Briefs and Motions* (16 September 2005, IT/184/Rev.2); ICTR, *Practice Direction on the Length of Briefs and Motions on Appeal* (16 September 2002). See also SCSL, *Practice Direction on Filing Documents before the Special Court for Sierra Leone* (adopted on 27 February 2003, as amended).

19 Regulations 57-65. For comparison, see also: ICTY, *Practice Direction on Formal Requirements for Appeals from Judgement* (7 March 2002, IT/201) and *Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal* (16 September 2005, IT/155/Rev.3); ICTR, *Practice Direction on the Length of Briefs and Motions on Appeal* (16 September 2002), *Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal* (16 September 2002), and *Practice Direction on Formal Requirements for Appeals from Judgement* (4 July 2005).

20 Regulations 31-32.

21 E.g. regulations 33-35.

22 Regulation 21, which also takes into account protective measures.

23 Regulation 26.

24 Regulation 27.

25 See regulations 28(3) (questions by a Chamber) and 29(2) (non-compliance with the Regulations)

26 See also Kaul, note 15, 376-377.

traditions, not much different than that of the States negotiating the Statute and the Rules. Difficult issues included the possibility to appoint counsel against the will of the accused,[27] directions regarding the presentation of evidence, including limitations, and other matters at trial,[28] and modification of the legal characterisation of facts in the charges (see further below).[29]

A particular concern was the factual and legal issues that are common to many trials regarding one and the same situations and which repeatedly require presentation of evidence and determinations in different trials, as experienced by the ICTY and ICTR. A typical example would be the existence of an armed conflict and whether it was of an international or non-international character. This question was thoroughly discussed but did not result in any specific provision.

Other matters deal with the relationship between different organs of the Court and the demarcation of their functions. This was particularly pronounced regarding the functions and responsibilities of the Pre-Trial Chamber prior to and during the criminal investigation and how these relate to the Prosecutor's mandate. Hence, a regulation whereby the Pre-Trial Chamber may request the Prosecutor to provide information which the Chamber considers necessary in order to exercise certain functions under the Statute generated much debate.[30] Also the relationship between the confirmation of charges by the Pre-Trial Chamber and the subsequent trial to be conducted by the Trial Chamber was discussed, as was the power of different organs to enter into cooperation agreements or arrangements with non-States Parties and intergovernmental organisations.[31]

III. Institutional matters

The Rules and the Regulations of the Court entail a number of supplementary provisions concerning institutional matters. The Rules further specify the conduct of the Plenary sessions and different solemn undertakings.[32] Further, the Regulations establish the Coordination Council for administrative coordination,[33] consisting of the President, the Prosecutor and the Registrar, and the Advisory Committee on Legal Texts, with both internal and external representation, for coordination and scrutiny of amendments to the Rules and the Regulations.[34]

27 Regulation 76, which allows the appointment of counsel "where the interests of justice so requires".

28 Regulation 54 on status conferences before the Trial Chamber, which indicates a number of measures to be imposed in order to control the length of the trial.

29 Regulation 55.

30 Regulation 48; se also Kaul, note 15, 377.

31 Regulation 107. Compare with article 87.5-6 (which refers to the unspecified "the Court"), article 54(3)(d) (which sets out the Prosecutor's powers in this regard), rule 16(4) (protection and relocation agreements to be negotiated by the Registrar), and rule 200(5) (bilateral enforcement agreements to be entered into by "the Court"). See also regulation 114 regarding enforcement agreements.

32 Rules 4-6.

33 Regulation 3.

34 Regulations 4-6.

Importantly, the Regulations also provide for two Offices of Public Counsel with the Registry, one for defence counsel and one for victims counsel.[35] These offices follow a model introduced by the Special Court for Sierra Leone, where a Defence Office has been established.[36] Similar ideas were discussed but not acted upon by the States in the ICC negotiations.[37]

The Rules and Regulations of the Court also address the designation and functions of a Single Judge and a Duty Judge of the Pre-Trial Chamber,[38] recusal, disqualification, and replacement of a judge and other functionaries,[39] alternate judges,[40] as well as removal from office and disciplinary proceedings.[41] Moreover, the Regulations add further clarification regarding the judges' term in office and precedence among them, service within the Appeals Chamber, Presiding Judges, Presidents of Divisions, and the Presidency.[42]

Some provisions concerning the Office of the Prosecutor and the Registry are included in the Rules, which are to be followed up by further directions in the Regulations of the respective organ.[43] Of particular interest are the functions of the Registry with respect to victims and witnesses, including the Victims and Witnesses Unit, and defence counsel, regarding which extensive regulation is provided (see further below). Language issues and services, which of course are crucial for the functioning of the Court, are also addressed.[44]

IV. Objectives and challenges

A. Explaining and linking procedures

The provisions of the Statute that deal with criminal proceedings are mainly contained in Parts 5 (Investigation and Prosecution), 6 (the Trial) and 8 (Appeals and Revision). But also other Parts of the Statute contain important procedural provisions: Part 2 on Jurisdiction and Admissibility, Part 4 on Composition and Administration, Part 7 on Penalties, Part 9 on Cooperation, and Part 10 on Enforcement. Many of the provisions are the result of separate compromises achieved after years of complex negotiations. Some of them address similar or inter-linked issues but are not

35 Regulations 77 and 81.

36 Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

37 See Gerard Dive 'The Registry' in: Roy Lee *et al.* (eds.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), at 277-279.

38 Rule 7 and regulations 17 and 47. See also articles 39(2) and 57(2). In addition, regulations 18-19 provide for duty legal officers of the Chambers and of the Registry.

39 Rules 33-38 and regulation 15.

40 Rule 39 and regulation 16. See also article 74(1), which also introduces the principle that a Judge cannot be replaced once the trial has commenced; cf. rule 15*bis* of the ICTY Rules and ICTR Rules respectively.

41 Rules 23-32 and regulations 119-125.

42 Regulations 9-14.

43 Rules 9 and 14.

44 Rules 40-43 and regulations 39-40. See also Chapter 2, Section 2 of the Registry Regulations.

fully interconnected, a task that had to be shouldered in the process of developing the Rules.

A good example is the relationship between provisions in Part 2, which includes the most sensitive political issues relating to the jurisdiction of the Court and its relationship to national jurisdictions, and the procedures of Part 5. One of the most contentious issues was providing the Prosecutor with the power to activate the jurisdiction of the Court on his or her own motion, albeit with a decisive involvement of the Pre-Trial Chamber (article 15). Quite apart from being decided very late at the Rome Conference, the procedural discussions relating to this *proprio motu*-power of the Prosecutor were solely focused on the inclusion of safeguards to avoid an eventual abuse of power and make this role politically viable. Hence, a two-step procedure was introduced whereby the Prosecutor, upon reception of information on crimes within the jurisdiction of the Court, may only proceed to a preliminary inquiry but a full-fledged investigation requires the authorization of the Pre-Trial Chamber.[45]

However, general provisions on the commencement of an investigation were developed by another working group (article 53) and there was a need to reconcile these articles. This was mainly done in rule 48 which confirms that factors to be considered under article 53 in order to initiate an investigation also apply to the Prosecutor's determination whether to seek an authorization of the Pre-Trial Chamber under article 15. In addition, rules 104-110 forge further links between article 15 and the procedures set out in article 53. It was also acknowledged that the Prosecutor would need to conduct similar inquiries and analyses regardless of which "trigger mechanism" has been employed and thus rules 47 and 104 harmonises the pre-investigation procedures of articles 15 and 53 respectively.[46]

Moreover, many important procedural provisions are included only in Part 6 of the Statute, relating to the trial, and the question arose whether, and if so to what extent, they apply also to the pre-trial proceedings. As an important clarification, the structure and content of the Rules indicate that such provisions also apply, at least partially, to the pre-trial proceedings. Examples are provisions on evidence, disclosure, protection of persons, and participation of victims in the proceedings. In addition, some of the provisions of the Regulations of the Court, including provisions on protective measures, testimony of witnesses, and experts, are explicitly applicable at all stages of the proceedings.[47]

A further example of insufficient integration was the relationship between articles 70 and 71, relating to offences against the administration of justice and mis-

45 For a detailed negotiating history of article 15, see Silvia A. Fernandez de Gurmendi 'The Role of the International Prosecutor' in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999), at 175-189.

46 It was decided that rules 111 and 112, dealing with the record of questioning, shall apply *mutatis mutandis* to testimony received by the Prosecutor under article 15(2) despite the fact that this testimony is taken during the preliminary inquiry, before the Pre-Trial Chamber has authorized a full investigation; see rule 47. Consistently with this decision, admissibility of testimony taken at this early stage shall also be governed by the provisions on evidence contained in article 69(4). This applies also with respect to article 53; see rule 104.

47 Regulations 20-44.

conduct before the Court, and the rest of the Statute. The Rules elaborate on these matters and clarify, *inter alia*, that the principle of complementarity does not apply to these offences.[48]

As noted in section 2.2, certain issues were consciously left out of the Statute to be dealt with in the Rules. It was also natural to address other additional matters of importance to the proceedings, such as provisions on medical examinations[49] and procedures with respect to deprivation or restriction of liberty.[50] Rules have also been added in order to promote effectiveness and efficiency in the proceedings (see below).

Another important, and perhaps unforeseen, bonus-effect of developing the Rules was the opportunity for States to compare and explain different interpretations of various provisions of the Statute. It transpired that a number of important procedural provisions were interpreted very differently, for example the scope for judicial intervention by the Pre-Trial Chamber in the criminal investigation[51] and the participation of victims in the proceedings.[52] While some of these differences could be reconciled and clarification be given in the Rules, others remain and will have to resolved by the Court. Unsurprisingly, the relationship between the respective roles of the Prosecutor and the Pre-Trial Chamber in the investigation has remained a disputed issue, as is detectable in some of the Regulations of the Court[53] but also in some Pre-Trial Chamber decisions.

There are also areas where clarifications were of importance for the implementation of the Statute by the States Parties. This relates to many provisions in Chapter 11 of the Rules, dealing with international cooperation and judicial assistance, and to Chapter 12 on enforcement. Some concerns were of a legal-technical nature, e.g. the content of the Court's orders for forfeiture and reparations,[54] but others related to more political concerns (sometimes linked to constitutional issues), e.g. the question of re-extradition of a person who was surrendered to the Court.[55] Important provisions were also included in the Regulations of the Court on additional procedures for challenges to the legality of a request for cooperation and for the establishment of a failure to comply with a request for cooperation.[56]

48 Rules 162-172.

49 Rules 113 and 135.

50 Rules 117-120.

51 Article 56 and 57.

52 Article 68(3).

53 Particularly, regulation 48.

54 Rule 218.

55 Rules 185 and 214. See also regulation 115 which further clarifies that the Court shall "have due regard to the principles of international law on re-extradition", a clarification clearly designed as an assurance that re-extradition will not take place without the consent of the state which surrendered the person to the Court; see e.g. article 15 of the European Convention on Extradition of 13 December 1957 and article 14 of the UN Model Treaty on Extradition of 14 December 1990 (UN Doc. A/Res/45/116).

56 Regulations 108-109.

B. Bridging legal traditions

Throughout the ICC negotiations on the criminal procedures there were tensions between different legal traditions, particularly between the common law and civil law traditions, and much effort was made to find solutions that would satisfy different domestic principles and approaches. After all, the procedures must be considered as fair by observers from all corners of the world. Hence, the procedural law is truly *sui generic* and exposes a carefully balanced combination of elements from the different legal traditions, something that needed to be preserved in the subsequent instruments. One important element was the division of functions between the Prosecutor and the judges, in part manifested by the creation of the Pre-Trial Chamber.[57] The different preferences, and interpretations of the Statute, were felt in the negotiations of the Rules, but are also evident with respect to the Regulations of the Court.

Another matter in the Rules regarding which strong opinions based on different legal traditions were exposed was the relationship between the functions of the Pre-Trial Chamber vis-à-vis the Trial Chamber. This was particularly the case regarding disclosure of evidence and whether the record of the pre-trial proceedings should also contain evidence and be transferred to the Trial Chamber (a "dossier").[58]

Lengthy discussions were also devoted to the procedures for the confirmation hearing as provided for in article 61. One major controversy in the Rules related to the presentation and examination of evidence at the confirmation hearing where the accused is present, including matters of disclosure.[59] Controversial was also the development of more detailed procedures for confirmation hearings in absentia, in itself a compromise when introduced in the Statute.[60] Conflicting views were put forward particularly concerning the involvement of a defence counsel and requirements for providing the accused with specific information.[61] However, certain significant issues could not be resolved, neither in the Statute nor in the Rules, such as when, i.e. for what purpose, a confirmation hearing *in absentia* should be held; it is clear, however, that the case cannot move to trial and a verdict without the presence of the accused.[62]

With respect to the Rules, the divide between systems attained its peak during the negotiations of rule 140 on directions for the conduct of the trial, which turned out to be one of the most controversial of all rules. The broad terms of the Statute on the conduct of the trial, merely stipulating that "the Presiding Judge may give directions for the conduct of the trial",[63] were considered by some to give insuffi-

57 For a more detailed background, see e.g. Fabricio Guariglia, "Investigation and Prosecution", in: Roy S. Lee (ed.), note 45, 227-238, and Hans-Jörg Behrens, "Investigation, Trial and Appeal in the International Criminal Court Statute (Parts V, VI, VIII), *European Journal of Crime, Criminal Law and Criminal Justice* 6 (1998) 429-441.

58 Rules 76-84, 121 and 131.

59 Article 61(5)-(6), and rules 121-122. Also note that rules 76-84 on disclosure in principle are applicable to both the pre-trial and trial stages of the proceedings.

60 See further, Håkan Friman, "Rights of Persons Suspected or Accused of a Crime", in: Roy Lee (ed.), note 45, 247-262.

61 Article 61.1 and rules 123-126.

62 Article 63.

63 Article 64(8)(b).

cient guidance. The critics, many of whom having their background in the common law tradition, argued that a more predictable procedural scheme was essential for a fair trial, upholding the rights of the accused, and for a consistent practice (i.e. equal treatment). On the other side were some civil law lawyers who considered that the judges should be sole arbiters of these procedures with no further guidance from the Rules.

After very intense debates, a compromise was reached which provides some further clarity and safeguards, particularly regarding the examination of evidence, but it still leaves the Court with ample margins to design the conduct of the trial. An important but unresolved question was whether the trials will be conducted in accordance with strict adversarial principles – with distinct cases being presented to the court, first a prosecution case and thereafter a defence case – or whether there will be more civil law-inspired trials. Only some further guidance is provided in the Regulations of the Court[64] and this fundamental issue will have to be resolved in jurisprudence. This solution is not without its problems, however, since there is a risk that fundamentally different approaches will be taken in different cases, resulting in uncertainty and preparation difficulties for the parties.[65]

As to the Regulations of the Court, the most principled debate between common law and civil law principles occurred with respect to regulation 55 on the authority of a Chamber to modify the Prosecutor's legal characterisation of the facts in the charges.[66] Apart from triggering a discussion on the relationship between the charges as confirmed by the Pre-Trial Chamber and this application of the principle of *jura novit curia* ("the court knows the law") by the Trial Chamber, civil law jurisdictions and common law jurisdictions regard the issue very differently. Would this be an unacceptable way of amending the charges, detrimental of the accused, or a permissive mechanism which could also contribute to avoiding an excessive charging practice? In fact, these very issues were discussed in the ICC negotiations but the differences of opinion could not be overcome. Hence, this issue was left to the judges to resolve and by regulation 55 they have given directions, jointly and in advance, which establish an important principle but also a number of procedural safeguards.

C. Balancing different values

The establishment of the Court is based on a concern that certain extremely serious crimes cannot go unpunished and cannot be confined to the ability and willingness of national systems to investigate and prosecute. But while this underlying and value-based objective is shared by the international community as a whole, the more detailed principles and procedures for international judicial intervention generated, at times, passionate disagreement. As already noted, the conflicting views did in part stem from the different legal traditions of the world, each of which rests on a set of societal values. The ICC, on the other hand, is by definition detached from a particu-

64 Regulation 43 on testimony of witnesses.

65 See e.g. *Informal Expert Paper: Measures available to the International Criminal Court to reduce the length of the proceedings*, Office of the Prosecutor, 2003, par. 86-93.

66 See further Carsten Stahn, "Modification of the Legal Characterisation of Facts in the ICC System: A Portrayal of Regulation 55", *Criminal Law Forum* 16 (2005), 1-31.

lar national system of values and this made the drafting of both the Statute and the Rules intrinsically difficult.

Some of the conflicts at the Rome Conference were clearly informed by cultural and civilizational factors, such as the criminalization of some sexual offences, the exclusion of the death penalty and the inclusion of life imprisonment. In all these cases, agreements could only be reached by an express recognition that both systems of values, national and international, although interrelated, are still intended to operate separately. Accordingly, explicit provisions in the Statute or, regarding capital punishment, a conference statement made it clear that the solutions for the ICC concerning "forced pregnancy" and penalties shall not affect national laws and practices.[67]

The need to reconcile social and cultural differences appeared also with respect to some important aspects of the Rules, particularly in connection with rules on evidence. The main areas of contention in this regard pertained to rules related to privileged communications and information, incrimination of family members, and evidence of sexual offences. In these cases, a balancing act had to be made by delegations in order to find a suitable compromise between the need to provide the Court with the necessary evidentiary tools for discharging its judicial functions and the need to protect other values, both national and international.

Rule 73 on privileged communications and information covers different classes of professional or other confidential relationships and the development of the provisions required a balancing of interests both in general terms and concerning the explicitly mentioned relationships, e.g. lawyer-client, patient-medical doctor or vis-à-vis a member of a religious clergy. The rule also acknowledges the specific mandate of the International Committee of the Red Cross and the need to preserve the confidential nature of its activities.[68] Additionally, rule 75 contains a compromise regarding the need to protect family values and prevents the Court from requiring a statement from a spouse, child or parent of an accused person that might tend to incriminate the latter. This solution required an agreement regarding the scope of "family members", something that differs widely from society to society.

The admission of evidence relating to sexual offences, in particular whether evidence of the prior sexual conduct of the victim could be admitted, was one of the most contentious matters in the negotiations of the Rules. Only after very long and at times heated discussions was an elaborate package accepted. It included provisions on corroboration, consent and prior sexual conduct.[69] Again, social and cultural differences were at play and the solution required the explicit acknowledgment that it was framed exclusively for ICC-purposes. At the request of the United Arab

67 See articles 7(f) ("forced pregnancy") and 80 (penalties), as well as the Statement on capital punishment which was read out by the President of the Rome Conference in connection with the adoption of the Statute on the 17 July 1998. For a detailed story of the negotiations on penalties, see Rolf Einar Fife, "Penalties" in: Roy S. Lee (ed), note 45, 319-343.

68 The solution of rule 73(4) also confirms the approach taken in the jurisprudence of the ICTY, *Prosecutor v. Simić et al*, Case No. IT-95-9-PT, T. Ch., Decision on the Prosecutors Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

69 Rules 63(4), and 70-72.

Emirates, the compromise package accompanied by a proviso in the Explanatory note stating that the Rules of the Court could not affect the procedural rules for any national court or legal system for the purpose of national proceedings.

The differences regarding penalties also reemerged when the Rules were developed, although to a lesser extent than in the previous negotiations. Apart from more technical issues such as the extent to which statutory law is required and the possible development of punishment scales for different crimes, some more value-based discussions also took place. In the context of developing mitigating and aggravating circumstances in the determination of sentence, the discussions touched upon the purposes of punishment such as retribution or rehabilitation of the offender, resulting in a non-exhaustive list of such circumstances.[70] Here too the controversy surrounding life imprisonment prompted debate and the Rules were to include additional pre-conditions for the imposition of this penalty.[71]

D. Providing for effectiveness and efficiency

An essential aspect of a fair trial is the accused's right to be tried without undue delay, a right laid down in all major international and regional human rights instruments[72] and in article 67 of the Statute. In spite of numerous measures being taken to expedite the proceedings, the experience of the ICTY and ICTR is that international criminal proceedings tend to be lengthy. Numerous reasons could be identified but the main reasons are the complexity and scope of the cases, and the difficulties originating in the international criminal tribunals and courts dependence upon the cooperation of States and others for their functioning. In addition, the *ad hoc* Tribunals were not given much guidance in their Statutes and the procedural law has evolved gradually.[73] Unlike in domestic systems, the *sui generis* nature of the criminal procedures does carry with it the inherent difficulty of uncertainty, at least initially, for everyone involved.[74] A level of uncertainty is also an effect of the high degree of flexibility, although also useful and often necessary, that characterise many procedural provisions and of the "constructive ambiguity" that is used as a tool to reach compromises in international negotiations.[75]

Many provisions in the Statute, Rules and Regulations of the Court are motivated by effectiveness and efficiency. An example in the Rules is the detailed scheme for the preparation of the confirmation hearing which includes time limits and disclosure provisions.[76] One aim was to provide for early disclosure of evidence. The

70 Rule 145.

71 Rule 145(3).

72 E.g. see article 14(3)(c) of the ICCPR, article 6(1) of the ECHR, article 7(1)(d) of the African Charter, and article 8(1) of the ACHR.

73 E.g. Theodor Meron, "Procedural Evolution in the ICTY", *Journal of International Criminal Justice* 2 (2004) 520-525.

74 E.g. Vladimir Tochilovsky, "International Criminal Justice: 'Strangers in the Foreign System'", *Criminal Law Forum* 15 (2004), 319-344.

75 Regarding "constructive ambiguity" in the ICC Statute and Rules, see e.g. Claus Kress, "The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise", *Journal of International Criminal Justice* 1 (2003), 603.

76 Rule 121. See also the general provision on time-limits in rule 101.

Regulations add quite stringent conditions for the document containing the charges and introduce a time limit within which the Pre-Trial Chamber shall deliver its decision.[77] As to the confirmation process itself, some argued that the case should in principle be trial ready after the confirmation of charges and, thus, that most of the disclosure should take place prior to the confirmation hearing. But others referred to the limited scope of this process according to article 61 and considered that the pre-confirmation disclosure should be more limited. Both sides also raised issues of effectiveness and efficiency in support of their respective views and the Court will have to find an appropriate balance for the confirmation process.[78]

In the same vein as the procedural development of the ICTY and ICTR, the judges are provided with powers to control and expedite the proceedings. Unlike the *ad hoc* Tribunals, however, the ICC Statute provides, under specifically regulated conditions, for judicial intervention also with respect to the initiation of a criminal investigation, or rather the decision not to investigate, and in the investigation itself. When drafting the Rules and Regulations of the Court, it was therefore necessary to determine whether different procedural provisions should apply only to a particular stage of the proceedings or instead be of general application. For example, rule 68 on the use of previously recorded testimony is confined to application by the Trial Chamber since article 61 allows for summary evidence in the process of confirming charges. In the Regulations of the Court, the judges inserted provisions to ensure the assignment and possible involvement of the Pre-Trial Chamber at the very earliest stages of the proceedings.[79]

The procedural mechanisms aimed at expediting the proceedings also include the use of recorded or transmitted testimonies by use of video or audio technology[80] and status conferences.[81] The Regulations of the Court further clarify that any Chamber may hold status conferences and apply different formats (e.g. as a video conference, in a written procedure, etc.).[82] In addition, the extensive powers of the Trial Chamber to issue orders for the conduct of the trial are also elaborated in greater detail.[83] The latter include restrictions regarding, *inter alia*, not only the length but also the content of legal arguments, as well as the time allocation for presentation of evidence and the length of the questioning of the witnesses, powers that must of course be exercised with great caution.[84]

Also regulation 55 on a Chamber's modification of the legal characterisation of facts (see above) should be understood in terms of effectiveness and efficiency; the

77 Regulations 52 and 53.

78 See further, e.g. Helen Brady, "Disclosure of Evidence", in Roy Lee *et al* .(eds.), note 45, 422-424.

79 See regulations 45 (information to the Presidency about State or Security Council referrals etc.) and 46(2) (assignment of a 'situation' to a Pre-Trial Chamber).

80 Article 69(2) and rules 68 and 111-112. See also article 56 on preservation of evidence for trial.

81 Rules 121 and 132.

82 Regulation 30.

83 Regulation 54.

84 Similar powers exist at the ICTY (rule *73ter* of the ICTY Rules), which have been interpreted in *Prosecutor v. Orić* Case No. IT-03-68-AR73.2, A.Ch., Interlocutory Decision on Length of Defence Case, 20 July 2005.

idea is clearly to avoid excessive and ambiguous charges that give rise to time-consuming proceedings, including multiple counts, challenges to the form of the charging document, and amendments.

A practical measure is the introduction of an electronic court management system, which is also intended to handle evidence other than live testimony.[85] This is not an entirely uncontroversial tool, however, and it must be designed to meet various requirements, *inter alia*, regarding confidentiality, protection of witnesses and victims, and disclosure of evidence. Another practical mechanism, which has proven very useful in the *ad hoc* Tribunals, are real-time transcripts of court hearings, which are also provided for in the Regulations of the Court.[86]

There are of course limitations as to how far efforts to expedite criminal proceedings may be taken. The boundary is the somewhat elusive notion of a "fair trial", particularly relating to the rights of the suspect or accused but also balanced against other interests and rights, e.g. victims' rights, as acknowledged in the law of the Court. Here too, the different legal traditions take different views and approaches, which was also exposed in the negotiations. Nevertheless, much time and efforts were spent to find an appropriate balance and to develop procedural safeguards. For example, rule 68 on testimonies recorded out of the trial explicitly protects the accused's right to examine the witness and regulation 55 on legal re-classification of facts includes procedural requirements in order safeguard the right to be informed of the charges and to prepare the defence.

V. Some aspects of the criminal procedures

A. Rights of suspected, accused and convicted persons

Apart from setting out comprehensive criminal procedures, the Statute also lists general rights of a suspect[87] or an accused in proceedings before the Court. These general rights, set forth in article 55 (the pre-trial phase) and article 67 (the trial phase), draw upon human rights standards as established in other international instruments, particularly the International Covenant on Civil and Political Rights (ICCPR).[88] But also the criminal procedures in themselves are drafted with a view to protect these rights. While most of the principles were not controversial as such, quite disparate views were expressed as to how they ought to be reflected in the procedures. In addition, the blend of adversarial and inquisitorial procedural elements sometimes resulted in multiple safeguards: attached to the suspect or accused as a

85 Regulation 26. Further directions are provided in the Registry Regulations.

86 Regulation 27.

87 The term "suspect" is used here for convenience although it is not used in the Statute or in the Rules. Instead article 55(2) refers to the situation "[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court".

88 See articles 9 and 14 of the ICCPR. Many of these rights are also included in regional human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 (and later amended), the African Charter on Human and Peoples Rights (African Charter) of 26 June 1981, and the American Convention on Human Rights (ACHR) of 22 November 1969.

party as well as in the form of obligations placed upon the Prosecutor and the judges to protect defence interests.[89]

The Rules and Regulations of the Court underpin many of the rights established by the Statute by adding and clarifying means and procedures for their practical implementation. An important clarification in the Rules is that the more comprehensive "trial rights" of article 67 shall apply from the time of the arrival at the Court of the arrested or summoned person, although with certain modifications.[90]

Regarding deprivation or restriction of liberty, for example, the Rules establish that the arrested person may challenge the arrest warrant before the Court, but not before national authorities, and may do so even before he or she has been surrendered to the Court.[91] Furthermore, a time limit and further procedures for the Pre-Trial Chamber's continuing reviews of a ruling on detention or release are provided,[92] as well as more detailed guidance regarding conditional release.[93] In addition, the Regulations of the Court require that the observations by relevant States shall be sought prior to a decision on interim release[94] and add extensive provisions on detention matters.[95] The further elaboration of these matters was natural due to the fundamental importance of the underlying rights. The fact that the ICC scheme regarding deprivation and restriction of liberty is quite different from the scheme applied by the ICTY and ICTR also added to the need for further guidance.

Other examples relate to the right to be informed of a suspicion or charges of a crime, to have time and facilities for preparations of the defence, to public hearings and records, and to interpretation and translation. Regarding notice of the suspicion or charge, the Rules provide additional requirements and safeguards.[96] To this the Regulations of the Court add formal requirements for the document containing the charges[97] and general provisions on notifications.[98] Sufficient notice is also important for the preparations of the defence, as is disclosure of evidence on which the Rules contain a comprehensive regime that is applicable, with some exceptions, to all stages

89 E.g. article 54(1)(a) (the Prosecutor's duty to investigate objectively), 56 (the role of the Pre-Trial Chamber concerning an unique investigative opportunity), and 64(2) (the Trial Chamber's responsibilities).

90 Rule 121(1). Respecting the substantive differences relating to the pre-trial phase, for example the requirements for presentation of evidence at the confirmation hearing, the application of the rights set forth in article 67 at this early stage are made subject to articles 60 and 61.

91 Rule 117; see also article 59(4).

92 Rule 118; see also article 60(3).

93 Rule 119; see also articles 58(7) and 60.

94 Regulation 51.

95 Chapter 6 of the Regulations of the Court. See also Chapter 5 of the Registry Regulations.

96 E.g. rule 111 (recording of the notification of a suspicion); rules 117(1) and 187 (information in the arrest warrant that shall be made available to arrested person); rule 121 (judicial control of notification of the arrest warrant and time limit for notification of charges); rule 123 (notification efforts required prior to a confirmation hearing *in absentia*).

97 Regulation 52.

98 Regulations 31-32.

of the proceedings.[99] Proper preparations also require practical arrangements such as confidential communication between a detainee and the defence counsel as provided for in the Regulations.[100]

Concerning the scope of the preparations that the defence conducts itself, it is important to note that the ICC procedures leave room for more civil law-styled proceedings whereby the investigation is almost completely conducted by the Prosecutor and, consequently, expose less distinct prosecution and defence cases at trial. In addition, the judges have indicated in the Regulations of the Court that the Pre-Trial Chamber will play an active role also during the investigation.[101] But the defence may also conduct its own investigation and obtain orders for collection of evidence and requests for cooperation from the Court.[102]

The principle of public hearings and the underlying aim of ensuring transparency and fairness by way of public scrutiny, which is laid down in the Statute,[103] were further reinforced. The Rules leave room for photographs and recordings[104] and the Regulations address broadcasting, real-time transcripts, and the release of transcripts and records.[105]

Important is a complete and accurate record of the proceedings.[106] However, it was also acknowledged that the principle of publicity must be balanced against other interests. Hence, restrictions are allowed in order to ensure, *inter alia*, the protection of victims, witnesses or the accused.[107] Interpretation and translations are indispensable, but also expensive and time consuming, features of international criminal proceedings and the general provisions of the Statute[108] are supplemented by the Rules and Regulations of the Court.[109]

The right of the accused to present and examine evidence on an equal footing as the Prosecutor is a well-established fair trial principle, which is also laid down in the Statute.[110] With respect to presentation of evidence the main difficulties related to the timing and content of defence disclosure.[111] One may also note that the quite far-

99 Rules 76 to 84. See also article 67(2) on disclosure of exculpatory and mitigating evidence by the prosecution.

100 Regulation 97.

101 Regulation 48.

102 Article 57(3)(b) and rule 116.

103 Article 67(1). See also regulation 20.

104 Rule 137(3).

105 Regulations 21 and 27.

106 Article 64(10) and rules 121(10) and 137(1).

107 See articles 68(1) and 69(2), rules 67-68 and 87-88, and regulations 20-21.

108 Articles 55(1)(c) and 67(1)(f).

109 E.g. rule 41 (additional working languages); rule 42 and regulation 40 (services within the Registry); rule 76(3) (translation of statements by prosecution witnesses); rules 117(1) and 187 (translation of the arrest warrant and other documents); rule 144(2) (translation of court decisions); rule 190 (translation of information to witnesses regarding self-incrimination); regulation 39 (language requirements for written submissions and other material); regulation 93 (information about detention regulations); regulation 97 (interpretation during contacts with defence counsel).

110 Article 67(1)(e).

111 Particularly rules 78 and 79.

reaching provisions of the Regulations allowing the Chambers to control and restrict the presentation of evidence apply equally to the prosecution and the defence.[112] More problematic to reconcile were the different views regarding measures that could be seen as affecting the accused's right to examine prosecution evidence properly.

Conceptual differences in different legal traditions complicated the discussions. Building upon the principles expressed in the Statute, the Rules outline additional measures and procedures for the preservation of evidence,[113] presentation of evidence by means of modern technology,[114] and the protection of victims and witnesses,[115] while at the same time safeguarding the rights of the accused. Hence, an appropriate balance between different interests was required. The most contentious issues, however, were the extent to which the identity of a witness could be withheld not only from the general public but also from the other party ('anonymous witnesses') and the format for examination of witnesses. While no consensus could be achieved on an explicit provision in the Rules either allowing or prohibiting 'anonymous witnesses',[116] it was possible to adopt a compromise scheme for the examination of witnesses.[117]

B. Rights of victims

A novelty in the Rome Statute is the departure from purely retributive justice by providing for reparations (including restitution, compensation and rehabilitation) to victims.[118] In addition, the Statute recognizes the right of victims to participate in all stages of the criminal proceedings and to express their own views and concerns. This scheme distinguishes the ICC from all its predecessors where victims are granted only the auxiliary role as witnesses.

This development has often been hailed as a great improvement, but there are also concerns as to the implementation of this scheme in practice. The Statute sets out only the basic principles for the access of victims to the ICC and these have been extensively developed in the Rules and Regulations of the Court. A first issue was the establishment of a comprehensive definition of 'victims' for the purposes of the ICC. While some States and many non-governmental organizations supported a broad definition based on the UN Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Powers (hereinafter the Victims Declaration),[119] other States were in favour of a restrictive regime for victims' participation in the proceedings and thus a more limited definition.

Once the modalities for such participation became clearer through the devel-

112 Regulations 43 and 54.

113 Rules 47, 68 and 114. See also articles 15(2) and 56.

114 Rule 68. See also article 69(2).

115 Rules 87-88. See also article 68.

116 Rule 81 (restrictions on disclosure) and 87-88 (protective and special measures). See also article 68(5).

117 Rule 140.

118 Article 75.

119 GA Res. 40/34 of 29 November 1985.

opment of the Rules, however, the broad definition gained stronger support. Hence, the negotiations were conducted with the Victims Declaration as the point of departure. But this proved controversial since many terms were considered ambiguous. Furthermore, there were calls for both broadening and for restricting the definition of the Declaration. A fundamental division arose between those who wanted a definition confined to natural persons and those who wanted to include legal entities as well. The final outcome was a new, simple and straightforward definition, covering natural persons and leaving room for including organizations and institutions as victims under certain circumstances.[120]

Apart from the general principle on participation of victims in their own right,[121] the Statute also refers to two specific instances when victims may make representations in the proceedings.[122] But only the basic principles are set out in the Statute and hence there was a need to elaborate the modalities in the Rules. To no surprise, this turned out to be an arduous task and many conflicting opinions were expressed.[123] Nonetheless, the discussions benefited from a meeting of experts held in Paris in April 1999 where a basic model for victims' participation was developed. Inspired by this model a coherent scheme was developed in the Rules, which essentially preserved the prerogative of the judges to determine when and how the right to participations should be exercised.[124] Specific provisions were made for the instances when the Statute explicitly provide for the participation of victims[125] and, in addition, some further procedural steps were identified where such participation was considered natural.[126] The Rules also establish when victims shall be notified in order to allow them exercising the right of participation, which also indicates decisive moments in the process when victims' interests may be affected.[127]

An important addition in the Rules, prompted by the potentially large number of victims, was the introduction of provisions on legal representatives for victims, including their qualifications and scope of participation.[128] One difficult question that was highlighted, but not conclusively resolved, was the determination of who should be considered a victim, particularly in the early procedural stages. For the practical operation of victims' participation, the Regulations of the Court provide further guidance. These include standardized application forms and preparatory

120 Rule 85.

121 Article 68(3).

122 Articles 15(3) and 19(3).

123 See e.g. Gilbert Bitti and Håkan Friman 'Participation of Victims in the Proceedings in: Roy S Lee et al (eds), note 45, 456-474. But critical voices have also been raised, querying, *inter alia*, what the purpose is and whether possible purposes could be achieved, e.g. Emily Haslam 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in: Dominick McGoldrick, Peter Rowe and Eric Donnelly (eds.) *The Permanent International Criminal Court – Legal and Policy Issues* (Hart Publishers: Oxford and Portland Oregon 2003), 315-334.

.124 Particularly rules 89-93.

125 Rules 50 (authorisation to commence an investigation *proprio motu*) and 59 (challenges to jurisdiction or admissibility). See also regulation 87.

126 Rules 87-88 (protective and special measures) and 119 (conditional release).

127 See rule 92.

128 In particular rules 90-91, but also rule 16 (responsibilities of the Registrar).

work within the Registry as well as matters concerning legal representation.[129]

The provisions on reparations to victims in the Statute are another novelty in the international adjudication of crimes.[130] The substantive legal principles and the procedures for reparations are outlined only in very general terms in the Statute, however, and further provisions were elaborated in the Rules. Since the Statute stipulates that the establishment of substantive law is a matter for the judges, the Rules mainly address procedural issues. Again the Paris expert seminar of April 1999 provided an inventory of questions to be considered. Focusing on the procedures, the Rules set out requirements regarding a request for reparation, notifications, expert assistance, and provisional measures.[131] The Regulations follow up with the development of a standard form and preparations to be undertaken by the Registrar.[132]

The measures were introduced with the aim to allow the victims to exercise their rights, as well as to achieve manageable and complete applications. The Rules were construed to encourage that requests for reparations be put forward at the earliest opportunity, but also taking into account that a reparation order may be issued post-conviction only and that the Court, according to article 75, in exceptional circumstances may determine the scope and extent of reparations on its own motion.

A more substantive and highly contentious issue was whether the regime should be confined to individual awards or also extended to collective ones. Some considered reparations as essentially being civil claims while others argued that they rather represent criminal sanctions. As a compromise, the Rules make individual awards the main rule but also allow collective awards be ordered.[133] In this context, the Trust Fund for Victims, as established by the Statute, came into focus as a conduit for collective awards.[134]

The protection of victims and witnesses is, as the experiences of the ICTY and ICTR show, of enormous practical importance. Hence, the Statute sets out the basic responsibilities of the Court in this regard, which rest with the Prosecutor and the various Chambers.[135] The Victims and Witnesses Unit, a neutral unit within the Registry, has also got particular tasks.[136] The Rules add concrete means and procedures, making a distinction between protective and so-called special measures.[137] Both the scope of the Court's responsibilities and the balancing between the protection and the rights of the accused were subject to debate.

One contested issue was the relationship between disclosure obligations and

129 Regulations 79-86. Within the Registry, a Victims' participation and reparations unit has been set up. See further Chapter 3 of the Registry Regulations.

130 Article 75. See also articles 57(3)(e) (preliminary measures) and 79 (trust fund for victims).

131 Rules 94, 96-97, and 99.

132 Regulation 94.

133 Rule 97(1).

134 Article 79 and Rule 98. See also rule 221 and regulation 116. Subsequently, a board of directors has been appointed and on 3 December 2005 the Assembly of States Parties adopted Regulations of the Trust Fund for Victims (ICC-ASP/4/Res.3).

135 Article 68(1)-(2). See also articles 54(1)(a) and 93)(f), 57(3)(c), 64(6)(e), and 69(2).

136 Article 43(6) and rules 17-19. See also Chapter 3 of the Registry Regulations.

137 Rules 87-88.

victims and witness protection.[138] Even more controversial was the question of so-called anonymous witnesses, as note above. National laws differ on this matter and while some provide an explicit prohibition, others allow anonymous witnesses under certain circumstances and conditions. In the debate, the proponents pointed primarily to a practical need, while the opponents resorted to matters of principle. No consensus could be reached and the Court will be the arbiter as to whether anonymous witnesses could and should be allowed under the procedural regime of the ICC.

C. Legal assistance

One of the most important safeguards for ensuring fair criminal proceedings is the right of the defence to legal assistance, which is provided for in the Statute.[139] The counsel shall be free of cost for the person concerned if he or she lacks the means to pay for the assistance. The Rules outline a procedure and give additional substantive provisions for the assignment of a defence counsel, which are supplemented in further detail by the Regulations of the Court and the Registry Regulations.[140] Among the issues addressed are the qualifications of counsel,[141] the establishment of a list of approved counsel,[142] requirements and procedures for free legal assistance,[143] the choice and assignment of counsel in the individual case,[144] and review of the Registrar's decisions by the Presidency.[145]

Another clarification in the Rules is that at any time after arrest, i.e. also before surrender to the Court, a request for assignment of counsel may be made.[146] Many provisions mirror the law of the ICTY and ICTR, but there are also certain differences. For example, practical experience of criminal proceedings as a qualification is more emphasized in the ICC Rules, and regulation 76 explicitly empowers the ICC Chambers to appoint counsel "where the interests of justice so require", i.e. also against the will of the person concerned.[147]

A connected matter is the right to communicate freely and in confidence with the counsel.[148] The Rules enforce this right by providing for a lawyer-client privilege and the Regulations of the Court by safeguarding it when the person concerned is

138 See article 68(5) and rule 81.

139 Articles 55(2)(c) and 67(1)(d).

140 Regarding the Registry Regulations, see Chapter 4 which includes detailed provisions, *inter alia,* on counsel and assistants to counsel, legal assistance paid by the Court, and training of counsel.

141 Rule 22 and regulation 67.

142 Rule 21 and regulations 69-71.

143 Rule 21(5) and regulations 83-85.

144 Regulations 74-76.

145 Rule 21(3) and regulation 72.

146 Rule 117.

147 Prior to the adoption of the ICC Regulations of the Court, the ICTY had declined to impose a legal counsel against the will of the defendant. In more recent decisions, however, the ICTY has done so under certain circumstances and also the SCSL have denied a request for self-representation; e.g. *Milošević,* Case No. IT-02-54, T. Ch., 4 April 2003, par. 40, and *Norman et al*, Case No. SCSL-04-14, T. Ch., 8 June 2004, paras. 8 and 27.

148 Article 67(1)(b).

detained at the Court.[149] The Regulations also address the right to diplomatic and consular assistance.[150] In addition, the Rules contain a number of provisions specifying certain functions of the defence counsel. Some pertain to functions that are already set out in the Statute,[151] while others are new.[152]

Acknowledging that conducting the defence is a true challenge in international criminal proceedings, the Registrar has got a general obligation to facilitate the work of defence counsels and, for that purpose, to organize the Registry in a manner that promotes the rights of the defence.[153] As already mentioned, the Regulations of the Court establish an Office of Public Counsel for the defence to perform, *inter alia*, functions at the early stages of an investigation.[154] There is also provision for the appointment of duty counsel.[155]

Apart from defence rights, the scheme for victims participation in the ICC proceedings entail a right for victims to have legal representation, as clarified in the Rules. A victim is free to choose a legal representative, but the Court may also request that the victim or groups of victims choose a common legal representative and even choose one on their behalf.[156] The imposition of counsel may be done for the purposes of ensuring the effectiveness of the proceedings when there are many victims. As a counterweight, the Rules indicate assistance by the Court in various ways, including financial assistance, and offer concrete directions for the participation of a legal representative for victims.[157] The Regulations of the Court elaborate further on the appointment of such legal representatives and on the modalities for legal assistance paid by the Court.[158] An Office of Public Counsel for victims is also introduced to provide support and assistance to victims and their legal representatives, including court appearances where appropriate.[159]

In the negotiations of the Rules, the issue of legal representation for witnesses

149 Rule 73 (witness privileges) and regulation 97 (communication with defence counsel). Furthermore, the Registrar has a general task of facilitating the protection of confidentiality in accordance with article 67(1)(b); rule 20(1)(a).

150 Regulation 98.

151 E.g. rule 116 on court orders at the request of the defence (see also article 57.3 b), rule 112 on questioning of a suspect (see also article 55[2]), and rule 114 on unique investigative opportunities (see also article 56).

152 E.g. rule 121 on disclosure, rules 123-126 on confirmation hearings *in absentia,* rule 146 on the extension of a sentence due to non-payment of a fine, and rule 224 on reviews of sentences.

153 Rule 20.

154 Regulation 77, which refers to functions in relation to unique investigative measures in accordance with article 56 and rule 47. An alternative, however, is the appointment of an external *ad hoc* counsel to protect the general interests of the defence when such measures are taken, e.g. *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04, PT Ch. I, Decision on the Prosecutor's Request for Measures under Article 56, 26 April 2005.

155 Regulation 73.

156 Rule 90.

157 Rules 90(5) and 91.

158 Regulations 79-85.

159 Regulation 81.

was also discussed.[160] While nothing prevents a witness from having legal assistance, there is no provision indicating that the Court should pay for such assistance.

VI. Jurisdiction and admissibility

The provisions of the Statute related to jurisdiction and admissibility establish the fundamental parameters of the relationship between the Court and States. The Court is not based on a system of universal jurisdiction but on a far more restrictive one linked to the principles of territoriality and active nationality. Therefore, unless the Security Council refers the matter to the Court, the Court may only exercise jurisdiction in a situation where the crimes have been committed either in the territory of a State Party or by nationals of a State Party.[161]

In addition, in accordance with article 12 of the Statute, a non-State Party may "accept the exercise of jurisdiction by the Court with respect to the crime in question" by lodging a declaration to that effect.[162]

Such ad hoc declarations of acceptance of jurisdiction do not only allow for an expansion of territorial or personal jurisdiction of the Statute but may also be used as a way of extending the temporal jurisdiction of the Court. More importantly, in accordance with article 11(2), if a State becomes a Party to the Statute after its entry into force, the Court may exercise its powers only with respect to crimes committed after the entry into force of the Statute for that State, unless that State has made a declaration under article 12, paragraph 3. Uganda, a State Party to the Statute, logded such a declaration in addition to its referral to the Prosecutor of the crimes committed in Northern Uganda. This declaration was intended to ensure that the Court would have jurisdiction for past crimes committed after the entry into force of the Statute but prior to the entry into force of the Statute vis-à-vis Uganda.[163]

Article 12 has been supplemented by the Rules in order to allow the Prosecutor to inquire, through the Registrar, from a non-State Party on a confidential basis whether it intends to make a declaration of acceptance of the Court's jurisdiction.[164] More important, however, the Rules have clarified the scope of such declaration so that it cannot be used by a non-State Party to accept jurisdiction over some crimes only, for instance over someone else's conduct in a conflict, but not over its own. Now, it is clear, in accordance with Rule 44 (2), that such a declaration would have as a consequence the acceptance of jurisdiction with respect to all crimes within the jurisdiction of the Court of relevance to the situation as well as all provisions on cooperation contained in Part 9 of the Statute.

It is important to note that the acceptance of a declaration made under article

160 See Dive, note 37, at 273.

161 See article 11.1

162 Cote d' Ivoire, a State non party to the Statute made such a declaration on 1 October 2003, accepting the jurisdiction of the Court as of 19 September 2002.

163 Uganda, a party to the Statute, referred to the Prosecutor the situation in Northern Uganda on 16 November 2003. On 27 February 2004 the Government of Uganda lodged a declaration of acceptance of jurisdiction with the Registrar, extending the temporal jurisdiction of the Court back to 1 July 2002.

164 Rule 44(1).

12, and the relevant Rules, is not in itself a "trigger" of jurisdiction and should not be equated to a referral of a situation to the Court, which can only be made by a State Party, in accordance with articles 13 and 14 of the Statute. But in the absence of a State Party or Security Council referral, an investigation concerning crimes covered by the *ad hoc* declaration may be initiated under the proprio motu powers of the prosecutor, following the regime set forth in article 15.

The Rules do not elaborate on referrals by State Parties. Rule 45 only clarifies that referrals should be in writing but do not expand on the scope of the referral, i.e what is the meaning of the term "situation". Procedurally the Regulations require the Prosecutor to inform the Presidency in writing of a referral by a State Party or the Security Council or of an intention to seek authorisation under article 15 in order to facilitate the timely assignment of a situation to a Pre-Trial Chamber.[165] The content of the Prosecutor's request for authorisation and time-limits for submissions by victims and States Parties are also regulated.[166]

The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it.[167]

A case within the jurisdiction of the Court will only be admissible if it meets the threshold of gravity and respects the system of complementarity. In accordance with the latter, a case will be admissible before the Court when there are no national proceedings related to it or where there are such proceedings but, in light of the circumstances set forth in article 17 of the Statute, the Court determines that the State is "unwilling or unable genuinely" to investigate or prosecute.[168]

Rule 51 allows the Court, when determining "unwillingness", to consider, inter alia, information from a State "showing that its courts meets internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". Furthermore, the rule indicates that the State may confirm in writing to the Prosecutor that the case is being investigated or prosecuted, which may also be taken into account by the Court in its determination.

Article 18 contains mechanisms for preliminary rulings regarding admissibility that include notice to States and deferral to national investigations, unless the Prosecutor obtains the Pre-Trial Chamber's authorization to investigate the case. Rules 52 to 57 supplement Article 18 with specific procedural provisions on notifications, the modalities for a deferral as well as on the proceedings for an authorization by the Pre-Trial Chamber, reviews of the deferral, and provisional investigative measures.

The Rules also supplement article 19 of the Statute on challenges to jurisdiction, in particular regarding the participation of States or the Security Council and of victims (Rules 58-62).

165 Regulations 45-46.

166 Regulations 49-50.

167 Regulation 46.

168 For an in depth analysis of this article see Informal Expert Paper: The Principle of complementarity in practice, ICC-OTP 2003.

VII. Cooperation by states and organizations

Most of the provisions regarding cooperation with the ICC are concentrated in Part 9 of the Statute but not exclusively. Other parts of the Statute also contain some norms, in particular on arrest proceedings and other measures that a State conducts at the request of the Court.

The cooperation regime in the Rome Statute is quite developed and detailed and it required little further elaboration in the Rules. Nevertheless, there were areas where clarifications were of importance for the implementation of the Statute by the States Parties. This was the case concerning many provisions in Chapter 11 of the Rules, dealing with international cooperation and judicial assistance, and Chapter 12 on enforcement. Some concerns were of a legal-technical nature, e.g. the content of the Court's orders for forfeiture and reparations,[169] but others related to more political concerns (sometimes linked to constitutional issues), e.g. the question of re-extradition of a person who has been surrendered to the Court.[170] Important provisions were also included in the Regulations of the Court on additional procedures for challenges to the legality of a request for cooperation and for the establishment of a failure to comply with a request for cooperation.[171]

One issue further addressed in the Rules regards communications to and from the Court. It has been clarified in Rule 176 (2) that the Registrar is responsible for transmitting and receiving communications regarding requests for cooperation made by a Chamber, while the Office of the Prosecutor shall itself handle the Prosecutor's requests for cooperation.

The Rules supplement the Statute on practical arrangements for the surrender of suspects to the Court, and the temporary transfer (for identification, testimony or other assistance) of a person in custody or a person convicted by the Court who serves his or her sentence in a State. Some provisions relate to the rights of different individuals, such as provisions on translation of documents, instructions regarding self-incrimination and on the possibility to obtain the views of the suspect in respect of the rule of specialty.[172] Rule 188 specifies the time limit for a request of surrender upon a provisional arrest, which is a maximum of 60 days from the arrest.

Rule 183 makes clear that a person who has been proceeded against or who is serving a sentence for a crime different from that for which surrender is sought may be transferred temporarily to the Court, as well as the modalities for such a person's appearance before the Court .

In response to concerns of States where the national system prohibits extradition of nationals, Rule 185 explains how to proceed when a person is released from the custody of the Court in cases other than upon the completion of sentence. The

169 Rule 218.

170 Rules 185 and 214. See also regulation 115 which further clarifies that the Court shall "have due regard to the principles of international law on re-extradition", a clarification clearly designed as an assurance that re-extradition will not take place without the consent of the state which surrendered the person to the Court; see e.g. article 15 of the European Convention on Extradition of 13 December 1957 and article 14 of the UN Model Treaty on Extradition of 14 December 1990 (UN Doc. A/Res/45/116).

171 Regulations 108-109.

172 Rules 187, 190-191 and 196-197.

original surrendering State will always have priority in case of competing requests regarding the person. In cases where the Court has found the case inadmissible because it is being duly investigated or prosecuted by a State, the Court shall make arrangements, as appropriate, for the transfer of the person to a State, including a State that has requested his or her extradition. This only applies when the original surrendering State does not request the person's return. When the return of the person to the original surrendering State would mean that no criminal proceedings would be instituted, the Prosecutor could seek a review of the inadmissibility decision in accordance with article 19 (10).

In addition to the cooperation obligations of States under the Statute, the Statute authorizes the Court to ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization. In accordance with article 54, the Prosecutor is specifically empowered to seek the cooperation of any State, intergovernmental organization or arrangement and to enter into such arrangements or agreement that may be necessary to facilitate such cooperation.

The Rules contain specific provisions on certain areas where cooperation could take place, such as the possibility of providing notifications, assistance and protection to victims through intergovernmental and non-governmental organizations[173]. An intergovernmental organization could be the receiver of a reward for reparations made through the Trust Fund, a provision that aims particularly at situations with large victimized communities.[174] The Rules also foresee a role for non-governmental organizations in respect of victims.[175]

Organizations may be important sources of information for the Court. Rule 104 (2) indicates that the Prosecutor may seek additional information from States, organs of the UN, intergovernmental and non-governmental organizations and other reliable sources for the purpose of determining whether to initiate any investigation either upon referral of a State or the Security Council, or on his or her own initiative. Later in the proceedings, organizations may provide observations to the Court, for example, by submitting amicus curiae briefs.[176]

The Rules address the issue of communication between the Court and intergovernmental organizations.[177] The Regulations have additional provisions on negotiation and signature of agreements. In accordance with Regulation 107, agreements with a State not party to the Statute, or with an intergovernmental organization, setting out a general framework for cooperation on matters within the competency of more than one organ of the Court, shall be negotiated under the authority of the President and concluded by the President on behalf of the Court. This sub-regulation is without prejudice of the right of the Prosecutor to enter into agreements

173 See Rule 18 (c) regarding the Victims and Witnesses Unit's discharge of its functions. Rule 92 (8) deals with cooperation in order to give adequate publicity to the proceedings and Rule 96 (2) publicity in respect of reparation proceedings.

174 Rule 98 (4).

175 See Rules 17 and 18 on functions and responsibilities of the Victims and Witnesses Unit and Rule 98 on the Trust Fund for Victims.

176 Rule 103.

177 Rules 176 (4) and 177 (2).

referred to in article 54, paragraph 3 (d).[178]

VIII. Final remarks

While elaborating the Regulations, the judges considered that certain issues should be dealt with in the Regulations in order to avoid a multitude of regulatory instruments to the extent possible. Hence, matters relating to, for example, defence counsel,[179] legal representatives for victims, and detention, are regulated there and not, as is the case in the ICTY and ICTR, in separate instruments.[180]

Nevertheless, the legal regime of the ICC is still quite complex. Apart from the Statute, the Rules, and the Regulations of the Court, both the Office of the Prosecutor (OTP) and the Registry are drafting their own Regulations, which supplement the former instruments.[181]

In addition, other instruments are to be observed, such as the codes of conduct for the judges[182] and for counsel,[183] the Agreement on the Privileges and Immunities of the ICC,[184] the Headquarters Agreement with the Host State,[185] and the Relationship Agreement between the ICC and the UN.[186] Although not "applicable law" in the meaning of article 21 of the Statute, these instruments will also have to be consulted and, by those to whom the instrument applies, adhered to. Fortunately, all

178 The agreement with MONUC concluded on 8 November 2005 was signed by the Registrar (upon delegation of the President) *and* the Prosecutor.

179 An explicit mandate to deal with the assignment of legal assistance in the Regulations is also given in rule 21(1).

180 E.g. ICTY, *Directive on Assignment of Defence Counsel* (28 July 2004, IT/73/Rev.10) and *Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal* (21 July 2005, IT/38/Rev.9); ICTR: *Directive on the Assignment of Defence Counsel* (15 May 2004) and *Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal* (5 June 1998).

181 Rules 9 and 14 of the ICC Rules. Draft OTP Regulations (June 2003) and the adopted Registry Regulations (approved by the Presidency on 6 March 2006; ICC-BD/03-01-06) are available at the ICC Internet page.

The OTP Regulations are framed to address: the mission and organisation of the OTP, standards of conduct and training, an operations manual, information and evidence management, and external communications.

The Registry Regulations contain provisions dealing with: court management (case files, notifications, access and storage, language services, etc.), victims and witness issues, counsel and legal assistance issues, and detention issues.

182 Code of Judicial Ethics, adopted by the Judges on 9 March 2005 (BD/02-01-05), in accordance with regulation 126 of the Regulations of the Court.

183 A Code of Professional Conduct for Counsel was adopted by the Assembly of States Parties on 2 December 2005 (ICC-ASP/4/Res.1).

184 Adopted by the Assembly of States Parties on 9 September 2002 (ICC-ASP/1/3) and coming into force on 22 July 2004 after the ratification of 10 States Parties (as of 17 November 2005 there were 33 ratifications).

185 The headquarters agreement was still being negotiated at the time of the 4th Assembly of States Parties in December 2005.

186 Adopted on 4 October 2004 and coming into force on the same day (ICC-ASP/3/Res.1).

these instruments are to be published in the Official Journal of the Court[187] and they will therefore be readily available together with any amendments.

187 Regulation 4 of the Regulations of the Court. The Official Journal shall also be made available on the Internet, see regulation 5.

Section 14

Criminal Proceedings at the ICC

Chapter 35

Charging in the ICC and Relevant Jurisprudence of the *Ad Hoc* Tribunals

Vladimir Tochilovsky

Introduction

Among the fundamental rights of an accused is the right to be informed in detail on the nature and cause of the charge against him and to have adequate facilities for the preparation of his defence (Article 14(3)(a) of the International Covenant on Civil and Political Rights). This provision is incorporated in Article 67 of the ICC Statute and similar provisions of the ICTY, ICTR and SCSL[1] (Article 21 of the ICTY Statute, Article 20 of the ICTR Statute, and Article 17 of the SCSL Statute). A charging document (Indictment) is one of the means through which an accused exercises the right to be informed in detail on the nature and cause of the charge against him.

From the very beginning of the functioning of the ICTY, the form of an indictment was one of the main topics of the legal debates in the office of the Prosecutor. That is how it was reflected in one of the articles of that time:

> The culture clash over evidentiary standards was hardly the first dispute among the tribunal's disparate, polyglot assemblage of lawyers, investigators, and judges ... "What form should the interviews take?" queries prosecutor Minna Schrag ... "What should an indictment look like? None of the indictments we've issued has looked the same, and the next indictment won't look like any of the previous indictments."[2]

Indeed, the ICTY and ICTR jurisprudence on indictments has developed substantially since then.[3] Practically every ICTY and ICTR indictment has been challenged by the defence counsel (form of the indictment, sufficiency of the material facts, particulars, etc.).[4]

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1 Hereinafter *ad hoc* tribunals.

2 *American Lawyer*, September 1995, p. 60

3 Although, even after eight years of the ICTY functioning, it was ascertained that "no generally accepted and uniformly applied definition of what constitutes a prima facie case in the Tribunal exists." (*Mladić,* Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002, par 18).

4 *Naletilić and Martinović*, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 5.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 827–841.

The *ad hoc* tribunals' jurisprudence on indictments is indeed applicable to indictments in the ICC even though there are some differences in the law of these institutions that may affect the ICC jurisprudence on this matter to a certain extent. Firstly, unlike *ad hoc* tribunals' law, the ICC Statute envisages two types of documents containing charges. The first one is in the form of an application for issuance of a warrant of arrest or a summons to appear containing "preliminary" charges[5]. After this preliminary charging and before the confirmation hearing the Prosecutor may continue the investigation and may amend or withdraw any charges.[6] The second charging document is the "document containing the charges on which the Prosecutor intends to bring the person to trial"[7] (hereinafter Indictment). Secondly, the difference in confirmation proceedings (*ex-parte* in the *ad hoc* tribunals and with the accused/counsel participation in the ICC) may also affect the requirements to the indictments in the ICC,[8] despite the fact that an amendment of the indictment after assignment of the case to a Trial Chamber, according to the amended in July 2000 Rule 50 of the ICTY Rules, may be granted by the Chamber only "after having heard the parties."

However, despite the differences, the requirements for pleading the material facts in an indictment, particularities in and structure of an indictment, etc., that have been developed in the *ad hoc* tribunals, are highly relevant to the ICC. It is sufficient to say that the law relating to the contents and requirements of an indictment in the ICC is similar to that in the Statutes and the Rules of the *ad hoc* tribunals. Accordingly, the *ad hoc* Tribunals' jurisprudence related to the indictments will assist those who will be involved in both application of the ICC law and development of the ICC jurisprudence.

As to the amendment of the indictment, unlike *ad hoc* tribunals, the ICC is bound by the principle of specialty. Pursuant to Article 101.1 of the ICC Statute, a person surrendered to the Court shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered. Under Article 101.2, the Court may request a waiver of these requirements from the State which surrendered the person to the Court.

I. Statement of the facts in the indictment

In accordance with Article 58.2 of the ICC Statute, an application for a warrant of arrest ("preliminary charges") shall contain a concise statement of the facts which are alleged to constitute those crimes. Accordingly, because of the rule of specialty (Article 101 of the ICC Statute), the same charges will be contained in the indictment submitted by the Prosecutor for the confirmation hearing under Article 61.3(a). Moreover, the indictment, according to Rule 121.3, shall contain "a detailed description of the charges". Similarly, pursuant to Article 18.4 of the ICTY Statute

5 Article 58.2 of the ICC Statute.

6 Article 61.4 of the ICC Statute.

7 Article 61 paragraph 3 (a) of the ICC Statute.

8 See, for instance, *Mladić,* Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002, par 24.

and Article 17.4 of the ICTR Statute, an indictment shall contain a concise statement of the facts and the crime or crimes with which the accused is charged. This Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Article 67.1. (a) and (b) of the ICC Statute which is similar to Article 21.4 (a) and (b) of the ICTY Statute and Article 20.4 (a) and (b) of the ICTR Statute.[9]

A. Material facts

The facts which apprise an accused of the nature, cause and content of the charge, are the "material facts" which must be pleaded in an indictment.[10] The pre-trial disclosure or pre-trial brief may not be used to fill in any gaps which may exist in the material facts pleaded in the indictment.[11] A distinction should be drawn between the material facts upon which the Prosecution relies, which must be pleaded, and the evidence by which those material facts will be proved, which need not be pleaded and must be provided by way of pre-trial disclosure.[12] Whether there is evidence to support any charge pleaded in an indictment is an issue to be determined by the Trial Chamber, at the conclusion of the trial or, if the issue is raised, at the close of the prosecution case.[13]

The materiality of a particular fact cannot be decided in the abstract, it is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct

9 *Stanković,* Decision on the Defence Preliminary Motion on the Form of the Indictment, 15 November 2002, para. 6; *Kupreškić et al.,* Appeal Judgement, 23 October 2001, par 88; *Brđanin* & *Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 18; *Furundžija*, Appeal Judgement, 21 July 2000, par 147; *Krnolejac* Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, Paras. 17 and 18; *Krnojelac*, Decision on the defence preliminary motion on the form of the indictment, 24 February 1999, paras. 7 and 12.

10 *Brđanin* & *Talić*, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 February 2001, para. 13; *Krnojelac*, Decision on the defence preliminary motion on the form of the indictment, 24 February 1999, para. 12.

11 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, par 10; *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, par 10; *Brđanin*, Decision on Motion to Dismiss Indictment, 5 October 1999, par 13; *Krnojelac*, Decision on the defence preliminary motion on the form of the indictment, 24 February 1999, paras. 12, 14-15.

12 See for instance, *Prosecutor* v. *Norman et al.*, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, Case No. SCSL-04-14-T, T.Ch. I, 29 November 2004, para. 24; *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 210; *Prosecutor* v. *Kupreškić et al.,* Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 88; *Prosecutor* v. *Krajišnik and Plavšić*, Decision on Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment, Case No. IT-00-39-AR72, Bench of the Appeals Chamber, 13 September 2000, p 3; *Prosecutor* v. *Furundžija*, Judgement, Case No. IT-95-17/1-A, App. Ch., 21 July 2000, para. 147.

13 *Brđanin*, Decision on Motion to Dismiss Indictment, 5 October 1999, para. 15.

charged to the accused.[14] The materiality of such details as the identity of the victim, the place and date of the events for which an accused is alleged to be responsible, and the description of the events themselves necessarily depends upon the alleged proximity of that accused to those events.[15]

i. Materiality of the facts in a case based on personal responsibility

In a case where it is alleged that the accused personally did the acts in question, the material facts must be stated with the greatest precision. The Prosecution must clearly identify the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute personal responsibility. Indeed, the material facts may vary depending on the particular form of personal liability.[16] The information pleaded must, so far as it is possible to do so, include the identity of the victim, the place and the approximate date of those acts and the means by which the offence was committed.[17]

Where it is not alleged that the accused personally did the acts for which he is to be held responsible what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts.[18]

The jurisprudence of the ICTY has established that participation in a crime under a theory of joint criminal enterprise liability is included within the scope of personal liability (Article 7.1 of the ICTY Statute, Article 6.1 of the ICTR Statute, Article 25 of the ICC Statute).[19] In cases of joint criminal enterprise, the accused

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14 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, para. 5; *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 12; *Kupreškić et al.,* Appeal Judgement, 23 October 2001, par 89.

15 *Stanković,* Decision on the Defence Preliminary Motion on the Form of the Indictment, 15 November 2002, para. 8; *Ljubičić*, Decision on the Defence Motion on the Form of the Indictment, 15 March 2002, p. 4; *Kupreškić et al.,* Appeal Judgement, 23 October 2001, para. 89; *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, paras. 18, 22; *Krajisnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 9; *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 18.

16 *Stanković,* Decision on the Defence Preliminary Motion on the Form of the Indictment, 15 November 2002, par 8; *Deronjić*, Decision on Form of the Indictment, 25 October 2002, par 6.

17 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, para. 25; *Galić*, Decision on Application by Defence for Leave to Appeal, 30 November 2001, para. 15; *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 22; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 18.

18 *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 18.

19 *Nikola Šainović & Dragoljub Ojdanić,* Decision on Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, 13 February 2003, p. 6; *Meakic et al.*, Decision on Prosecution's Motion for Joinder of Accused, 17 September 2002, para. 28; *Kordić & Čerkez*, Judgement, 26 February 2001, paras. 395-400; *Krnojelac*, Decision on Form of Second Amended Indictment, 11 May 2000, para. 9;

must be informed by the indictment of the nature or purpose of the joint criminal enterprise; the time at which or the period over which the enterprise is said to have existed; the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group, and the nature of the participation by the accused in that enterprise.[20] An indictment charging joint criminal enterprise must clearly articulate the meaning of "committed". If it is not alleged that the accused physically perpetrated any of the crimes charged personally, it should be stated in the indictment.[21] Where any of these matters is to be established by inference, the prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.[22]

ii. Materiality of the facts in a case based on superior responsibility

In a case based upon superior responsibility (Article 28 of the ICC Statute, Article 7.3 of the ICTY Statute and Article 6.3 of the ICTR Statute), the following are the minimum material facts that have to be pleaded in the indictment:[23]

(i) that the accused is the superior (ii) of subordinates, sufficiently identified, (iii) over whom he had effective control[24] – in the sense of a material ability to prevent or punish criminal conduct[25] – and (iv) for whose acts he is alleged to be responsible;[26]

(i) the accused knew or had reason to know[27] that the crimes were about to be or had been committed[28] by those others,[29] and (ii) the related conduct of those others

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Tadić, Judgment, 15 July 1999, paras. 185-229.

20 *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 13; *Brđanin & Talić*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 21; *Krnojelac*, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16.

21 *Brđanin & Talić*, Decision Varying Decision on Form of Further Amended Indictment, 2 July 2001, para. 5.

22 *Krnojelac*, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16.

23 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, para. 7.

24 Article 28 of the ICC Statute refers to "effective authority and control."

25 *Delalić et al.*, Appeal Judgement, 20 February 2001, para. 256. Article 28 of the ICC Statute uses words "prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution".

26 *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, paras. 11 and 17; *Brđanin & Talić*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 19; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 9; *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 9.

27 Article 28 of the ICC Statute refers to "knew or should have known."

28 Article 28 of the ICC Statute refers to "crimes were being committed or about to be committed."

29 *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 11; *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, para. 11; *Brđanin & Talić*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 19; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 9.

for whom he is alleged to be responsible.[30] The facts relevant to the acts of those others will usually be stated with less precision,[31] the reason being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue;[32] and

the accused failed to take the necessary and reasonable measures[33] to prevent such crimes or to punish[34] the persons who committed them.[35]

The Prosecution is obliged to plead the nature of the superior-subordinate relationship between the accused and others whose acts he is alleged to be responsible for. For instance, to describe the accused as the "commander" of a camp is sufficient for asserting that he was superior to everyone else in the camp and that he was responsible for the functioning of the camp.[36]

iii. General offence charging

Given the massive scale of the offences which the international courts have to deal with, it is often impracticable to charge each offence in a separate count.[37] Where the offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the pros-

30 *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 11; *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, para. 11; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 38.

31 *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 11; *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, para. 11; *Brđanin & Talić*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 19.

32 *Krajišnik & Plavsić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 11; *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, para. 11; *Brđanin & Talić*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 19; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 9; *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 18(A); *Kvočka et al.* Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17.

33 Article 28 of the ICC Statute refers to "reasonable measures *within his power*."

34 Article 28 of the ICC Statute uses words "prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

35 *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 11; *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, para. 11; *Brđanin & Talić*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 19; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 9.

36 *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 11; *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 9.

37 *Brđanin* & *Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 61; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17.

ecution is not required to lay a separate charge in respect of each murder.[38]

Where the prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence. A mere service of witness statements is not sufficient for such notice.[39] The prosecution shall identify in its pre-trial brief, in relation to each count, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused.[40] If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its pre-trial brief, specific notice must be given to the accused of that particular intention.[41]

iv. Cumulative and alternative charging

Both the alternative charging and cumulative charging are permissible in international jurisdictions in certain circumstances.[42] The Defence will have to prepare their cases in respect of all the charges, irrespective of whether they are charged in the alternative or cumulatively.[43]

It is permissible to charge an accused with more than one offence for the same conduct (cumulative charging) when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others. The Prosecution may include cumulative charges on the basis that the Chamber may not accept a particular element of one charge which does not have to be established for the other charges. Cumulative charging also reflects the totality of the accused criminal conduct.[44]

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38 *Brđanin* & *Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 61.

39 *Brđanin* & *Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.

40 *Brđanin* & *Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.

41 *Brđanin* & *Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.

42 *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 25.

43 *Blagojević et al.,* Decision on Motion of Accused Blagojević to Dismiss Cumulative Charges, 31 July 2002, p. 3. *Kunarac et. al.*, Appeal Judgement, 12 June 2002, para. 167; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 25.

44 *Blagojević et al.,* Decision on Motion of Accused Blagojević to Dismiss Cumulative Charges, 31 July 2002, p. 3.; *Kunarac et. al.*, Appeal Judgement, 12 June 2002, para. 167; *Ljubičić*, Decision on the Defence Motion on the Form of the Indictment, 15 March 2002, p. 6; *Delalić et al.*, Appeal Judgement, 20 February 2001, paras. 389-425; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, 47; *Kordić & Ćerkez*, Decision on Defence Motion to Dismiss or Alternatively to Order The Prosecutor to Elect Between Counts, 1 March 1999, p.2; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 5;

The Prosecution may rely upon alternative cases, so that, if the Trial Chamber does not accept its principal case, the prosecution relies in the alternative.[45] In particular, the Prosecution may plead an alternative responsibility, personal and superior, but the factual allegations supporting either alternative must be sufficiently precise so as to permit the accused to prepare his defence on either or both alternatives.[46]

B. Particulars in the indictment

The Indictment must be sufficiently clear to enable the accused to fully understand the nature and cause of the charges brought against him.[47] The accused is entitled to particulars necessary in order for the accused to prepare his defence and to avoid prejudicial surprise.[48] Where possible, the Prosecution has a duty to provide information as to the time and place of the crime, the identity of the victims and the means by which the crime was perpetrated.[49] Although pre-trial disclosure may assist the defence in a better understanding of the details of the crimes with which an accused is charged, an indictment must first meet the requisite standards of specificity and precision.[50]

A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the

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Delalić, Judgment, 16 November 1998, paras. 1221-1223; *Akayesu*, Judgment, 2 September 1998, para 468; *Kupreškić*, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p 3; *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para 32; *Delić*, Appeal Decision, 6 December 1996, paras 35-36; *Delalić*, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, 2 October 1996, para 24; *Tadić* Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, paras. 15-18.

45 *Brđanin & Talić*, Decision on Form of Third Amended Indictment, 21 September 2001, para.22.

46 *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 13 and footnote 21; *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 April 1997, para. 32.

47 *Karemera,* Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, inter alia, Lack of Jurisdiction and Defects in the Form of the Indictment, 25 April 2001, para. 16; *Kanyabashi*, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, 31 May 2000, para. 5.1; *Nsengiyumva*, Decision on the Defense Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment, 12 May 2000, para. 1.

48 *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000. See also *Brđanin*, Decision on Motion to Dismiss Indictment, 5 October 1999.

49 *Došen & Kolundžija*, Decision on Preliminary Motions, 10 February 2000, para. 8; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12.

50 *Stanković,* Decision on the Defence Preliminary Motion on the Form of the Indictment, 15 November 2002, para. 9; *Strugar et al.,* Decision on Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002, par 8; *Brđanin* & *Talić*, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 February 2001. Paras 11-13.

nature of the alleged criminal conduct charged to the accused,[51] which includes the proximity of the accused to the relevant events.[52] It is essential for the accused to know from the indictment just what that alleged proximity is.[53]

Where the identification cannot be of a specific date, a reasonable range of dates should be specified.[54] Such details as the exact address of the property destroyed, or the name of its owner, are not necessary to be provided in an indictment that covers a small area and vast number of property allegedly destroyed in that area. In such cases it is sufficient to indicate the name of the villages, hamlets or areas where the houses or barns concerned were located.[55]

In a case based upon superior responsibility, if the Prosecution is unable to identify those directly participating in the alleged criminal acts by name, it will be sufficient for it to identify them at least by reference to their 'category' (or their official position) as a group.[56]

i. Particulars related to the nature of the criminal responsibility of the accused

The Prosecution must identify the particular course of conduct of the accused which are alleged to constitute his or her criminal responsibility.[57] The accused is entitled to a specific statement in the indictment of the nature and extent of his participation in the conduct alleged. The Prosecution does not have to identify precise conversations or actions taken by the accused, but the accused is entitled to know the manner in which he is to be held responsible – for example, whether it is alleged that he

51 *Stanković*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 15 November 2002, para. 7; *Deronjić*, Decision on Form of the Indictment, 25 October 2002, par 5; *Kupreškić et al.*, Appeal Judgement, 23 October 2001, para. 89.

52 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, par 5; *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, para. 10; *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 18.

53 *Brđanin* & *Talić*, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 February 2001, para. 13.

54 *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 42

55 *Ademi*, Decision on the Second Defence Motion on the Form of the Indictment, 21 January 2002, p. 4.

56 *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 22; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46.

57 *Ljubičić*, Decision on the Defence Motion on the Form of the Indictment, 15 March 2002, p. 4; *Brđanin* & *Talić*, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 6; *Kupreškić et al.*, Appeal Judgement, 23 October 2001, paras. 95, 98; *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, par 18; *Krajišnik*, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 9; *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 18.

ordered the persecution, torture and killings, or whether he merely assisted in some other identified way.[58]

When an accused is charged both with personal and superior criminal responsibility, the indictment must separate these acts clearly.[59] If a count consists of more than one incident, the Prosecution shall clearly plead with respect to each incident under the count, whether its case is one of personal or superior responsibility.[60] However, it is not necessary to indicate the particular nature of the responsibility alleged in relation to each count where the nature of the responsibility alleged is the same in relation to every count.

ii. Particulars related to victims

In most cases, the massive scale of the crimes alleged before the international criminal courts does not allow for specific naming of victims. However, if the Prosecution is in a position to do so, it should.[61] Otherwise, the Prosecution must provide some identification of the victims at least by reference to their category or position as a group.[62]

If the Prosecution case is to be that the victims which it identifies died, and also that a number of other persons died whom it is unable to identify, the charge would nevertheless be sufficiently pleaded in the circumstances of this case once those particulars have been included in the indictment.[63]

iii. Particularity of other information

Legal prerequisites which apply to offences charged (such as existence of a state of armed conflict, civilian status of victims, etc.) are material facts and must be pleaded

58 *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 22. See also *Đukić*, Decision on Preliminary Motion of the Accused, 26 April 1996, para. 18; *Tadić*, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, para. 12.

59 *Ademi*, Decision on the Motion on the Form of the Indictment, 12 November 2001, p. 3; *Kupreškić et al.,* Appeal Judgement, 23 October 2001, para. 21; *Došen & Kolundžija*, Decision on Preliminary Motions, 10 February 2000, para. 32; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 32; *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997, para. 32; *Delalić et al.*, Decision on Motion by the Accused Hazim Delić Based on Defects in the Form of the Indictment, 15 November 1996, para. 18.

60 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, paras. 25-26.

61 *Kupreškić et al.,* Appeal Judgement, 23 October 2001, paras. 89 – 90; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 23.

62 *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 22; *Krnojelac,* Decision on Form of Second Amended Indictment, 11 May 2000, para. 18; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 58.

63 *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 58

in an indictment.[64] With respect to the relevant state of mind (*mens rea*), either the specific state of mind itself should be pleaded, or the facts from which the state of mind is necessarily to be inferred, should be pleaded in an indictment.[65]

Where the Prosecution is in a position to provide details as to the means by which the crime is perpetrated, it should identify the method of commission of the crime, or the manner in which it was committed.[66]

The charges of the grave breach of the Geneva Conventions require the Prosecution to establish particular consequences of the conduct in question.[67] If the Prosecution pleads a case of "instigation", the instigating acts, the instigated persons or group of persons that are not yet prepared to commit the crime (as opposed to an *omnimodo facturus*), are to be described precisely.[68]

iv. Particulars and the use of certain terminoly in the Indictment

With regard to the location of alleged events, expressions such as "*including, but not limited to*" or "*among others*" are vague and should not be used in an indictment.[69] There might be certain situations in which use of the term "*including*" is acceptable and others in which it will not be. In particular, the Prosecution should, in respect of those parts of an indictment where the term is used to signify some of the victims of a crime, to list, to the extent possible, additional names of victims.[70] With regard to the time of alleged events, the term "*about*" in the phrases "*from about* (month, year) *to about* (month, year)" and "*between about*" is vague and should not be used in an indictment.[71] The Prosecution may use the term "*and/or*" in an indictment. This is an evidentiary matter and that it is best left to be determined at trial, on the basis of the evidence presented.[72]

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64 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, para. 8; *Strugar et al.*, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002, para. 7. *Krajišnik & Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 9; *Hadžihasanović et al.*, Decision on Form of Indictment, 7 December 2001, para. 10.

65 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, para. 8; *Brđanin* & *Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 33.

66 *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 24.

67 *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 31.

68 *Deronjić*, Decision on Form of the Indictment, 25 October 2002, para. 31.

69 *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 26.

70 *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 26.

71 *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 22; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 19; *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997, para. 23.

72 *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 26.

v. Schedules to the Indictment

In order to avoid muddling the text of the indictment, some details of the incidents can be placed in the schedules.[73] In particular, the schedules may contain such details as the identity of victims, the nature of the injury or the cause of death, and the area in which the incident occurred, a list of properties destroyed or damaged, etc. The contents of the schedules form an integral part of the indictment.[74]

C. Additional particulars regarding the offences charged

It has been opined in one of the ICTY decisions that while the indictment must contain certain information which permits the accused to prepare his defence, it need not contain *all* of the information to which the accused will ultimately be entitled under the Rules.[75] Indeed, where the indictment is not so vague as to be defective and the information the accused seek is not apparent from the witness statements disclosed in accordance with Rule 66(A), the accused's remedy lies in requesting the Prosecution to supply particulars of the statements upon which it relies to prove the specific material facts in question. If the Prosecution's response to that request is unsatisfactory, then and only then, the Accused may seek an order from the Trial Chamber that such particulars be supplied.[76]

The disclosure materials play a role in fulfilling the defendant's right to be informed of the "nature and cause" of the charges against him and they contribute to ensuring that the accused has an adequate opportunity to prepare his defence.[77]

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73 *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 54.

74 *Galić*, Decision on Application by Defence for Leave to Appeal, 30 November 2001, par 16; *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 54.

75 *Prosecutor* v. *Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, Case No. IT-98-34-PT, T. Ch. I, 15 February 2000, para. 18.

76 *Prosecutor* v. *Mrkšić et al.*, Decision on Form of Second Modified Consolidated Amended Indictment, Case No. IT-95-13/1-PT, T. Ch. II, 29 October 2004, para. 22; *Prosecutor* v. *Halilović*, Decision on Defence Motion for Particulars, Case No. IT-01-48-PT, T. Ch. III, 16 December 2003, p. 3; *Prosecutor* v. *Mrkšić*, Decision on Form of Consolidated Amended Indictment and on Prosecution Application to Amend, Case No. IT-95-13/1-PT, T. Ch. II, 23 January 2004, para. 53; *Prosecutor* v. *Brđanin and Talić,* Decision on Form of Third Amended Indictment, Case No. IT-99-36-PT, T. Ch. II, 21 September 2001, para. 8; *Prosecutor* v. *Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, Case No. IT-98-34-PT, T. Ch. I, 15 February 2000, para. 17; *Prosecutor* v. *Delalić et al.,* Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, Case No. IT-96-21-T, T. Ch. II *quarter*, 2 October 1996, par. 21; *Prosecutor* v. *Delalić et al.,* Decision on the Accused Mucić's Motion for Particulars, Case No. IT-96-21-T, T. Ch. II *quarter*, 26 June 1996, para. 7; *Prosecutor* v. *Tadić*, Decision on the Defence Motion on the Form of the Indictment, IT-94-1-T, T. Ch. II, 14 November 1995, para. 8.

77 *Prosecutor* v. *Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, Case No. IT-98-34-PT, T. Ch. I, 15 February 2000, para. 16.

Where the indictment is not so vague as to be defective, an accused may seek additional particulars by filing a motion for further particulars in accordance with Article 57.3(b) of the ICC Statute which is similar to Rule 54 of the ICTY, ICTR, and SCSL Rules. Pursuant to that Article, the Pre-Trial Chamber may upon the request of an accused issue such orders as may be necessary to assist the person in the preparation of his or her defence.[78]

When a motion for particulars is reviewed, the materials already in the possession of the Defence, including discovery materials, will be considered by the Trial Chamber in order to determine whether the requested particulars are necessary for the accused to prepare his defence and to avoid prejudicial surprise.[79]

II. Confirmation and amendment of the indictment

Under Article 61 of the ICC Statute, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the accused and his or her counsel. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The accused may also present evidence at the hearing. If satisfied, on the basis of the hearing, that there is sufficient evidence to establish substantial grounds to believe that the person committed the crime charged, the Pre-Trial Chamber shall confirm the charge.

In contrast, in accordance with Article 19 of the ICTY Statute and Article 18 of the ICTR Statute, if satisfied, upon the review of the indictment and the supporting material, that a *prima facie* case has been established by the Prosecutor, the Judge shall confirm the indictment. A *prima facie* case for this purpose is understood as whether there is evidence, if accepted and not contradicted by the accused, upon which a reasonable trier of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.[80] The review and confirmation is an *ex-parte* procedure in the *ad hoc* tribunals.

In accordance with Article 61.4 and Rule 121.4, after issuance of a warrant of arrest or a summons to appear and before the hearing to confirm the indictment, the Prosecutor may amend the charges after notice to the Pre-Trial Chamber and the accused not later than 15 days before the date of the hearing. Indeed, unlike the *ad hoc* tribunals, the ICC is bound by the principle of specialty. Pursuant to Article 101.1 of

78 *Prosecutor* v. *Halilović*, Decision on Defence Motion for Particulars, Case No. IT-01-48-PT, T. Ch. III, 16 December 2003, p. 3; *Prosecutor* v. *Delalić et al.,* Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, Case No. IT-96-21-T, T. Ch. II *quarter*, 2 October 1996, para. 21; *Prosecutor* v. *Delalić et al.,* Decision on the Accused Mucić's Motion for Particulars, Case No. IT-96-21-T, T. Ch. II *quarter*, 26 June 1996, para. 7; *Prosecutor* v. *Tadić*, Decision on the Defence Motion on the Form of the Indictment, IT-94-1-T, T. Ch. II, 14 November 1995, para. 8.

79 *Prosecutor* v. *Halilović*, Decision on Defence Motion for Particulars, Case No. IT-01-48-PT, T. Ch. III, 16 December 2003, p. 4.

80 *Mladić,* Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002, para. 26; *Milošević et al.,* Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, 29 June 2001, para. 3; *Kordić,* Decision on Defence Motions for Judgment of Acquittal, 6 April 2000, para. 26; *Kunarac*, Decision on Motion for Acquittal, 3 July 2000, para. 3.

the ICC Statute, a person surrendered to the Court shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered. Under Article 101.2, the Court may request a waiver of these requirements from the State which surrendered the person to the Court.

Article 61 gives discretion to the Pre-Trial Chamber or the Trial Chamber to allow the amendments. The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly. The amendments do not prejudice the accused in the preparation and conduct of his defence if all or most of the facts upon which the new charges are based were included in the original indictment.[81]

Before deciding whether to authorise the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law (Rule 128.2). If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

The Pre-Trial Chamber or the Trial Chamber have discretion to grant such additional time as necessary to ensure adequate time for the preparation of the defence and, therefore, no injustice will be caused to the accused if he is given adequate opportunity to prepare an effective defence.[82] Article 61 does not contain any requirement that an indictment can only be amended if new evidence has been discovered after the initial indictment has been filed.

The *ad hoc* Tribunals' Rules also give discretion to the Trial Chamber or a Judge of the Trial Chamber to allow the amendments after having heard the parties. The Rules neither provide any parameters as to the exercise of discretion by a Chamber nor does it contain any express limits of such discretion.[83] The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly. The amendments do not prejudice the accused in the preparation and conduct of his defence if all or most of the facts upon which the new charges are based were included in the original indictment.[84]

The Trial Chamber has discretion to grant such additional time as necessary to ensure adequate time for the preparation of the defence and, therefore, no injustice

81 *Meakić et al.*, Decision on the Consolidated Indictment, 21 November 2002, p. 4

82 *Meakić et al.*, Decision on the Consolidated Indictment, 21 November 2002, p. 4; *Brđanin & Talić*, Decision on filing of Replies, 7 June 2001, para 3. See also *Martić,* Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002, par. 21; *Naletilić & Martinović,* Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 4; *Kovašević,* Appeals Chamber, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, paras 24, 28, and 33.

83 *Martić,* Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002, para. 21. Virtually every indictment filed by the Prosecutor in matters before the ICTY and the International Criminal Tribunal for Rwanda (ICTR) has been amended at least once.

84 *Meakić et al.*, Decision on the Consolidated Indictment, 21 November 2002, p. 4.

will be caused to the accused if he is given adequate opportunity to prepare an effective defence.[85] Rule 50 does not contain any requirement that an indictment can only be amended if new evidence has been discovered after the initial indictment has been filed.[86] The addition on new charges in the absence of new factual material is acceptable provided that the test laid out above is met.[87]

85 *Meakić et al.*, Decision on the Consolidated Indictment, 21 November 2002, p. 4.

86 *Martić,* Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002, para. 21.

87 *Martić,* Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002, para. 23; *Naletilić & Martinović,* Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 6; Niyitegeka, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000.

Chapter 36

Prosecution Disclosure Obligations in the ICC and Relevant Jurisprudence of the *Ad Hoc* Tribunals

Vladimir Tochilovsky

I. Introduction

One of the fundamental rights of an accused is the right to have adequate facilities for the preparation of his defence.[1] In particular, it means that the accused or his defence counsel shall be granted access to the documents, records, other information and tangible objects necessary for the preparation of the defence.[2]

Articles 61 (3) and 67 (2) of the ICC Statute as well as Rules 76, 77, 83 and 84 of the ICC Rules of Procedure and Evidence (herinafter ICC Rules) provide for the Prosecutor's disclosure obligations at the pre-trial and trial preparation stage. In general, the ICC Statute and the Rules require the Prosecution to turn over ("disclose") to the defence the following material: exculpatory material (Article 67.2); copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial (Rule 76); and books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial (Rule 77).

It is the role of the Trial Chamber to enforce the disclosure obligation in the interests of a fair trial, and to ensure that the rights of the accused to have adequate time and facilities for the preparation of his or her defence and to examine, or have examined, the witnesses against him or her, are respected.[3] It was emphasised that the premise underlying disclosure obligations is that the parties should act *bona fides* at all times. Any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation.[4]

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1 Article 14(3)(b) of the International Covenant on Civil and Political Rights. This right is also incorporated in Article 67.1(b) of the ICC Statute.

2 *Manfred Nowak*, U.N. Covenant on Civil and Political Rights: CCPR Commentary, Kehl am Rhein, Strasbourg; Arlington: Engel 1993, p. 256.

3 *Prosecutor* v. *Brima et al.*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, para. 16; *Prosecutor* v. *Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. IT-98-33-A, App. Ch., 16 July 2004, para. 7; *Prosecutor* v. *Furundžija*, Scheduling Order, Case No. IT-95-17/1-PT, T. Ch. II, 29 April 1998.

4 *Prosecutor* v. *Brima et al.*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, para. 16.

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To comply with its disclosure obligations, the Prosecution must be aware of what information and evidence has been collected by the OTP. To this end, the OTP investigative and legal staff must adhere to the OTP internal guidelines governing collection and handling evidence. By taking the Prosecutor's disclosure obligations into account at early stages, and by instituting some way of noting or recording potentially discoverable evidence or information as it is found, the burden of the disclosure obligation at the later appropriate time could be lightened.

The ICC provisions on disclosure, like most of the other procedural provisions, were mostly borrowed from the ICTY Rules of Procedure and Evidence (hereinafter ICTY Rules). In January 1999, the Australian delegation to the Preparatory Commission for the International Criminal Court submitted their "Draft Rules of Procedure and Evidence of the International Criminal Court" (hereinafter, Australian draft rules)[5] as a "starting point for the work of the Commission".[6] Most of the provisions on disclosure in the Draft replicated relevant provisions of the ICTY Rules at that time.[7] Accordingly, the relevant jurisprudence of the ICTY, as well as ICTR and SCSL (hereinafter *ad hoc* Tribunals) that have similar Rules, is undoubtedly applicable to the ICC.

A. Two stages in disclosure

Unlike the *ad hoc* tribunals, where the confirmation of the indictment is an *ex-parte* procedure, under Article 61 of the ICC Statute, the Pre-Trial Chamber shall hold a hearing to confirm the charges. Accordingly, the ICC provisions envisage two stages in the Prosecution disclosure in the ICC, namely, disclosure for the confirmation hearing and pre-trial disclosure. The ICC Prosecution is under obligation to disclose to the Defence the material which are intended for use for the purposes of the confirmation hearing prior to the hearing (Article 61.3 and Rule 121.2). Apparently, the ICC law does not require to have *all* collected material placed before the Pre-Trial Chamber. According to Article 61 (paragraphs 5 and 7), the Prosecution is to submit "sufficient evidence to establish *substantial grounds to believe* that the person committed each of the crimes charged." The Australian draft rules separated the disclosure for confirmation hearing (Rule 66 of the draft) from the pre-trial disclosure (Rule 67 and onwards).

In contrast, the French delegation believed that the whole disclosure should be completed far earlier in the proceedings. Although in their proposed draft Rule 58 the French delegation referred to Article 61 which governs confirmation hearing, their draft envisaged that the Rule would also govern the pre-trial disclosure.[8] Indeed, the scope of disclosure is different at these two stages. While the former

5 *Proposal submitted by Australia. Draft Rules of Procedure and Evidence of the International Criminal Court*, PCNICC/1999/DP.1, 26 January 1999.

6 Australian draft rules, a footnote at p. 1.

7 As it was noted in preamble to the section on disclosure, the proposed provisions "draw on, but do not adopt without amendment, ICTY Rules".

8 *Proposal by France on Rules of Procedure and Evidence. Part 3, section 3, subsection 2; Section 3. Pre-trial phase*, PCNICC/1999/DP.7, 12 February 1999. See Rule 58.1 and footnote 2 of the Draft.

requires evidence sufficient "to establish *substantial grounds to believe*", the latter requires the evidence sufficient to prove the "guilt of the accused *beyond reasonable doubt*". Ultimately, the delegates adopted the two-stage approach. Apparently, under Rule 121(2), the bulk of disclosure will take place before the confirmation of charges.

II. Disclosure of Exculpatory Material

A. A fundamental obligation

Under Article 67.2 of the ICC Statute, the Prosecutor "shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." The disclosure of exculpatory material to the accused is fundamental to the fairness of proceedings.[9] This is one of the most onerous responsibilities of the Prosecution[10] and "is coterminous with and equally important to the function of the Prosecutor as the duty to prosecute.[11] It was emphasised that the Prosecution's obligation to disclose exculpatory material forms part of the Prosecution's duty as ministers of justice assisting in the administration of justice.[12]

B. General provisions

Article 54.1(a) of the ICC Statute imposes a duty on the Prosecutor to investigate incriminating and exonerating circumstances equally in order to find the truth. Such an expanded, in comparison with the *ad hoc* Tribunals, obligation of the ICC Prosecutor inevitable expands the scope of his disclosure obligation. For instance, in one of the ICTY Trial Chamber's decisions, it was opined that the obligation to disclose exculpatory evidence "is not intended to serve as means through which the

9 *Prosecutor* v. *Krstić*, Judgement, Case No. IT-98-33-A, App. Ch., 19 April 2004, para. 180.

10 *Prosecutor* v. *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, Case No. IT-99-36-A, App. Ch., 7 December 2004, p. 3; *Prosecutor* v. *Brđanin and Talić,* Decision on "Motion for Relief form Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", Case No. IT-99-36-T, T. Ch. II, 30 October 2002, para. 23.

11 *Prosecutor* v. *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, Case No. ICTR-98-41-AR73(B), App. Ch., 6 October 2005, para. 44; *Prosecutor* v. *Brđanin,* Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for An Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3.

12 *Prosecutor* v. *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, Case No. IT-99-36-A, App. Ch., 7 December 2004, p. 3; *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 264; *Prosecutor* v. *Kordić and Čerkez*, Decision on Motions to Extend Time for Filing Appellant's Briefs, Case No. IT-95-14/2-A, App. Ch., 11 May 2001, para. 14.

Prosecution is forced to replace the Defence in conducting investigations or gathering material that may assist the Defence".[13]

Similarly, in several ICTR cases it was opined that the Prosecutor has no obligation "to hunt for and disclose materials which are not in its possession or control", unless the Defence specifically identifies the requested material, demonstrates that it has made prior efforts to obtain the material, and shows that the Prosecution is in a better position than the Defence to procure the material.[14] However, such an approach is hardly applicable in the ICC where the Prosecution does have the obligation to investigate both incriminating and exonerating circumstances equally.

It is for the Prosecution to determine whether or not evidence is exculpatory. The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution.[15] The Chamber does not intervene in the exercise of this discretion by the Prosecution, unless it is shown that the Prosecution abused its discretion.[16] However, although proof of prejudice to an accused is required before a remedy under Article 67.2 can be given, that burden on the alleging party cannot serve to isolate violations of the Rule to the detriment of a fair trial. The onus on the Prosecution to enforce the rules rigorously to the best of its ability is not a secondary obligation, and is as important as the obligation to prosecute.[17]

According to the *ad hoc* Tribunals' jurisprudence, the obligation to disclose exculpatory material implies the disclosure of the exculpatory material in its original form, and not in the form of a summary. If the exculpatory material is enclosed in

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13 *Prosecutor* v. *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, Case No. IT-02-60-PT, T. Ch. II, 12 December 2002, para. 26.

14 *Prosecutor* v. *Bizimungu et al.*, Decision on Jérôme-Clément Bicamumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence, Case No. ICTR-99-50-T, T. Ch. II, 15 December 2004, paras. 22 and 26; *Prosecutor* v. *Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, Case No. ICTR-99-50-T, T. Ch. II, 23 April 2004, para. 9.

15 *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 264; *Prosecutor* v. *Brđanin and Talić,* Decision on "Motion for Relief form Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", Case No. IT-99-36-T, T. Ch. II, 30 October 2002, para. 30.

16 *Prosecutor* v. *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, Case No. IT-99-36-A, App. Ch., 7 December 2004, p. 3; *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 264; *Prosecutor* v. *Kvočka et al.*, Decision, Case No. IT-98-30/1-A, App. Ch., 22 March 2004, p. 3; *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, Case No. ICTR-96-3-A, App. Ch., 12 December 2002; *Prosecutor* v. *Musema*, Decision ("Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal"), Case No. ICTR-96-13-A, App. Ch., 18 May 2001, p. 4; *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 39.

17 *Prosecutor* v. *Kordić & Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, para. 242.

a statement, it is the statement that needs to be disclosed. In order to make real use of the material, the Defence is entitled to be provided with the exculpatory material in its original form, minus redactions the Prosecution deems appropriate (only the sections that contain the exculpatory material should be provided to the Defence, not the whole document). The redacted versions of exculpatory material that will be disclosed should however be "sufficiently cohesive, understandable and usable and not taken out of context".[18]

Although Article 67.2 does not require the Prosecution to identify the material being disclosed to the Defence as exculpatory[19], as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing as exculpatory.[20]

If exculpatory evidence is known and the evidence is accessible, the Prosecution may be relieved of its obligation to disclose the material under Article 67.2.[21] However, a distinction should be drawn between material of a public character in the public domain, and material reasonably accessible to the Defence. Unless exculpatory material is reasonably accessible to the accused, namely, available to the Defence with the exercise of due diligence, the Prosecution has a duty to disclose the material itself.[22]

18 *Prosecutor* v. *Sesay et al.,* Sesay Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Case No. SCSL-04-15-T, T. Ch. I, 9 July 2004, para. 34; *Prosecutor* v. *Blagojević et al*., Joint Decision on Motions Related to Production of Evidence, Case No. IT-02-60-PT, T. Ch. II, 12 December 2002, para. 24; *Prosecutor* v. *Brđanin and Talić,* Decision on "Motion for Relief form Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", Case No. IT-99-36-T, T. Ch. II, 30 October 2002, para. 26; *Prosecutor* v. *Blaškić*, Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence", Case No. IT-95-14-T, T. Ch. I, 29 April 1998, para. 19.

19 *Prosecutor* v. *Krstić*, Judgement, Case No. IT-98-33-A, App. Ch., 19 April 2004, para. 190.

20 *Prosecutor* v. *Mrkšić et al*., Order Setting a Time-Limit for Disclosure Pursuant to Rule 66(A)(ii), Case No. IT-95-13/1-PT, T. Ch. II, 24 November 2004, p. 3; *Prosecutor* v. *Krajišnik,* Decision on Motion from Momčilo Krajišnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, Case No. IT-00-39 & 40-PT, T. Ch. III, 19 July 2001, p. 2.

21 *Prosecutor* v. *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, Case No. IT-99-36-A, App. Ch., 7 December 2004, p. 4; *Prosecutor* v. *Kordić and Čerkez*, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance With its Disclosure Obligation Under Rule 68 of the Rules, Case No. IT-95-14/2-A, App. Ch., 11 February 2004, para. 20; *Prosecutor* v. *Blagojević et al.,* Joint Decision on Motions Related to Production of Evidence, Case No. IT-02-60-PT, T. Ch. II, 12 December 2002, para. 26; *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 38.

22 *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 296.

C. "Evidence"

At the time when Article 67.2 of the ICC Statute was being drafted, the corresponding ICTY Rule 68, which was a prototype of Article 67.2, contained reference to "evidence" ("[t]he Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."). This wording was reproduced in the ICC Statute.

In July 2001 the word "evidence" in the ICTY Rule 68 was replaced with the word "material".[23] This amendment reflected the ICTY jurisprudence which interpreted the word "evidence" in Rule 68 very widely. It was emphasised that "The reference to material is not restricted to material in a form that would be admissible in evidence, but includes all information in any form which falls within the Rule 68 description."[24] It includes any information which *may* affect the credibility of prosecution evidence.

For instance, in the *Furundžija* case it was untimely disclosure of the documents related to the psychological treatment of one of the main Prosecution's witnesses that made the Trial Chamber to reopen the hearing. The Trial Chamber emphasised that "the accused's defence has been conducted on the basis that the witness' memory was flawed. Any evidence relating to the medical, psychiatric or psychological treatment or counselling that this witness may have received is therefore clearly relevant and should have been disclosed to the Defence."[25] It was emphasised that the reference to evidence is not restricted to material in a form that would be admissible in evidence, but includes all information in any form which falls within the description of the exculpatory evidence.[26]

In transmitting material of exculpatory material the Prosecution must also include any information going to the authenticity of a document so as to enable the Defence to make full use of it. Indeed, if there is other material which tends to establish the authenticity of the document, such other material itself becomes an integral part of the exculpatory evidence as being beneficial to the accused. Moreover, if the Prosecution possesses evidence which tends to suggest that some specific material being ruled on by it may not be authentic, the Prosecutor would, of course, be obliged to transmit such evidence as exculpatory evidence.[27]

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23 The current version of the Rule refers to "any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigated the guilt of the accused or affect the credibility of Prosecution evidence."

24 *Prosecutor* v. *Kordić and Čerkez*, Decision on Motions to Extend Time for Filing Appellant's Briefs, Case No. IT-95-14/2-A, App. Ch., 11 May 2001, par 9; *Prosecutor* v. *Brđanin and Talić*, Decision on Motion by Momir Talić for Disclosure of Evidence, Case No. IT-99-36-PT, T. Ch. II, 27 June 2000, par 8.

25 *Prosecutor* v. *Furundžija*, Decision, Case No. IT-95-17/1-T, T. Ch. II, 16 July 1998, para. 18.

26 *Prosecutor* v. *Kordić and Čerkez*, Decision on Motions to Extend Time for Filing Appellant's Briefs, Case No. IT-95-14/2-A, App. Ch., 11 May 2001, para. 9; *Prosecutor* v. *Brđanin and Talić*, Decision on Motion by Momir Talić for Disclosure of Evidence, Case No. IT-99-36-PT, T. Ch. II, 27 June 2000, para. 8.

27 *Prosecutor* v. *Blaškić*, Case No. IT-95-14T, T. Ch. I, Decision on the Defence Motion for

D. Some Types of Exculpatory Materials

Where the defence has been conducted on the basis that a witness' memory was flawed, any evidence relating to the medical, psychiatric or psychological treatment or counselling that the witness may have received should be disclosed to the Defence.[28] Testimony given in other trials is generally encompassed by the Prosecution's disclosure obligation pursuant to Article 67.2. However, the Prosecution has no obligation to research publicly accessible material for the Defence.

The Prosecution shall monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony.[29] In this regard, the Office of the Prosecutor has a duty to establish procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence provided by such witnesses is re-examined in light of Article 67.2 to determine whether any material has to be disclosed.[30]

Information falling under Article 67.2 contained in notes taken in preparation of a potential plea agreement shall be disclosed to a co-accused.[31] Since favourable arrangements between the Prosecution and their witness may go to the credibility of Prosecution's evidence, the Prosecution shall provide to the Defence the identity of those proposed witnesses who have entered into such agreements. In the *Halilović* case, the Trial Chamber ordered the Prosecution to provide to the Defence "a list identifying those proposed witnesses who have entered into favourable arrangements, if any, that may go to the credibility of Prosecutions' evidence".[32]

As a general rule, interpretations and arguments made by the parties in their submissions, filed under seal, are not subject to disclosure under Article 67.2. However, in extraordinary cases in which evidence becomes exculpatory only in connection with such a submission, the Prosecution has the obligation to disclose this submission pursuant to Article 67.2.[33]

Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, 30 January 1998, para. 15.

28 *Prosecutor* v. *Furundžija*, Decision, Case No. IT-95-17/1-T, T. Ch. II, 16 July 1998, para. 18.

29 *Prosecutor* v. *Krstić*, Judgement, Case No. IT-98-33-A, App. Ch., 19 April 2004, para. 206.

30 *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 302.

31 *Prosecutor* v. *Blagojević and Jokić*, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, Case No. IT-02-60-T, T. Ch. I Section A, 13 June 2003, p. 7.

32 *Prosecutor* v. *Halilović*, Decision on Defence Motion for Identification of Suspects and other Categories Among its Proposed Witnesses, Case No. IT-01-48-PT, T. Ch. III, 14 November 2003, p. 3.

33 *Prosecutor* v. *Kordić and Čerkez*, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules, Case No. IT-95-14/2-A, App. Ch., 11 February 2004, para. 19.

E. Continuing obligation

Disclosure under Article 67.2 is a continuing obligation for the Prosecution. The Prosecution's obligation to disclose exculpatory material continues during the post-trial stage and proceedings before the Appeals Chamber.[34] The terms "continuing obligation" should be understood to mean that the Prosecution must, on a continuous basis, search all material known to the Prosecutor, including all its files, in whatever form and in relation to all accused, for the existence of material which may suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence, and disclose the existence of such material completely to the defence.[35]

Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in Article 67.2.[36] Since the Prosecutor's disclosure obligation is ongoing, the information obtained at any stage of the proceedings and even after the trial may have to be disclosed to the defence.

F. Defence request based on Article 67.2

According to the *ad hoc* Tribunals' jurisprudence, upon Defence request, a Chamber can issue an order for disclosure upon a showing that the Prosecution failed to discharge its obligations and that the request for disclosure is sufficiently specific.[37]

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34 *Kordić*, Appeals Chamber, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules, 11 February 2004, para. 17; *Rutaganda*, Appeals Chamber Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, , 12 December 2002; *Rutaganda*, Appeals Chamber, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions "), 28 June 2002, p. 3.

35 *Prosecutor* v. *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, Case No. IT-02-60-PT, T. Ch. II, 12 December 2002, para. 29; *Prosecutor* v. *Blaškić*, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-rule 66(A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused, Case No. IT 95-14-T, T. Ch. I, 15 July 1998.

36 *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000.

37 *Prosecutor* v. *Bizimungu et al.*, Decision on Jérôme-Clément Bicamumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence, Case No. ICTR-99-50-T, T. Ch. II, 15 December 2004, para. 24; *Prosecutor* v. *Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, Case No. ICTR-98-44-I, T. Ch. III, 7 October 2003, para. 12; *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, Case No. ICTR-96-3-A, App. Ch., 12 December 2002; *Prosecutor* v. *Musema*, Decision ("Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal"), Case No. ICTR-96-13-A, App. Ch., 18 May 2001, p. 4.

Indeed, a request based on Rule 68 is not required to be so specific as to precisely identify which documents shall be disclosed.[38] The test to be applied for disclosure under Article 67.2 has two steps: first, if the Defence believes that the Prosecution has not complied with Article 67.2, it must first establish that evidence other than that disclosed might prove exculpatory for the accused and is in the possession of the Prosecution; and second, it must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.[39] It was also emphasised by the SCSL that in order to sustain an allegation by the Defence of a breach by the Prosecution of its disclosure obligation under Rule 68, the Defence must demonstrate, by *prima facie* proof: (1) that the targeted evidentiary material is exculpatory in nature, (2) the materiality of the said evidence, (3) that the Prosecution has, in its possession, custody, or control, the targeted exculpatory evidentiary material, and (4) that the Prosecution has, in fact, failed to disclose the targeted exculpatory evidentiary material.[40]

Once the Defence satisfies a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber in addressing what is the appropriate remedy, has to examine whether or not the Defence has been prejudiced by a breach of Rule 68.[41] A Chamber may also order the Prosecution to submit a signed report to certify that it is aware of its continuing obligations under Rule 68 if the Defence satisfies the Chamber that the Prosecution has failed to discharge its obligations.[42] Such a report

38 *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 40; *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, Case No. ICTR-96-3-A, App. Ch., 12 December 2002.

39 *Prosecutor* v. *Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, para. 179; *Prosecutor* v. *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, Case No. IT-99-36-A, App. Ch., 7 December 2004, p. 3; *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 268; *Prosecutor* v. *Sesay et al.*, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, Case No. SCSL-04-15-T, T. Ch. I, 23 July 2004, para. 9; *Prosecutor* v. *Norman et al*., Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, T. Ch. I, 16 July 2004, para. 7; *Prosecutor* v. *Brđanin*, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", Case No. IT-99-36-PT, T. Ch. II, 30 October 2002, para. 23; *Prosecutor* v. *Blaškić*, Decision on the Production of Discovery Materials, Case No. IT-95-14-PT, T. Ch. I, 27 January 1997, para. 50.2.

40 *Prosecutor* v. *Sesay et al.*, Decision on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor, Case No. SCSL-04-15-T, T. Ch. I, 2 May 2005, para. 36.

41 *Prosecutor* v. *Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, para. 179; *Prosecutor* v. *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 268; *Prosecutor* v. *Brđanin and Talić,* Decision on "Motion for Relief form Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", Case No. IT-99-36-T, T. Ch. II, 30 October 2002, para. 23.

42 *Prosecutor* v. *Kordić and Čerkez*, Decision on Motions to Extend Time for Filing Appellant's Briefs, Case No. IT-95-14/2-A, App. Ch., 11 May 2001, para. 15; *Prosecutor* v.

can be signed by a member(s) of the Prosecution team, who conducted the search, in which it is certified that "a full search has been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of exculpatory evidence."[43]

III. Disclosure of other material

A. Disclosure relating to prosecution witnesses

In accordance with Rule 76, within the time-limit prescribed by the Trial Chamber, the Prosecution shall make available to the defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. Copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses. The statements shall be disclosed in a language which the accused understands.

B. Meaning and forms of witness statements

The Tribunals' Appeals Chamber in the *Blaškić* case emphasised that "the usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime."[44] Any statement or declaration made by a witness in relation to an event he or she witnessed and recorded in any form by an official in the course of investigation, falls within the meaning of a "witness statement" under Rule 66.[45]

Statements of prosecution witnesses, according to another Decision in the *Blaškić* case, include all statements of the prosecution witnesses "which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source" regardless of the form of the statement (in particular whether or not "taken under oath or signed").[46]

Under the jurisprudence of the *ad hoc* Tribunals, the Prosecution is required to make available to the Defence, the witness statement in the form in which it has been recorded. The mere fact that a particular witness statement does not correspond

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Blaškić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000.

43 *Prosecutor* v. *Krnojelac*, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, Case No. IT-97-25-PT, T. Ch. II, 1 November 1999, para. 11.

44 *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 15.

45 *Prosecutor* v. *Brima et al.*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, para. 16; *Prosecutor* v. *Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, T. Ch. I, 16 July 2004, para. 10.

46 *Prosecutor* v. *Blaškić*, Decision on the Production of Discovery Materials, Case No. IT-95-14-PT, T. Ch. I, 27 January 1997, para. 37.

to established standard does not relieve a party from its obligation to disclose it pursuant to Rule 66(A)(ii).[47] Rule 66 requires disclosure of all witness statements in the possession of the Prosecution, regardless of their form or source, save for any material covered by Rule 70(A).[48]

It was also emphasised that the Prosecution has the obligation to continuously disclose to the Defence copies of statements of all witnesses whom it intends to call whether in the form of "will say" statements or interview notes or any other forms obtained from a witness at any time prior to the witness giving evidence in trial.[49] Investigator's notes of statements made by a witness are disclosable save for any material covered by Rule 70(A).[50]

C. Unsigned statements

The OTP of the ICC may also adopt the policy of disclosing to the Defence a witness statement that was not signed by the witness due to time constraints. Indeed, it would not be necessary to disclose an unsigned draft statement, which later culminated in finalised, signed versions, if they are identical in content. However, the facts recounted by the witness in unsigned statement which are either exculpatory or do not appear in the signed statement would have to be disclosed to the defence.

The OTP of the ICC may also provide in its policy guidelines that the facts recounted by the witness after the statement was signed, which do not appear in the signed statement, shall be disclosed to the Defence. Such disclosure can be done in a form, showing the date and name of investigator/lawyer who spoke to the witness, which contains the facts recounted by the witness in a conversation or unsigned statement which were either exculpatory or did not appear in the signed statement. It would also be indicated that this account was not checked by the witness.

Testimony in Tribunal's proceedings also constitutes a witness statement for the subsequent proceedings and therefore is subject to disclosure if the witness is intended to be called to testify in subsequent proceedings in relation to the subject matter of the testimony. In other words, the testimony is a witness statement for the subsequent proceedings.[51]

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47 *Prosecutor* v. *Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, T. Ch. I, 16 July 2004, para. 14; *Prosecutor* v. *Niyitegeka*, Appeal Judgement, Case No. ICTR-96-14-A, App. Ch., 9 July 2004, para. 35.

48 *Prosecutor* v. *Brima et al*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, para. 16.

49 *Prosecutor* v. *Sesay et al.*, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, Case No. SCSL-04-15-T, T. Ch. I, 23 July 2004, para. 15.

50 *Prosecutor* v. *Brima et al.*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, para. 16; *Prosecutor* v. *Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, T. Ch. I, 16 July 2004, paras. 7 and 16.

51 *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-

D. Disclosure related to "proofing"

It has been recognized that the practice of "proofing" witnesses before their testimony at trial, by both the Prosecution and Defence, has been in place and accepted in the ICTY.[52] Such a proofing by the Prosecution enables differences in recollection, especially additional recollections, to be identified. Indeed notice of such additional recollection shall be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise. When exculpatory or other new significant information is disclosed by a witness during proofing this information must be provided to the defence as soon as reasonably practicable thereafter. Indeed, in deciding on admissibility of the new evidence, a Chamber will assess what period of notice is required in order to give the Defence adequate time to prepare.[53]

Although, except where the subject of a notice of a new item of evidence, or a change of evidence is extensive, it is not required to have such notice in the form of a signed statement.[54] In any event, the disclosure shall be done in a form, showing the date and name of the person who spoke to the witness, which contains significant new relevant information recounted by the witness at the proofing. It should also be indicated that this account has not been checked by the witness.

E. Protection of victims and witnesses in disclosure, delay of disclosure

When conducting disclosure to the Defence, the Prosecutor shall take appropriate measures to protect the safety of victims and witnesses. In accordance with Article 68 of the ICC Statute, where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Further, pursuant to Rule 76.4 of the ICC Rules, pre-trial disclosure relating to the Prosecution witnesses "is subject to the protection and privacy of victims and witnesses."

According to the Tribunals' jurisprudence, in exceptional circumstances the prosecution may seek leave to delay a disclosure of unredacted (*i.e.,* with information identifying the witness) statements of the witnesses who may be in danger or

95-14-A, App. Ch., 26 September 2000, para. 15; *Prosecutor* v. *Kupreškić et al.,* Decision on the Prosecutor's Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session Under Rule 79 of the Rules, Case No. IT-95-16-PT, T. Ch. II, 29 July 1998, p. 3; *Prosecutor* v. *Furundžija*, Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, Case No. IT-95-17/1-PT, T. Ch. II, 5 June 1998, para. 7.

52 See *Prosecutor* v. *Limaj et al.,* Decision on Defence Motion on Prosecution Practice of "Proofing" witnesses, Case No. IT-03-66-T, T. Ch. II, 10 December 2004.

53 See *Prosecutor* v. *Sesay et al.,* Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, Case No. SCSL-04-15-T, T. Ch. I, 23 July 2004, para. 12; *Prosecutor* v. *Bagosora et al.,* Decision on admissibility of Evidence of Witness DP, Case No. ICTR-98-41-T, T. Ch. I, 18 November 2003, p. 3.

54 *Ibid.*, pp. 2-3.

at risk. However, the identity of the victim or witness shall be disclosed in sufficient time prior to trial to allow adequate time for preparation of the defence. The time allowed for preparation must be the time before trial commences rather than before the witness gives evidence.[55]

The exceptional circumstances warranting the extraordinary measures of delayed disclosure are the extreme nature of the danger and risk witnesses and/or their families face should it become known that they will testify in these proceedings.[56] The greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness.[57]

What time frame is reasonable for such delay of disclosure depends on the category of the witness. The ICTY practice with respect to the time is 30 days prior to the anticipated start of trial.[58] The following three criteria are considered in the ICTY in respect of applications made for such a delay of disclosure: the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public; the extent to which the power to make protective orders can be used not only to protect individual victims or witnesses in the particular trial, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future; and the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused.[59]

F. Disclosure and inspection of other relevant material

According to Rule 77, the Prosecutor shall, on request, permit the defence to inspect any material in the Prosecutor's custody or control, which are relevant to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. Indeed, permission for inspection

55 *Prosecutor* v. *Milutinović et al.,* Decision on Prosecution's Motions for Protective Measures, Case No. IT-99-37-PT, T. Ch. III, 17 July 2003, p. 4; *Prosecutor* v. *Milošević,* First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Case No. IT-02-54-T, T. Ch. III, 3 May 2002, par 3.

56 *Prosecutor* v. *Milošević,* First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Case No. IT-02-54-T, T. Ch. III, 3 May 2002, para. 8.

57 *Prosecutor* v. *Brđanin and Talić,* Decision on third motion by prosecution for protective measures, Case No. IT-99-36-PT, T. Ch. II, 8 November 2000, para. 13.

58 *Prosecutor* v. *Milutinović et al*., Decision on Prosecution's Motions for Protective Measures, Case No. IT-99-37-PT, T. Ch. III, 17 July 2003, p. 4; *Prosecutor* v. *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, Case No. IT-94-1-T, T. Ch. II, 14 November 1995, para. 21.

59 *Prosecutor* v. *Milutinović et al*., Decision on Prosecution's Motions for Protective Measures, Case No. IT-99-37-PT, T. Ch. III, 17 July 2003, p. 4; *Prosecutor* v. *Milošević*, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Case No. IT-02-54-T, T. Ch. III, 3 May 2002, para. 3; *Prosecutor* v. *Brđanin and Talić,* Decision on third motion by prosecution for protective measures, Case No. IT-99-36-PT, T. Ch. II, 8 November 2000, para. 13.

is subject to Rule 81.[60] In general, Rule 77 is also applicable on appeal.[61] However, it does not apply on appeal if the evidence requested by the Defence was available at the trial.[62]

G. Materiality

Rule 77 is a copy of 66(B) of the ICTY Rules. The latter, apparently, had been borrowed from United States' Federal Rules of Criminal Procedure (Rule 16(a)(1)(C)). For this reason the Trial Chamber in *Delalić* for instance, sought guidance in application of this US Rule in analysing the ICTY Rule 66 (B).[63] Rule 77 requires a *prima facie* showing of materiality to the preparation of the defence of the evidence requested and that the requested evidence is in the custody or control of the Prosecution.[64] The test of materiality was defined as follows: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3)

60 *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, Case No. ICTR-96-3-A, App. Ch., 12 December 2002.

61 *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, Case No. ICTR-96-3-A, App. Ch., 12 December 2002; *Prosecutor* v. *Rutaganda*, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions "), Case No. ICTR-96-3-A, App. Ch., 28 June 2002, p. 3; *Prosecutor* v. *Musema*, Decision on *("*Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal*"),* Case No. ICTR-96-13-A, App. Ch., 18 May 2001; *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 32.

62 *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, Case No. ICTR-96-3-A, App. Ch., 12 December 2002; *Prosecutor* v. *Rutaganda*, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions "), Case No. ICTR-96-3-A, App. Ch., 28 June 2002, p. 3; *Prosecutor* v. *Musema*, Decision on ("Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal"), Case No. ICTR-96-13-A, App. Ch., 18 May 2001; *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 32.

63 *Prosecutor* v. *Delalić et al*, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Case No. IT-96-21-T, T. Ch. II *quarter*, 26 September 1996.

64 *Prosecutor* v. *Naletilić and Martinović*, Decision on Joint Motions for Order Allowing Defence Counsel to Inspect Documents in the Possession of the Prosecution, Case No. IT-98-34-T, T. Ch. I Section A, 16 September 2002, p.3; *Prosecutor* v. *Ndayambaje*, Decision on the Defence Motion for Disclosure, Case No. ICTR-96-8-T, T. Ch. II, 25 September 2001, para. 11; *Prosecutor* v. *Delalić et al.,* Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Case No. IT-96-21-T, T. Ch. II *quarter*, 26 September 1996, para. 9.

to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).[65]

It was noted that it is the Prosecution's obligation to make the initial determination of materiality of evidence within its possession and if disputed, the Defence is required to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor.[66] The Defence may not rely on conclusory allegations or a general description of the information. Rule 66 (B) requires a *prima facie* showing of materiality to the preparation of the defence of the evidence requested and that the requested evidence is in the custody or control of the Prosecution.[67]

H. "Unused" statements

Neither Rule 77 nor Rule 66 of the ICTY Rules have any indication of whether "unused" witness statements, which are material to the defence, are to be disclosed under these provisions. The Tribunals and ICC provisions, like the mentioned US Rule, list "books, documents, photographs and tangible objects" as subject to disclosure. The reason could be that in the US, from where the provision was borrowed, it is not a usual practice for investigators to take signed written statements from witnesses. In this regard, the Tribunals' Appeals Chamber, in the *Rutaganda* case, in June 2002, ruled that written witness statements should be considered as being included within the scope of documents to be disclosed under Rule 66(B).[68]

I. "In possession or control"

Rule 77 refers to material which is *in Prosecution possession or control*. As the *ad hoc* Tribunals' experience shows, there might be situations when an enormous amount of domestic archives will have to be seized by the Prosecution in the various domestic archives. Such massive seizures may be necessary because access to relevant domestic records in the territory of the conflict will be too limited in time (due to the hostile environment) to identify relevant evidence. At the same time, if left in the State's

65 *Prosecutor* v. *Delalić et al*, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Case No. IT-96-21-T, T. Ch. II *quarter*, 26 September 1996.

66 *Prosecutor* v. *Sesay et al.,* Sesay Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Case No. SCSL-04-15-T, T. Ch. I, 9 July 2004; *Prosecutor* v. *Delalić et al.,* Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Case No. IT-96-21-T, T. Ch. II *quarter*, 26 September 1996, para. 11.

67 *Prosecutor* v. *Naletilić and Martinović*, Decision on Joint Motions for Order Allowing Defence Counsel to Inspect Documents in the Possession of the Prosecution, Case No. IT-98-34-T, T. Ch. I Section A, 16 September 2002, p.3; *Prosecutor* v. *Ndayambaje*, Decision on the Defence Motion for Disclosure, Case No. ICTR-96-8-T, T. Ch. II, 25 September 2001, para. 11; *Prosecutor* v. *Delalić et al.,* Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Case No. IT-96-21-T, T. Ch. II *quarter*, 26 September 1996, para. 9.

68 *Prosecutor* v. *Rutaganda*, Decision on ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions"), Case No. ICTR-96-3-A, App. Ch., 28 June 2002, p. 3.

territory, the records may be meddled with. Because of these factors, the selection of the relevant portions of the records will have to be done on the broadest relevance criteria (relevant time period and territory). If all these seized domestic archives are brought into the Prosecution's custody, this will then activate an enormous burden of disclosure for the Prosecutor. In order to avoid this situation, the Prosecutor might choose to have them placed in a common archive under the Registry's supervision. This would ensure that the material is equally accessible both for the prosecution and defence. If there are legitimate confidentiality concerns, the Prosecution may choose to keep some material solely in its possession, in which case the normal disclosure duties would be triggered.

IV. Late Disclosure

The Prosecution is required at all times to complete its disclosure obligations with due diligence and continued disclosure of material on a piecemeal basis over an extended period of time is an inefficient use of the resources available to both parties and not in the interests of the good administration of justice, and may, if such practice continues without justification, adversely affect the rights of the accused to be informed of the case against him and to have adequate time and facilities for the preparation of his defence.[69] It was also emphasised that the Prosecution must exercise the utmost diligence in all areas of disclosure regulated by the Rules, especially since late disclosure can result in the recalling of witnesses, which causes unnecessary inconveniences and financial burdens for the Tribunal.[70]

Indeed, where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Chamber's option in such an eventuality would be to apply appropriate remedies which may include exclusion of such evidence.[71] However, despite the failure of the Prosecution to strictly comply with the provisions of Rule 66 of the Rules in furnishing the witnesses' statements to the defence within the pre-trial stage, the Defence will not suffer material prejudice where the Defence has sufficient time to adequately prepare for trial.[72]

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69 *Prosecutor* v. *Halilović*, Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease Investigations, Case No. IT-01-48-PT, T. Ch. III, 30 September 2004, p. 4.

70 *Prosecutor* v. *Orić,* Decision on Defence Motion to Recall a Witness, Case No. IT-03-68-T, T. Ch. II, 30 November 2004, p. 3.

71 *Prosecutor* v. *Sesay et al.,* Ruling on Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199, Case No. SCSL-04-15-T, T. Ch. I, 26 July 2004, para. 7; *Prosecutor* v. *Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, T. Ch. I, 16 July 2004, para. 7.

72 *Prosecutor* v. *Brima et al.,* Brima – Decision on Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements, Case No. SCSL-04-16-PT, T. Ch. I, 2 August 2004, para. 24; *Prosecutor* v. *Brima et al.,* Kanu – Decision on Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements, Case No. SCSL-04-16-PT, T. Ch. I, 30 July 2004, para. 24; *Prosecutor* v. *Bagosora*, Decision on the Motion by the Defence Counsel for Disclosure, Case No. ICTR-96-7-T, T. Ch. II, 27 November 1997, para. (D)(v).

V. Restrictions on Disclosure

A. National security information

According to Article 54.3 of the ICC Statute, the Prosecutor may "agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence. Pursuant to Rule 81.3, where steps have been taken to ensure the confidentiality of information, in accordance with Articles 54, 57, 64, 72 and 93, such information shall not be disclosed, except in accordance with those Articles. The fact that information is provided in the form of testimony does not exclude it from being "information" or "initial information" provided under Rule 70.[73]

It was emphasised by the ICTY Appeals Chamber that the purpose of restriction on disclosure of confidential information is to encourage States, organizations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected.[74] The exceptions to disclosure are introduced to permit the use, as and when appropriate, of certain information which, in absence of explicit provisions, would either not have been provided to the Prosecutor or have been unusable on account of its confidential nature or its origin. Without such guarantees of confidentiality, it is almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfil its functions.[75]

It was opined in one of the ICTY Appeals Chamber's Decision that where there is any doubt upon the face of the material placed before a Trial Chamber when the protections of Rule 70 are sought, the Trial Chamber should invite the party which provided the information and the Prosecutor to supply evidence upon these issues before ruling upon the application of Rule 70 to the information in question. The Trial Chamber should give the information provider an opportunity to be heard on the question by filing written submissions, but need not allow additional oral

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73 *Prosecutor* v. *Milošević*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, Case No. IT-02-54-AR108*bis* & AR73.3, App. Ch., 23 October 2002, paras. 20-23.

74 *Prosecutor* v. *Milošević*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, Case No. IT-02-54-AR108*bis* & AR73.3, App. Ch., 23 October 2002, para. 19.

75 *Prosecutor* v. *Milošević*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, Case No. IT-02-54-AR108*bis* & AR73.3, App. Ch., 23 October 2002, para. 19; *Prosecutor* v. *Brđanin and Talić,* Public Version of the Confidential Decision on the Admission of Rule 92 *bis* Statements dated 1 May 2002, Case No. IT-99-36-T, T. Ch. II, 23 May 2002, paras. 17-18; *Prosecutor* v. *Blaškić*, Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures, Case No. IT-95-14-PT, T. Ch. I, 11 November 1997, para. 10.

submissions by the information provider unless the Trial Chamber determines that the interests of justice so require.[76]

B. Internal documents

According to Rule 81.1 of the ICC Rules, reports, memoranda, or other Prosecution internal documents are not subject to disclosure. It was emphasised that it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party.[77]

Under these Rules correspondence, handwritten questionnaires, and notes of meetings at the Office of the Prosecutor, should be excluded from inspection and disclosure.[78] Investigator's notes of an internal nature not containing statements made by a witness are protected under Rule 70(A).[79]

Notes taken by the Prosecution in preparation of a potential plea agreement do not have to be disclosed, although exculpatory information containing in the notes shall be disclosed to the co-accused. [80] As to the oral communications between the Prosecution and a witness in the course of preparing a witness for testimony, they fall outside the scope of documents protected under Rule 81.1. Indeed, oral communication can hardly qualify as "documents" within the context of the Rule.[81] A Prosecution witness is not a client of the Prosecutor, and therefore the privilege provided for under Rule 97, does not apply to the relationship between the Prosecution and its witnesses.[82]

The OTP of the ICC may provide in its policy guidelines that the internal documents, containing exculpatory facts, themselves need not necessarily be provided

76 *Prosecutor* v. *Milošević*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, Case No. IT-02-54-AR108*bis* & AR73.3, App. Ch., 23 October 2002, para. 31.

77 *Prosecutor* v. *Blagojević and Jokić*, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, Case No. IT-02-60-T, T. Ch. I Section A, 13 June 2003, p. 6.

78 *Prosecutor* v. *Nahimana et al.*, Decision on the Prosecutor's *Ex-Parte* Application to Exclude Certain Documents from Defence Inspection of Microfiche Material, Case No. ICTR-99-52-T, T. Ch. I, 25 October 2002.

79 *Prosecutor* v. *Brima et al*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, para. 16.

80 *Prosecutor* v. *Blagojević and Jokić*, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, Case No. IT-02-60-T, T. Ch. I Section A, 13 June 2003, p. 6.

81 *Prosecutor* v. *Bizimungu et al.*, Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing, Case No. ICTR-00-56-T, T. Ch. II, 1 April 2005, para. 30.

82 *Prosecutor* v. *Bizimungu et al.*, Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing, Case No. ICTR-00-56-T, T. Ch. II, 1 April 2005, para. 34.

to the Defence. Such disclosure can be done in a form, showing the date and name of investigator/lawyer who spoke to the witness, which contains the facts recounted by the witness in a conversation or unsigned statement which were exculpatory.

C. Prosecution's application under Rule 81.2

Rule 81.2 of the ICC Rules, allow the Prosecutor to apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose material relevant to preparation of the Defence. The Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from an obligation to disclose if such disclosure may: prejudice further or ongoing investigations (see also 81.2 of the ICC Rules), or for any other reasons may be contrary to the public interest, or affect the security interests of any State. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

VI. Translation of Disclosed Material

The right of the accused under Article 67.1(a) has been interpreted in the *ad hoc* Tribunals as the right to obtain a translation in his language, of all evidentiary material which relates to the determination by the Trial Chamber of the charges against him, namely, those submitted by either party at trial.[83] This principle must be extended to prior witness statements that the Prosecution is required to disclose to the accused under Article 76.1 even if the said documents are not to be submitted to the Trial Chamber for consideration during trial.[84]

Under Rule 76.1, the statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks. In addition, according to the *ad hoc* tribunals' jurisprudence, at the pre-trial stage, the following material shall be disclosed in a language the accused understands:[85] all prior statements obtained by the Prosecutor from the accused irrespective of whether it will be offered at trial; material listed in Rule 77 which appeared in a language understood by the accused at the time it came under the Prosecution's custody or control. The effective date of filing of the material listed above is the date of filing in one of the official languages of the Court, but all statutory time-limits for responses in relation to this material shall be the date of filing of the translation in

83 *Prosecutor* v. *Muhimana*, Decision on Defence Motion to have all Prosecution and Procedural Documents Translated into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, Case No. ICTR-95-I-B-I, Tr. Ch. I, 6 November 2001; para. 22; *Prosecutor* v. *Delalić et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, Case No. IT-96-21-T, T. Ch. II *quarter*, 25 September 1996, para. 6.

84 *Prosecutor* v. *Muhimana*, Decision on Defence Motion to have all Prosecution and Procedural Documents Translated into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, Case No. ICTR-95-I-B-I, Tr. Ch. I, 6 November 2001, para. 23.

85 *Prosecutor* v. *Ljubičić*, Decision on the Defence Counsel's Request for Translation of all Documents, Case No. IT-00-41-PT, T. Ch. I, 20 November 2002, p. 3.

the language understood by the accused.[86]

During the trial stage, the Chamber may direct the Prosecutor to tender exhibits or the relevant parts of such exhibits (either in hard copy or in audio format) in a language understood by the accused.[87] It was opined, that the guarantees provided in Article 67.1 do not extend to all documents, but only to evidence, which forms the basis of the determination by the Chamber of the charges against the accused. This right is ensured, *inter alia*, by the fact that all evidence admitted at trial is provided in a language the accused understands. Accordingly, all exhibits which the parties intend to submit for admission shall be available in a language the accused understands, as well as in at least one of the official languages of the Tribunal at the time of it being submitted to the Chamber for admission and it is the responsibility of the party, intending to submit the document, to ensure that such translations are available.[88]

In setting forth the principles applicable to translation of documents, a balance should be stricken between the right of an accused to a fair trial and considerations of judicial economy related to the organisation of the Court and of the translation services. The additional work to be borne by the translation services would be considerable and would directly result in slowing the proceedings as well as substantially increasing Court fees.[89]

86 *Prosecutor* v. *Ljubičić*, Decision on the Defence Counsel's Request for Translation of all Documents, Case No. IT-00-41-PT, T. Ch. I, 20 November 2002, p.3.

87 *Prosecutor* v. *Ljubičić*, Decision on the Defence Counsel's Request for Translation of all Documents, Case No. IT-00-41-PT, T. Ch. I, 20 November 2002, p.3.

88 *Prosecutor* v. *Naletilić and Martinović*, Decision on Defence's Motion Concerning Translation of all Documents, Case No. IT-98-34-T, T. Ch. I Section A, 18 October 2001, pp. 3-4.

89 *Prosecutor* v. *Muhimana*, Decision on Defence Motion to have all Prosecution and Procedural Documents Translated into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, Case No. ICTR-95-I-B-I, Tr. Ch. I, 6 November 2001, para. 12; *Prosecutor* v. *Zarić*, Decision on Defence Application for Leave to Use the Native Language of the Assigned Counsel in the Proceedings, Case No. 95-9-PT, T. Ch. I, 21 May 1998, para. 8.

Chapter 37

The Conduct of Trials*

Josée D'Aoust

I. Introduction

This article addresses the Conduct of Trials before the International Criminal Court (ICC). However, at the present time, no trial was ever held before the ICC so we cannot benefit from any case law that would interpret the Statute of the International Criminal Court (hereinafter, the Statute) or the Rules of Procedure and Evidence of the International Criminal Court (hereinafter, the Rules) in that regard. Therefore, we have tried, when possible, to refer to the case law of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Ruanda (ICTR) (hereinafter, the *ad hoc* tribunals) and other internationalized tribunals to give guidelines on how some principles and similar rules were interpreted in the past. We first addressed the general provisions such as the location of the trial, the presence of the accused and the duties of the Trial Chamber upon the assignment of a case. Then we referred to the commencement of the trial and the presentation of evidence and lastly we addressed the decision of the court and, the sentencing process.[1]

II. General Provisions

A. Place of Trial

Pursuant to Article 62 of the Statute, the trial shall be held at the seat of the Court[2] "unless provided otherwise". "The Court may sit elsewhere whenever it considers it desirable."[3] Rule 100 of the Rules sets forth the procedure for holding the proceed-

* The views expressed herein are solely those of the author and do not necessarily reflect those of the Office of the Prosecutor or those of the United Nations.

1 On the same topics, see generally Vladimir Tochilovsky, 'Indictment, Disclosure, Admissibility of Evidence', *in* The Jurisprudence of ICTY and ICTR, Wolf Legal Publishers, 2004. See also Frank Terrier, 'Power of the Trial Chamber' and 'Proceedings before the Trial Chamber', *in* The Rome Statute of the International Criminal Court, Vol II (A. Cassese, P. Gaeta and J. Jones (eds.), Oxford University Press, 2002, Chapter 31.1 and 31.2, at 1259 -1318.

2 The seat of the Court is in The Hague , the Netherlands, (Article 3 (1) of the Statute).

3 Article 3 (3) of the Statute and Rule 100 (1) of the Rules.

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 ISBN 978 90 04 16308 9. pp. 863–891.

ings elsewhere than the seat of the Court. The request to that effect may be made by the Prosecution, the Defence or by a majority of the Judges of the Court. It shall be made in writing and addressed to the Presidency. The request must specify the State where the moving party wants the proceedings to be held. After satisfying itself on the views of the relevant chamber and after consulting the State where the Court intends to sit and secure its consent, the Presidency shall refer the matter to the judges, which shall take the final decision in plenary session, by a two-thirds majority. The Court may grant the request if it considers that it is necessary, in the interests of justice, to do so.[4]

Similar provisions exist in the Rules of Procedure and Evidence of both the ICTR and the ICTY.[5] However, the practice of the *ad hoc* tribunals was more focused on authorising site visits rather than holding proceedings in States other than the host State.

According to the case-law of the *ad hoc* tribunals, the decision to hold the trial elsewhere than the seat of the Tribunal is a discretionary one and should be taken after due consideration of several factors, including the necessity and value of such a visit; the accessibility of the location; the number of sites to visit and the safety of the judges, parties and the accused.[6] Site visit is important since it allows the Trial Chamber to gain a better understanding of the evidence presented at trial and a better knowledge of the places of the alleged events.[7] Pursuant to the case-law of the ICTR, visits to a particular location may be conducted either before[8] or after the presentation of evidence.[9]

All these factors must be assessed in view of the particular circumstances of each case and as stated by the Trial Chamber in *Prosecutor v. Théoneste Bagosora et al.*:

> "In view of the logistics and costs involved, a decision to carry out a site visit should preferably be made when the visit will be instrumental in the discovery of the truth and determination of the matter before the Chamber."[10]

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4 Rule 100.

5 Rule 4 of the ICTR Rules of Procedure and Evidence (hereinafter ICTR Rules) states that "A Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President, in the interests of justice". See also Rule 4 of the ICTY Rules of Procedure and Evidence (hereinafter ICTY Rules), which states that: "A Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorized by the President, in the interests of justice."

6 *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis, 17 February 1998, para. 8; *Prosecutor v. Mladen Naletilić and Vinko Naletilić*, Case No. IT-98-34-PT, Decision on Motion for on-site visit, 5 October 2001; *Prosecutor v. Théoneste Bagosora et al*, Case No. ICTR-98-41-T, Decision on Prosecution's Motion for Site Visits in the Republic of Rwanda, 29 September 2004, paras.3 and 4.

7 *Prosecutor v. Ignace Bagilishema,* Case No: ICTR-95-1A-T, Judgement, 7 June 2001, para. 10.

8 Idem.

9 *Prosecutor v. Elie Ndayambaje et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda Under Rules 4 and 73 of the Rules of Procedure and Evidence, 23 September 2004, paras. 14-15.

10 *Prosecutor v. Théoneste Bagosora et al*, Case No. ICTR-98-41-T, Decision on Prosecution's

If the Court is called upon to exercise its jurisdiction in respect of crimes committed in countries that are still unstable or where the security of the Court, the parties and the witnesses is at risk, it may be impossible for the Court to consider holding the proceedings there even if it is persuaded that doing so would be in the interests of justice.

Holding proceedings in the region where the alleged crimes were committed or at least visiting the crime scenes when possible is of paramount importance and has a real impact on the community concerned. It may also contribute to appease the unfortunate but although too real critic that international justice is rendered far away and by strangers. In order for justice to have an impact on all communities, they must feel that they play an important role in the justice system and that the international justice system is part of their world.

Holding proceedings or part thereof in close proximity to the affected community may help its members to understand that justice is part and parcel of their lives, that fundamental principles are upheld and that impunity cannot be tolerated. However any such decision should only be rendered after consideration of all relevant factors and should be granted only and when it is in the interest of justice to do so.

B. Presence of the Accused

The right of an accused to be tried in his presence is enshrined in most international and national legislations.[11] According to Article 63 (1) of the Statute, the presence of the accused at trial is obligatory. The use of the word 'shall' in Article 63 (1) read in conjunction with Article 67 (4) which provides, as a minimum guarantee, for the accused to be present at the trial, renders the presence of the accused mandatory and thereby excludes trials *in absentia* unless specifically provided by the Statute.[12]

Article 63 (2) of the Statute allows the Trial Chamber to remove the accused from the proceedings in exceptional circumstances if the accused continues to dis-

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Motion for Site Visits in the Republic of Rwanda, 29 September 2004, para.4; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis, 17 February 1998, para. 8.

11 See Article 14 (3) (d) of the International Covenant on Civil and Political Rights (1966); Article 21 (4) (d) of the Statute of the International Criminal Tribunal for the former Yugoslavia; Article 20 (4) (d) of the Statute of the International Criminal Tribunal for Rwanda; Article 17 (4) (d) of the Statute of the Special Court for Sierra Leone and Rule 60 of the Rules of Procedure and Evidence; Regulation 2000/30 On Transitional Rules of Procedure of East Timor, article 5, UNTAET/REG/2000/30 (hereinafter, UNTAET/REG/2000/30); Article 247 of the Criminal Procedure Code of the Republic of Bosnia and Herzegovina, 2003; Act of 22 May 1981 No. 25 (amended, 1985 and 1998) Relating to Legal Procedure in Criminal Cases (The Criminal Procedure Act) (Norway); Section 230 (1) of the German Criminal Procedure Code, 1998.

12 Article 63 (2) of the Statute; Similar provision can also be found in Section 5, UNTAET/REG/2000/30: "No trial of a person should be held in absentia, except in the circumstances defined in the present regulation. The accused must be present at the hearing conducted pursuant to Section 29.2 of the present regulation, unless the accused is removed from the court under the provisions of Section 48.2 of the present regulation."

rupt the proceedings, provided that all other alternative measures have proven inadequate. In such a case, the accused may be removed "only for such period as is strictly necessary." If such a situation occurs, the Trial Chamber shall provide for measures that will allow the accused, if not physically in the courtroom, to observe the trial and instruct his or her counsel.

However, in both international and most national jurisdictions the right of the accused to be present at trial is not absolute. This right can be derogated in circumstances when the Accused either clearly waives his/her right to be present, abscond from justice or become so obstructive that it is in the interests of justice to remove him/her from the proceedings.[13] We already looked at the situation where the accused is obstructive, but what would be the situation if the accused clearly waived his right to be present, like it was the case in some situations before the *ad hoc* tribunals and the Special Court for Sierra Leone.

In *Prosecutor v. Barayagwiza*, the accused, while in custody of the Tribunal, refused to attend the trial and instructed his counsel not to participate in any way in the proceedings, arguing that it was impossible for him to have a fair trial before an impartial and independent Tribunal. While being seized of a request by the defence counsel to withdraw from the case due to these circumstances, the Trial Chamber rejected the counsel's request to withdraw but also stated:

> "*In such circumstances, where the accused has been duly informed of his ongoing trial, neither the Statute nor human rights law prevent the case against him from proceeding in his absence.*"[14]

Likewise, with regard to the refusal of an accused to attend the trial after having given instructions to his counsel to act on his behalf, the Special Court for Sierra Leone held that:

> "*The Chamber, therefore, finds that, though in essence trial in the absence of an accused*

13 Rule 80 (b) of the Rule of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia; Rules 80 (b) and 82 *bis* of the Rule of Procedure and Evidence of the International Criminal Tribunal for Rwanda; Rules 60 and 80 (b) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone; Sections 5 and 48.2 of UNTAET/REG/2000/30; Articles 475 and 544 of the Canadian Criminal Code, 2001; Section 231 to 234 of the German Criminal Procedure Code, 1998.

14 *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 6. The Trial Chamber also stated at para. 7: "Article 20 of the Statute is modelled on Article 14 (3)(d) of the International Covenant on Civil and Political Rights, which is equivalent to Article 6 (3)(d) of the European Convention on Human Rights. Human rights case-law does not prevent that a trial takes place in the absence of the accused provided that he has been duly notified of the proceedings. Reference is made to, views of the Human Rights Committee, in the case *Maleki v. Italy,* adopted on 27 July 1999 (Communication No 699/1996). Here, the Committee reiterated that a trial *in absentia* is compatible with Article 14, only when the accused is summoned in a timely manner and informed of the proceedings against him. In that case, the accused was convicted *in absentia*, duly represented by his court-appointed lawyer (paragraph 9.3). Similar principles are developed in Strasbourg case-law, see, for instance, the Court's judgement of 28 August 1991 in *F C B v Italy* (Series A 208-B) with further references (paragraphs 29-36)".

> *person is an extraordinary mode of trial, yet it is clearly permissible and lawful in very limited circumstances. The Chamber opines that it is a clear indication that it is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification."*[15]

However, the Statute and the Rules of Procedure and Evidence of the *ad hoc* tribunals and the Special Court for Sierra Leone do not contain provisions similar to Article 63 (1) of the ICC Statute with respect to the presence of the accused, and the Statute and the Rules of the ICC do not contain provisions similar to Rule 82 *bis* of the ICTR Rules, or Rule 60 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. These international instruments refer either to the right of the accused to be tried in his or her presence[16] or to provisions specifically allowing the Court to proceed in the accused's absence subject to certain conditions, or his or her removal in case of obstructive conduct.[17] These provisions were interpreted as allowing the Trial Chamber, in some cases, to hold the trial without the accused being present. However, the question is whether this interpretation could be applied in light of the specific provision of Article 63 of the Statute.

It is possible to conclude that by virtue of the specific language of Article 63 and in the absence of any other specific dispositions, the Court would not have jurisdiction to commence or continue the trial in the absence of the accused even if the accused was duly informed of the proceedings and clearly waived his right either expressly or absconded from justice.[18] Similarly, the Court would not have jurisdiction to hold a trial in the absence of the accused, even if the accused gave clear instructions to his or her legal representative to act in his or her behalf. This is even more so considering that the Statute specifically provides in Article 61 (2) that the Pre-Trial Chamber may hold the confirmation hearing in the absence of the person charged if he/she has waived his right to be present or has absconded from justice but adopted the mandatory provision of Article 63 for the trial.

Furthermore, in a situation similar to the ones before the ICTR and the Special Court for Sierra Leone, I see no reason why the Trial Chamber could not issue an order to bring the accused before the Court to attend his/her trial.[19]

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15 *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and succeeding days, 12 July 2004, para. 8.

16 Article 21 4 (d), ICTY Statute; Article 20 (4) (d), ICTR Statute; Article 17 4 (d) of the Statute of the Special Court for Sierra Leone.

17 Rule 80(B) of the ICTY Rules; Rule 80 (B) and Rule 82 *bis* of the ICTR Rules; Rules 60 and 80(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

18 For a different opinion see Frank Terrier's papers, *supra,* note 1.

19 Article 64 (6) (a) provides that the Trial Chamber may: "Exercise any functions of the Pre-Trial Chamber referred to in Article 61 (11)." Article 61 (11) provides that the Trial Chamber may exercise any functions of the Pre-Trial Chamber that 'is relevant and capable of application in those proceedings." Article 57 (3) (a) states that the Pre-Trial

C. Public Trial

Article 64(7) provides that:

> *"The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information given in evidence."*[20]

The right to a public trial is fundamental and is enshrined in both international and national legislations. A public trial protects many different interests. It ensures that the trial is fair and that decisions are reached after due consideration of reliable and admissible evidence presented in conformity with the rule of law. It allows public scrutiny of the Court's process and ensures that international standards are respected and that justice is rendered. As stated by the Trial Chamber in *Prosecutor v. Duško Tadić*:

> *"The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that a trial is fair. As the European Court of Human Rights noted: "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of . . . a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . ." (Sutter v. Switzerland, decision of 22 February 1984, Series A, no. 74, para. 26.) In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal. As such, the Judges of this Trial Chamber are, in general, in favor of an open and public trial. This preference for public hearings is evident in Article 20 (4) of the Statute, which requires that: "The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence." Also relevant is Rule 78, which states that: "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."*[21]

As stated in the Trial Chamber's decision above, a public trial also serves the important purpose of enabling the world to know the facts and the truth about the matters before the Court. In many instances, genocide, crimes against humanity and war crimes are committed far away from international observers, media and the outside world and often within communities that are so afraid to speak due to threats and violence.

A public trial serves the fundamental purpose of informing the world of the experience and suffering endured by the victims and protects the accused against vindictive prosecution. It allows for discovery of truth, and thus favors reconciliation within the communities concerned and put an end to impunity.

However, like all fundamental rights, the right to a public trial is not absolute

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Chamber may: "At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation." Therefore, applying this article *mutadis mutandis* it would allow the Trial Chamber, at the request of the Prosecutor, to issue any orders or warrants as may be required for the Conduct of Trials.

20 See also article 67 (1): "In the determination of any charge, the accused shall be entitled to a public hearing [.]"

21 *Prosecutor v. Duško Tadić,* Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 32.

and may be restricted when the Trial Chamber, after careful consideration of the interests of all parties involved, reaches the decision that the interests of justice are better served by ordering in camera hearings or strict protective measures. All parties can request protective measures or in camera hearing or such measures may be ordered *proprio motu* by the Chamber. Article 68 (2) provides:

> *"As an exception to the principle of public hearing provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness."*

The balance between the right to a public trial and the necessity for the Trial Chamber to take appropriate measures to protect the safety of victims and witnesses or to protect sensitive information or privacy of witnesses "must be assessed within the context of the circumstances of each case." [22] The practice before the *ad hoc* tribunals and other international tribunals is that the moving party will have to establish a real likelihood that the witness is in danger or at risk or that it is in the interests of justice and not prejudicial to the accused for the Trial Chamber to grant closed session hearing.[23]

In camera hearings are not the only measures, however, that a Trial Chamber may grant in order to protect the safety of victims and witnesses, sensitive information or the privacy of witnesses. In many instances, other protective measures, such as non-disclosure of the identity of the witnesses or victims to the public or the media including the presentation of their testimony by technical means that enable the alteration of pictures or voice or other electronic or special means to ensure non-disclosure of identity will afford an effective protective measure.[24]

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22 *Prosecutor v. Zejnil Delalić et al*., Case No. IT-96-21-T, Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997, para. 28; *Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003, para.2.

23 *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić,* Case No. IT-95-9-T, Order for "Closed Session" Testimony, 14 June 2002, page 2; *Prosecutor v. Radoslav Brđanin and Momir Talić,* Case No. IT-99-36-PT, Decision on Motion of the Prosecution for Protective Measures, 3 July 2000, para. 26.

24 Articles 64 (6) c) and (d), 68 (2) and Rules 87 and 88; See also *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, *Order for Protective Measures,* 27 November 2000; *Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, *Decision on Bagosora Motion for Protection of Witnesses,* 1 September 2003.

D. Duty of the Trial Chamber upon Assignment of a Case

i. Adopt procedures to facilitate the fair and expeditious conduct of the proceedings

After the assignment of the case to a Trial Chamber, the Trial Chamber shall "confer with the parties and adopt the necessary procedures to facilitate the fair and expeditious conduct of the proceedings."[25] "The Trial Chamber shall hold a status conference in order to set the date of the trial" and any other status conferences as necessary in order to facilitate the fair and expeditious conduct of the proceedings.[26]

ii. Language of the trial

Article 64 (3) (b) of the Statute provides that the Trial Chamber, upon assignment of the case for trial, shall determine the language or languages to be used. The official languages of the Court are Arabic, Chinese, English, French and Russian,[27] while the working languages are English and French.[28] Rule 41 of the Rules provides that the Presidency, in particular circumstances, may determine that an official language other than English and French may be used as the working language of the proceedings. The Rules provide for situations where the Presidency *shall* authorize the use of another language for the proceedings while in other circumstances it remains discretionary to decide on the need of using another language.[29]

Of course, it may well be that the accused neither speaks nor understands any of the working or official languages of the Court. In such a case, Article 67(f) of the Statute entitles the accused to have, free of any cost, the assistance of an interpreter. Any interpretation of the Rules in respect of the language of the proceedings must be consistent with the provision that in the determination of any charges against him, the accused is entitled:

> *"To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented in Court are not in a language which the accused fully understands and speak"*[30]

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25 Article 64 (3) (a).

26 Rule 132.

27 Article 50 (1).

28 Article 50 (2).

29 Rule 41(1)(a) and (b) provides that the Presidency *shall* authorize the use of an official language as the working language if requested by any participant when the majority of the persons involved in the case speak and understand the language or at the joint request of the Prosecution and the Defense. It thus appears that once the requirements of Rule 41 sub-paragraphs (1) (a) or (b) are met, the Presidency must authorized the use of another official language as opposed to its discretion to do so pursuant to Rule 41 (2), if it is satisfied that it facilitates the efficiency of the proceedings.

30 Article 67 (f).

iii. Ensure that the Prosecution's disclosure obligations were respected

The Trial Chamber must ensure that all material and information necessary for the conduct of the trial, not already disclosed to the defense, is disclosed in a timely fashion before the commencement of the trial. [31]

iv. Ensure that a complete and accurate record of the trial is maintained and preserved by the registrar.[32]

The Trial Chamber shall ensure that a complete and accurate record of the proceedings is preserved. Therefore, the Registry shall retain a record of the proceedings, "including transcripts, audio and video recordings and other means of capturing sound and image."[33] The Registry is the custodian of the evidence pursuant to Rule 138. "The Trial Chamber may authorize persons other than the Registrar, including the public and the media, as it is also the practice of the *ad hoc* tribunals, to take photographs, audio or video recording and other means of capturing sound or images at trial."[34]

III. Commencement of the Trial and Duties of the Court

A. Reading of the Charges

Pursuant to Article 64 (8) (a) of the Statute, "at the commencement of the trial, the Trial Chamber shall have" the charges previously confirmed read to the accused. "The Trial Chamber shall satisfy itself that the accused understands the nature of the charges" he is facing. In reaching its decision, the Trial Chamber may request that the accused be examined to determine if he is mentally fit to understand the nature of the charges in compliance with the Rules of Procedure and Evidence.[35] If the Trial Chamber concludes that the accused is unfit to stand trial, it shall order that the trial be adjourned and the case must be reviewed at least every 120 days or at any time the Chamber deems it necessary or at the request of the Prosecution.

Once it is satisfied that the accused understands the nature of the charges he is facing, the Trial Chamber shall have the charges read and ask the accused to enter a plea. If the accused maintains his plea of not guilty, the trial will begin. However, if the accused enters a plea of guilt, the Trial Chamber shall than follow the procedure set forth under Article 65 of the Statute.

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31 Article 64 (3) (c).

32 Article 64 (10).

33 Article 64(10) and Rules 131 and 137.

34 Rule 137 (3); See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-I, Order for Release of Audio-Visual Record and Permitting Photography, 6 December 2004.

35 Rules 113 and 135.

B. Guilty Plea

Article 65 provides that when an accused enters a plea of guilt, the Trial Chamber shall determine and satisfy itself that:

- The accused understands the nature and consequences of the admission of guilt;
- The admission is voluntarily made by the accused after sufficient consultation with defense counsel; and
- The admission of guilt is supported by the facts of the case that are contained in:
  - The charges brought by the Prosecutor and admitted by the accused;
  - Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
  - Any other evidence, such as testimony of witnesses, presented by the Prosecutor or the accused.

i. The Accused understands the nature and consequences of the admission of guilt

First and foremost, the Trial Chamber must satisfy itself that the accused understands the nature and the consequences of his plea. The accused must understand that by entering a plea of guilt, he or she renounces some of the rights conferred to him or her under the Statute, including to be presumed innocent until proven guilty according to the rule of law and to present his own case. As stated by the ICTY Appeals Chamber in the Separate Opinion of Judges McDonald and Vohrah in *Prosecutor v. Drazen Erdemović*:

> *"Thus, the immediate consequences which befall an accused who pleads guilty are that he forfeits his entitlement to be tried, to be considered innocent until proven guilty, to test the Prosecution case by cross-examination of the Prosecution's witnesses and to present his own case."*[36]

ii. The admission must be voluntarily made by the Accused after sufficient consultation with defence counsel

Voluntarily implies that it must be made by an accused who is mentally fit to understand the consequences of pleading guilty as stated earlier and that it was not "the result of any threat or inducement other than the expectation" that it may be considered as a mitigating factor and have an impact on the final decision of the Trial Chamber in imposing a lesser sentence.[37]

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36 *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 8 (hereinafter, *Erdemović* Judgment).

37 *Erdemović* Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para.10; *Jean Kambanda v. the Prosecutor*, Case No. ICTR-97-23-A, Jugement, 19 October 2002, para. 61 (hereinafter, *Kambanda* Appeal Judgment).

Understanding the consequences of a guilty plea also requires the Chamber to satisfy itself that the plea is informed and unequivocal[38] and thereby ensuring that the accused was given sufficient time to consult with his counsel in order to make a conscious and informed decision. The Chamber must be satisfied that the accused understands that by entering a guilty plea he or she admits to the veracity of the charges against him and acknowledges his or her criminal responsibility for his or her actions and conduct. The Trial Chamber must be satisfied that the accused's acknowledgement of criminal responsibility is not indicative of the existence of a legal defense that would contradict his or her admission of guilt. If the Trial Chamber concludes that the evidence presented or that the accused explanation of his actions amounts to a defense in law, then the Trial Chamber should "reject the plea and have the defense tested at trial."[39]

iii. The admission of guilt is supported by the facts

The Trial Chamber must also be satisfied that the plea is factually and legally supported. In reaching this decision, the Trial Chamber will have the possibility of considering among other factors "the charges brought against the accused by the Prosecutor and admitted by the accused", any material submitted by the Prosecution and accepted by the Defense in addition to the charges and any evidence submitted by the Prosecution or the Defense.[40] As the Trial Chamber stated in the case of *Prosecutor v. Goran Jelisić*: "A guilty plea is not in itself a sufficient basis for the conviction of an accused. Although the Trial Chamber notes that the parties managed to agree on the crime charged, it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime".[41]

In the practice of the *ad hoc* tribunals, the facts in support of the charges may often be enumerated and admitted by the parties in a plea agreement or factual basis signed by the accused and counsel. In such a case the Trial Chamber may consider that in absence of any disagreement on the fact supporting the charges, the plea of guilt should be accepted and the accused should be found guilty.[42] On the other hand, the parties may consider necessary to present additional evidence either *viva voce* or by way of documentary evidence.[43]

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38 *Erdemović* Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para.31; *Kambanda* Appeal Judgement, para. 84; *Prosecutor v. Lino De Carvalho*, Special Panel for Serious Crimes, Case No. 10/2001, Judgment, 18 March 2004, para. 27 (hereinafter, *Lino De Carvalho* Judgment).

39 *Erdemović* Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 29.

40 Rule 65 (1) c).

41 *Prosecutor v. Goran Jelicić*, Case No. IT-95-10-T, Judgment, 14 December 1999, at para. 25.

42 *Prosecutor v. Omar Serushago*, Case No. ICTR 98-39-S, Sentence, 5 February 1999, para. 8. Sentence upheld by the Appeals Chamber, ICTR 98-39-A, 6 April 2000; *Kambanda* Appeal Judgment, para. 93.

43 *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1, Sentencing Judgment, 27 February 2003 (hereinafter, *Plavšić* Sentencing Judgment) ; *Prosecutor v. Joao Franca da Silva Alias Jhoni Franca*, Special Panel for Serious Crimes, Case No. 04a/2001, Judgment, 5 December 2002 (hereinafter, *Joao Franca da Silva* Judgment).

As stated clearly in Article 65 (5) of the Statute, the Trial Chamber is not bound by any discussions or suggestions by the parties regarding the modification of the charges, the admission of the plea or the penalty to impose.

If the Trial Chamber "is not satisfied that the requirements of paragraph 1 have been met it shall consider the plea of guilt has not been made and shall order the trial to continue …" and "may remit the case to another Trial Chamber."[44] We share the opinion of Frank Terrier that while Article 65 (3) does not make it mandatory for the Trial Chamber to remit the case to another Chamber this decision should be carefully considered. Being convinced that, as professional judges the Trial Chamber can make a complete abstraction of the previous admission of guilt, to remit the case to another Trial Chamber may prevent any apprehension of bias and will definitely remove any suspicions of a risk of infringement of the right of the accused to have a fair and impartial trial.[45]

However, it appears from the reading of the Rules that even if the Trial Chamber would consider that the admission of guilt is supported by the facts it could nevertheless rule that in the interest of justice a more complete presentation of evidence is required and it may either order the prosecution to present additional evidence or refuse the guilty plea and order the trial to continue. In such a case it will consider the guilty plea as not having been entered and may also remit the case to another Trial Chamber. In order to reach this decision the Trial Chamber may request the views of the parties.[46]

If the Trial Chamber is satisfied that all the requirements pursuant to paragraph 1 have been met the Trial Chamber may convict the accused of the crime and impose a sentence after having heard the parties. The criteria generally accepted in determining the appropriate sentence will be reviewed later in this article.

The decision of the Trial Chamber shall be motivated and "placed on the record."[47]

IV. Presentation of Evidence

A. General provisions

At the commencement and during the trial, the Presiding Judge, pursuant to his or her obligation to ensure that the proceedings are fair and expeditious[48] and are conducted in a fair and impartial manner, shall give directions to the parties in regard to the presentation of evidence. It may also "provide for the protection of the accused, witnesses, victims" and confidential information and "rule on any other relevant matters."[49]

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44 Article 65 (3).

45 See Frank Terrier, *supra*, note 1.

46 Article 65 (4) and Rule 139; See similar provisions in Section 29A.4, UNTAET/REG/2000/30.

47 Rule 139.

48 Articles 64 (2), 64 (3) (a) and 64 (8) b).

49 Articles 64(6) (c) and (e), 68 (2), and Rules 87 and 88.

i. List of witnesses

In the practice of the *ad hoc* tribunals, trial chambers have often tried to invite the parties to carefully consider their list of witnesses in order to reduce to a minimum required the evidence to be presented in order to prove their case adequately but as expeditiously as possible. In fact trial chambers have on numerous occasions either limited the number of witnesses to be called by the parties or limited the length of time available to them to present their case. However, such a decision should be carefully balanced in order to guarantee that the quest to ensure an expeditious trial is not achieved at the detriment of the right of the parties to adequately and fairly present their case.[50]

In the case of the *Prosecutor v. Vidoje Blagojević*[51] the Trial Chamber stated that:

> *"The Trial Chamber recalls that it has the power to set the number of witnesses that either party may call, pursuant to Rule 73 bis and Rule 73 ter of the Rules, and shall exercise this power if necessary. Furthermore, the Trial Chamber recalls that pursuant to Rule 89(D), it may exclude evidence if the probative value is substantially outweighed by the need to ensure a fair trial. One criteria used to establish whether a trial is fair is if an accused is tried without undue delay."*[52]

In *Prosecutor v. Naser Orić*, the Appeals Chamber overturned some of the conclusions reached by the Trial Chamber in limiting the number of witnesses the accused was authorized to call, the length of the defense case and limiting the subjects he could address. The Appeals Chamber stated:

> *"Some of the topical restrictions, such as those on evidence regarding the general historical and political background of the Balkan conflict, are defensible as a reasonable exercise of the Trial Chamber's Rule 73 ter responsibility to "set the number of witnesses the defense may call" and "determine the time available to the defense for presenting evidence." Others, however, are unreasonable in light of the fact that the defense of military necessity may play a central role in Oric's defense on Counts 3 and 5 of the indictment."*

The Appeals Chamber continues:

> *"In addition, it should be noted that although Rule 73 ter gives the Trial Chamber the authority to limit the length of time and number of witnesses allocated to the defense case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the*

50 *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002.

51 *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis, 12 June 2003, para. 20.

52 Article 21(4)(c) of the Statute of the Tribunal.

> *time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights."*[53]

ii. Order of presentation of evidence

The Rules provide that the order and manner of presentation of evidence is at the discretion of the parties or subject to the direction of the Trial Chamber if no agreement can be reached between the parties.[54] Because the Prosecution bears the burden of proof[55] it seems obvious that it will present its case first. However, the ICC Statute and Rules embrace a more genuine desire to truly mix the principles and practices of both the civil law and common law systems. Therefore, differences between the two approaches will need to be considered in any interpretations of the provisions.

We believe that this issue can be illustrated by referring to the timing and the manner related to the accused testimony. In common law and in the practice of the *ad hoc* tribunals if the accused waives his right to remain silent and decides to testify in his defense this will occur after the Prosecution closed its case. Trial chambers also ruled that it was up to the accused to decide the timing of such testimony within his/her defense.[56] However, in some civil law jurisdictions the accused is called to give his/her statement at the very beginning of the Trial before the Prosecution presents its case.[57]

A second distinction is that in common law systems if the accused waives his right to remain silent and takes the stand he will first be sworned in and will be exposed to cross-examination by the Prosecution since he is considered as a witness in his/her own defense.[58] However, in many civil law jurisdictions the accused is rarely sworn in before addressing the Court.[59]

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53 *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, paras. 6 and 8.

54 Rule 140 (1).

55 Article 66 of the Statute clearly states that the accused is presumed innocent until proven guilty in accordance with the applicable law. This is a fundamental principle in all legal systems. Rule 66 (2) and (3) provide that the Prosecution bears the onus of proof and its burden is to prove guilt beyond a reasonable doubt, while Rule 67 (i) provides that in the determination of the charges against him, as a minimum guarantee, the accused shall "not to have imposed on him or her any reversal of proof or any onus of rebuttal."

56 Rule 85 C) of both ICTY and ICTR Rules; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion to Compel Accused to Testify Prior to Other Defence Witnesses, 11 January 2005, para. 5; *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Prosecutor's Motion on Trial Procedure, Case No. IT-95-14/2-PT, 19 March 1999, page 4.

57 Section 30.4, 30.5 and 33.1 of UNTAET7REG/2000/30 which states: "[.] Unless otherwise ordered, evidence at trial shall be presented in the following sequence: (a) the statement of the accused, if he or she chooses to make a statement; (b) evidence of the prosecution; (c) evidence of the defence"; Code of Criminal Procedure of France, 2000, Section. 328: "The President interrogates the Accused and receives his statement" and Section 442: "The presiding judge interrogates the defendant and hears his statement before hearing the witnesses."; Section 243 of the German Criminal Procedure Code 1998: "Evidence shall be taken after the defendant's examination."

58 Rule 85 (C) of both the ICTY and ICTR Rules.

59 Furthermore, the ICC Rules do not contain a similar provision as Rule 85 (C) of the *ad*

Article 67 (1) (h) of the Statute states that the accused has the right "to make an unsworn oral or written statement in his or her defense."[60] This provision appears similar to Rule 84 *bis* of the ICTY Rules where it states that the accused, after the opening statement of the prosecutor, may if he wishes so make an unsworn statement, not subject to cross-examination, to the Trial Chamber.[61]

The Trial Chamber may also require the attendance and testimony of witnesses and production of documents, other than the one collected and presented by the parties, which is considered necessary to discover the truth with regard to the charges against the accused.[62]

Finally, the ICC Statute and Rules, as opposed to the other international tribunals, provide for the possibility for the victims to participate in the proceedings to express their views and concerns, if the Court considers it appropriate and not inconsistent with the right of the accused and a fair and impartial trial.[63]

iii. Examination of witnesses

As regards the manner of presentation of evidence, the rules establish that the party calling the witness should first examine him/her followed by the examination of the opposite parties. Both parties can question the witness in regard to all relevant matters including reliability and credibility.[64]

The rule, however, specify that the defense will be the last to examine a witness and that the judges can question the witness at any time during his or her testimony.[65] Furthermore, a witness to be called to give evidence should not be present during the testimony of other witnesses.[66]

In the practice of the *ad hoc* tribunals despite the fact that in some cases judges played a more active role in the establishment of the facts it remained a more adversary system where the parties were in control of the presentation of evidence. However, this practice gradually changed and as the Trial Chamber stated in *Prosecutor v Zejnil Delalić et al*:

> *"Judge [of the Tribunal], as an impartial arbiter, may put questions to a witness, during examination-in-chief, cross-examination or re-examination, to clarify issues which remain unclear after an answer by the witness."*[67]

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hoc tribunals which specifically provides that the accused may appear as a witness in his/her defense.

60 Article 67 (h).

61 Rule 84 *bis* also provides that the probative value, if any, of such statement will be determined by the Trial Chamber.

62 Article 64 (6) (b) and ((d).

63 Article 68 (3).

64 Rule 140 (2).

65 Rule 140 (2) (d).

66 Rule 140 (3).

67 *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion on the Presentation of Evidence by the Accused, Esad Lanzo, 1 May 1997, para. 26.

Moreover, in *Prosecutor v. Enver Hadžihasanović et Amir Kubura*, the Trial Chamber went further and ruled that the Trial Chamber was fully authorized to question any witnesses in order to clarify any of their explanations and that the sole purpose of such intervention was "its duty in the truth-finding process."[68]

iv. No need of corroboration of a single witness's testimony to prove a crime

Rule 63 (4) clearly states that there is no requirement for corroboration in order to prove a crime within the jurisdiction of the Court, including sexual violence. This makes it clear that the Chamber may accept that a charge has been proven on the basis of a single testimony if it rules it relevant and credible.[69] In *Prosecutor v. Dragoljub Kunarac et al.*, the Appeals Chamber stated:

> "*On the issue of corroborating evidence, the Appeals Chamber reaffirms its settled jurisprudence that corroboration is not legally required; corroborative testimony only goes to weight.[.]*"[70]"

v. Credibility of the Evidence

Like in any other trials, judges from the ICC will have to assess the credibility of the evidence presented in order to decide, at the end of the trial, if the evidence establishes the guilt of the accused beyond reasonable doubt.

Like in any national jurisdiction judges use their experience and different indicia to evaluate the credibility, the reliability and the weight to give to the evidence presented before them.

In evaluating the credibility of witnesses the Trial Chamber may examine several factors such as: the personality of the witnesses, their integrity, the manner in which they related the events, the level and their ability to observe the events, the consistency between their *viva voce* testimony and prior statements or other evidence and many other indicia.[71] However, because of the nature of the crimes within the jurisdiction of the international tribunals many of the witnesses have seen extensive atrocities, lost several members of their families, may still be traumatised and often testify months or years after the events. All those considerations need to be assessed carefully by the Trial Chamber.[72] The Chamber will have to assess the probative value

68 *Prosecutor v Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on Defence Motion Seeking Clarification of the Trial Chamber's Objective in its Questions Addressed to Witnesses, 4 February 2005, page 5.

69 *Prosecutor v. Jean Paul Akayezu*, Case No. ICTR-96-1-T, Judgement, para. 135; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23, Judgement, 12 June 2002, para. 268 (hereinafter, *Kunarac Judgment*).

70 *Kunarac Judgment*, para. 268.

71 *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-T, Judgment, 1 September 2004, paras. 20 to 36 (hereinafter, *Brđanin* Judgment).

72 *Prosecutor v. Jean Paul Akayezu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras. 130-156; *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, Judgment, 6 March 1997, paras. 15-23; *Prosecutor v. Zoran Kupreskić et al.,* Appeal Judgement, Case No.

of each and every piece of evidence and decide if, after consideration of the whole of the evidence, it is satisfied beyond reasonable doubt of the guilt of the accused.

vi. Special principles of evidence in case of sexual violence

In case of sexual violence consent cannot be inferred by reason of any words or conduct of the victim which was obtained by coercive measures, by reason of silence or lack of resistance or if the victim is incapable of giving a genuine consent.[73] Evidence of prior or subsequent sexual conduct of the victim or witness is not admissible.[74] The Rule provides that before any questioning of a victim or witness or before introducing any evidence in regard to the consent of the victim, notification has to be given to the Chamber describing the substance and the relevancy of such evidence to the issue at stake. In such a case, the Trial Chamber should hold an *in camera* hearing on the admissibility of such evidence or questioning and should be guided by the general principle of Article 69 (4) of the Statute and the need to ensure that the proceedings are conducted with full respect of the rights of the accused and due regard for the protection of the victims.[75]

B. Admissibility of Evidence

i. Relevancy and admissibility

The Trial Chamber shall at the request of a party or on its own motion rule on the admissibility or relevance of evidence.[76] Article 69 (4) of the Statute states:

> *"The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alias, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence."*

National laws governing admissibility of evidence do not bind the Trial Chamber in the determination of the admissibility of evidence before the Court.[77]

In the practice of the *ad hoc* tribunals a broad approach on the admissibility of evidence was adopted which opted for an extensive admission of evidence as long as it was ruled relevant, reliable and had a probative value that was not substan-

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IT-95-16-A, 23 October 2001, paras. 31-40; *Brđanin Judgment*, paras. 20 to 36.

73 Rule 70 (a) to (c).

74 Rule 71; See also *Prosecutor v. Zejnil Delalić et al.,* Decision on the Prosecution's Motion for the Redaction of the Public Record, Case No. IT-96-21-T, 5 June 1997, paras. 43-60.

75 Rule 72 (2) and (3).

76 Rule 64 (9) (a).

77 Rule 63 (5); See also *Prosecutor v. Zlatko Aleksoski*, Case No. IT-95-14/1-T, Decision on Prosecution's Appeal on Admissibility of Evidence, 16 February 1999, para. 19; *Radoslav Brađnin & Momir Talić*, Order on the Standards Governing the Admission of Evidence, para. 10.

tially outweighed by the need to ensure a fair trial,[78] preferring to leave to the Trial Chamber, after the presentation of the whole of the evidence, the assessment and the determination of its proper weights. [79]

Furthermore, the *ad hoc* tribunals also rejected the strict approach on admissibility found in common law systems stating:

> *"While the importance of the rules on admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight."*[80]

Pursuant to Article 64 (9), the Trial Chamber shall have the power to rule on the admissibility either at the request of a party or on its own initiative.

ii. Evidence obtained in violation of the Statute or international recognized human rights

Article 69 (7) of the Statute provides that "evidence obtained in violation of the Statute or international recognized human rights shall not be admissible if the violation casts a doubt on [its] reliability" or its admission "would be antithetical to or would seriously damage the integrity of the proceedings". As 69 (7) clearly provides that the Trial Chamber, in reaching its decision to exclude evidence will need to evaluate and balance the effect of the violation on the reliability of the evidence or on the integrity of the proceedings.

It will be to the Trial Chamber to assess all circumstances of the case, including the nature of the violation, the circumstances in which the violation was committed and the impact of the admission of such evidence on the integrity of the proceedings. In considering similar issues, the Trial Chamber stated in *Prosecutor v. Radislav Brađnin*:

As stated above, in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged. Such an approach is con-

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78 *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T, Decision on the Admission into Evidence of Intercept-Related Materials, 18 December 2003, para. 14; *Prosecutor v. Zejnil Delalić et al.* Case No. IT-96-21-AR 73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, paras. 18-20; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para. 9.

79 *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October 2004, para. 10; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Order on the Standards Governing the Admission of Evidence, paras. 13 and 14; *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, paras. 16 and 20.

80 *Prosecutor v. Zejnil Delalić et al.,* Decision on the Motion of the Prosecution for the Admissibility of Evidence, para. 20; See also *Radoslav Brađnin & Momir Talić*, Order on the Standards Governing the Admission of Evidence, para. 14.

sistent with and in the same spirit as that set out by the Appeals Chamber in the case *Prosecutor v. Dragan Nikolić* when analyzing the circumstances under which a violation of human rights would require a court to set aside the jurisdiction:

> *"Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made in abstracto, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."*[81]

iii. Timing of the objection on admissibility

Pursuant to Rule 64 of the Rules, a party must raise any issues on the admissibility of the evidence at the moment it is submitted to a Chamber. Lack of doing so will preclude the party from objecting at a later stage unless the issue was not known at the time of the submission. In such a case a party must raise the issue as soon as it becomes known to it. The Chamber may request the parties to file written submissions in support of their arguments and all decisions on evidentiary matter must state its reasons.

C. Type of Evidence

Like in any criminal trial, the parties are called upon to present evidence or challenge the evidence presented in order for the Prosecution to prove its case or the defence to raise a reasonable doubt. The type of evidence a party can present generally includes: testimonial evidence (by fact or expert witnesses), material evidence (photographs, maps, videotapes, audiotapes, arti-facts) and documentary evidence.

i. Witness testimony

a. Mode of presentation

Witnesses can be classified in two general categories: fact and expert witnesses. A fact witness is someone who witnessed the events in dispute while an expert witness is called to assist the Trial Chamber where the expert specialised knowledge or skills will assist the Chamber on a specific issue at stake such as a military expert, historian, pathologist or others persons in regard to specialized or technical issues.[82]

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81 *Prosecutor v. Dragan Nikolić,* Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, para. 30; see also *Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 3 October 2003, para. 61; *Prosecutor v. Zejnil Delalić et al*., Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 44.

82 *Prosecutor v. Vidoje Blagojević et al.,* Case No. IT-02-60-T, Decision on Prosecution's Motion for Admission of Expert Statements, 7 November 2003, para. 19; *Prosecutor v.*

A fact witness will generally be called to testify on specific facts or events that he or she personally saw or experienced. However, as stated by the Trial Chamber in the *Prosecutor v. Tihomir Blaškić* because of the extent and the huge number of victims and similarity in the *modus operandi* of the crimes generally committed within the jurisdiction of the Court, it can be expected that the witnesses will sometimes refer to events, which others, and not they themselves, experienced.[83] However, as stated before in regard to the admissibility of evidence, because the trials are heard by professional judges the primary questions regarding the admissibility of hearsay or second hands evidence will be more on its reliability, it relevancy and probative value.[84]

1. *Viva voce* before the Trial Chamber

The general principle is that a witness should be heard in person unless otherwise decided by the Chamber, pursuant to the Statute and the Rules.[85] There are many reasons why the presence of the witness is required. As stated by the Trial Chamber in *Prosecutor v. Duško Tadić*, the physical presence of the witness before the court "enables the judges to better evaluate his or her credibility" and "may help discourage … false testimony."[86]

However, the Court may also allow for the *viva voce* or recorded testimony to be given by video or audio technology or by written transcripts, if the Trial Chamber rules that it is necessary and not prejudicial to or inconsistent with the rights of the accused.[87]

2. Live testimony by video link (Rule 67)

Rule 67 of the Rules provides that a Trial Chamber may allow the testimony of a witness by means of video or audio recording, provided such technology permits the parties and the judges to examine the witness. The Rule also provides that the Chamber, with the assistance of the Registry, ensures that the venue chosen "is conducive to the giving of truthful and open testimony" and to ensure the safety, "dignity and privacy of the witnesses."

The practice within the ICTY and ICTR has been that the decision to grant a request by a party to present testimony by video link as opposed to having the wit-

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Sam Hinga Norman et al., Case No. SCSL-04-14-T, Decision on Prosecution Request for Leave to call Additional Witnesses and for Orders for Protective Measures, 21 June 2005, p. 4; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-04-T, Decision by a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, p. 2.

83 *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 21 January 1998, para. 4.

84 *Prosecutor v. Tihomir Blaškić*, Decision on Standing Objection, para. 4; *Prosecutor v. Sam Hinga Norman et al.,* Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para. 26; *Prosecutor v. Slobodan Miloševi*ć, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18.

85 Article 69 (2).

86 *Prosecutor v. Duško Tadić*, Case No: IT-94-1-T, Decision on the Defense Motion to Summon and Protect Defense Witnesses and on the Giving of Evidence by Video Link, 25 June 1996, para. 11.

87 Article 69 (2)

ness come to the seat of the Tribunal is often based on several criteria, including whether such testimony is deemed important, that it would be unfair to proceed without it, and whether the witness is unable or unwilling to come to the seat of the Tribunal.[88]

3. Prior recorded testimony

Rule 68 of the Rules provides that pursuant to Article 69(2), the Trial Chamber may allow the "audio or video testimony of a witness or the transcript or other documented evidence of such testimony" to be submitted only if the Prosecutor and the Defense had the opportunity to examine the witness at the time of the recording[89] or, if the witness is present before the Trial Chamber, agrees to such a procedure and the parties and the Chamber "have the opportunity to examine the witness."[90]

b. General principles with regard to testimony

1. Solemn undertaking

Before testifying, each witness shall give a solemn undertaking to tell the truth.[91] Each witness must also be informed, before testifying, of the provisions of Article 70 of the Statute with regard to giving false testimony.[92]

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88 *Prosecutor v. Duško Tadić*, Decision on the Defense Motion to Summon and Protect Defense Witnesses and on the Giving of Evidence by Video Link, para.19; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Order for Video-Conference Link, 24 February 2000, p. 2; *Prosecutor v. Théoneste Bagosora et al,* Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT via video-link, 8 October 2004, para. 5.

89 This provision may be similar to the procedure of deposition provided in the both *ad hoc* tribunals Rules and the Rules of other internationationalized tribunals. See Rules 71 of the ICTY and ICTR Rules, and Section 36.3 of UNTAET/REG/2000/3; See *Prosecutor v. Mladen Naletilić and Vinko Naletilić*, Case No. IT-98-34-PT, Decision on Prosecutor's Motion to Take Depositions for Use at Trial (Rule 71), 10 November 2000; *Prosecutor v. Théoneste Bagosora et al.,* Case No. ICTR-98-41-I, Decision on Prosecutor's Motion for Deposition of Witness OW, 5 December 2001.

90 While Rule 68 of the Rules and Article 69 (2) of the Statue are considerably different than Rules 89 (F) and 92 *bis* of the ICTY Rules some of the case-law may be of assistance. One major difference between them is that the ICC Statute and the Rules provide for the admission of transcripts and other documented evidence of such testimony *only if* the parties had the opportunity to examine the witness at the time of the recording *or that the witness is present in Court and available for examination or cross-examination*. See *Prosecutor v. Fatmir Limaj et al.,* Case No. IT-03-66-T, Decision on Prosecution third Motion for Provisional Admission of Written Evidence *in Lieu* of Viva Voce Testimony Pursuant to Rule 92bis, 9 March 2005, para. 6; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Application Under Rule 89 (F) to Receive the Evidence-in-Chief of Witness Diego Arria in Written Form, 23 January 2004; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003, para.21.

91 Article 69 (1), Rule 66.

92 *Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-T, Decision on the Defence Motion to Direct the Prosecution to Investigate the Matter of False Testimony by Witness "E", 10 March 1998. While the Trial Chamber rejected the defense motion, it enunciated the essential elements required in regard to a charge of false testimony.

A minor or a witness whose judgment is impaired and does not understand the nature of the solemn undertaking may still testify as long as the Chamber is satisfied that the person can describe the facts of which he or she has knowledge and understands the meaning of the duty and responsibility to speak the truth.[93]

2. Compellability of the witness

Usually a witness will be required to appear in Court to give his or her testimony either by a party or by the Trial Chamber. However, occasionally, despite the best efforts of the parties some witnesses will be reluctant to appear in Court. In such a case, the Trial Chamber, pursuant to Article 64 (6) (b), may require the attendance and testimony of the witness by issuing a request of assistance to a State in facilitating such demand and the State pursuant to Article 93 (1) (b) should "facilitate the voluntary appearance of persons as witnesses or expert before the Court".[94] However, from a reading of the Statute and the Rules it appears that the Trial Chamber would not have the authority to cite a witness for contempt or take other measures if he or she would refuse to comply with such a request. Article 70 (1) (c) of the Statute seems to apply only to an individual who would interfere in the attendance of a witness and, unless we would give a very broad interpretation of this provision to include the refusal to appear of the witness as an interference to attend, we do not believe that it is applicable and Article 71 (1) refers to the power of the Court to sanction conduct that occurs before the Court (*in facie*) and not *ex facie*.

The Statute and the Rules refer to a request of assistance to facilitate "*the voluntary*" appearance of a witness as opposed to give the Trial Chamber the power to issue a "subpoena" which would allow the Court to impose sanction on the recalcitrant witness. Consequently, we do not believe that the Trial Chamber would have, as opposed to what was decided in *Prosecution v. Blaškić*, a power to sanction the non-respect of such a request.[95]

3. Obligation to answer questions

A witness appearing before the Court is compelled to testify unless he or she invokes a specific privilege allowing him or her not to disclose information or refuse to answer for fear of incriminating him or herself. The persistent refusal of the witness to answer the question when directed to do so may lead the Trial Chamber to cite the witness for contempt and expose the witness to punishment if convicted.[96]

Article 69 (5) and Rules 73 to 75 deal with privileged communication and information and rights to refuse to answer.

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93 Rule 66 (2).

94 See also Article 93 (1) (e); *Prosecutor v. Aloys Simba,* Case No. ICTR-01-76-T, Decision on the Defence Request for a Subpoena for Witness SHB, 7 February 2005, para. 3; *Prosecutor v. Sefer Halilović,* Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 7; *Prosecutor v. Radoslav Brđanin and Momir Talić,* Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, paras 48-50.

95 *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-AR108 *bis,* Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 21. For a different opinion see Frank Terrier, *supra*, note 1.

96 Article 71 (1).

a) i) Privileged communications and information (Rule 73)

1 As in most, if not all judicial systems, the rule provides that the communications between a person (client) and his legal counsel is privileged and not subject to disclosure unless the person to whom the protection is afforded (the client) waives his or her right in writing or the person "voluntarily disclosed the information to a third party and that third party give evidence of that disclosure."[97]

2 Rule 73 also provides that the Trial Chamber may rule that other communications between a person and another class of professionals are protected by a privilege of non-disclosure if the Trial Chamber is satisfied that:

> *"The communications …are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;*
> *Confidentiality is essential to the nature and type of the relationship…; and*
> *Recognition of the privilege would further the objectives of the Statute and Rules."*

Pursuant to Rule 73(3), in making a decision, the Court shall give particular regard to recognizing as privileged those communications made in a context of professional relationships, such as, between a person and his or her medical doctor, psychiatrist or between a person and a member of a religious clergy.[98]

3 Finally, a non-disclosure privilege concerns any information, documents or any other evidence obtained by any official or employee, past or present of the International Committee of the Red Cross (ICRC), in the performance of his/her duties, unless ICRC "does not object in writing to such disclosure or otherwise have waived this privilege or the information, document or other evidence is contained in the public domain."[99]

This provision codifies the privilege of non-disclosure of the ICRC recognised in the decision of *Prosecutor v. Blagoje Simić*, where the majority of the Trial Chamber held that the ICRC had a right under customary international law to non-disclosure of information acquired by present or former employee in the course of performing official ICRC functions and having the effect to bar the Trial Chamber from admitting the information.[100] The Rule provides that notwithstanding the recognition of a non-disclosure privilege, there may be circumstances where the Trial Chamber may find the information of such great importance for a particular case that it may in consultation with the ICRC, seek to resolve the matter in a cooperative way after having balanced different interests.[101]

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97 Rule 73 (1).

98 See also *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

99 Rule 73 (4) to (6) inclusively.

100 *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, especially paras. 74, 76, 80.

101 Rule 73 (6).

b) ii) Self- incrimination

Rule 74 provides that a witness may object to make any incriminating statement against her or himself.[102] In such a case, the Court may request the witness to answer the question but only after having given him or her the assurance that the responses to the questions will be kept confidentially, will not be transmitted to any State and that they will not be used directly or indirectly against the witness in any proceeding before the Court except under articles 70 and 71 which deal with offences against the administration of justice and sanctions for misconduct before the Court.[103]

Before considering such a procedure the Court should request the views of the prosecutor.[104] In determining if the Court should request the witness to answer, the Court shall consider several factors including the necessity and the uniqueness of the evidence, the nature of the incrimination and the risk for the security or safety of the witness.[105] If the Chamber does not provide the assurance then the witness cannot be compelled to answer the questions but can continue his or her testimony on other matters.[106]

If the Court grants the assurance it shall order that the proceeding be conducted in closed session, that no one should be allowed to disclose the identity of the witness and the content of the testimony, subject to sanction pursuant to Article 71 in case of violation, and that the record be sealed and that protective measures should be used in any court decision to protect the identity of the witness and content of the statement.[107]

The Court may also grant to a witness who appears before the Court an assurance that "he or she will not be prosecuted, detained or subjected to any restriction of freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State."[108] This provision is similar to provisions found in most treaties for mutual assistance or multilateral agreements in criminal matters, which allow a State, in which a person needs to be called as a witness but is not within the jurisdiction of the Court to obtain a temporary immunity from prosecution or arrest or detention for the purpose of appearing before the Court to give his or her testimony.[109]

c) iii) Incrimination by family members

Pursuant to Rule 75 of the Rules, the spouse, child or parents of an accused is competent but not compellable to make any statement that might tend to incriminate the accused. The provision stipulates that in evaluating the testimony of the witness

102 Rule 74 (3) (a).

103 Rule 74 (3).

104 Rule 74 (4).

105 Rule 74 (5).

106 Rule 74 (6).

107 Rule 74 (7).

108 Article 93 (2).

109 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996, paras.8-15; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Order Granting Safe Conduct to Defence Witnesses, 25 June 1998, page 3.

the Trial Chamber is allowed to take into consideration the refusal of the witness to answer a question that was either contradicting the witness previous statements or was selective in answering the questions. The need to protect the privacy of family life and relationship tends to make it necessary to enact provisions that will prevent family members from being forced to testify against each others.[110]

d) iv) Non-compellability of the Accused

Of course, the accused is not a compellable witness. Article 67 of the Statute makes it abundantly clear that the accused cannot be compelled to testify or to confess guilt and has the right to remain silent. In the *Prosecutor v. Jean-Paul Akayezu*, when seized with a request by the Accused to summon two other accused, charged in different cases, to appear in his defence, the Trial Chamber ruled that:

> *"[W]hereas, as regards an accused, the Tribunal is of the opinion that compelling him or her to appear as a witness could perhaps violate his or her fundamental right not to be forced to testify against himself or herself or to confess guilt, a right which is recognized under the provisions of Article 20 (4)(g) of the Statute of the Tribunal, and also under those of Article 14 (3)(g) of the 1966 International Covenant on Civil and Political Rights; whereas, accordingly, the Tribunal considers that in this case there is a risk that the appearance of the two accused as witnesses could cause prejudice to them."*[111]

ii. Documentary evidence and Material Evidence (audio or videotapes or other arti-facts)

Documentary evidence is usually tendered in evidence through a witness either in examination in chief or in cross-examination. A party who wishes to present documentary evidence will have to establish that the evidence presents "sufficient indicia of reliability" and must lay the source of the document.[112] Some of the indicia of reliability referred to by several Trial Chambers of the *ad hoc* tribunals included:

> *"[t]he place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the*

110 Sections 35.2 and 35.5 of UNTAET/REG/2000/30; Section 1221 of Act of 22 May 1981 No. 25 Relating to Legal Procedure in Criminal Cases of Norway; Section 52 of the German Criminal Procedure Code, 1998.

111 *Prosecutor v. Jean-Paul Akayezu*, Case No. ICTR-96-4-T, Decision on a Motion for Summons of Witnesses Called by the Defense, 17 February 1998, page 3; See also *Prosecutor v. Théoneste Bagasora et al.*, Case No. ICTR-98-41-T, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003, para. 23; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-04-T, Decision by a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, para. 2.

112 *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, Decision on the Admission of Exhibits Tendered through Witness Jadranko Martinović, 3 September 2002, para. 2; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Order on the Standards Governing the Admission of Evidence, para. 18; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8.

> *document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting.*"[113]

As for any piece of evidence, the proper weight of the documentary evidence admitted will be given by the Trial Chamber after evaluation of the whole of the evidence presented by the parties at trial.[114]

D. Different Modes of Presentation of Evidence

i. Agreement as to evidence

The Prosecution and the Defense may agree that an alleged fact is not contested and the Trial Chamber may consider this fact as proven unless the Chamber rules that a more complete presentation is necessary in the interest of justice. [115] This means that if the Trial Chamber accepts a fact as agreed by the parties it considers it has proven which prevent the parties to adduce evidence to the contrary. This was also provided in the Rules of both the *ad hoc* tribunals and was considered as beneficial since allowing the parties to agree to alleged facts limits the litigation to issues that are truly in dispute between the parties.[116]

ii. Judicial notice

Article 69 (6) of the Statute provides that the Court shall not require proof of facts of common knowledge but must take judicial notice of them.[117] Several decisions from both the *ad hoc* tribunals and the Sierra Leone Special Court have defined the scope of what may constitute facts of common knowledge. In *Prosecutor v. Laurent Semanza* the Trial Chamber stated that:

> *"The term 'common knowledge' is generally accepted as encompassing '…those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature.'"*[118]

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113 *Prosecutor v. Théoneste Bagosora et al,* Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, para. 8; See also *Prosecutor v. Radoslav Brđanin and Momir Talić*, Order on the Standards Governing the Admission of Evidence, para. 20.

114 *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Decision on the Admission of Exhibits Tendered Through Witness Jadranko Martinović, para. 2; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Order on the Standards Governing the Admission of Evidence, para. 18.

115 Rule 69.

116 *Prosecutor v.Vidoje Blagojević et al.*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para. 11.

117 It is to be noted that the ICC Statute and Rules do not contain any provision concerning judicial notice of adjudicated facts but only refer to judicial notice of facts of common knowledge.

118 *Prosecutor v. Laurent Semanza,* Case No. ICTR-97-20-1, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts pursuant to Rules 94 and 54, 3

Trial chambers also ruled that what constitute a fact not reasonably in dispute is, "if it is generally known within a tribunal's jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot be called in question."[119] As the agreed facts mentioned above, once the Court takes judicial notice of facts of common knowledge it implies that such facts cannot be challenged during trial.[120]

V. Closing of the Case

A. Closing Arguments

The Trial Chamber after declaring the submission of evidence closed should invite the Prosecutor and the Defense to make closing statements.[121] When the Trial Chamber authorized a victim to participate in the proceedings, the Chamber can, if it finds it appropriate, invite the victim or legal representative to make a closing statement. [122]

B. Chamber's Verdict

The final decision of the Trial Chamber must be based on the entirety of the evidence presented at trial. In assessing the evidence the Trial Chamber must evaluate the credibility, the reliability and the appropriate weight to give to the evidence presented and discussed at trial in order to determine if the prosecution has met its burden to prove the guilt of the accused beyond reasonable doubt.

The Judges must attempt to achieve unanimity, however, if they fail to do so the verdict shall be rendered by a majority of Judges.[123] All deliberations should be held *in camera*.[124] The decision should be in writing and give full and reasoned statement of the evidentiary findings and conclusions. There should be one decision. In case of dissent the decision should include the view of both the majority and minority.[125] The decision should be rendered in a reasonable time after the end of the trial.[126]

November 2000, para. 23. *Prosecutor v. Sam Hinga Norman et al.,* Case No. SCSL-04-14-AR73, *Fofana - Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*", 16 May 2005, paras. 20 to 23; *Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 10.

119 *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-1, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts pursuant to Rules 94 and 54, 3 November 2000, para. 24.

120 *Prosecutor v. Sam Hinga Norman et al.,* Case No. SCSL-04-14-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 2 June 2004; *Prosecutor v. Momcilo Krajišnik*, Case No. IT-00-39-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 28 February 2003, para. 16.

121 Rule 141.

122 Rule 89.

123 Article 74(3).

124 Article 74 (4) and Rule 142.

125 Article 74(5).

126 Rule 143 (1).

C. Sentencing

"In the event of a conviction the Trial Chamber shall consider the appropriate sentence to be imposed." Pursuant to Article 76 (1), in determining the appropriate sentence to impose, the Trial Chamber should take into account the "evidence presented and submissions made during trial that are relevant to sentence." Before the end of the Trial, the Chamber may hold a hearing to receive "any additional and relevant evidence and submissions relevant to the sentence"[127] in particular the Court may receive any representations by the parties and victims on the appropriateness of imposing, in addition to imprisonment, any order of reparation, restitution, compensation or rehabilitation in respect of the victims.[128] The decision should be pronounced in public and copies should be provided to all parties in a working language of the Court and to the accused in a language he or she understands.[129]

i. Applicable penalties

The Trial Chamber may impose a term of imprisonment not exceeding 30 years, or a term of life imprisonment if it is justified by the "extreme gravity of the crime and the individual conduct of the convicted person."[130] In addition to a term of imprisonment, the Court may impose a fine and/or the forfeiture of property and assets derived directly or indirectly from the crimes for which the accused was convicted[131]

The Statute provides that the Chamber in determining the appropriate sentence must take into consideration the gravity of the crimes and the special circumstances of the accused.[132] Determining the appropriate sentence is within the discretionary power of the Trial Chamber and should always be decided according to the facts of each case.[133] The case law of both *ad hoc* tribunals held that retribution and deterrence are the main objectives in sentencing for international crimes.[134] Retribution meaning that the sentence must be proportionate to the particular crime committed by the accused and deterrence meaning that the penalty imposed should "have sufficient deterrent value to ensure that those who would consider committing similar crimes would be dissuaded from doing so."[135]

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127 Article 76 (2).

128 Article 76 (3), Article 75 and Rule 143.

129 Rule 144 (1) and (2).

130 Article 77 (1) (a) and (b).

131 Article 77 (2) (a) and (b).

132 Article 77 (1) (a) and (b).

133 *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment, 19 April 2004, para. 241; *Prosecutor v. Goran Jelicić*, Case No. IT-95-10-A, Appeal Judgment, 5 July 2001, para. 101.

134 *Prosecutor v. Zlatko Aleksovski*, Case No. It-95-14/1-A, Appeals Judgment, 24 March 2000, para. 185 (hereinafter, *Aleksovski* Appeals Judgment); *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1, Sentencing Judgement, 21 July 2001, paras. 28-30; *Prosecutor v. Georges Rutaganda*, Case No ICTR-96-3, Judgment, 6 December 1999, para. 456; *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-S, Sentencing Judgment, 7 December 2005, para.22 (hereinafter, *Bralo* Sentencing Judgment)

135 *Prosecutor v. Stevan Todorović*, Case No. IT-92-9/1-S, Sentencing Judgment, 31 July 2001, paras. 29 and 30 (hereinafter, *Todorović* Sentencing Judgment); Aleksovski Appeals

ii. Gravity of the crime and individual conduct of the convicted person

The practice of the a*d hoc* tribunals established that the gravity of the crime is the most important factors to consider in determining sentence.[136] In considering the gravity of the crime the Trial Chamber may look at particular circumstances of the case including factors such as: the nature of the crime, the number of victims and form and degree of participation of the accused.[137]

The Trial Chamber must also consider any aggravating and mitigating factors specific to the case. Part of recognized aggravating factors are the number and vulnerability of the victims, the effect of the crime on the victims, the manner in which the crime were perpetrated and the position of the accused as superior officer. [138] Parts of recognized mitigating factors are: a plea of guilt, the collaboration with the Prosecutor, expression of remorse, the age and medical conditions of the accused.[139]

We all have, depending on the legal cultures we come from, our own opinion on the advantages or dangers of a plea of guilt and even more on the weight it should be given on sentence. However, the case law of the *ad hoc* and other internationalized tribunals recognised that a guilty plea expresses acceptation of responsibility for the crimes committed, it is a public recognition of what took place to the victims and an acknowledgement of their suffering, it contributes to reconciliation and in establishing the truth and may encourage other perpetrators to come forth. Finally it also relieves the witnesses to give evidence in Court and having to relive their traumatic experience.[140]

VI. Conclusion

It will be interesting to see how the case-law of the international criminal court will evolve in the years to come. The international community created the ICC as a permanent institution with the desire to put an end to impunity and to bring alleged perpetrators to justice and it has a very important mandate to fulfil. The ICC will continue to interpret, define and apply norms of international justice, learning from the experience of the *ad hoc* and other international tribunals and will participate in creating the future of the international criminal justice.

Judgment, para. 185; *Bralo* Sentencing Judgment, para.22.

136 *Todorović* Sentencing Judgment, 31 July 2001, para.31; *Prosecutor v. Zejnil Delalić, et al.*, Case No. IT-96-21-A, Appeals Judgement, 20 February 2001, para. 731; *Aleksovski* Appeals Judgment, para. 182; *Prosecutor v. Georges Rutaganda*, Case No ICTR-96-3, Appeal Judgment, 26 May 2003, para. 591.

137 *Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30-PT, Judgement, 2 November 2001, para. 701; *Prosecutor v.Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para.26; *Plavšić* Sentencing Judgment, para.27.

138 *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, para. 227; *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, paras. 339, 340, 716, 732, 736, 741.

139 *Prosecutor v.Goran Jelesić*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001; Plavšić, Sentencing Judgment, para. 61; *Kambanda* Appeal Judgment, para. 120; *Lino de Carvalho* Judgment, paras 66 to 71.

140 *Idem.*

Section 15

Victims in the Process before the ICC

Chapter 38

Victims' Rights and Interests in the International Criminal Court

Theo van Boven

Introduction

Having known Professor Igor Blishchenko for many years as a distinguished legal scholar, a good friend and a generous person who transgressed political and ideological boundaries, I feel honoured to contribute to this publication and to pay tribute to his memory. In this regard it must be recalled that the preamble of the Rome Statute of the International Criminal Court is mindful that during the twentieth century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.

The suffering and the plight of victims was undoubtedly one of the motivations of all those persons and institutions who advocated the establishment of an effective International Criminal Court (ICC) as a reaction against widespread patterns and practices of impunity for perpetrators of the most serious international crimes. It is against this background that the ICC Statute, while obviously having the prosecution and punishment of perpetrators as its major focus, also pays special attention to the rights and interests of victims. It is significant that the Statute goes well beyond treating the victim as an accessory tool in the criminal procedure and that it awards the victim a standing in her or his own right.

I will start to highlight the perspective of the victim, an aspect which is often underrated in national and international society. Then, for the sake of comparative background, I will review the position of the victim in the International Criminal Tribunal for the Former Yugoslavia (ICTY). Next, attention will be given to some developments in the process prior to the Rome Conference establishing the ICC, notably the views of the International Law Commission (ILC) which prepared the initial draft of the ICC Statute, to be followed by efforts pursued by non-governmental actors in support of victims' rights and interests which were also reflected in the draft Statute presented to the Rome Conference. This paper will further review the provisions relating to the position of victims in the Rome Statute. Thereafter, attention will be given to participation of victims in ICC proceedings and reparation through the Trust Fund as evidenced by recent developments.

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I. The Perspective of the Victim

In the activities of the United Nations to promote and protect human rights and to advance and enforce international humanitarian law, limited attention used to be paid to the rights and interests of victims. In cases where violations of human rights and humanitarian law were the subject of international scrutiny, the facts – and sometimes their root causes – were reported and analysed as a basis for pronouncements by UN policy organs such as the General Assembly, the Commission on Human Rights (replaced by the Human Rights Council) and occasionally the Security Council. Thus, series of country situations, often stricken by violence and armed conflict, appeared on the agenda of international bodies. Any resolution or motion of censure focussed on policies and practices and did not immediately target the persons responsible for these policies and practices. The criminal responsibility of perpetrators remained largely outside the official concerns of inter-governmental institutions and the plight of victims, if at all taken up, was more a concern for humanitarian assistance than the subject of redress and reparation.

However, in the area of crime prevention and criminal justice the plight of victims became a more consistent subject of concern and attention. In that area the United Nations prepared an important instrument and adopted in November 1985 the *Declaration of Basic Principles for Victims of Crime and Abuse of Power* (General Assembly resolution 40/34). The first paragraph described victims of crime as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws proscribing criminal abuse of power".

While it would be an overstatement to say that the end of the Cold War inaugurated an era of compassion with victims, the new situation did open up potentials for international co-operation and revitalised visionary ideals which had been dormant for long in the minds of people. In this new political setting institutions and organisations examining gross and massive violations of human rights and humanitarian law, widely reported by the media, became more sensitive to the suffering of victims. Solidarity and pressure groups generated energetic efforts to provide help and relief as well as legal recourse to the survivors of rape in armed conflicts.

Human rights organisations together with important sectors of civil society and governmental opinion stood up in favour of a more effective enforcement of international criminal justice. The idea to set up an International Criminal Court with powers to mete out justice to perpetrators of serious international crimes and to afford some satisfaction to victims and survivors, responded to widespread hopes and aspirations. These trends were confirmed and re-enforced by the establishment of ad hoc international tribunals for the former Yugoslavia and Rwanda which progressively gained impact and by the growth of international petition procedures providing *locus standi* to persons claiming to be victims of violations of human rights under United Nations and regional international human rights instruments.

It fits in this pattern that the United Nations General Assembly adopted in December 2005, after a long period of discussions and preparations the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International*

Humanitarian Law[1] containing a normative framework for rendering justice to victims and implementing their rights. In categorising the various forms of reparation, the basic principles and guidelines largely follow the catalogue drawn up by the International Law Commission in the Articles on State Responsibility: *restitution, compensation, rehabilitation, satisfaction* and *assurances and guarantees of non-repetition.*[2] The growing emphasis on the perspective of the victim is a visible expression of a gradual convergence of human rights law, international humanitarian law and the law pertaining to crime prevention and criminal justice.

II. The Victim in the International Criminal Tribunal for the Former Yugoslavia

A cursory review of the provisions of the ICTY Statute shows that the ad hoc tribunal for the former Yugoslavia[3] deals with victims principally in their role as witnesses,[4] for the sake of their protection (Articles 15, 20(1) and 22). The Tribunal's Rules of Evidence and Procedure further elaborate the protection principle. Thus, Rule 34 provides for the setting up, under the authority of the Registrar, of a Victims and Witnesses Unit with the task of recommending protective measures for victims and witnesses and providing counselling and support, in particular in cases of rape and sexual assault.

The ICTY described the principles for the unit's support work in the following terms: to respect, as much as possible, witnesses' freedom to make their own decisions (taking into account the need to ensure their safety and security); to provide material and psychological support throughout their stay in the Netherlands in connection with the Tribunal; to ensure that they are informed of the facilities available to protect them; to prepare them for trial by making them familiar with the place where they give evidence; to arrange for specialist and psychological care; and to provide support services for after-care in the home country[5].

Rules 69 and 75 set out in detail protective measures to be taken in exceptional circumstances requiring the non-disclosure of the identity of a victim and witness, taking also into account the rights of the accused. The ICTY dealt repeatedly with the intricacies of whose rights and interests prevail in conflictual situations as regards the disclosure or non-disclosure of the identity of a victim/witness[6].For present purposes it is also relevant to draw attention to two other ICTY Rules which put the position of the victim in a somewhat wider perspective.

Rule 105, in connection with Rule 88, provides for the possibility that, in case it

1 A/RES/60/147, dated 16 December 2005.

2 UN Doc.A/51/10, chapter III, articles 42-46.

3 It should be noted that the relevant provisions of the ad hoc tribunal for Rwanda are virtually identical.

4 See in more detail Roger S. Clark and David Tolbert, *Towards an International Criminal Court*, in The Universal Declaration of Human Rights: Fifty Years and Beyond (eds. Yael Danieli, Elsa Stamatopoulou, Clarence J. Dias), New York, 1998, pp. 99-112 (at pp. 104-107).

5 Third annual report of the ICTY, UN doc.A/51/292 – S/1996/665, para. 121.

6 Roger S. Clark and David Tolbert, note 4, at p. 105.

is concluded by the Trial Chamber that unlawful taking of property was associated with the crime and a specific finding to that effect was made in the judgement, the Trial Chamber may order the restitution either of the property or the proceeds as appropriate. This provision representing the notion of restitutive justice on behalf of victims is followed by Rule 106 on the issue of compensation to victims. It orders the Registrar of the ICTY to transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim, whereupon a victim on the basis of relevant national legislation may bring an action in a national court or other competent body to obtain compensation.

It is undeniable that prosecution and punishment by the ICTY of persons criminally responsible for serious violations of international criminal law constitutes by itself a good degree of satisfaction to victims and survivors. At the same time, it is also true that the ICTY Statute and Rules place victims largely in an accessory role. As witnesses they serve the interests of criminal justice. Nevertheless, the Rules relating to restitution and compensation open up, albeit in a limited and embryonic fashion, a possibility for the Tribunal to assist the victims in obtaining reparation and justice for themselves. But it appears that these provisions were included in the Rules as a symbolic afterthought rather than that they were expected to produce concrete results.

III. The Victim's Position in Preparatory Stages of the ICC Statute

A. UN International Law Commission

The Draft ICC Statute elaborated by the International Law Commission did not attribute a place to the victim that went much beyond the terms of the ICTY Statute. The victim was mainly regarded as a witness in the proceedings and in need of protection (Article 43 ILC Draft). A timid resonance of a broader victim's perspective was, however, included in the article on applicable penalties (Article 47 ILC Draft) which stated that fines paid may be transferred by order of the Court to several purposes, including a State the nationals of which were the victims of the crime and a trust fund established by the UN Secretary-General for the benefit of victims of crime. In the commentary the limited nature of this provision was recognised since it was "not intended in any way to substitute for reparation or to prevent any action which victims may take to obtain reparation through other courts or on the international plane"[7].

In fact, from the very beginning the majority of the ILC members were very reluctant in granting victims a broader position under the authority of the proposed ICC. When the ILC held a general debate on the question of international criminal jurisdiction and on the tasks of the proposed ICC, the views of those prevailed who had strong reservations about the possibility of "intermingling strictly criminal proceedings against individuals and civil claims for damages"[8]. They raised the practical objection of the potentially large numbers of victims that could be involved

7 UN Doc. A/49/10, chapter II, Article 47, *Commentary*, para. 4.

8 UN Doc. A/47/10, para. 89.

and they expressed doubt whether the granting of compensation for injuries suffered as a result of crimes referred to the ICC was within the scope of its mandate. By and large the ILC felt that victims' right to reparation, including the restitution of property, should best be left to national jurisdictions and to international judicial co-operation agreements.

B. NGO efforts

Strengthening the perspective of the victim, largely underexposed in the ILC Draft, became one of the target issues for many non-governmental actors, notably *Redress Trust, European Law Students Association, Women's Caucus for Gender Justice, Human Rights Watch* and many others.[9] They put forward a series of proposals with a view to promoting victims' rights and interests in the participation of ICC proceedings and in particular they sought to advance the idea that the ICC should receive authority to award or order reparations to victims. These NGO efforts found a sympathetic but not overwhelming response on the part of governmental delegations.

The London-based organisation *Redress*, set up to seek reparation for torture survivors, proposed on the basis of extensive consultations and a thorough study that the ICC in imposing sentences on a person convicted of crime may demand "without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State, other appropriate forms of reparation.[10] Acceptance of this proposal would give the ICC the power to award punitive damages to the victim(s). As regards determining an appropriate sentence, *Redress* recommended that not only the gravity of the crime and the individual circumstances of the convicted person be taken into account, as was proposed in the ILC Draft, but also the impact of the crime on the victims and that also attention be given to "the efforts made to afford reparation to victims". Finally, in order to take account of the need to implement awards made to the victim, *Redress* recommended that the article on recognition of judgements of the Court be made more precise so as to cover the obligation of States Parties "to carry out the judgements of the Court".

Similarly *Human Rights Watch* in its excellent study proposing recommendations for an independent and effective ICC, stressed that the making of reparations from perpetrator to victims can play a critical role in the healing process of victims and societies as a whole and that reparation is an essential element in the administration of international justice. In its recommendations Human Rights Watch supported the notion that the ICC should be empowered to make orders for reparations against the convicted person in favour of victims. It also recommended in the light of the then draft basic principles and guidelines on the right to reparation that reparation should be broadly defined to include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. It further recommended that the ICC

9 See Roger S. Clark and David Tolbert, note 4, at pp. 1001-101; see also David Donat-Cattin, *The Role of Victims in the ICC Proceedings*, in The International Criminal Court; Comments on the Draft Statute (ed. Flavia Lattanzi et al.), Napoli, 1998, pp. 251-272.

10 Redress, Promoting the right to reparation for survivors of tortue: What role for a permanent international criminal court?, London, 1997, Chapter VII Recommendations, pp. 42-44.

Statute clarify that reparation orders against individuals, as judgements of the Court, should be binding on States Parties and directly enforced by them.[11]

C. The Draft ICC Statute presented to the Rome Conference

Large parts of the Draft ICC Statute presented to the Rome Conference in the final report of the Preparatory Committee[12] stood in brackets which meant that no agreement was reached on the bracketed passages or that such passages constituted one out of two or more proposed options. For present purposes it should be noted that in the draft Article 68 on the protection of victims and witnesses, the reference in the title of this article to *their participation in the proceedings* as well as the further elaboration of this notion in the text of the draft article itself, were in brackets.

It should further be noted that the whole of the text of the draft article 73 on *reparation to victims* and many separate elements of this draft article stood equally in brackets. It was nevertheless of crucial importance, that as a result of joint governmental and non-governmental efforts, a substantive draft article was before the Conference which was comprehensive enough to serve as a suitable basis for preserving the essentials. This is precisely what happened.

The most controversial element, ultimately deleted from the article on reparations, was the responsibility of the State to award reparations on the order or on the recommendation of the Court, in particular if the convicted person was acting on behalf of that State in an official capacity. It appears from the text adopted by the Rome Conference, that the Court can only make an explicit order for reparation against a convicted person (Article 75). In this way a nexus can be established between criminal responsibility of the perpetrator and civil responsibility entailing a punitive element on his part.

While the notion of State responsibility was expressly deleted for reasons which were also in the minds of members of the ILC (see above), and which were based on the intent that the ICC be a court to deal with individual criminal responsibility, this state of affairs will not prevent victims to pursue claims for reparations through the Trust Fund or outside the ICC as is also clearly expressed in Article 75(b) that nothing in the article shall be interpreted as prejudicing the rights of victims under national or international law.

D. The Victim in the Rome Statute

As was indicated in the introductory paragraph of this paper, it is one thing to regard the victim as a witness to serve the criminal justice system and it is another matter to grant the victim a standing in her or his own right in the criminal procedure. The ICC Statute makes room for the victim in both capacities and in that sense the Statute is innovative and combines elements of both the common law and the civil law criminal justice practice. The following provisions are pertinent:

– Article 43(6) relating to the setting up of a V*ictims and Witnesses Unit*, much

11 Human Rights Watch, *Justice in Balance*, New York – Washington – London – Brussels, 1998, pp. 122-126.

12 UN Doc.A/CONF.183/2/Add.1.

along the same lines and following the experiences of the ICTY referred to above. It should be noted that the Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence;
- Article 54 (1(b)) in connection with duties and powers of the Prosecutor to conduct investigations, the Prosecutor shall *respect the interests and personal circumstances of victims and witnesses, including age, gender and health;*
- Article 64(6(e)) in relation with the functions and powers of the Trial Chamber which may, in performing its functions prior to trial or during the course of a trial, take measures to provide for the *protection* of witnesses and victims;
- Article 68 on *the protection of the victims and witnesses and their participation in the proceedings* which sets out the measures to be taken in order to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account such factors as age, gender and health. The same article also allows that for the protection of victims and witnesses proceedings be held *in camera* as an exception to the principle of public hearings. Such measures can in particular be taken in the case of a victim of sexual violence or a child who is a victim or witness.

The ICC Statute further substantiates and strengthens the position of the victim where it allows the victim to defend or represent his or her interests before the Court as a matter of his or her own right. In this connection the following provisions are of immediate interest:
- Article 15(3) allowing victims to make *representations to the Pre-Trial Chamber* (in accordance with the Rules of Procedure and Evidence) when the Prosecutor has requested the Trial Chamber for authorisation to proceed with an investigation;
- Article 19(3) dealing with questions of jurisdiction or admissibility entitles those who have referred the situation to the Court as well as victims to *submit their observations* to the Court when the admissibility of a case is challenged and a ruling is sought on this matter;
- Article 68 referred to above in relation to the protection of the victims and witnesses contains a special paragraph (3) on the *participation of victims in the proceedings* where the personal interests of the victims are affected. In such cases the Court shall permit that the *views and concerns of the victims* be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Detailed provisions are contained in the finalised draft text of the Rules of Procedure and Evidence on application for participation of victims in the proceedings (Rule 89), legal representatives of victims (Rule 90) and participation of legal representatives in the proceedings (Rule 91);
- Article 75 concerning *reparation to victims* referred to above, provides that the Court shall establish principles relating to reparations to victims, including restitution, compensation and rehabilitation. On this basis the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to victims and will state the principles on which it is acting. While the notion of State responsibility for

awarding reparations was not retained in the Statute, Article 75 does authorise the Court to make an order directly against a convicted person specifying appropriate reparations to victims, including restitution, compensation and rehabilitation. Where appropriate the Court may order that the award for reparation be made through the Trust Fund;

– Article 79 provides that a *Trust Fund* be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court and of their relatives.

The position of the victim in the ICC Statute, in particular the standing of the victim to pursue her or his own rights, claims and interests in relation to the international criminal justice procedure, constitutes a substantial advancement compared with the place attributed to the victim in the procedures of the international military tribunals established after World War II and of the *ad hoc* international tribunals more recently created by the Security Council.

The criminal law and procedural arrangements which characterise these "predecessors" of the ICC, were strongly influenced by the adversarial system prevalent in the United States of America and other common law countries, which in the search for the truth places victims in a quasi dependent position as witnesses. Without prejudice to the crucial role that witnesses play for the collection and corroboration of evidence, a more independent role for the victim/witness is advisable and as such recognised in many domestic criminal law systems, in particular where victims may claim damages as *partie civile* in connection with the criminal procedure. For various reasons such a course of action commends itself.

First, it makes the criminal offender more conscious of the fact that not only wrong was committed against public and moral order but that in addition serious injury and sufferings were inflicted on human beings. Second, it establishes a link between punitive measures and measures of reparation. Third, it tends to facilitate and expedite the procedural action to obtain civil damages.

The strengthening of the position of the victim in the ICC Statute is a happy illustration of the fact that in many ways the Statute is not the product of one predominant legal system and culture but the result of a healthy cross-fertilisation of several legal systems and cultures. As stated earlier, the ICC Statute permits the victim in several ways and at different stages to participate in the proceedings in order to represent and pursue her or his own interests. In particular the victim can make representations to the Pre-Trial Chamber in connection with the authorisation of an investigation (Article 15(3)), she or he can submit observations with regard to jurisdiction and admissibility questions (Article 19(3)), she or he can present views and concerns where her or his personal interests are affected at different stages of the proceedings (Article 68(3)), and above all she or he may request reparations, including restitution, compensation and rehabilitation (Article 75).

The latter provision on reparations is in itself a major advancement. The Rules of Procedure and Evidence contain in this respect important provisions on the publication of reparation proceedings (Rule 96), assessment of reparations (Rule 97) and the Trust Fund (Rule 98). Publicity of the reparations proceedings is intended to inform other victims, interested persons and interested States. Assessment of reparations shall take into account the scope and extent of any damage, loss or injury and may be

determined on the basis of advice of appropriate experts appointed to assist in this matter. The rights of victims and the convicted person shall be duly respected.

The Trust Fund may be of considerable importance in cases where the number of the victims and the scope, forms and modalities of reparations make a collective award appropriate or where an award for reparations be made to an intergovernmental, international or national organization approved by the Trust Fund.

E. Participation of victims in proceedings and reparation

The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002 after the 60th instrument of ratification had been deposited. The Court became truly operational with the inauguration of the Judges, the Prosecutor and the Registrar in March, June and July 2003 respectively. Within the Registry of the Court the rights and interest of victims are particularly cared for by the Office of Public Counsel for Victims, offering necessary legal assistance, and by the Victims Participation and Reparation Section.[13]

In the Court's early years of existence some remarkable developments should be noted because of their potential impact on the rights and interests of victims in their future relationship with the Court. One such development pertains to the question of *participation of victims* in the proceedings of the Court, more in particular whether already during the investigation of a situation by the Prosecutor victims are entitled to present their views and concerns in accordance with Article 68(3) of the Statute. A request to this effect was made by the Fédération Internationale des Ligues des Droits de l'Homme on behalf of six victims of the situation of the Democratic Republic of the Congo (DRC), one of the situations referred to the Court and being the subject of investigation by the Prosecutor.

The Prosecutor, arguing that investigation of a situation does not fall under "stages of the proceedings" as meant in Article 68(3), objected to the right of victims to participate in the investigation stage since, in view of the massive scale of alleged criminality in the DCR, many thousands of individuals might claim such a right. According to the Prosecutor, a distinction has to be made between a class of "situation victims" and a victim who has been affected personally by a "case" and the accused of such a case.[14]

Pre-Trial Chamber I concluded, however, in a significant decision of 17 January 2006, that the six victims are entitled in the exercise of their procedural rights pursuant to Article 68(3) in relation to the ongoing investigation, to present their views and concerns, to submit relevant materials and to request the Pre-Trial Chamber to order specific measures. In its decision, Pre-Trial Chamber I analysed in detail Article 68(3), it also referred to the enhanced status of victims in human rights law and international humanitarian law and took into account in this respect the case law of the European and Inter-American Courts of Human Rights.

Pre-Trial Chamber I further analysed the criteria included in Rule 85(a) of the

13 See Report of the International Criminal Court for 2004, UN Doc. A/60/177, para. 45.

14 Situation in the Democratic Republic of the Congo, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings, No.: ICC-01/04, dated 23 January 2006, para. 5.

Rules of Procedure and Evidence on the definition of "victims", *viz.* natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. For purposes of the assessment of harm suffered, Pre-Trial Chamber I took into account the above-mentioned UN Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, both of which refer in their definition of "victims" to emotional suffering and economic loss as forms of harm suffered.[15]

The issue at stake in this procedure before Pre-Trial Chamber I involves the degree of access of victims to the International Criminal Court. The Pre-Trial Chamber's decision would allow a broad scope and a wide range of victims participation. The Prosecutor feared, however, that such approach would severely complicate the functions attributed to him by the Statue of the Court. The matter is not settled since the Prosecutor was granted leave to appeal the Pre-Trial Chamber's decision.

Another important development having an impact on the relationship of victims with the Court is the adoption by the Assembly of States Parties on 3 December 2005 of the *Regulations of the Trust Fund* for the benefit of victims of crimes within the jurisdiction of the Court.[16] As the Regulations determine, the Trust Fund shall be funded by (a) voluntary contributions; (b) money and other property collected through fines or forfeiture (Article 79(2) of the Rome Statute); (c) resources collected through awards for reparations ordered by the Court pursuant to Rule 98 of the Rules of Procedure and Evidence; (d) such resources as the Assembly of States Parties may allocate.

The Regulations contain among other matters detailed provisions for making Rule 98 operational with regard to resources collected through awards ordered by the Court, *viz.* individual awards to victims pursuant to Rule 98(2), collective awards to victims pursuant to Rule 98(3), and awards to an intergovernmental, international or national organization pursuant to Rule 98(4).

In the course of the drafting of the Regulations differences of opinion arose about the uses of resources, in particular voluntary contributions, collected independently from the Court orders pursuant to the provisions of Rule 98, and about the role of the Board of Trustees in this regard. One opinion supported by the Victims Rights Working Group favoured broad powers for the independent Board of Trustees. Another opinion sought to reduce the role of the Board of Trustees and wished that the Court should determine how the Trust Fund's resources are to be used and that only those persons should benefit from the Fund who had been victimized by crimes that were prosecuted by the Court. Consequently, following the latter opinion victims who are eligible for reparation orders would have to wait for many years for the accused perpetrator of the crime against them to be arrested and convicted before reparations orders could be made. After lengthy negotiations this restrictive view on the functioning of the Trust Fund and on the role of the Board of

15 Situation in the Democratic Republic of the Congo, Decision of Pre-Trial Chamber I on the Applications of Participation in the Proceedings, No.: ICC-01/04, dated 17 January 2006.

16 Resolution ICC-ASP/4/Res.3, dated 3 December 2005.

Directors did not prevail.

The Regulations provide that, also in the absence of Court orders pursuant to Rule 98, the Trust Fund shall be seized with reparation arrangements when "the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families"(Regulations, para. 50 (a)(i)). However, as a compromise an elaborate conditional clause was linked to such activities of the Board prescribing that the Court be notified by the Board and allowing the Court to express the opinion that the envisaged activities of the Board would pre-determine any issue to be determined by the Court or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (Regulations, para. 50 (a)(ii)).

The two developments referred to above and relating to participation of victims in proceedings and reparation raise a common intricate problem; how broad is the category of persons who as victims may have access to the Court and to its Trust Fund. There is no doubt that the situations referred to the Court for investigation, such as those pertaining to the Democratic Republic of the Congo, Uganda and Darfur, the Sudan, involve huge numbers of victims afflicted by crimes within the jurisdiction of the Court. Should they all have access to the Court in terms of participation and reparation? The more restrictive view would link the number of victims to cases of prosecution and conviction, the broader view would throw a wider net. The latter position has the perspective of the victim at its side but at the same time the question remains where to draw the line. The Court as well as the Board of Trustees of the Fund will have to go a long way to elaborate criteria for victims' participation and reparation.

Relevant in this respect is that both the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (para. 2) and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (para. 9) determine that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

Summary of Main Features

- The perspective of the victim has been gradually strengthened in the elaboration of the Rome Statute on the Establishment of an International Criminal Court. It was thus recognised that victims of crimes not only have an interest in the prosecution of perpetrators but also an interest in restorative justice, whether in the form of compensation or restitution or otherwise.
- It must be understood that the authors of the Rome Statute were reluctant to include in a Statute which is aimed to establish individual criminal responsibility, the notion of State responsibility with a concomitant competence of the International Criminal Court to order States to award reparations to victims. However, the fact that victims can only pursue through the ICC claims for reparations against convicted persons, does not prevent victims to pursue claims for reparation through the Trust Fund or outside the ICC.

- In addition to the issue of reparations, many other provisions of the Rome Statute allow victims to defend their rights and interests before the International Criminal Court, in particular through participation by themselves or their legal representatives in the proceedings and by the expression of their views and concerns. Thus, victims are not only perceived in their accessory role to serve the criminal justice system but also in the function of having their own standing in the criminal procedure.
- While it must be realised that in criminal proceedings the parties in the procedure are, as a matter of principle, the prosecutor and the accused, there is a growing tendency in domestic legal systems, now also reflected in the Statute of the ICC, to recognise and accept the victim as a civil party. Such development is welcome because it may make the criminal offender more conscious of the serious injury and sufferings inflicted on human beings, because it establishes a link between punitive measures and measures of reparation and it may open up perspectives of reconciliation.
- In determining the category and scope of victims' participation in ICC proceedings and victims' entitlement to reparation, it is advisable to seek guidance in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law. Both instruments determine that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

Chapter 39

Ensuring Effective Participation and Adequate Redress for Victims: Challenges Ahead for the ICC

Ilaria Bottigliero

I. From Theory to Practice in Victims' Redress

When the Statute of the International Criminal Court[1] was adopted on a beautiful Roman summer's day in 1998, probably few could have guessed that by July 2002, the International Criminal Court (ICC) would commence work.[2] Since 2002, the ICC has become widely accepted as the world's principal institution for the administration of international criminal justice. One of the more appealing themes of the whole ICC regime is undoubtedly its innovative vision of victims' rights. In the ICC, victims' issues are no longer left exclusively in the hands of domestic authorities, but they have become considered a matter of concern for the whole international community.

Unlike the Nuremberg and Tokyo International Military Tribunals, or the ICTY and ICTR,[3] the ICC Statute allows victims ample room to participate in its proceedings and to receive some form of redress directly from the Court's judicial awards. At the time of the Nuremberg and Tokyo Trials, circumstances were not ripe for an international approach to reparations and States continued to address compensation matters according to their own particular domestic standards and procedures, despite

1 Statute of the International Criminal Court, *adopted* in Rome in a non- recorded vote, 120 in favour, 7 against and 21 abstaining, on 17 July 1998, *entered into force* on 1 July 2002. Hereinafter 'ICC Statute' or 'Rome Statute'.

2 Article 126 of the ICC Statute required sixty ratifications in order for the Statute to enter into force – a relatively high number. Following the adoption of the ICC Statute, a global ratification campaign was launched to encourage and assist Governments to join the ICC. Notably, the NGO Coalition for an International Criminal Court (CICC) – a coalition composed of around one thousand member organizations – actively lobbied Governments all over the world to join the ICC, thus contributing enormously to the Statute's swift entry into force. As of January 2006, the ICC Statute had attracted 139 signatures and 100 ratifications. For a general assessment of the International Criminal Court see Mahnoush H. Arsanjani and W. Michael Reisman, "The Law-in-Action of the International Criminal Court", 99 *American Journal of International Law*, April, 2005; Diane F. Orentlicher, "Judging Global Justice: Assessing the International Criminal Court", 21 *Wisconsin International Law Journal*, Fall 2003. For a substantial analysis of the Rome Statute's provisions, see William A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed., Cambridge University Press (2004).

3 *See* Ilaria Bottigliero, *Redress for Victims of Crimes under International Law*, Martinus Nijhoff Publishers, The Hague (2004) at 195-196.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 907-923.

the fact that severe violations clearly constituted matters of international concern and issues of redress could have been addressed at an international level.

Even in more recent times however, under the Statutes of the two *ad hoc* tribunals for the former Yugoslavia and for Rwanda, Judges could only award the restitution of unlawfully taken property to the rightful owner, or defer a case to 'national Courts or other competent bodies' to initiate compensation proceedings. No monetary compensation could therefore be provided directly to the victims.[4] The ICC, in contrast, represents a truly unique mechanism by advancing the rights of victims through international criminal law and procedure.

This advance was not easily won at the Rome Conference, where some Governments doubted whether victims should play any role at all in the Court's proceedings. Even more controversial proved to be the questions of victims' redress, the overall suitability of a reparation regime at the international level, the possibility of expensive reparation awards and other practical implementation issues. At the end of the day, supporters of a comprehensive victims' redress regime prevailed, and as a result, the ICC has been equipped with a complete system of victims' participation in the proceedings, combined with the possibility for Judges to award reparations directly to victims.[5]

As innovative as it is however, the ICC's victims' redress regime will have to overcome a number of serious challenges, mainly having to do with the way victims can access the Court, with their participation in the proceedings and with some important practical aspects of the reparation procedure, including the way the Trust Fund has been set up to work. Now that the ICC's Prosecutor has been investigating its first cases,[6] possibly involving thousands of victims, it has become essential to focus on some of the more practical and urgent challenges the Court will most probably face in ensuring victims' adequate redress. These challenges are likely to test

4 The drafters of the Statutes opted for this indirect approach to avoid flooding the Tribunals with too many compensation claims. *See* Ilaria Bottigliero, "Redress and International Criminal Justice in Asia and Europe", *Asia Europe Journal*, Vol. 3 (4) 2005, pp. 453-46. For an evaluation of achievements and limitations of the two Tribunals see Yves Beigbeder, *International Justice Against Impunity: Progress and New Challenges*, Martinus Nijhoff 2005. *See also* Timothy K. Kuhner, "The Status of Victims in the Enforcement of International Criminal Law", 6 *Oregon Review of International Law*, Spring 2004.

5 Article 75 of the Rome Statute on 'Reparations to victims' provides, *inter alia*, that:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.

6 By the time of writing of the present article, three situations had come under ICC investigation in the following countries: Uganda, Democratic Republic of the Congo and Sudan. The first two were referred to the Court by the respective territorial States Parties and the latter by the Security Council with Chapter VII Resolution 1593 (2005).

the ICC over the coming years, and may expose inadequacies and weaknesses in the Court's support system for victims. We are now faced with a crucial question: will the ICC fulfill its promise?

In the following discussion, we consider some of the challenges facing the ICC with respect to victim's participation and reparations. First, we point out how the ICC's referral system may complicate victims' access to the Court. Then, we assess strengths and weaknesses of the newly adopted Trust Fund's Regulations and finally, we look at the ICC's first procedural decision on victims' participation, as an early indicator of the Court's approach towards victims' redress.

II. Does the ICC Referral Procedure Ensure Effective Participation of Victims in the Proceedings?

One of the key questions before negotiators in Rome was whether or not to provide victims with some degree of access to the Court's judicial proceedings. This practice, well-known in civil law systems as *partie civile*, was initially looked upon rather skeptically by common lawyers as *terra incognita* – difficult to navigate theoretically and practically. Eventually, the debate between supporters and opponents of victims' participation swung towards the former, thus allowing victims some degree of direct participation in the Court's proceedings. This brought the ICC in line with modern victimology theory which recognizes the victim's participatory experience in the retributive process as a fundamental component of the healing process, especially where serious human rights violations are involved.[7] In this sense, the ICC helps crystalize one of the emerging, fundamental normative components of the victims' right to redress, namely the right to be involved in the justice process, irrespective as to whether this process is to be administered by a judicial body, such as the ICC, or by quasi-judicial bodies such as truth and reconciliation commissions, enquiry commissions, human rights bodies, or similar entities.[8]

Based on these premises, Article 68(3) on 'Protection of the Victims and Witnesses and their Participation in the Proceedings' provides that:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court [...]. Such views and concerns may

7 *See inter alia*, Jamie O'Connell "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?", 46 *Harvard International Law Journal*, Summer 2005; Erica Harper "Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice", 10 *Journal of Conflict & Security Law*, Summer 2005; Eric Stover, Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press (2004). For a specific reading of the victims' position in ICC proceedings *see* Gerard J. Mekjian and Mathew C. Varughese, "Hearing the Victim's Voice: Analysis of Victims' Advocate Participation In the Trial Proceeding of the International Criminal Court", 17 *Pace International Law Review*, Spring 2005.

8 On truth commissions see Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Routledge (2001).

> be presented by the legal representatives of the victims where the Court considers it appropriate [...]

This provision basically allows victims to be heard at certain stages of the proceedings, thus conferring upon them a measure of *locus standi*.[9] The Statute itself however, does not allow victims to seize the Court's jurisdiction directly. Unlike the European Court of Human Rights or the Inter-American Court of Human Rights, where individual victims can petition the Court either directly or, in the Inter-American system, through the Commission, the drafters of the Rome Statute decided against conferring individual victims full capacity to petition the Court. Instead, the Statute vests the primary responsibility and capacity to activate the Court's jurisdiction in:

- a State Party[10]
- the UN Security Council, acting under Chapter VII[11]
- the ICC's Prosecutor, acting *proprio motu*[12]

In other words, under the ICC's referral system, victims can only have their cases heard if the cases are brought before the Court by actors qualified under the Statute's strict rules.[13] This makes victims' access to the Court dependent upon the willingness of States Parties to bring certain situations before the Court, the decisiveness of the

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9 Rules of Procedure 89 to 99 of Subsection 3 on 'Participation of victims in the proceedings' further expand Article 68(3). As discussed below, victims are entitled to file submissions before the Court at the pre-trial stage, during the proceedings or at the appeal stage. Victims can send standardized submissions to the Victims' Participation and Reparation Unit, which forms part of the Registry. The Unit then submits the application to the competent Chamber, which, in turn, decides on the arrangements for the victims' participation in the proceedings. The Chamber may reject an application if it considered that the person did not qualify as a victim for the purposes of the ICC. It is in fact up to the individual petitioner to present sufficient evidence in support of the fact that he or she has been a victim of a certain crime under consideration before the Court. A petition may also be made by a person acting with the consent of the victim, or in their name when the victim is a child, or in case of disabilities preventing the victim from filing a petition directly. *See* the ICC website at http://www.icc-cpi.int/victimsissues/ victimsparticipation.html, last visited on 5 June 2006.

10 Under Articles 13 and 14, for a State Party to be able to refer a particular situation to the ICC, the crimes under consideration must have been committed either in the territory of a State Party, including on board a vessel or aircraft (territoriality criterion), or by a national of a State Party (nationality criterion).

11 The Security Council, acting under Chapter VII, can refer to the ICC situations occurring anywhere in the world, irrespective of ICC membership, territoriality or nationality criteria.

12 Before proceeding with an investigation *proprio motu*, the Prosecutor must seek the authorization of the Pre-Trial Chamber. It must also be mentioned that, under Article 12(3), non-party States can lodge a declaration with the Registrar, accepting the exercise of jurisdiction by the Court on an *ad hoc* basis, with respect to a specific crime. In such case, the accepting State has an obligation to cooperate with the Court in accordance with Part 9. So far, this option has been exercised by Cote d'Ivoire – a signatory, but not a party to the ICC – which filed a declaration of acceptance of ICC's jurisdiction over crimes committed in the country's territory since 19 September 2002.

13 *See* Articles 12 and Article 13. On the referral system of the ICC *see* Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff 2005.

Security Council to act in certain situations, or the readiness of the Prosecutor to start an investigation. One of the advantages of this indirect referral system is that, by channeling and regulating victims' access to the Court, the system protects the Court from the possibility of uncontrolled streams of petitions that might otherwise flood the ICC.[14] In terms of disadvantages however, the current ICC referral procedure could make victims' access to the Court very difficult and unnecessarily demanding, for the reasons discussed below.

A. Restrictions to the Prosecutor's **proprio motu** *power to initiate an investigation under Article 15*

The most direct way for victims to approach the Court would seem to be through the Prosecutor's independent power of investigation, according to the following procedure laid down in Article 15 of the Statute:[15]

- Victims send information to the Prosecutor on a particular situation that falls within ICC jurisdiction.
- The Prosecutor then has an obligation to 'analyse the seriousness of the information received' and to determine whether, on the basis of such information, there is a 'reasonable basis' to proceed with the investigation. If necessary, the Prosecutor can seek additional information.
- Should the Prosecutor decide that the information received is not adequate to satisfy the 'reasonable basis' requirement to proceed with an investigation, victims are allowed to submit further information on the same situation 'in light of new facts or evidence'.[16]

The procedure described above seems quite straightforward, but a number of serious practical shortcomings for victims may be lurking in the shadows.

First, the Prosecutor's power to initiate an investigation *proprio motu* is not unlimited. The Prosecutor's capacity to investigate a particular situation out of his or her own motion must comply with the general conditions of territoriality or nationality, unlike the Security Council's authority to refer to the Court situations of genocide, war crimes or crimes against humanity, taking place anywhere in the world, even where the country in question is not a party to the Rome Statute, by adopting a resolution under Chapter VII of the UN Charter.[17] Specifically, the Prosecutor can only initiate *proprio motu* investigations into situations that have occurred either in the territory of a State Party to the ICC, or that have involved accused who are nationals of a State Party to the ICC.[18] This is, in itself, a valuable tool for victims.

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14 It is well-known, for example, that admissibility questions have considerably slowed the work of the European Court of Human Rights.

15 Under Article 15, the Prosecutor can "initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court".

16 Article 15(6).

17 This was the case for the Darfur situation, which was referred to the ICC by the Security Council acting under Chapter VII of the UN Charter. Sudan, a signatory but not a party to the ICC, strongly opposed the ICC's referral.

18 *See* Article 15 in combination with Article 12.

It gives them an opportunity to call for the Court's action where the country in which the crime was committed, or the country of nationality of the alleged offender, although parties to the ICC, may be unwilling or unable to prosecute and punish the offenders. Practically however, only victims that are already within the coverage of the ICC, either by territory, or by virtue of the accused's nationality, can expect some action to be taken by the Prosecutor. Although the Rome Statute poses no restrictions as to what kind of information the Prosecutor can receive, or from whom, this system relegates the more vulnerable victims – those who have suffered harm by a national of a non-party State, or in a territory of a non-party State – almost completely outside the referral system. Ultimately, these victims can rely only on Security Council action, which however, can become entangled in political considerations as discussed below.

B. Political considerations affecting the Security Council's power of referral

As the principal organ of the United Nations responsible for dealing with threats to or breaches of international peace and security, Security Council action remains essential in ensuring that crimes of concern to the international community as a whole such as genocide, war crimes or crimes against humanity, do not go unpunished. The question remains however, can victims effectively rely on the Security Council to see their cases brought before the ICC?

The ICC Statute provides the Security Council with a uniquely broad power of referral, consistent with the Council's primary Charter responsibility for the maintenance of international peace and security. Acting under Chapter VII, the Security Council can refer to the Court *any* situation involving crimes under the ICC's jurisdiction, irrespective as to whether the crimes occurred in an ICC State Party or involved accused who are nationals of an ICC State Party.[19] In this sense, Security Council action is essential to ensure that victims outside ICC coverage by virtue of territory or nationality, or lacking alternative justice avenues receive proper redress. As the ultimate political body however, the Security Council naturally follows political considerations and priorities in its decisions, including on what cases, if any, to refer to the ICC. This leaves victims in a very uncertain situation, because the chances of having their cases referred to the Court are likely to depend on a range of political factors. Unfortunately, China, Russia and the United States had not at the time of the writing of the present article, become parties to the Statute, and as Council permanent members, they can veto any draft resolution to refer a situation to the ICC.[20]

19 *See* Article 13.

20 This particular situation is currently exacerbated by the open opposition of the United States towards the ICC. This, at the time of writing, represented an additional factor of risk to consider when evaluating the effectiveness of Security Council action to ensure victims enjoy the right to access to international justice on an equal basis. Having said that, in the case of Darfur, Sudan, the UN Security Council invoked Chapter VII and referred the case to the ICC with resolution 1593 (2005), adopted on 31 March 2005. The referral was possible because the United States chose to abstain rather than veto the draft resolution, and no other permanent members cast a veto, thus allowing for the first time, the use of the Security Council's power to refer to the ICC a situation involving

C. Weaker position of vulnerable victim groups and unreliability of inter-State referral procedure

Finally, the ICC system of indirect victims' access to the Court could prove particularly disadvantageous for vulnerable groups, such as women, minorities, indigenous people, persons coming from rural communities or other marginalized groups, who typically experience greater difficulty in accessing remedies at all levels. For example, in many countries, women have limited access to justice as compared to men. Crimes that typically target women, such as sexual slavery, human trafficking or rape, frequently have been accorded lower priority than other offenses, both at investigative and prosecutorial stages. Factors such as the level of education and the family background of the woman, cultural barriers, or the lack of political will to prosecute and punish crimes targeting women, in some situations could make women's access to the ICC more difficult.[21] Similar scenarios can be envisaged with respect to crimes involving ethnic, racial or religious minorities, or members of other disadvantaged groups. The system of 'indirect referral' to the ICC could also put victims in a disadvantageous position where the territorial Government has become actively involved in perpetrating the crimes in question – a not uncommon occurrence – in which case the Government might have little or no interest in calling for ICC prosecution.

Bearing in mind the political and technical complexity of both Prosecutor and Security Council referral procedures, is it realistic for victims to rely on the referral capacity of third States Parties having no specific interest in the crime in question? If we recall that the inter-State complaint procedure of the UN human rights treaty body system[22] has never once been used in all its years of existence, one wonders

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a non-party State. On the Darfur referral, *see* Luigi Condorelli and Annalisa Ciampi, "Comments on the Security Council Referral of the Situation in Darfur to the ICC", 3 *Journal of International Criminal Justice*, July 2005.

21 Throughout history, the prosecution of international crimes against women has never been easy. Even in recent times, the two Statutes for the former Yugoslavia and for Rwanda failed to recognize rape as a war crime and did not cover any other form of sexual or gender-based violence within the definition of war crimes. In practice, this resulted in some serious limitations in the actual prosecution of the crime of rape under each Statute, at least during the early phase of the operation of the Tribunals, because the Prosecutor had to fulfill the higher threshold of a crime against humanity, including the widespread and systematic character of the act, in order to issue an indictment on counts of rape. This gap in the law has been at least partially filled by the jurisprudence of the two Tribunals. Notably, in the *Akayesu Case* the Tribunal, presided by Judge Pillay, affirmed that rape perpetrated on a mass or systematic scale could amount to genocide, in view of the definition of genocide as laid down in the Genocide Convention of 1948, which covers the imposition of "measures intended to prevent births" with intent to destroy, in whole or in part, a national, ethnical, racial or religious group – a situation which can be related to practices of enforced sterilization or sexual violence. *Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, Case No. ICTR-96-4-T at 241. *See* Ilaria Bottigliero, "The Contribution of Humanitarian Law to Gender Justice in Asia through the ICC", 3 *ISIL Yearbook of International Humanitarian and Refugee Law* (2003), pp. 48-58. For other cases involving gender related crimes, *see Delalić et. al.*, Final Judgment of 16 November 1998 at paras. 495-496; *Furundžija Case*, Judgement of 10 December 1998 at para. 163.

22 Human rights treaty bodies are committees composed of independent experts established to monitor the implementation of fundamental international human rights treaties. They

what the chances are for third State Party referrals in the ICC framework. In the UN human rights treaty body system, countries have almost always avoided pointing the finger at other countries, especially for potentially sensitive causes, such as those involving marginalized or minority groups. One wonders whether ICC State Parties would be likely to depart from this approach in which case the ICC inter-State referral procedure might offer little hope for victims' redress.

To conclude this part of the discussion, hopefully, the establishment of the Office of Public Counsel for Victims[23] will encourage and increase the participation of victims in ICC's proceedings. This Office was set up to provide "legal research and advice to victims and their legal representatives at all stages of the proceedings", as well as to provide legal representation to victims. Placed under the Registry for administrative purposes, the Office comprises Counsel, Legal Officers and Administrative Assistants. It is designed to function completely independently from the Registry and the organs of the Court and in this connection all members of the Office are obliged to follow a 'Code of Professional Conduct for Counsel'.[24]

III. Ensuring Adequate Reparations through Victims' Empowerment and an Accessible Trust Fund

The ICC's comprehensive reparation regime fills a real gap in international norms on victims' redress, but will it work in practice? In international criminal law, and to a lesser extent also in human rights law, reparation matters have been left largely to the

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are set up in accordance with the provisions of the specific treaty they monitor. Currently, there are seven human rights treaty bodies, namely: the Human Rights Committee (HRC), monitoring the implementation of the International Covenant on Civil and Political Rights 1966 and its Optional Protocols; the Committee on Economic, Social and Cultural Rights (CESCR), monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights 1966; the Committee on the Elimination of Racial Discrimination (CERD), monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination 1965; the Committee on the Elimination of Discrimination Against Women (CEDAW), monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women 1979; the Committee Against Torture (CAT), monitoring the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment; the Committee on the Rights of the Child (CRC), monitoring the implementation of the Convention on the Rights of the Child 1989 and its Optional Protocols; and the Committee on Migrant Workers (CMW), monitoring the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990. The treaty bodies perform a number of functions, including consideration of State parties' reports, consideration of individual complaints or communications and publication of general Comments on the respective treaties. For further reading on the UN human rights treaty body system, see G. Alfredsson, J. Grimheden, B. G. Ramcharan and A. de Zayas (eds.), *International Human Rights Monitoring Mechanisms*, The Raoul Wallenberg Institute Human Rights Library, Vol. 7, 2001.

23 Established on 19 September 2005 by the Assembly of State Parties pursuing Regulations 80 and 81.

24 Adopted by the Assembly of State Parties during its fourth session (ICC-ASP/4/Res.1).

periphery of the political agenda, and many reparation issues were not addressed.[25] The very limited reparation provisions of the ICTY and ICTR Statutes have proven ineffective in practice, and in fact, were never utilized thus far. Whether or not the ICC reparation regime will be effective in assisting victims in their quest for justice, will likely depend on a number of issues discussed below.

A. Victims' role in requesting reparations – publicity and divulgation duties

The way reparation procedures are designed to be set in motion could prove to be among the more problematic areas. As mentioned above, unlike in the ICTY and ICTR, ICC Judges have the power to make a direct order for the award of victims' reparations, including restitution, compensation and rehabilitation, either by resorting to the offender's pecuniary resources or by accessing the Trust Fund. Reparation orders however, will not be 'automatic'. Rather, the reparation procedure is intended to be activated mainly at the request of the victims,[26] because the Statute specifically indicates that only in 'exceptional circumstances' can the Court act on its own motion to order victims' reparations.[27] This particular situation makes the effectiveness of the ICC reparation system dependent upon the active interest of victims in initiating reparation proceedings, the level of organization of victims' groups, as well as victims' access to information, funds and equipment. To make the ICC's reparation regime work well, NGOs, civil society, victims groups, and other interested parties should receive proper training and information on the possibility to file claims for damages before the ICC.[28] This is not only a moral duty on the international community, but

25 Such issues have undermined efforts at reconciliation and peace, even many years after the crimes were committed. As an example, the question of Chinese war victims' compensation, in particular the victims of Germ Warfare Unit 731 and the 'Comfort Women' from World War II Japanese occupation of China, remains a serious cause of tension between China and Japan. This has been worsened by the regular visits of Japanese Prime Minister Junichiro Koizumi to the Yasukuni Shrine in Tokyo, where 14 Class-A war criminals are enshrined, together with ordinary soldiers. Partly because of these unresolved redress issues, China currently has opposed a permanent seat on the United Nations Security Council for Japan, arguing that Japan has never sufficiently recognized its wartime responsibilities. *See further* Ilaria Bottigliero, "Redress and International Criminal Justice in Asia and Europe", *supra* note 4.

26 The application procedure under Rule 94 seems quite straightforward. If victims wish to have their reparation claims heard by the Court, they must file detailed information in writing with the Registrar, including the 'identity and address of the claimant'; a 'description of the injury, loss or harm'; the location and date of the incident; if possible the identity of the person the victim believes to be responsible for the violation; a description of the objects for which restitution is claimed; a claim for monetary compensation, rehabilitation and other forms of remedy; and any other relevant supporting documentation. The Rules of Procedure and Evidence do not set a range in the amount that victims can claim for compensation.

27 From a reading of Article 75 in combination with Rule 95 it may be inferred that the Court's independent power to award reparations will be used mainly where the Court considers it impossible for victims to file a request for reparations.

28 On the participation of NGOs and civil society in international claims *see* Tullio Treves *et al.* (ed.), *Civil Society, International Courts and Compliance Bodies*, Cambridge University Press, December 2004.

it is also part of a special divulgation duty, under the Statute's Rules of Procedure and Evidence which place upon the Registrar a specific obligation "to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to ... victims, interested persons and interested States".[29] It is therefore essential that relevant information on how to access the ICC's reparation mechanisms actually reaches marginalized groups, minorities, women, the illiterate and other vulnerable sectors of society.

B. The Trust Fund regulations: old problems and new developments

At the Rome Conference, Governments left open a number of questions related to the Trust Fund's operation, some of which have been considered by the Assembly of States Parties at later stages. The Statute itself contains only one substantive provision on the Fund: Article 79 providing that the Fund is established "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims". Criteria for managing the Trust Fund, the Fund's financial structure and sources, the extent of the Trust Fund's powers and functions beyond the reparation regime, and the identification of reparation beneficiaries, could not all be resolved in Rome.[30]

The recently adopted Regulations of the Trust Fund for Victims[31] clarify many of these issues, including the key question as to whether or not to provide the Trust Fund with independent capacity to negotiate with Governments or other entities on matters concerning contributions to the Fund. On this point, Regulations 23 and 24 provide that the Board of Directors, set up to manage and oversee the Trust Fund, "shall establish contact with Governments, international organizations, individuals corporations and other entities to solicit voluntary contributions to the Trust Fund". Granting the Fund's manager independent capacity to negotiate with external entities has at least two important advantages. First, it gives the Fund the possibility to ensure a steady income of voluntary contributions. Second, this capacity could prove essential should the Fund consider in future to expand its intermediary role beyond strict ICC reparation parameters.[32]

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29 *See* Rule 96, providing *inter alia* that: "the Court may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations in order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court".

30 On the ICC's Trust Fund *see generally* Peter G. Fischer, "The Victims' Trust Fund of the International Criminal Court – Formation of a Functional Reparations Scheme", 17 *Emory International Law Review*, Spring 2003.

31 Regulations for the Trust Fund for Victims, *adopted* by the Assembly of States Parties at the 4th plenary meeting on 3 December 2005, by consensus, *see* Resolution ICC-ASP/4/Res.3. In the same resolution, the Assembly of States Parties also "Requests the Board of Directors to continue to pursue its invaluable efforts in fundraising" and also "calls upon governments, international organizations, individuals, corporations and other entities to contribute voluntarily to the Fund". At the same time, the Assembly of States Parties also decided to assess the implementation of the Regulations not later than at its seventh regular session.

32 This scenario may occur for example where a Government involved in any way in a crime under consideration by the Court wishes to provide victims with some form of reparation

The newly adopted Regulations also address some of the concerns raised in Rome with respect to the source of voluntary contributions to the Trust Fund. During the negotiations, a number of delegations insisted that such sources should be properly verified, to avoid the ICC receiving contributions from sources whose purposes or activities might conflict with the spirit of the Rome Statute. Under Regulation 26, the Board is obliged to "establish mechanisms that will facilitate the verification of the sources of funds received by the Trust Fund". In any event, Regulation 30 prohibits the acceptance of voluntary contributions "which are deemed not to be consistent with the goals and activities of the Trust Fund" and which "would affect the independence of the Trust Fund".

Another welcome development in the Regulations is the general prohibition of earmarking of voluntary contributions from Governments (Regulation 27). These contributions will therefore be placed in the common fund for the compensation of any victim who has been awarded reparations by the ICC. In case of voluntary contributions coming from sources other than Governments, there still remains the possibility for donors to earmark up to one third of their contribution for specific activities or projects, subject however to the following conditions:

– that the allocation benefits victims and their families, and
– that the allocation does not discriminate among victims "on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or other status".

Similarly, under Regulation 30, the Board is obliged not to accept contributions "the allocation of which would result in a manifestly inequitable distribution of available funds and property among the different groups of victims". While the Regulations clarify many matters having to do with financial allocations and management of the Fund, other areas remain less clear.

Perhaps more troubling is the ambiguity over who should be considered a 'victim' for the purposes of the Trust Fund – a key question the Court has partially clarified in one of its first decisions, discussed below. When it comes to determining who is a victim for the purposes of the Fund, Regulation 42 simply states that: "The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families". This follows logically from Article 79 of the Rome Statute, which provides that the Trust Fund "shall be established ... for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims". However, the weak link lies in the direct reliance of Regulation 42 on Rule 85,[33] which had already attracted criticism when the Rules of

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through the ICC Trust Fund. In this case, the Fund could conceivably act as an intermediary, as in the event of reparations awarded under Article 75 of the Statute through the Trust Fund, but this remains to be seen.

33 Rule 85 reads as follows: "For the purposes of the Statute and the Rules of Procedure and Evidence: (a) Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".

Procedure and Evidence were initially adopted. In a nutshell, some commentators have interpreted the provision of Article 79(1) in combination with Rule 85 as conferring 'victim's status' for the purpose of the Trust Fund exclusively on family members and victims of violations already under consideration in ICC proceedings.[34]

Others however, have suggested that the Trust Fund's scope of action should cover also victims of violations that are not yet under consideration in the Court's proceedings.[35] Although from a general interpretation of the Regulations it could be inferred that the Fund should operate for the benefit of the victims directly involved in ICC proceedings, the drafters of the Regulations, by embracing Rule 85 without further explanation, seemed to have missed a good opportunity finally to clarify this crucial question, instead of leaving the matter to be answered through the adjudication process.

The lack of clarity in the definition of victim leaves open a number of important questions. When should a person be considered a victim for the purposes of the Trust Fund? Should the Fund provide material support to victims who do not yet have any formal connection with ICC proceedings? If so, at what stage of the proceedings? Should the Fund be able to provide support to victims as soon as an investigation starts? What should be the threshold for victims to access the Trust Fund?

With regard to some of these issues, States Parties were able to reach a compromise solution by determining the moment when the Fund should initiate its provision of support for victims, whether in material form or in the form of physical and psychological rehabilitation.[36] Specifically, Regulation 50 stipulates that the Trust Fund shall be seized whenever its Board of Directors considers it necessary "to provide physical or psychological rehabilitation or material support for the benefit of victims and their families".[37] In order to initiate the provision of material or other support to a specified group of victims, the Fund's Board of Directors must notify to the Court of its intention, after which the relevant Chamber has a 45-day period to oppose such decision.[38] Overall, this would appear to be an acceptable compromise

34 *See* Amnesty International, "International Criminal Court: Ensuring an Effective Trust Fund for Victims", IOR 40/005/2001 of 1 September 2001 at 5-6.

35 *See* Project on International Courts and Tribunals (PICT), "The Trust Fund for Victims (Article 79 of the Rome Statute): A Discussion Paper", ICC Discussion Paper No. 3, February 2001 at 9.

36 As recalled in the Report of the Coalition for the International Criminal Court on the Fourth Session of the Assembly of States Parties, "the VRWG and the TFV Team felt that the TFV should be able to act as soon as an investigations starts, to assist all victims of a situation before the Court as it deems necessary, independently of Court orders or decisions in the management of voluntary contributions". *See* www.iccnow.org, last visited on 5 June 2006.

37 This seems to be in line with earlier interpretations suggesting that the Fund's Manager should have discretionary power to make an 'interim award' in special circumstances, such as in support of special measures taken by the Court. *See* Amnesty International, *supra* note 34 at 7.

38 More specifically, Rule 50 states that the provision of support measures can proceed only if:

> the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the

between complete independence to act on the part of the Fund's Board on the one hand, and total inaction until final judgment has been reached – an approach that could prejudice the well-being of victims and their right to prompt redress – on the other.

IV. The Court's First Decision on Victim' Participation: Some Welcomed Clarifications

In the Court's first substantial decision on the situation in the Democratic Republic of the Congo,[39] the ICC Judges addressed some of the ambiguities described above concerning the definition and role of victims in the proceedings. In the specific instance, six individuals, represented by Fédération Internationale des Ligues des Droits de l'Homme (FIDH), requested to participate as victims at the investigative stage of the proceedings.[40] This prompted Pre-Trial Chamber I to consider "whether the Statute, the Rules of Procedure and Evidence ... and the Regulations of the Court accord victims the right to participate in the proceedings at the stage of investigation of a situation and, if so, what form such participation should take".[41] In its decision, the Court also considered the question of whether the applicants met the criteria for being considered victims within the meaning of rule 85 of the Rules.[42]

Interestingly, the applicants' request was challenged by the Prosecutor's Office on several grounds.[43] The Prosecutor's main contention was that victims could not participate in the 'proceedings' at the investigative stage because "there are, strictly speaking, no proceedings within the meaning of Article 68 (3) of the Statute during the investigation phase" since "from a terminological point of view, the word 'pro-

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Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to Article 19, admissibility pursuant to Articles 17 and 18, or violate the presumption of innocence pursuant to Article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". In addition, "Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days from the expiry of the period specified in sub-paragraph (a) (ii). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a)(ii), the Board may proceed with the specified activities".

39 Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, ICC-01/04 of 17 January 2006.

40 The applicants based their claim upon Article 68(3) of the Statute, stating that:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

41 ICC-01/04 at para. 22.

42 *Ibid.*

43 Conversely, the application was not challenged by the *ad hoc* Defence Council.

ceedings' does not encompass the investigation of a situation". The Prosecutor labeled victims' participation as 'inappropriate' and further argued that, in any case, the applicants had failed to show that their personal interests were affected at the investigation stage.[44]

In response to the Prosecutor's challenge, the Pre-Trial Chamber observed that paragraph 1 of Article 68, which imposed on the Court a general obligation to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", referred in particular to the investigation stage and that, in fact, there was no 'explicit exclusion' of the investigation stage from the scope of application of Article 68(3) on the question of victim's participation.[45] On this basis, the Chamber concluded that Article 68(3) of the Statute gave victims 'a general right of access to the Court', including at the stage of investigation of a specific situation.[46] Remarkably, the Court noted that the victims' right of participation at the investigation stage was in fact consistent with the 'object and purpose of the victims participation regime' of the ICC, and, more generally, with 'the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law'.[47]

The Chamber went on to say that victims had the right, under the Statute, to express an 'independent voice and role' in ICC proceedings. As the Chamber correctly remarked, the European Court of Human Rights stressed this point on numerous occasions, insisting that victims participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different".[48] Significantly,

44 ICC-01/04 at para. 25. The Prosecutor supported its case on the basis of the drafting history of Article 68, which, he argued, "confirms that the right of victims to participate under Article 68 was firstly seen as a right to participate in proceedings relating to a trial. Even though Rule 89 is found in Chapter 4 of the Rules which is entitled 'Provisions relating to various stages of the proceedings', it is important to note that Article 68 is in Part 6 of the Statute which is entitled 'The Trial'. In addition, the Prosecutor insisted that: "rule 92 of the Rules of Procedure and Evidence limits the participation of victims to the stages mentioned in sub-rules 2 and 3 of that rule. This interpretation implies that the right of victims to participate in the proceedings is limited to certain proceedings which are triggered either by the Prosecutor's 'decision not to investigate or to prosecute under Article 53' (rule 92 (2)) or by the Chamber's 'decision to hold a conformation hearing under Article 61' (rule 92 (3))." *Ibid*. at paras. 39-40.

45 *Ibid.* at para. 45.

46 *Ibid.* at para. 46. *See* also para. 54.

47 *Ibid.* at para. 50. For further discussion on this matter, *see* Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas", 27 *Hastings International and Comparative Law Review*, Winter 2004.

48 *Ibid.* at para. 51. The Chamber referred to jurisprudence of the European Court of Human Rights, where victims' participation was recognized "from the investigation stage, even before confirmation of the charges, particularly where the outcome of the criminal proceedings is of decisive importance for obtaining reparations for the harm suffered" (para. 52). The Court also cited the *Blake Case* from the Inter-American Court of Human Rights, where Article 8 (1) of the American Convention on Human Rights was applied to victims participating in criminal proceedings from the investigation stage (para. 53). The Chamber recalled that: "The Inter-American Court decided that it was clear from the terms of Article 8 of the Convention that victims of human rights violations or their

the Chamber further noted that the victims' right to participate in the proceedings was part of a more general right to participate 'in the fight against impunity', thus expanding the meaning of victims' participation beyond a mere procedural technicality.

Finally, the Chamber dismissed the Prosecutor's argument that it would be 'inappropriate' and 'inconsistent with basic considerations of efficiency and security' for victims to participate at the investigation stage because, in the words of the Prosecutor's Office: "[f]irstly, allowing for third party intervention at the investigation stage could jeopardize the appearance of integrity and objectivity of the investigation [...]. Secondly, participation in an investigation could be seen as necessarily entailing disclosure of the scope and nature of the investigation"[49]. The Chamber disagreed with the Prosecutor, holding that victims' participation at the investigation stage did not *per se* jeopardize the integrity and objectivity of the investigation, nor was it 'inherently inconsistent with basic considerations of efficiency and security'.[50] To the contrary, the Chamber considered that the personal interests of victims were in fact affected at the investigation stage, since their participation at this stage could serve to 'clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered'.[51]

In conclusion, the Chamber rejected the arguments of the Prosecutor and instead decided to grant the status of victims to the applicants. The six individuals were therefore able to participate at an early investigative phase of the DRC proceedings, where they were allowed to 'present their views and concerns', 'file documents' and 'request the Pre-Trial Chamber to order specific measures'.

Soon after this landmark decision was reached, the Prosecutor raised a number of objections. The Prosecution reiterated the argument that to allow victims to participate at such an early stage of the proceedings would prejudice the impartiality and integrity of the investigation and that, in addition, it could create a serious unbalance between victims and any accused who might have to appear before the Court in future. The Prosecution further expressed its concern that, were a large number of victims allowed to participate at early stages of the proceedings, it could seriously slow the course of investigations. This could lengthen the whole trial process and violate the right to fair trial, in particular, the right to be tried without undue delay. In addition, lengthy investigation and trial procedures would increase the burden on the Court to provide effective protection for victims and witnesses.[52]

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relatives are entitled to take steps during criminal proceedings, from the investigation stage and prior to confirmation of the charges, to have the facts clarified and the perpetrators prosecuted, and are entitled to request reparations for the harm suffered" (para. 53).

49 *Ibid.* at para. 56.

50 *Ibid.*

51 *Ibid*. at para. 63. The Chamber also accorded priority to the rights of victims, stating that: "the close link between the personal interests of the victims and the investigation is even more important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations pursuant to Article 75 of the Statute". *Ibid*. at para. 72.

52 Décision Relative à la Requête du Procureur Sollicitant l'Autorisation d'Interjeter Appel de la Décision de la Chambre du 17 Janvier 2006 sur les Demandes de Participation à la

Similar arguments were put forward by the ICTY already in the year 2000, but interestingly there, the Prosecution argued in favour of increased victims' participation in court proceedings, whereas the Judges opposed this possibility on grounds similar to those raised by the ICC Prosecutor. In an interview of 9 June 2000, Prosecutor Carla del Ponte expressed her concern over a lack of procedures providing for victims' participation in the two *ad hoc* Tribunals. She argued that although "the Prosecutor's role is to get defendants convicted ... [i]n the current system, there is little time and space left to plea in the favour of victims. ... A system of criminal law that does not take into account the victims of crimes is fundamentally lacking".[53] She therefore called for an expanded victims' role in the two Tribunals' proceedings, both in terms of participation and receiving reparations. The ICTY Judges however, completely rejected the proposal to expand victims' procedural standing on the grounds that such a move would have "negative consequences for the accused's right to an expeditious trial due to an inevitable lengthening of proceedings and an increase in the workload of the Chambers".[54]

Regrettably, despite the fact that the ICC Statute fully supports victims' participation in the proceedings, the ICC's Prosecutor has put forward arguments that would seem to undermine basic victims' rights. Fortunately, ICC Judges again rejected the Prosecution's arguments on the basis that, in the case under consideration, there would be no threat either to the fairness or promptness of the proceedings, or to the well-being of witnesses. The investigations were at an early stage, no individual had yet been named as defendant, and neither had anyone yet been the object of an arrest warrant or summons (para. 39). In any case, in the words of the Chamber, even if the procedure had been well under way, the Chamber would still be in a position to ensure the protection, security, well-being of victims and witnesses as well as to ensure respect for their private life and identity in case of need (para. 52).

V. Time to Fulfill the Promise of the ICC's Reparation Regime

It is too early to predict what approach the ICC will take to the many other questions critical to victims' redress.[55] However, the ICC's progressive decisions on victims' participation as regards the DRC seems to indicate the Court's inclination to

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Procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, ICC-01/04 of 31 March 2006, at paras. 11 *et seq.*

53 *Compensating Victims with Guilty Money*, interview with Carla del Ponte, ICTY and ICTR Chief Prosecutor, in *Judicial Diplomacy: Chronicles and Reports on International Criminal Justice*, The Hague, 9 June 2000.

54 *Victims' Compensation and Participation*, at paras. 33-36. Report prepared by the ICTY Rules Committee, Appendix to a Letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, Annex to UN Doc. S/2000/1063 of 3 November 2000.

55 For example, the Court may be called to reflect on the impact of complementarity on the victims' right to redress: what if victims have a better chance at redress in the ICC as in their own country? Is this a violation of the basic principles of non-discrimination and equal treatment of victims in the enjoyment of their right to redress? Or the Court may be asked to rule on broader admissibility questions such as whether the inability or unwillingness of a country to provide redress can be considered a valid ground for the ICC to exercise jurisdiction.

protect victims' in line with both the spirit of the Statute and the increased role of victims in human rights, humanitarian law and international criminal law generally. Moving from theory to practice, the ICC has a real chance to make a substantial difference in the life of victims and to fulfill the promise of its reparation regime to ensure victims adequate and prompt redress.

Section 16

Penalties

Chapter 40

Uniform Justice and the Death Penalty

Eric Myjer

I. The issue

This year at the well-known annual international art fair in Maastricht a New York art gallery had a simple painting by the American artist Andy Warhol for sale for a mere 3 million American dollars. The also as silkscreen well-known painting depicted in black and white a photograph of an electric chair put on canvas and was a mere 54 by 74 inch. The photo apparently already appeared in a newspaper in 1953 when it illustrated an article about the controversial execution of Julius and Ethel Rosenberg who had been found guilty of spying in the days of McCarty-ism.

It made me wonder, however, why somebody might be willing to spend millions of dollars on a picture – even one by Andy Warhol – of a cold mechanical death machine and hang it on the wall. Not only can one debate the esthetical value of this painting, it also brings into play the ethical dimension since it concerns a machine that kills people as a sanction for breach of a rule of law. This happened not only in the past, but it happens still right now. It brought to mind that the views on this topic world-wide are diverging and capital punishment still is an accepted punishment in large parts of the world in countries as diverse as the United States, Japan or Afghanistan. There, however, appears to be an element of selectivity on the issue. When the other day in an Afghan court the prosecutor based himself on the in Afghanistan applicable Sharia law and asked the court to impose the death penalty, this led to a world wide uproar. It concerned a case where someone had changed religion from Islam to Christianity, which is in violation of Sharia law. Such punishment, it was claimed by human rights organizations, violated the human right to freedom of religion. Under pressure from some western countries presently operating in Afghanistan in the end the person in question (the suspect) was granted asylum in Italy. That western countries were worried is understandable for freedom of religion is regarded as a strong human right,[1] which is closely related to the freedom of opinion.[2] This issue brought into focus the principle of state sovereignty versus human rights. But it thereby also demonstrated the selectivity in the public outrage when it concerns human rights. For if one accepts that the death penalty still is an acceptable penalty, one accepts thereby

1 Compare art. 18 juncto art. 4 ICCPR; art. 9 ECHR; and art.18 UDHR.

2 Art 19 ICCPR, Art. 10 ECHR and Art. 19 UDHR. C.Ovey& R.C.A.White, Jacobs & White, *The European Convention on Human Rights* (2006), at. 310.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 927–942.

a breach of one of the most fundamental human rights, namely the right to life. This was also clear when the Rome Statute was being negotiated.

In the final agreement on the issue which penalties the International Criminal Court would be able to apply it was decided that under Article 77 of the Rome Statute that the Court could choose between either imprisonment for a period of up to 30 years, or life imprisonment. In addition thereto the court might decide on a fine or on the forfeiture of proceeds. Just looking at the section on penalties in the Rome Statute it would appear that there was consensus between the participating states that for the offences under the Rome Statute the death penalty was no longer a proper penalty. On further view, however, it appears that there was no such agreement altogether. States were only able to come to an agreement on the issue of penalties after having reached a compromise.[3] This compromise entailed that the penalty clause in article 77 was without prejudice to the penalties that might be ordered within the national legal regimes. This was done via Article 80,[4] which makes clear that article 77 does not prejudice the national application of penalties and national laws. Given the principle of complementarity between the jurisdiction of the International Criminal Court (ICC) and the national jurisdiction and the fact that not all States Parties have abolished the death penalty, it would therefore still be possible that national courts might decide on the death penalty, whereas the ICC would not be able to do so. Furthermore it had to be clear that the non-mentioning of capital punishment as a penalty could not viewed as contributing to the development of customary international law in the sense that there was an *opinio iuris* to abolish capital punishment. This was made clear in a statement made by the President of the Conference in relation to the adoption of the Statute on 17 July 1998.[5]

Given the very principle of complimentarity it therefore was accepted that the national punishment and the punishment by the ICC may diverge. From the point of view of an international law academic there appears not much of a problem. For of course this is exactly the result of what States Parties to the Rome Statute intended to allow for. States Parties wanted a maximum amount of freedom to create justice within their own national system. Only when States decide not to have a national prosecution, then the ICC may be involved. Furthermore, although the right to life to the uninformed observer appears to be unqualified, there are exceptions in human rights instruments like the ICCPR and the ECHR.

However, from the point of view of a criminal judge there crops up an element of uneasiness. This follows less from the fact that in certain parts of the world capi-

3 See Rolf Einar Fife, commentary on Article 80, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, at. p 1009.

4 "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law the law of States which do not provide for penalties prescribed in this Part."(art. 80 Rome Statute).

5 "The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or no-inclusion of the death penalty.... Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes." Rolf Einar Fife, commentary on Article 80, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court,* at. p 1010.

tal punishment is still regarded as an acceptable punishment, but more from the fact that within one regime – that of the Rome Statute – it would be possible to qualify the very same facts as criminal ones according to the Rome Statute in either the national or in the international procedures, but that this might however lead to a qualitative different punishment. There appears, in other words, to be an element of incongruity given that two different procedures – the national and the international one- that hang together via the Rome Statute may on the one hand lead to a similar qualification of the crime committed, but on the other hand to a qualitatively different punishment. Thereby it does not only concern a difference in punishment that is of a *quantitative* character – for instance 2 years imprisonment versus 4 years imprisonmen – but one that is of a *qualitative* character, namely imprisonment versus the taking of somebody s life via capital punishment.[6] In other words there appears to be an element of unequal justice. The question which I want to raise in this short essay (contribution) is whether such inequality is acceptable from the point of view of the right to a fair trial as a central principle of law. And does the fact that the qualitative difference is between life and death make a difference. In other words does the fact that it involves the right to life make any difference.

For this I will look: at the complimentarity principle under the Rome Statute (2); sentencing: the penalties (3); the death penalty as an exception to the right to life (4); possible conflicting principles (the principle of legality; the principle of a fair trial) (5); I will finish with a concluding paragraph (6).

II. Admissibility and the complimentarity principle under the Rome Statute

Central to the system whereby "the most serious crimes of concern to the international community" are being prosecuted and whereby the International Criminal Court has such an important role, is the primary role for national criminal jurisdiction. This is what the principle of complimentarity is about. In that respect there is a similarity with the principle of subsidiarity in the Treaty on the European Union.[7] Within the system of the ICC it is called the complimentarity principle. The Preamble of the Rome Statute makes it clear that this is a central principle:

> *Emphasizing that the International Criminal Court established under this Statute shall be complimentary to national criminal jurisdictions.*

6 A pertinent question that could be raised in this context is what from a humanitarian point of view is worse: imprisonment for life or death. The only thing that can be said with certainty is that the death penalty is irreversible, when it has been executed.

7 "The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community" (article 2 Treaty on European Union). In said Article 5 subsidiarity is described as "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, *only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States* and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."(Article 5) (Emphasis added, EM).

This complimentary principle has to be looked at in conjunction with another preambular paragraph namely the one that stresses the duty of States to exercise its criminal jurisdiction over those responsible for international crimes.

When a case is brought before the ICC it will have to test whether the complimentary principle applies. We find the applicable rules in Article 17 on the issues of admissibility. Under Article 17 the Court therefore shall determine that a case is inadmissible when that case is being investigated or prosecuted by a State which has jurisdiction over it (*para a*),[8] or when the case has been investigated but the State has decided not to prosecute (*para b*) or that person already has been tried *(ne bis in idem*) (*para c*). The fourth ground for inadmissibility is that the case is not of sufficient gravity to justify further action by the Court (*para d*). Interesting is that with regard to the instances in which either a state is in the process of investigating or prosecuting a case under *para a* or under *para b* has decided not to prosecute the Court might decide otherwise if it decides that there is a case that the State in question is *unwilling or unable genuinely to carry out the investigation or prosecution*, or that its decision not to prosecute is a result thereof. Paragraph 2 and 3 then provide the basis for that decision. For our reasoning we should keep the unwillingness in mind, for the inability primarily concerns a case whereby the judicial system has collapsed.

> 1. (...)
> 2. In order to determine *unwillingness* in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility from crimes within the jurisdiction of the Court referred to in article 5;
>   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances is inconsistent with an intent to bring the person to justice. (Emphasis added, EM).

With regard to this unwillingness it should be kept in mind that in both Art 17(1(a) and (b) reference is made to an unwillingness to *genuinely* carry out the investigation or prosecution. This appears to allow the Court to pierce the veil of an on the surface 'normal' prosecution or investigation. Although Article 17 appears only to refer to procedural rules of national and international criminal law it definitely also concerns the material decision whether a crime has been committed and what punishment the perpetrator deserves. For there can be no *genuine* intent to do justice if the final

8 The formulation makes clear that the ICC can only come to an informed decision, including on the question whether a state might initiate proceedings, by hearing the state in question. For this the general rules on cooperation will provide the legal framework (Art. 86-onwards, Rome Statute). In order not to complicate matters too much here it is assumed that states determine their own jurisdiction.

judgment is merely there in order to convince the outside world that justice is being meted out, but cannot be taken seriously for no "serious" punishment has been given. It is for that reason that the Court may weigh whether there is a case of 'purpose of shielding the person concerned from criminal responsibility' or proceedings that are/were not conducted "independently or impartially". Only in such instances or when the ICC is convinced that it is not a case for national prosecution it will determine that the case is admissible.[9]

III. Sentencing: the penalties

In the event of a conviction the Trial Chamber shall consider the appropriate sentence to be imposed.[10] Article 77 of the Rome Statute describes the applicable penalties namely:

1. (...)
   (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
   (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
(2) In addition to imprisonment, the Court may order:
   (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
   (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fida third parties.

From this list of possible penalties in the Rome Statute it is clear that the death penalty, which could be found in the Nuremberg Statute,[11] is not available just like in the cases of the ICTY and the other UN Tribunals. On the look of it it therefore appears that the abolitionists have won their case and that there was consensus among States Parties that for the offences under the Rome Statute the death penalty was no longer a proper penalty. On further view, however, it appears that there was no such agreement at all. States were only able to come to an agreement on the issue of penalties after having reached a compromise.[12] The compromise meant that the penalty clause in article 77 was without prejudice to the penalties that might be ordered in the national legal regimes. This was done via Article 80,[13] which makes clear that article 77 does not prejudice the national application of penalties and national laws.

9 On the complexities regarding the application of the "shield criteria and the *ne bis in idem* rule (prohibition of double jeopardy) (art. 17 juncto art. 20 Rome Statute) see G.A.M. Strijards, *Een Permanent strafhof in Nederland* (A permanent Criminal Court in the Netherlands) (2001) p. 38 onwards.

10 Article 76 (1), Rome Statute.

11 Art. 27, Charter of the International Military Tribunal.

12 See Rolf Einar Fife, ibid, commentaries on Article 80, at pp. 1009.

13 "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law the law of States which do not provide for penalties prescribed in this Part." (art. 80 Rome Statute).

Furthermore it should to be clear that the non-mentioning of capital punishment as a penalty could not be viewed as contributing to the development of customary international law in the sense that there was an *opinio iuris* to abolish capital punishment. This was made clear in a statement by the President of the Conference in relation to the adoption of the Statute.[14]

Given the central place in the regime of the ICC of the complementarity principle with its primary role for national prosecution and sentencing –in theory at least- it is therefore a real possibility that with regard to the crimes described in the Rome Statute convicted persons on a national level may be sentenced to death, since not all States Parties have abolished the death penalty within their national system. This leads to the strange situation that within a single system – the regime of the ICC – a convicted person may be sentenced at the national level to the death penalty, whereas at the international level another person for (given) an identical set of facts and convicted for an identical crime may be sentenced to a lengthy (up to life) imprisonment. Although in international law a central principle is that states are free to decide for themselves to what extent they are willing to bind themselves via treaty or customary law – and with regard to the Rome Statute States Parties have been very explicit both as regards the complementary principle and as regards the possible penalties- this possibility of divergent sentences within one regime raises some serious questions.

This is because within the single regime of the Rome Statute, that encompasses both the national and the international component, the possibility is created of unequal justice. One element is that it would be possible to have qualitatively different sentences within a single regime. Another element is the way the state of national jurisdiction may influence the involvement of the ICC. Although it may be argued that the very principle of complementarity by itself refers to these two separate regimes, namely a national and an international (ICC) regime, the better view is to regard the regime of the Rome Statute as one encompassing regime that includes two sub-regimes that are tied together by the Rome Statute, namely the national and the international criminal procedures regarding the five crimes of the Statute.

Assuming one single regime, makes one wonder whether there are rules or principles within international law that are contrary to these consequences of the complementarity principle. In order to answer that question it first it has to be established that the death penalty is not conflicting with a *ius cogens* rule concerning the right to life. If that is not the case the question can be raised whether the sentence of a death penalty as a punishment compared with imprisonment as a punishment is not of such a qualitative different order, that allowing for such a differentiation within one single regime encompassing two possible procedures, this comes into conflict with some general principles of law.[15] Furthermore how can be prevented that the way the national jurisdiction is exercised (executed) becomes an instrument of (national) politics and not of fair trial.

14 See footnote 4.

15 Compare Article 38 (1) Statute International Court of Justice.

D. The death penalty, as an exception to the right to life

i. The right to life

The right to life is one of the core human rights for without life no rights. In article 3 of the Universal Declaration on Human Rights (UDHR) it reads:

> Everyone has the right to life, liberty and the security of person.

Given that most of the provisions of the UDHR have matured into fully binding rules of customary law[16] one might hold that the right to life as formulated here is unconditional since it does not contain an exception like the death penalty. The history of this article, however, makes it clear that such exception was left out for fear that it might be interpreted as approving the death penalty whereas in some states an abolitionist movement had gained strength. There is no doubt, however, that the death penalty at that time was viewed as a necessary evil.[17] This is clear from the first comprehensive human rights instrument namely the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) were the exception is made:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life internationally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.(2(1))

This, however is not the only exception for it also makes exceptions for other functions of the state involving its monopoly on the use of force internally for reasons of self-defence, for instance by the police in the course of an arrest, or externally when a state orders people to use force in self-defence of the state

> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (1) in defence of any person from unlawful violence;
> (2) (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (3) (c) in action lawfully taken for the purpose of quelling a riot or insurrection.(2(2))

A similar formulation as in article 2 paragraph 1 we find in Article 6 ICCPR:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. (1)

16 E.Riedel, commentary in: B. Simma, *The Charter of the United Nations, A Commentary* (2002) at pp. 926-927.

17 "(T)he death penalty was viewed virtually unanimously as a necessary evil, one whose existence could not be justified on philosophical or scientific grounds.", Schabas, *The Abolition of the Death Penalty in International Law* (1997), at 43.

Different from the ECHR the ICCPR does not make explicit exceptions for the cases described in paragraph 2. These appear to be covered by the rather open formulation "arbitrarily deprived of his life." Paragraph's 2-6,[18] however, all but one concern the death penalty and are more detailed than the corresponding clause in the ECHR. The careful phrasing clearly shows that this exception to the right of life is the result of a difficult and lengthy debate. Although the ICCPR was only adopted in 1966 there already was agreement on the contents of article 6 in 1957.[19] Interestingly in two sub-paragraphs there is a reference to abolition of the death penalty. Indirectly it shows the central importance that is attached to the right to life.

ii. Further steps: the protocols

For the European area two factors combine to a complete abolition of the death penalty, namely the speedy adoption of the two protocols – Protocol 6 (1983) and Protocol 13(2002) – on the death penalty and the fact that the former East European Countries that wanted to join the Council of Europe had to become party to all the Protocols to the ECHR, including the one on the death penalty, as expressed in Resolution 1044(1994) of the Council of Europe.[20]

In 1982 the Committee of Ministers of the Council of Europe mandated its Steering Committee for Human Rights to prepare a draft additional protocol to the ECHR abolishing the death penalty in peacetime.[21] This Protocol was opened up for

18
- In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.(2(2))
- When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.(2(3))
- Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of death may be granted in all cases.(2(4))
- Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.(2(5)
- Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.(2(6)).

19 Schabas, ibid. at 48-49.

20 "The adequate implementation of the additional protocol to the European Convention on Human Rights should be a matter of continuous concern to the Assembly and the willingness to ratify the protocol be made a prerequisite for membership of the Council of Europe." (Para. 6, Resolution 1044 (1994) Council of Europe).The abolition of the death penalty was realized "... firstly de facto (obligation for any acceding state to adopt a moratorium on executions) and then de jure (signature, followed by ratification, of Protocol No 6 within three years)." R.Badinter, Moving towards universal abolition of the death penalty, in: Council of Europe, *Death Penalty, beyond abolition* (2004), at 8.

21 Hans Christian Kruger, Protocol No.6 to the European Convention on Human Rights, in *Death Penalty, beyond abolition*, Council of Europe (2004), at. 88.

signature in 1983. It entered into force on 1 March 1985. Important of this protocol is the fact that the abolishment of the death penalty is directly applicable, that no reservations to the protocol are allowed and that no derogation is possible in time of emergency. Under Protocol 6, however, death penalty states could make provisions that the death penalty is authorized for acts committed in *time of war or of imminent threat of war*. This led in 2002 to the adoption of an absolute prohibition in Protocol 13 concerning the abolition of the death penalty also during war in other words in all circumstances. The protocol entered into force on 1 July 2003.

Protocol 6 has been ratified by 45 states, only Russia has signed but not yet ratified. Russia, however has declared a "moratorium" on the death penalty in peacetime.[22] This means that regarding the peacetime abolition Europe is *de facto* death penalty free. Protocol 13 has been ratified by 36 states, but has not been ratified by Albania, France, Italy, Latvia, Moldavia, Poland and Spain. It has neither been signed nor ratified by Azerbaijan and Russia. For *time of war or of imminent threat of war*, the most relevant category for the ICC, Europe is death penalty free but for these states. For the states that have only signed Protocol 13 one might debate in what way Article 18 (on interim obligations) of the Vienna Convention on the Law of Treaties[23] already puts any limitation on their freedom to resort to the death penalty in time of war or of imminent threat of war.[24]

The development with regard to the abolition of the death penalty in the context of the ICCPR is, as can be expected from a global convention compared with a regional convention, more complicated. At the global level it developed that in favour of a gradual abolition were mainly the West European and South American states, whereas against were states as diverse as the United Sates, Japan and Islam oriented states like Iran. When it developed that there would not be a majority for a draft resolution to limit the instances in which the death penalty could be applied aiming at its gradual abolition, a resolution to that effect was not tabled.[25] Then the focus became foremost on the creation of safeguards for cases where the death penalty was being considered, like no death penalty for minors, mothers of young children, or people over the age of 70.

Finally in 1980 a draft protocol to abolish the death penalty was adopted by resolution of the General Assembly. In the debate leading up to the adoption of the draft 2nd Optional Protocol there appeared to be a stark division between those that wanted to keep the death penalty on the books (the *rentionists*) and those in favour of abolishing (the *abolitionists*). Within the former group there were Islamic states

22 "February 1996: Russia joins the Council of Europe. It commits to signing and ratifying the protocol to the European Convention on Human Rights banning it in peacetime. Russia has not done this to date but brings in a moratorium on the death penalty in 1998, and no death penalty sentence has taken place ever since". (www.coe.int/T/E/Com/files/CM_Chair-sessions/chair/russia/Presse.asp – 23k – 5 juni 2006.

23 Vienna Convention on the Law of Treaties (1969).

24 See for instance the discussion on interim obligation of the signatories of the Chemical Weapons Convention: J. Klabbers, "Strange bedfellows: the Interim Obligation" and the 1993 Chemical Weapons Convention(pp. 11-34) and the comments by E.W.Vierdag (pp.31-34);T. Marauhn, (pp. 35-45); J.Sztucki, (pp. 47-55) in E.P.J.Myjer (ed) *Issues of Arms Control Law and the Chemical Weapons Convention* (2001).

25 Schabas, ibid. at 160.

like Pakistan who argued that abolition would be contrary to Islamic law.[26] Given the divergent views it was not before 1989 that the 2nd Optional Protocol was adopted. The voting reflected the widely differing views, namely 59 voted in favour, 26 voted against with 48 states abstaining. The nature of the states that voted against is revealing and makes clear that there is still a long way to go before the European regional example of a death penalty free area will (if ever) be achieved.[27] The 2nd Optional Protocol entered into force in 1991. There are at present 33 signatories and 56 Parties, which is still relatively low. The most remarkable fact, however, was that despite the widely diverging ideological differences a protocol was adopted at all.

The central clause is clear:

- No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed. (1(1))
- Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction. (1(2))

Article 2 than makes an exception for time of war:

> No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. (2(1))

This therefore points to another important exception on the death penalty namely within humanitarian law. At present only a reservation by Azerbaijan is applicable.

It can therefore be concluded that, leaving aside the states that are only signatories, at the global level less than a third of the states have decided to renounce the death penalty. Only in certain regions like most of the Council of Europe the death penalty has been abolished. Also no rule of customary law, or of *ius cogens*, abolishing the death penalty can be identified either as demonstrated by the lengthy deliberations on the 2nd Optional Protocol, or for that matter on the Rome Statute. Although one may share Schabbas' optimism with regard to an increase in abolitionist states, however one cannot get around the large areas of the world were arguments in favour of a complete (also in wartime) abolition of the death penalty are met with strong resistance in states as diverse as the United States or Islamic ones "where an entranced and immutable religious doctrine insists upon the death penalty in certain cases."[28] In that sense I am less optimistic than Schabbas for whom his conclusion that the abolitionists have gained a majority[29] is central. However, also he

26 Schabas, ibid at 170.

27 Afghanistan, Bahrain, Bangladesh, Cameroon, China, Djibouti, Egypt, Indonesia, Iran, Iraq, Japan, Jordan, Kuwait, Maldives, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sierra Leone, Somalia, Syria, Tanzania, United States, Yemen, Malaysia (and Sudan that by mistake did not vote against). See UN Doc. a/44/824, UN Doc. a/44/PV. 82, p. 11. See Schabas, ibid at 175.

28 Schabas, ibid. at 307.

29 Schabas, ibid, 296.

recognizes that Islamic law is a serious obstacle to further developments[30] because of claims that is provided for in their religious law, a position which appears to gain in political endorsement in Islamic countries. Also the strong retentionist stream in the United States forms a serious obstacle.[31]

E. Possible conflicting principles

Now that it has been established that the possibility of a qualitative difference in penalty between a national sentence amounting to the death penalty and a sentence by the ICC cannot be ruled out on the ground that the death penalty conflicts with a conventional rule or with a rule of customary law, in particular *ius cogens,* the next question is whether the possible imposition of two qualitative different punishments for a crime within one regime does not conflict with one of the general principles of international law, another source of law as referred to in Article 38 of the Statute of the International Court of Justice. Is there some particular principle that can be identified that is applicable to criminal procedures and that sets a standard in this respect. In particular two possible principles spring to mind that might be relevant, namely the principle of legality and the principle of fair trial.

Within the regime of the ICC in Article 21[32] a three-tiered hierarchy[33] is established for the sources of the law to be applied namely the Statute, Elements of crimes and its Rules of Procedure and Evidence. The second tier are the applicable treaties and the principles and rules of international law. The third tier then encompasses the general principles of law to be derived from the national legal systems. This category, according to Schabbas, "rather generally corresponds to the sources of international law set out in Article 38 of the Statute of the International Court of Justice (ICJ),

30 Schabas, ibid.

31 See E.Claes & T. Daems, *De Doodstraf in Amerika en de grenzen van het Europese abolitionisme* (The death penalty in the United States and the limits of the European alolitionism), 2005 *Delict en Delinquent*, pp. 703-721),who point to the fact that a refined international law with its different and refined human rights instruments as such is not sufficient to convince the US retentionists. They wonder how the death penalty can be denied a future when that same international law does not have enough moral status to realize an abolitionist policy. They look at cultural aspects both in Europe and the US and they critically analyze the due-process arguments and the argument that the death might lead to closure with the victims.

32 1. The Court shall apply:
   (a) In the first place, this Statute, Elements of crimes and its Rules of Procedure and Evidence;
   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."(Art 21 (1).

33 W.A. Schabas, *An Introduction, to the International Criminal Court*, at 91.

although the wording is quite original."[34] The third tier of hierarchy would then point to domestic law.[35]

Schabas obviously wants to make sense of the three categories mentioned in Article 21, but the general principles of law to be derived from national systems, should at least also be viewed in connection with the second tier , for these very principles may lead as "general principles of law recognized by civilized nations (38(1(c) to recognized principles of international law. Brownly, basing himself on Oppenheim, is of the opinion that the reference to the general principles of law in Article 38 Statute primarily relates to the application by the International Court of Justice of the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States.[36] The general principles of international law may refer to these principles or to customary law principles as in the case of fundamental principles that are regarded as *ius cogens*.

i. The principle of legality

With regard to material criminal law in the European Convention for the Protection of Human Rights the principle of legality is laid down in Article 7,[37] where it is held that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. This is also referred to as the *nullum crimen sine lege* principle. Article 15 of the International Covenant on Civil and Political Rights expresses the same in Article 15.[38] Also the Universal Declaration on Human Rights pronounces this principle.[39] In the same way in the Rome Statue we find this principle in Article 22:

> A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. (Art. 22(1).

And with regard to the actual punishment the Rome Statute also states the *nulla poena sine lege* principle:

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34 Ibid.

35 Ibid at 92.

36 I.Brownlie, *Principles of Public International Law* (2003), at 16.

37 "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed..."(Article 7).

38 "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed ...."(Article 15).

39 "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." (Article 11(2)).

> A person convicted by the Court may be punished only in accordance with this Statute (Art. 23)

In the European Convention for Human Rights the principle of legality with regard to when a public authority is allowed to impinge upon fundamental rights can for instance be found in the references in Articles like 5 (right to liberty and security) "and in accordance with a procedure prescribed by law" or 8 (right to respect for family and private life): "There shall be no interference by public authority ... such as is in accordance with the law".

Similar principles can also be found in national legal systems. These are fundamental principles that, in other words, lay down that an individual should know in advance, before he or she performs a certain act, that such an act is contrary to the law and that acting may involve a prosecution leading to a conviction and a sentencing. An element thereof is that this person will know in advance what the punishment may involve or on what grounds a public authority may act contrary to certain rights.

The law, in this sense, has to be viewed on the national level as the rule adopted according to the mechanism accorded by the national constitution (i.e. the parliamentary system) in other words via Hart's secondary rules.[40] The principle of legality clearly falls in the second tier as a principle of international law and can therefore be regarded as a strong principle. The question to be answered is what does it exactly amount to in the case of the death penalty in cases where the complimentarity principle under the Rome Statute is applicable and a case is tried at the national level?

In the case that at a national level a court that has jurisdiction for any of the crimes referred to in Article 5 Rome Statute (the crime of genocide; crimes against humanity or war crimes) and that can in accordance with the national law of that state impose the death penalty and that state is not bound by any international obligation (because it is a party to one of the relevant human rights Protocols) to abolish the death penalty this clearly answers to the principle of legality. This principle is also not breached when that particular state is also a party to the Rome Statute for there can be no misunderstanding that the very complimentarity principle gives priority to that state's national jurisdiction. The principle of legality in this respect only demands that the suspect should know in advance to the commission of one of these crimes, or at least would have access to such knowledge, that this is the law of his or her nation state.

This being the rule, it could be argued, however, that the principle of legality by its nature encompasses the element of legal certainty, for it is not sufficient to only know what the rules are and what the possible consequences are of a breach of those rules, but also how these rules are going to be applied. It may be argued that although a clear road map is presented to the individual, it is not clear in advance whether the national road or the international one will be used. It may be clear that the primary jurisdiction is the national one, but there is no guarantee that this will in fact be the case, or whether it will be properly applied. It is for that very reason that the complimentary jurisdiction of the ICC was introduced to allow for prosecution if the national state failed to do so. And even if the national jurisdiction has been applied

40 See H.L.H. Hart, *The Concept of Law* (1961), especially pp. 77 onwards.

the national (death penalty) state may have decided not to have a *genuine* investigation or prosecution in order to protect the suspect. If in that case the ICC would take over, the suspect in question would be in a more advantageous position than the one that is sentenced under the national jurisdiction and given a death penalty, for the ICC would not be able to pass a death sentence. (The very shielding might lead via ICC involvement to even further shielding!) However, when there appears to have been a *genuine* trial in the case of an individual who is convicted to death, there would not be such a "remedy'.[41]

For although the ICC is not meant as a second instance, its very involvement in such a case effectively comes down to acting as such. In such cases the only international instance that could be involved might be a human rights supervisory body on grounds like breach of the right to a fair trial, or the right to appeal to a higher instance. All that would be dependent on the instruments to which the state of jurisdiction is a party. In other words the complimentarity principle leaves a suspect's national state room for manoeuvre. This is contrary to the element of legal certainty. The argument that the uncertainty is known in advance is fallacious, for then nothing would be left of that very principle. Where the inequality in penalties can not be regarded as *contra legem,* the inequality with regard to possible ICC involvement appear contrary to this principle of law. Another principle of law that might come into play is the related principle of fair trial.

ii. The principle of a fair trial

Where the principle of legality encompasses both the *material* aspect as well as the *procedural* aspect, the principle of fair trial is about the procedural aspect. Articles like 6 ECHR or 14 ICCPR set a minimum standard to which a person is entitled, like the right of access to an independent and impartial court established by law, a fair and public hearing, procedural equality, a judgement within a reasonable time or a reasoned decision. These procedural requirements should of course be in accordance with the legality principle.

The incorrect application of these criteria might lead to a national redress via an appeal or internationally to an appeal with a regional human rights court like the European Court for Human Rights, or to an appeal with the Human Rights Committee. In case of a complaint before one of these international supervisory bodies, this might result in a judgement (or view) that finds a breach of the fair trial principle, but not to the conclusion that in a particular case the national judge should have decided on a punishment other than the death penalty. It would then be up to the national state to choose the means whereby it will comply with the judgement/decision of the supervisory human rights body, like compensation or a review of the case.

It would be interestingly to see whether either after such judgement/decision

41 It might be defended, however, that in a case whereby the state of nationality that has denied all the fundamental procedural rules and has convicted someone to the death penalty, the ICC via an extensive interpretation of the complimentarity rule should regard itself competent to hear the case. Such option appears rather theoretical for it does not seem likely that in that case the state of nationality would hand over the convicted individual, which would be necessary ex. Article 63 Rome Statute to have a trial. It might however lead to a "mobilization of shame".

by a human rights supervisory body, or even without, the ICC might regard itself competent to hear the case arguing that these procedural mistakes amount to an unwillingness to genuinely carry out the investigation or prosecution thereby basing its jurisdiction on Article 17(2). Given the very explicit reference to the principles of due process recognized by international law and the specific instances mentioned this certainly could be argued. It then seems clear that if the ICC finds that there is a case of possible or proven deficiencies of a procedural nature that amounts to an Article 17(2) case it might hear the case. In that case a possible breach of the principle of a fair trial coincides with the instances of Article 17(2).

In cases of clearly described procedural requirements also the principle of legality is involved. But arguing along these lines has a surreal dimension from the perspective of the death penalty, for it seems that the arguments could only be applied in cases where a person appears to be shielded , which logically is not the case when that person has been sentenced to death. For the whole point of this clause in conjunction with the complementarity principle is to prevent a person from being shielded by its national system and that is exactly not the case with a capital punishment. In other words a strict application of the procedural criteria by the national court and an ensuing capital punishment might lead the ICC to an inadmissibility, whereas "under performance" by the national court of, for instance, "the proceedings were not or are not being conducted independently or impartially" (17(2(c), might lead to ICC involvement and a lesser penalty. Both from the point of view of the principle of legality and from the principle of fair trial this result is unsatisfactorily. This leads me to formulate an additional principle to be taken into consideration namely *the principle of coherence.*

VI. In conclusion: a principle of coherence

Although it cannot be held that there is a full breach of the principle of legality, the fact that an individual does not have a clear roadmap of how a possible prosecution within a single comprehensive legal regime might take place prior to his or her acts that might amount to one of the crimes within the jurisdiction of the ICC, this at least amounts to a lack of legal certainty which forms part of this principle of legality. Given that this lack of legal certainty concerns the procedural aspects it brings into play the principle of the right to a fair trial. Both these principles are involved now that it is has been made clear that the ICC may only be involved in a 'national case" when there is a minimum sentence (*de minimis)* but not when there is a maximum sentence like the death penalty *(de maximis)*. The very Rome Statute creates this possibility that the ICC will only assume that there is a case of *unwillingness to genuinely carry out an investigation or prosecution* against an individual when there is a minimum sentence intended to shield the individual. Since this may be dependent on a policy decision by the state of national jurisdiction, such a policy decision may determine whether or not the ICC may become involved. This presents the individual with insufficient legal certainty. In order to bridge this gap it seems also necessary when there is doubt as to the intention of the state of jurisdiction with regard to the necessary degree of independence and impartiality in the national proceedings leading to a maximum sentence to allow for involvement of the ICC, for such would be a coherent application of the rules laid down in Article 17(2).

One could call this the principle of coherence the logic of which is dictated by the fact that the Rome Statute has created one regime, within which the ICC should try to exclude as far as possible all possible negative effects of any national policy decisions on the outcome of a prosecution .The application of the principle of cohesion can bridge these conflicting aspects via a more coherent procedure. Legal coherence thereby is both a procedural requirement of fair trial and one of legality. It points to the necessity that a procedure is in all respects coherent and fair both from the point of view of the suspect as well as from the prosecutor. The point is not to eliminate different penalties, but to create equal justice by piercing the national shield, in order that all suspects are treated in the same way and that not some suspects can count on better national protection.

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Section 17

Appeal and Revision Procedures

Chapter 41

Standards of Appeals and Standards of Revision

José Doria

Introduction

The basic foundation on which lies any credible system of justice has always is its set of axioms embodying the principle of legality such as *ne bis in idem, res judicata, and in dubio pro reo*. It can be said that it is the balanced combination of these axioms that has prompted domestic societies and the international community as whole to develop judicial forms of redress of previous decisions, since these are principles that would normally act as swords of two sides.

On the one side the principles *ne bis in idem, res judicata*, *in dubio pro reo,* appear favorable to the accused, in the sense that they justify the prohibition of revision of any decision finally taken by a court of justice (this would be the particular case of acquittals or lenient sentences). However, the same principles might also play against the interests of the accused and justice, if decisions finally taken by a court of justice are instead vitiated by errors of proper procedure, law or fact that *cause prejudice*, *invalidate the decision* or represent a *miscarriage of justice*. In these circumstances, there is little merit in arguing about the sanctity of the principle of *res judicata, as* "the principle of *finality* must be balanced against the need to avoid a *miscarriage of justice*."[1]

Since the principles *ne bis in idem*, *res judicata* and *in dubio pro reo* are generally considered as the norm, revision of final decisions will normally be unwarranted unless there are sufficient reasons for doing so. The mere recognition of lawful grounds on which a previous decision can be appealed and/or revised or even the actual finding that a procedural error, an error of law or fact has indeed been committed will not be sufficient to invalidate a previous lawfully taken decision, exactly because of the sanctity of the principle of *res judicata.*

As the Appeals Chamber of the ICTY has variously stated:

> It is not any error of law that leads to a reversal or revision of the Trial Chamber's decision; rather, the appealing party alleging an error of law must also demonstrate that the error renders the decision invalid[2]

1 *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Appeal Decision, 31 March 2000, Separate Opinion of Judge Shahabuddeen, at para.11.

2 *Prosecutor v. Anto Furundžjia*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 36. (hereinafter, *Furundžjia* Appeal).

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Similarly "it is not any and every error of fact which will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but one which has let do a miscarriage of justice."[3] "The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence."[4]

All this makes the work of assessing under which standards, decisions of trial chambers should be reviewed of the utmost importance, since they represent the crucial test enabling the disturbance of a *res judicata* on appeal or revision procedures.

Before reaching conclusions on standards of review in appeal and revision procedures, this chapter will proceed with a historical survey of the codification of appellate procedures in international law generally, followed by a review of grounds of appeal and how they interact with the standards of sppeal. In the last two sections the same will be done in relation to the standards of revision.

I. Historical survey

It can be said that the codification in international law of the right of indigent accused to Appeal a decision of a lower international court started only with the establishment of the *ad hoc* Tribunals. Its antecessors, the Nuremberg Tribunal[5], the Tokyo Tribunal[6] and the courts established on the basis of Control Council Law 10[7], did not envisage any appellate procedure.[8]

However, subsequent developments in the field of human rights stressed the need for an appeal procedure in international judicial forums. This right was rec-

3 *Furundžjia* Appeal, para. 37.

4 *Furundžjia* Appeal, para. 37.

5 Indeed Article 26 of the Nuremberg Statute provided that "The Judgement of the Tribunal as to guilt or the innocence of any defendant shall give the reasons on which it is based, and shall be final and not subject to review." See Charter of the International Military Tribunal (the Nuremberg Tribunal), 8 August 1945, Text reprinted in D. Schindler & J. Toman, (eds.), *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, Martinus Nijhoff Publishers, 1988, at 912-919.

6 Article 17 of the Statute of the Tokyo Tribunal held: "The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity". See Charter of the International Military Tribunal for the Far East (the Tokyo Tribunal), 19 January 1946, in The Tokyo War Crimes Trial, (annotated, compiled and edited by Pritchard, R. John and Zaide, Sonia Magbanua), Garland Publishing Inc., New York & London, 1987,Vol.1 Pre-Trial Documents: Transcript of the Proceedings in Open Session, pp. 1-2.

7 Article 3 of Control Council Law 10, held: "Any persons found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just." See Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (20 December 1945), *Official Gazette of the Control Council for Germany*, No 3, Berlin, 31 January 1946 ('CCL No. 10').

8 However, both Statutes provided for a right of commutation of sentences. See Article 29 of the Statute of the Nuremberg Tribunal, and Article 17 of the Tokyo Tribunal.

ognized in the UN Covenant on Civil and Political Rights of 1966,[9] the American Convention on Human Rights of 1969,[10] and the Protocol nr 7 to the European Convention on Human Rights of 1984.[11]

Although human rights conventions are primarily intended to universalize the conduct of states vis-à-vis their own citizens, those provisions apply the more so in cases adjudicated by international criminal institutions.

Therefore when in 1993 and in 1994 the UN SC decided to establish international criminal tribunals to try perpetrators of serious violations of international humanitarian law committed on the territory of the former Yugoslavia and Rwanda, respectively, a similar provision concerning appeal and revision procedures was introduced. Additionally for sake of consistency of the appellate jurisprudence, a single Appeals Chamber was convened for both sister tribunals.[12]

A. Developments at the ICC

Similar developments occurred with the draft ICC Statute. Indeed an appeal and revision procedure for the International Criminal Court was introduced since the very first draft prepared by the International Law Commission.[13]

However, states parties had difficulties reaching an agreement on the scope of the appeals rights conferred upon the parties under the ICC Statute. In particular, the options discussed during the preparatory work were whether or not to allow:

a) only cassation (i.e. the right to reverse or confirm the appealed judgement only, without amending it), or full appeals (i.e. including the right to amend the previous judgement);
b) review of only points of substantive law, or also factual, procedural issues and other grounds;
c) appeals against both types of verdicts (conviction or acquittal), or only against convictions (but not acquittals);
d) appeals against sentences only, or against both sentences, and verdicts;
e) appeals against verdicts and sentences or also against interim decisions, refusal to grant release from custody and reparation decisions;
f) appeals in all circumstances or through procedures of request of leave to appeal;
g) not only appeals but also revisions;
h) revisions of acquittals or only of convictions and sentences;
i) revisions based on new facts only or also based on new evidence, and other grounds.

9 Article 14(5), UN Covenant on Civil and Political Rights, 1966.

10 Article 8(2)(h), American Convention on Human Rights, 1969.

11 Article 2, Protocol 7 to the European Convention of Human Rights, 1984.

12 See respectively Articles 25 (ICTY Statute) and 24 (ICTR Statute).

13 See Article 48 and 49 of the ILC Draft of the ICC Statute, available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf.

The text ultimately adopted in Rome allows full appeals not only cassation.[14] It allows appeals both against interim[15] and final[16] decisions. It allows appeals against convictions, and acquittals, or sentences[17] and reparation decisions.[18] In terms of substance appeals are allowed not only on points of law, facts or procedure, but any other valid grounds regarding, for example, the fairness of proceedings.[19] Appeals for certain types of interim decisions are subject to a procedure of leave to appeal.[20]

The Rome Statute of the ICC allows post appeals Revisions but only of convictions and sentences (excluding acquittals), based on grounds of new facts,[21] false, forged, or falsified evidence, and serious misconduct or breach of a judge's duty.[22]

II. Grounds of Appeal v. Standards of Appeal

There is sometimes confusion made between grounds of appeal and standards of appeal. Although these terms of art are related they are not the same, and it is important that the distinction between them is clearly made.

Grosso modo, grounds of appeal are intended to reflect *the basis* on which an appeal can be brought against a decision of the Court, whereas standards of appeal relate to the *tests* that need to be met, for a successful ground of appeal.

Whereas grounds of appeal are normally indicated in the statutes of the international tribunals, standards or tests of appeal, apart from being codified in the text of the statutes are also a product of the development of the jurisprudence of the international tribunals and reflect either customary law or general principles of law accepted by the principal legal systems of the world. It is normally up to the Appeals Chamber as the final arbiter of the law consistent with the principle "*jura novit curia*", to determine which test the parties need to meet in order to win a ground of appeal. In this law-finding process judges are richly assisted by the submissions of the parties.

There are two recognized distinct groups of grounds of appeal and standards of review on appeals.

Depending on whether or not the decisions appealed are final (verdicts or sentences) or interim (other decisions), grounds and standards of appeal may be distinguished between grounds and standards of appeal for final decisions and for interim decisions. And depending on whether or not the final decision appealed is one of

14 Article 83(2), Rome Statute of the ICC.

15 Article 82, Rome Statute of the ICC.

16 Article 81, Rome Statute of the ICC.

17 Article 81(1) (2), Rome Statute of the ICC.

18 Article 82(4), Rome Statute of the ICC.

19 Article 81(1) (2), Rome Statute of the ICC.

20 Articles 82 (1) (d); 82 (2), Rome Statute of the ICC.

21 As will be seen further below, the issue of whether revisions under the ICC Statute are only allowed on grounds of new facts (the French text of the ICC Statute refers to new facts) or also new evidence (the English text of the ICC Statute refers to new evidence) is not easy to solve. See *infra* section V.

22 Article 84, Rome Statute of the ICC.

verdict or sentence we will also have respectively grounds and standards of review on Appeals against judgements of verdicts, and those grounds and standards of review against sentencing judgements.

III. Grounds of Appeal for Final Decisions

The history of codification of international procedure law shows that whereas some of the grounds of appeal are normally provided in the statutes of the international tribunals, the list is normally not exhaustive but indicative, and the chambers with the help of the parties may add legitimate grounds of appeal missing from the statutory provisions. This is, as we will see, one of the essential features that distinguishes grounds and standards of appeal (that can be added and developed) from grounds and standards of revision (that cannot).[23]

For example, the statutes of the *ad hoc* tribunals provide for the following two grounds of appeal: a) error on a question of law invalidating the decision, b) error of fact which has occasioned a miscarriage of justice.[24]

The initial draft ICC Statute prepared by the International Law Commission provided for 4 different grounds of appeal: a) procedural error, b) error of fact, c) error of law, d) disproportion between the crime and the sentence.[25]

The Statute of the Special Court for Sierra Leone provides 3 grounds of appeal: a) procedural error, b) an error on a question of law invalidating the decision, c) an error of fact which has occasioned a miscarriage of justice.[26]

The ICC Statute allows appeals under the following grounds: a) procedural error, b) error of facts, c) error of law, d) any other ground that affects the fairness or reliability of proceedings or decisions, e) disproportion between the crime and sentence.[27]

It would appear that the list of grounds of appeal in the ICC Statute was intended to be exhaustive, (by being non-exhaustive), in order to allow appeals on any possible ground. Commentators have discussed the implications of the inclusion of "any other ground that affects the fairness or reliability of proceedings or decisions" that is restricted to reviews on appeal of convictions in favor of the accused, under Article 81(1)(b)(iv) of the ICC Statute. The question is whether or not any such ground could also be understood as included in the wider ground of "procedural error" to enable the Prosecutor to bring appeals also on this basis. Commentators note, for example, that whereas procedural errors ought to include only any formal violations of the Statute and the Rules of Procedure, "grounds that affect the fairness or reliability of the proceedings or decision" would normally "be substantive". Accordingly, "these grounds may relate to the trial in open court, equality of arms, or self-incrimination, the accused's right to be legally represented and to cross-exam-

23 On Standards of Revision see *infra* further section V.

24 See Article 25, ICTY Statute, and Article 24, ICTR Statute.

25 See Article 48 of the 1994 ILC Draft Statue of the ICC.

26 See Article 21 (1), Statute of the Special Court for Sierra Leone, adopted 16 January 2002.

27 See Article 81, ICC Statute.

ine prosecution witnesses, there may be circumstances personal to the accused or his legal representative, or a conflict of interests among others."[28]

However, in my view there should be no problems since none of the enumerated "any other grounds" of appeal would be covered by "the procedure" or "law" of the Court. Therefore, they should in principle be covered, by grounds of error of law or procedural error. At least this has been the approach of the appeals chambers of the *ad hoc* tribunals that have allowed appeals on grounds not specifically indicated as "procedural error" or "error of law".[29]

IV. Standards of Review for the Different Grounds of Appeal and Different Judgements

In the absence of its own jurisprudence on final decisions in the ICC, it makes sense reviewing the scope of the different grounds of appeal as they have been developed by the case law of the *ad hoc* Tribunals. However, concerning interim decisions, the review will be made based on the developing ICC Appeals jurisprudence.

A. Some general remarks on common features of standards of review on appeal

In appeals against verdicts (both convictions and acquittals) the jurisprudence of the *ad hoc* tribunals has developed a refined system of standards for entertaining any of the recognized grounds of appeal: error of law, error of facts, procedural error or errors on any other grounds.

One general feature of all standards of review on appeal (an exception is only made for errors of law in one case described below) is that they are *result oriented*, in the sense that it is not enough to prove that an error was indeed committed. More importantly is to prove that the error had a *substantial negative* impact on the final verdict or sentence. This is to reflect the principles described above of *res judicata*, *in dubio pro reo*, *ne bis in idem*.

Accordingly, from this point of view, one element that runs across all standards of review is that tests of review always have two aspects: one is an *operative* aspect, and the second, the technical aspect. The operative part works to show that there was indeed an error (a violation of the applicable law or conduct), whereas the technical aspect works to prove that there was a miscarriage of justice or prejudice to the accused. Both must be met in order to win an appeal.

A second important feature of standards of review (other than those applicable to findings of errors of law) is that they are standards of *reasonableness, discretion* and *persuasion* rather than standards of *correctness*, in the sense that triers of facts are not required to reach the *only possible conclusion*, but only one out of many possible

28 See Robert Roth, Marc Henzeline, The Appeal Procedure of the ICC, in *The Rome Statute of the International Criminal Court: A Commentary*, (A. Cassese *et al*. eds), Oxford University Press, 2002, 1535, at 1544, 1545.

29 See *Prosecutor v. Dragoljub Kunarac,* Radomir *Kovač, Zoran Vuković,* Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para 38, (hereinafter, *Kunarac* Appeal) (noting that "Where a party contends that a Trial Chamber has made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether such an error of substantive or *procedural law* was in fact made.") (Emphasis added).

outcomes (this also applies even if some other possibilities, more favourable to the appellant, were reviewed by the trier of facts, but which decided ultimately not to pursue with them). Therefore, provided that the respondent party can prove *persuasively* that the conclusion reached by the trier of facts is at least *one reasonable possibility out of many*, it does not matter whether or not there were some other more favourable possibilities to the appellant (the accused or the prosecution).

A third feature of all standards of review on appeal including appeal on errors of law is *sequencing*, in the sense that the Appeals Chamber will not jump into conclusions about the consequences of an error unless it first found that an error was indeed committed (*test of appeal*), and second, the Appeals Chamber will not find whether an error was indeed committed (*test of appeal*) unless the ground of appeal is properly and well documented from a formal procedural point of view (*test of sufficiency*). Appeals submissions filed undocumented are *prima facie* considered as unfounded and dismissed *tout court*.

It is only when an appellant party had succeeded in proving all these three features that he can be considered to have met the required burden of proof on appeal, which is one of *beyond a reasonable doubt*, and his appeal submissions can be entertained.

Therefore, from this point of view it is fair to assume that a successful appeal submission needs to meet both certain procedural and substantive requirements. In this case the *test of sufficiency* of the ground of appeal (i.e. when well-documented and other formalities are respected), will be the procedural requirement, whereas the *test of appeal* properly, the substantive one. An appeal submission that fails to meet the relevant procedural requirements (for example, appeal submissions outside the time limit required, or which suffer from vagueness) will be dismissed even before the case enters the merit, and even when there were *prima facie* reasons to believe that an error was indeed committed.

The one exception for tests of review on errors of law

Out of these general rules, appeal submissions on grounds of errors of law have two additional distinctive features regarding the *test of appeal* properly: one is that, *lack of sufficiency of arguments* on errors of law does not relieve it of the merit of being considered.[30] This is so because appeals ahambers are considered to be the final arbiters of law, according to the principle *jura novit curia*, and also because the substantive requirement for the test of review on errors of law is *correctness* rather than *reasonableness* or *persuasiveness*, even less *discretion (*as it happens with other grounds).

The second feature is that *lack of proof of a result*, does not necessarily invalidate the ground of appeal on errors of law, if the Appeal may help to clarify important points of law.

Accordingly, the test of review on grounds of errors of law can be considered (as opposed to the tests for other grounds of appeal) an *inchoate test*, and errors of law *inchoate grounds of appeal*, since their admission does not depend on whether or not they can invalidate the verdict and sentence.

30 However, lack of sufficiency of arguments for a test applicable to any other ground of appeal will invalidate the ground of appeal.

The following detailed discussion of standards of appeal will help to prove the thesis elaborated above. For ease of analysis and understanding the standards of appeal will be reviewed below separately, first judgements of verdicts, then sentencing judgements and lastly for interim decisions.

B. Grounds and standards of appeal against verdicts

A great deal of appeal submissions do normally relate to verdicts (convictions or acquittals). This is particularly so because a successful appeal against a verdict is normally reflected in the sentencing unless some other circumstances are considered.

This chapter will review the standards of appeal for verdicts. Appeal submissions against verdicts can be entered on the following grounds: a) error of law invalidating a decision, b) error of facts occasioning a miscarriage of justice, c) errors of procedure causing prejudice, d) errors based on any other grounds occasioning a miscarriage of justice or causing prejudice

i. Standards of review for grounds of appeal based on errors of law

The jurisprudence of the *ad hoc* tribunals has been consistent in affirming that the test for entertaining an appeal for errors of law is threefold:

a) first the issue is not whether or not the findings of the Trial Chamber were persuasive or reasonable (as the Prosecution has once submitted[31]), but whether or not the findings of law were correct;[32]
b) second if the findings of law were incorrect the issue is whether they invalidate the decision;[33]
c) and third, if the findings were incorrect and yet did not invalidate the decision either, the issue is whether nonetheless entertaining an appeal alleging errors of law is worth, because it raises issues of general importance.[34]

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31 *Furundžjia* Appeal, para. 30

32 *Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-A, Judgement 17 September 2003, para. 10 (hereinafter *Krnojelac* Appeal); *Prosecutor v. Tihomir Blaškić*, Case It-95-14-A, Judgement, 29 July 2004, para. 14 (hereinafter, *Blaškić* Appeal).

33 *Kunarac* Appeal, para. 38.

34 In *Akayesu* the Appeals Chamber held: "23. [...] On the other hand, [the Appeals Chamber] may deem it necessary to pass a decision on issues of general importance if it finds that their resolution is likely to contribute substantially to the development of the Tribunal's jurisprudence. The exercise of such a power is not contingent upon the raising of grounds of appeal which strictly fall within the ambit of Article 24 of the Statute. In other words, it is within its discretion. While the Appeals Chamber may find it necessary to address issues, it may also decline to do so. In such a case (if the Appeals Chamber does not pass on an issue raised), the opinion of the Trial Chamber remains the sole formal pronouncement by the Tribunal on the issue at bar. It will therefore carry some weight." See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 23 (hereinafter, *Akayesu* Appeal).

See also *Krnojelac* Appeal, para. 8 (noting that: "The main concern is to ensure the development of the Tribunal's case-law and the standardisation of the applicable law. It is appropriate to consider an issue of general importance where its resolution is deemed important for the development of the Tribunal's case-law and it involves an important

Only when any of these three tests is met, will the Appeals Chamber entertain an Appeal on errors of law.

a. Standards of review and the issue of sufficiency of arguments alleging errors of law distinguished

In addition, the issue of the relevant test for errors of law should be distinguished from the issue *of sufficiency of arguments alleging errors of law*. In the later case "if a party's arguments do not support its contention, that party does not automatically lose its point since the Appeals Chamber may intervene and, for other reasons, find in favour of the contention that there is an error of law."[35]

b. Standards of review and the issue of sufficiency of grounds of appeal distinguished

Standards *of review on appeal* should also be distinguished from standards of *sufficiency of the ground of appeal*. While both go to satisfying the burden of proof on appeal (beyond reasonable doubt) necessarily lying on a party alleging an error of law, the later relates to the way in which the ground of appeal is formulated.

The Appeals Chamber in *Krnojelac* recognized based on the case-law of the *ad hoc* tribunals that "the burden of proof on appeal is not absolute with regard to errors of law. Nevertheless, the party alleging an error of law must, at least, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised is not *a priori* legitimate and may therefore be rejected on that ground.[36]

There is therefore no point whatsoever in a party duplicating the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber, in order to justify the Appeals Chamber intervenion.[37] Nor will the appeals chambers "consider the parties' claims in detail if they are obscure, contradictory or vague or if they are vitiated by other blatant formal defects."[38]

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point of law that merits examination."; See also *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić*, Case IT-95-16-A, Judgement, 23 October 2001, para. 22 (hereinafter *Kupreškić* Appeal).

35 *Blaškić* Appeal, para. 14; *Jean Kambanda v the Prosecutor*, Case No. 97-23-A, Judgement, 19 October 2000, para. 98 (hereinafter, Kambanda Appeal); *Prosecutor v. Miroslav Kvoćka, Mlado Radić, Zoran Zigić, Dragoljub Prcac*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 16 (hereinafter *Kvoćka* Appeal); *Prosecutor v. Dario Kordić, Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 17 (hereinafter, *Kordić* Appeal); *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 6 (hereinafter, *Vasiljević* Appeal); *Laurent Semanza v. the Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 7; *Kupreškić* Appeal, para. 26; *Furundžjia* Appeal, para. 35.

36 *Krnojelac* Appeal, para. 10, *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 2 March 2006, para. 8 (hereinafter, *Stakić* Appeal).

37 *Kupreškić* Appeal, para. 27.

38 *Prosecutor v. Ivica Mariazić & Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27

In the *Krnojelac* case, the Appeals Chamber agreed with the Prosecution that the Defence brief has failed to meet the burden of proof if it lacks clarity as to the alleged errors or law or fact and that in relation to various factual issues, the accused presents the arguments raised at trial without referring to any part of the judgment and without identifying in its analysis or submissions any error occasioning a miscarriage of justice. The Appeals Chamber noted that the question was "whether the Defence has presented grounds of appeal that are invalid in accordance with the Tribunal's case-law and are thus to be rejected outright because the Defence has not satisfied the review criteria on appeal."[39]

In the *Kunarac* case, the Appeals chamber agreed and stated that "the appellant must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must be given references to paragraphs in Judgements, transcript pages, exhibits or other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made."[40] "Similarly, the respondent must clearly and exhaustively set out the arguments in support of its contentions. The obligation to provide the Appeals Chamber with exact references to all records on appeal applies equally to the respondent. Also, the respondent must prepare the appeal proceedings in such a way as to enable the Appeals Chamber to decide the issue before it in principle without searching, for example, for supporting material or authorities."[41]

Lack of these additional formal elements in an appeal submission will necessarily mean that the party has failed to meet its burden of proof on appeal and render its grounds of appeal invalid.[42]

c. Consequences of finding a legal error

When the Appeals Chamber finds that the Trial Chamber has committed an error arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber is required to articulate the correct legal standard and review the relevant factual findings of the Trial Chamber on that basis. To do so the Appeals Chamber will normally apply the new correct legal standard to the evidence in the trial record and determine whether or not it is itself convinced, beyond reasonable doubt, as to the factual finding challenged by the Defence before that finding is con-

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September 2006, para. 18; *Kunarac* Appeal, 46, *Krnojelac* Appeal, para. 16; *Blaškić* Appeal, para. 13.

39 *Krnojelac* Appeal, para. 17.

40 *Kunarac* Appeal, para. 44; *Prosecutor v. Clement Kayishema, Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement, 1 June 2001, para. 137 (hereinafter, *Kayishema* Appeal); *Juvenal Kajeljeli v. the Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 7 (herinafter, *Kajeljeli* Appeal); *Vasiljević* Appeal Judgement, para. 11; *Eliezer Niyitegeka v. the Prosecutor,* Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 10; *George Anderson Nderunbumwe Rutaganda v. the Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 19.

41 *Kunarac* Appeal, para. 45.

42 *Prosecutor v. Ivica Mariazić & Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006, para. 18; *Kunarac* Appeal, para.46, *Blaškić* Appeal para. 13.

firmed on appeal.[43]

This, however, does not amount to a review of the trial record *de novo,* rather it "will in principle only take into account ... evidence referred to by the Trial Chamber in the body of the Judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal."[44]

ii. Standards of review for grounds of appeal based on errors of facts

Regarding errors of facts, which are truly errors in the exercise of the Trial Chamber's discretion, there are two situations in which different standards of review are applied:

a) alleged errors on the factual conclusions the Trial Chamber reached based on the evidence submitted at trial;
b) alleged errors based on the submission of additional evidence that was not available at trial.

For the first type of situation (errors of facts based on the evidence submitted at trial) the test for entertaining an appeal is twofold:

a) the first test is "reasonableness", namely whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached;[45]
b) the second one is whether or not the error of law has occasioned a miscarriage of justice.[46]

Regarding the first test (reasonableness, or abuse of discretion standard), the appeals chambers of the *ad hoc* tribunals have variously reiterated that this test is justified since "the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence."[47]

Therefore, an appellant suggesting only a variation of the findings which the Trial Chamber might have reached "has little chance of a successful appeal, unless

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43 *Stakić* Appeal, para. 9; *Blaškić* Appeal, para. 15.

44 *Blaškić* Appeal, para. 13.

45 *Blaškić* Appeal para. 16; *Furundžjia* Appeal, para. 37, *Prosecutor v. Zlato Aleksovski* Case No. IT-95-14/1-AR77, Judgement, 30 May 2001, para. 63 (hereinafter, *Aleksovski* Appeal); *Prosecutor v. Zdavko Mucic, Hazim Delić, Ezad Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001, paras. 434-35 (hereinafter, *Čelebići* Appeal); *Alfred Musema v. the Prosecutor*, Case No. ICTR- 96-13-A, Judgement, 16 November 2001, para. 17.

46 *Furundžjia* Appeal, para.37; *Prosecutor v Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 64 (hereinafter, *Tadić* Appeal); *Kunarac* Appeal, para. 35-48; *Čelebići* Appeal, 434-435.

47 *Kupreškić* Appeal, para. 30; Kvoćka, 18.

it establishes beyond any reasonable doubt that *no* reasonable trier of fact *could have* reached a guilty finding."[48]

The Appeals Chamber also explained that under these circumstances it would not "lightly disturb findings of fact by a Trial Chamber."[49] This is so since it is recognised that "only the Trial Chamber is in a position to observe and hear the witnesses testifying and is thus best able to choose between two diverging accounts of the same event. First instance courts are in a better position than the Appeals Chamber to assess witnesses' reliability and credibility and determine the probative value of the evidence presented at trial."[50]

In relation to the second test (miscarriage of justice), the Appeals Chamber in *Kupreškić* held that "In order for the Appeals Chamber to overturn a factual finding by the Trial Chamber, an appellant must demonstrate that the Trial Chamber committed a factual error and the error resulted in a miscarriage of justice. The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime." Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice."[51]

Therefore, in order to be successful an appeal based on grounds of factual errors must meet both tests. It is not enough to prove that there was a factual error, it is also important to prove that in addition the error has occasioned a miscarriage of justice, for example, when a person is convicted for a crime that the Prosecutor has failed to prove with convincing evidence.[52]

No trial de novo

Likewise in proving unreasonableness of a trier of facts assessment of the evidence, an appellant must have in mind that Appeals Chamber will not act as trial *de novo*.[53] Since an "appeal is not an opportunity for the parties to reargue their cases. It does not involve a trial *de novo*"[54] there is "no point whatsoever in a party reiterating arguments which failed at trial on appeal, unless the party demonstrates that the fact that they were dismissed resulted in an error such as to justify the Appeals Chamber intervening."[55] "Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits."[56]

48 *Krnojelac* Appeal, para. 12.

49 *Kupreškić* Appeal, para. 32.

50 *Krnojelac*, para. 11.

51 *Kupreškić* Appeal, para. 29., See also *Kvočka* Appeal, para. 18; *Kunarac* Appeal, para. 39; *Furundžjia* Appeal, para. 39.

52 *Krnojelac* Appeal, para. 13.

53 *Furundžjia* Appeal, paras. 38-40.

54 *Kupreškić* Appeal, para. *22.*

55 *Krnojelac,* para. 15.

56 *Stakić* Appeal, para. 11.

Therefore, appellant submissions will be dismissed without detailed reasoning as unfounded where: a) the argument of the appellant is clearly irrelevant; b) it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appellant; c) or the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.[57]

iii. The standard of review for error of facts based on the submission of additional evidence that was not available at trial (new evidence)

a. The notion of new evidence

Article 83 of the ICC Statute provides that, when the ICC Appeals Chamber revisits a first instance judgement in light of new evidence showing that such a judgement is erroneous, the Appeals Chamber may remand a "factual issue" to the original Trial Chamber for it to determine a new factual issue that arises on appeal, or may itself call evidence to determine the issue.

In similar terms the ICTY Statute gives power to the Appeals Chamber to remand a factual issue to the original Trial Chamber or to call itself the fresh evidence and determine the issue.

Trial Chamber decisions will normally be reversed where an appellant succeeds in establishing that no reasonable trier of facts could have reached a conclusion of guilt based upon the evidence before it at trial.

However, all too often miscarriage of justice may equally be occasioned where the evidence before a Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable, and an innocent person may have been convicted.

In principle "there are a host of reasons as to why evidence that was accepted as reliable by a Trial Chamber may subsequently be shown to be incorrect: the numerous practical difficulties that all parties at trial before the Tribunal face in locating all relevant witnesses and documentary evidence from distant countries, not always co-operative with the Tribunal, is one such problem."[58]

New evidence is normally understood under the *ad hoc* tribunals jurisprudence as one that was not available at trial to Counsel acting with reasonable diligence, and one whose admission is in the interests of justice, or one which was available at trial but whose exclusion would lead to a miscarriage of justice.[59] It is *additional* to evidence adduced at trial in respect of a fact that was known and considered at trial, i.e. it is evidence that goes to prove an underlying fact that was at issue in the original trial.[60]

57 *Kunarac* Appeal, para. 48.

58 *Kupreškić* Appeal, para. 44.

59 *Kupreškić* Appeal, paras. 48-78.

60 *Kupreškić* Appeal, para. 49.

b. Standards of admission and review of errors of facts based on new evidence

During discussions on the desirable test for admission of new evidence and for review of errors of facts based on new evidence, the divide between the Prosecution and the Defence was around a more lenient ("could", "might" standard)[61] and a more stringent ("would", "must")[62] tests. The Appeals Chamber in *Kupreškić* opted for a more lenient approach, advocating the interests of justice and held that in deciding "whether to admit the evidence in the first instance, the relevant question is whether the additional evidence *could* have had an impact on the trial verdict."[63]

Once additional evidence has been admitted, the Appeals Chamber is then required to decide "whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice."[64] The Appeals Chamber ruled that in determining whether to uphold a conviction where additional evidence has been admitted, "the relevant question is: has the appellant established that no reasonable tribunal of fact *could* have reached a conclusion of guilt based on the evidence before the Trial Chamber together with the additional evidence admitted during the appeal proceedings.[65]

In *Blaškić*, the Appeals Chamber slightly modified the *Kupreškić* test by requiring the Appeals Chamber itself to be satisfied beyond reasonable doubt of the conclusion reached by the Trial Chamber.

The *Blaškić* Appeals Chamber argued that whereas in the standard of review for new evidence adopted by the *Kupreškić* Appeals Chamber the test was whether or not a reasonable trier of fact could have been satisfied as to the finding in question, what is required when the Appeals Chamber is itself seized of the task of evaluating trial evidence in combination with the additional evidence, is that it be *still convinced itself*, beyond reasonable doubt, as to the guilt (or acquittal) of the accused as found by the Trial Chamber.[66]

The Appeals Chamber argued further that "if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt."[67]

The Appeals Chamber then moved to put forward an exhaustive list of tests covering a wide range of possible hypothetical situations of review of errors of facts and law based on new evidence.[68]

For alleged errors of facts based on new evidence the *Blaškić* Appeals Chamber envisaged two possible outcomes, depending on whether or not an error on the legal

61 *Kupreškić*, para. 73.
62 *Kupreškić*, para. 74.
63 *Kupreškić,* para. 76.
64 *Kupreškić*, para. 72
65 *Kupreškić*, para. 75, 76.
66 *Blaškić* Appeal*,* para.22,23.
67 *Blaškić* Appeal, para. 23.
68 See *Blaškić* Appeal*,* para. 24. See also *Kordić* Appeal, para. 24.

standard is additionally found. It is important to note that although the Appeals Chamber (AC) has applied its tests only to findings of guilty challenged by the accused, in our view the tests are universal and could perfectly be applied too for findings of acquittal challenged by the Prosecution:

Situation a): no additional error in the legal standard is found. In this case:
(i) The AC decides first on the basis of the trial record alone, whether or not no reasonable trier of fact could have reached the conclusion of guilt (or acquittal) of the Trial Chamber. If the answer is negative, then the verdict is dismissed and there is no need to review the trial record in light of the new evidence;
(ii) However if the AC finds that based on the evidence available at trial, the Trial Chamber did not abuse of its discretion in reaching a conclusion of guilt (or acquittal), (i.e. that any other trier of fact could have reached a similar conclusion) then and only then it needs to determine *in light of the additional evidence admitted*, whether it is *still itself* convinced beyond reasonable doubt as to the finding of guilt.

Situation b) an additional error in the application of the legal standard is found. In this case:
(i) The AC first applies the correct legal standard and decides whether it *is still itself* convinced, beyond reasonable doubt, as to the finding of guilt (or acquittal) reached by the Trial Chamber. If the answer is negative, then no further action is required and the verdict is dismissed;
(ii) However, if the AC after applying the correct legal standard becomes itself convinced beyond reasonable doubt that the Trial Chamber was right, then and only then it needs to review further the issue based on the new evidence, to determine whether it *is still itself* convinced, beyond reasonable doubt, that the conclusion of guilty (or acquittal) reached by the Trial Chamber is right.[69]

It would appear, therefore, that for standards of review for new evidence adduced at the appeals level, the Appeals Chamber is required to apply for its own evaluation, not a discretionary test of reasonableness, but a higher test of "beyond reasonable doubt".

Accordingly, from an appellant's point of view, it makes sense to provide convincing arguments justifying the remand of the case back to the Trial Chamber that has decided it. Since the Trial Chamber has discretion in deciding what credibility to give to the facts, moreover, doubts are decided in favour of the decision of the Trial Chamber.[70] Whereas when the Appeals Chamber reviews the case in light of the new evidence, it needs to apply a "beyond reasonable doubt" test to its conclusions rather than just any reasonably possible conclusion that any trier of fact could have reached.

69 See *Blaškić* Appeal, para. 24. See also *Kordić* Appeal, para. 24.

70 See *supra,* ffs 45-50 and accompanying discussion.

iv. Standards of review for grounds of appeal based on procedure errors and unfairness to the accused

Some commentators define "procedural errors" as any formal violations of the Statute or the Rules of Procedure and Evidence, and "grounds that affect the fairness or reliability of the proceedings as any substantive violations which may affect the normal conduct of the trials and may relate for example to the requirement of trials in open court, equality of arms, the accused's right to be legally represented , any personal circumstances of the accused, his legal representative (for example conflict of interests), any other circumstances that may affect the conduct of the trial itself such as an uprising in the city where the Court is located, or a threat to the safety of participants".[71]

These same commentators rightly come to the logical conclusion that any appeal brought to ICC even formally regarded as only "affecting the fairness or reliability of decisions" can and should be entertained by the Appeals Chamber under Article 81 (1)(b)(iv), since from a formal point of view it can amount to a procedural error too, in the sense that any such appeal raising issues of fairness of the proceedings before the Court, would in one or the other way violate either a provision of the Statute, the Rules of Procedure and Evidence or the Regulations of the Court.[72]

This is the approach taken by the *ad hoc* tribunals that do not specifically single out any other particular ground (apart "errors of law" and "errors of fact") as based on procedural errors or unfairness, although they customarily allow any such appeal, that is normally referred to as raising issues of unfairness of the decisions.

For example several appeals, specially in the beginning of its work, were raised before the ICTY on such grounds like 'absence of impartiality of a judge and conflict of interest on account of a previous work related to the issues treated at trial';[73] 'selectivity of the prosecutorial strategies on account of alleged charging policies that target chosen ethnicities';[74] 'improper denial of a fair trial on account of a judge being asleep for most of the proceedings';[75] 'conflicts of interest on account of a judge being elected vice-President in her home country, while still holding the position of a judge of the Tribunal.[76]

Nonetheless it appears that these grounds of appeal are distinct from mere grounds of errors of either law or facts, otherwise the *ad hoc* tribunals would have

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71 See Robert Roth and Marc Henzelin, "The Appeal Procedure of the ICC", at 1544-1545.

72 See Robert Roth and Marc Henzelin, "The Appeal Procedure of the ICC", at 1545 (noting that " In theory then, it seems doubtful, in the light of Article 81(1)(b)(iv), that the ICC Appeals Chamber can voluntarily and in general restrict its own powers to examine the grounds for appeal. Rather, it seems that the Appeals Chamber *must* examine the grounds for any appeal that is brought to it, against a conviction or sentence handed down by a Trial Chamber, before deciding whether or not that appeal is admissible.").

73 See *Čelebići* Appeal, grounds of Appeal: 'Judge Odio Bonito and Victims of Torture Fund', pags.244-250 (hereinafter *Čelebići* Appeal Judgement); *Furundžjia* Appeal, Fourth ground of Appeal, 'Judge Mumba and her past work for the UN Commission on the Status of Women', pags. 50-67 (*Furundžjia* Appeal Judgement).

74 See *Čelebići* Appeal, grounds of Appeal: 'Selective Prosecution', pags. 206-213.

75 See *Čelebići* Appeal, grounds of Appeal: 'Judge Karibi-Whyte', pags. 214-226.

76 See *Čelebići* Appeal, grounds of Appeal: 'Judge Odio Bonito and Vice-Presidency of Costa Rica', pags. 227-243.

used the same standards of review for these grounds. The fact that these tribunals cannot use the same standards like the ones for errors of law or fact is an indication that the approach taken by ICC Statute that singles out "procedural errors" and "any other ground affecting the fairness of proceedings" is justified.

Experience shows that the ICTY and ICTR have used different standards for different claims based on grounds of unfairness of proceedings.

a. Standards of review for grounds of appeal based on conflict of interests

For example, for appeals on grounds of unfairness of proceedings on account of conflicts of interests and lack of impartiality of a judge, the Appeals Chamber in *Furundžjia* found that the standard was twofold:

a) whether or not actual bias can be shown;
b) if not, whether nonetheless an unacceptable apprehension of bias still exists.[77]

The Appeals Chamber explained that whenever actual bias can be shown, lack of impartiality is also shown. And that an unacceptable apprehension of bias exists either a) when a judge has financial or propriety interests in the outcome of the case; b) when it is proved that his decision would lead to a promotion of a cause in which he/she is involved together with one of the parties to the case; c) or when the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[78] The tests are disjunctive and not cumulative.

Because, in most cases, actual bias or visible apprehension of bias such as direct interests in a cause that affects a party to the proceedings, would be difficult to prove, (otherwise the judge would have disqualified himself), the only relevant test for review of challenges based on allegations of lack of impartiality, bias, and conflict of interests would be the third one, namely *whether or not a* reasonable *apprehension of bias can be shown*.

This is the test actually endorsed in two other similar instances where issues of unfairness of proceedings, based on allegations of lack of impartiality and conflicts of interests arose involving Judge Odio Bonito.[79] In both cases the *Čelebići* Appeals Chamber endorsed the *Furundžjia*'s test and held:

> The relevant question to be determined by the Appeals Chamber is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case. The apprehension of bias must be a reasonable one. Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold. A judge of the Tribunal makes a solemn declaration that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously.[80]

77 See *Furundžjia* Appeal, paras. 189, 190.
78 See *Furundžjia* Appeal, paras. 189, 190.
79 See *supra* ft 76.
80 Č*elebići* Appeal, paras. 683, and 697, citing *Furundžjia* Appeal, para. 189, 190.

Another important element for the standard of review for *allegations based on conflicts of interest* omitted in the analysis of the Appeals Chambers is the procedural aspect of *prejudice,* which is self-evident when bias, actual or apprehended, is proved.

b. Standards of review for grounds of appeal based on alleged discriminatory conduct

However, standards of review based on *allegations of unfairness due to conflict of interests* are not applicable to allegations of unfairness grounded on other vices like *selectivity of prosecutions or improper conduct of judges*, which more properly could be considered as procedural errors.

For example, in the case alleging selective prosecutions based on discriminatory motives (a ground of appeal brought by the accused in the *Čelebići* case), the Appeals Chamber found that the relevant test was threefold:[81]

a) an unlawful or improper motive must be shown for the application of the challenged principle;
b) the challenged principle was not used consistently in similarly situated cases;
c) the application of the challenged principle caused substantial prejudice to the applicant.

Regarding this last test the Appeals Chamber held that "even if in the hypothetical case that those against whom the indictments were withdrawn were identically situated to Landžo, the Appeals Chamber cannot accept that the appropriate remedy would be to reverse the convictions of Landžo for the serious offences with which he had been found guilty. Such a remedy would be an entirely disproportionate response to such a procedural breach. As noted by the Trial Chamber, it cannot be accepted that "unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial".[82]

c. Standards of review for grounds of appeal based on alleged improper conduct

A different test was again applied in a case alleging improper conduct by a presiding judge that was purportedly asleep for most part of the trial proceedings. The Appeals Chamber found the test of review of such allegations to be twofold: a) actual improper conduct, b) actual prejudice to a party.

a) Contrary to the test applied in cases alleging unfairness of proceedings based on conflict of interests, in cases of improper conduct, the test is not one of *reasonable apprehension* of improper conduct, but one of proof of *actual* improper conduct. The party challenging a verdict on account of improper conduct of judges must thus prove that the reproached conduct actually took place.[83]

81 *Čelebići* Appeal, para. 612.

82 *Čelebići* Appeal, para. 618.

83 *Čelebići* Appeal, para. 626 (finding that: "The jurisprudence of national jurisdictions indicates that it must be proved by clear evidence that the judge was actually asleep or oth-

b) In addition, the reproached conduct must also be proved to have caused actual prejudice to a party.[84]

d. Dismissal of grounds of appeal based on failure to raise the issue at trial

One particular characteristic of appeals based on grounds of unfairness is that a party is obliged to raise the issue at trial or his right to do so at appeals level will be considered *opportunistic* and the Appeal dismissed, unless it raises issues of general importance. For this reason in principle there can be only few grounds based on allegations of unfairness, since these issues happen during trial, they can be spotted during trial. Accordingly, they should be brought to the immediate attention of that Trial Chamber without waiting for an appeal.

In one such case of improper conduct, the *Čelebići* Appeal Chamber accepted that, "as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party."[85] Having found the appeal opportunistic the Appeals Chamber dismissed it.[86]

In similar terms the Furundžjia Appeals Chamber in the case of 'Judge Mumba and the UN Commission on the Situation of Women', held that only the general interest of the appeal has prevented it from dismissing it *tout court*:

> Although the Appeals Chamber has decided to consider this matter further, given its general importance, it would point out that information was available to the Appellant at trial level, which should have enabled him to discover Judge Mumba's past activities and involvement with the UNCSW.[87]

C. Grounds and Standards of Appeal against Sentence

It is true that in most cases appeals are brought against verdicts, however very often too the appeal is brought as a twofold one, against both verdict and sentencing. In some other cases the appellant does not dispute the evidence or the Tribunal's judgement thereof, but only the leniency or severity of the sentence, found manifestly disproportionate to the crimes. In these cases appeals are solely brought against the sentencing.

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erwise not fully conscious of the proceedings, rather than that he or she merely gave the appearance of being asleep. Landžo accepted that it was necessary to prove by evidence the allegation upon which this ground of appeal is based").

84 *Čelebići* Appeal, para. 625 (finding that: "The national jurisprudence considered by the Appeals Chamber discloses that proof that a judge slept through, or was otherwise not completely attentive to, part of proceedings is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to a such degree as to give rise to a right to a new trial or other adequate remedy"). See also paras. 630, 639.

85 *Čelebići* Appeal, para. 640.

86 *Čelebići* Appeal, para. 650.

87 *Furundžjia* Appeal, paras. 173, 174.

i. "Disproportion between the crime and the sentence" as the ground of appeal against sentences under the ICC Statute

Contrary to the ICC Statute, neither the statutes of the *ad hoc* tribunals nor its jurisprudence have ever developed an independent ground of appeal against sentencing as such. Although it is evident that what is at stake is the "disproportion between the crime and the sentence", the grounds of appeal have normally been considered the same "errors of law or facts".

However, in the broader sense it appears that even at the ICC, appeals against sentencing will have to be based on some "errors of law or facts", since disputing a sentence as too high or too lenient will always be a matter of how successful was the Prosecutor in proving (with the evidence and its legal theories) the crimes charged and how the trier of fact has balanced this with the existence of additional credible evidence, if any, mitigating or aggravating the accused's culpability.

Therefore, in our view it makes sense having an independent ground of appeals against sentences as provided in the ICC Statute, although the absence of such specific ground has never prevented the *ad hoc* Tribunals from finding the right *test* in order to come to the right conclusions as to whether or not there is any disproportion between a crime and a sentence.

Therefore, the standards of review adopted in the *ad hoc* tribunals would normally be the same as the ones to adopt in the ICC, specially since they reflect the same customary law or general principles of law recognized by the principal legal systems of the world that the ICC would have to apply under Article 21 of the ICC Statute. In addition this would help to have a consistent jurisprudence.

ii. Standard of review for the ground of appeal against sentence

In sentencing appeal judgements, the jurisprudence of the *ad hoc* tribunals has been consistent in affirming that the *test* for finding whether there was a manifest or significant disproportion between the crime and the sentence, is whether or not the Trial Chamber committed any "*discernible error*"[88] and has rejected the so-called "tariff of sentence" disproportion test.[89]

In the *Jelisić* case the Appeals Chamber held that "tariff of sentences" was not itself the standard but only an *indicia* through which the Appeals Chamber "may infer that there was disregard of the standard criteria by which sentence should be

88 See *Prosecutor v. Radislav Kristić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 242 (hereinafter, *Kristić* Appeal); *Aleksovski* Appeal, para. 187; *Vasiljević* Appeal, para. 9; *Čelebići* Appeal, para. 725; *Kupreškić*, para. 408; *Furundžjia* Appeal, para. 239.

89 See *Kupreškić* Appeal, para. 405 (the defence Counsel stating that "the test applied by the Appeals Chamber to date is "a rather onerous way of approaching a question of an appeal against sentence" and that "sentences ought to be subject to review if they were "capricious or perhaps more likely excessive." And that this "opens the door to a fair review of an excessive sentence not by the appellant seeking to identify a discernible error, but by demonstrating that when looked at the case in the round and putting all the factors into account, the sentence is out of reasonable proportion with the line of sentences passed in similar circumstances for the same offences." That there is "a recognisable range of tariffs or sentences, and a discernible pattern of sentencing, created by relevant precedents.").

assessed, as prescribed by the Statute and the Rules."[90]

In meeting the standard of review of "discernible error" for sentencing appeals, the Appellant is required to demonstrate how the Trial Chamber "ventured outside its discretionary framework in imposing a sentence as it did."[91]

Therefore, the Appeal Chamber will not disturb a sentence imposed by a Trial Chamber on grounds of disproportion between crime and sentence, unless the Appellant proves that the Trial Chamber "either erred in the weighing process involved in the exercise of its discretion by taking into account what it ought not to have, or erred by failing to take into account what it ought to have taken into account."[92]

a. Sentencing appeals are not trials ***de novo***

Just as appeals against convictions, sentencing appeals too, do not amount to "trials *de novo*." Trial chambers are "vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the individual circumstances of the accused and the gravity of the crime."[93] Therefore, "the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice."[94]

The jurisprudence of the *ad hoc* tribunals holds in particular that in deciding whether the Trial Chamber has committed a discernible error, the following factors should be taken into account: the gravity of the offence and the individual circumstances of the convicted person, the general practice regarding prison sentences in the courts of the country of the accused, and any aggravating or mitigating circumstances.[95]

b. Consideration of factors available but not raised at trial in sentencing appeals

A question arose in the jurisprudence of the tribunals as to whether in assessing "discernible error", the Appeals Chamber is required to take into account factors and circumstances that, although available at the trial, were not put forward by Counsel as mitigating factors at trial level.

The Appeals Chamber in the *Kupreškić* sentencing judgement answered the question in the negative and reminded the well settled jurisprudence of the Tribunal according to which "[t]he appeal process ... is not designed for the purpose of allow-

90 *Prosecutor v. Goran Jelisić,* Case No IT-95-10-A, Judgement, 5 July 2001, para. 96.

91 See *Čelebići* Appeal, para. 725; see also *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, para. 8 (hereinafter, *Momir Nikolić* Sentencing Appeal).

92 See *Prosecutor v. Dragan Nikolić* Judgement on Sentencing Appeal, Case No. IT-94-2-A, 4 February 2005, para. 9 (hereinafter, *Dragan Nikolić* Sentencing Appeal).

93 *Kupreškić* Appeal, para. 408; *Momir Nikolić* Sentencing Appeal, para. 8.

94 *Dragan Nikolić* Sentencing Appeal, para. 8.

95 *Dragan Nikolić* Sentencing Appeal, para. 7; *Čelebići* Appeal, para. 716.

ing parties to remedy their own failings or oversights during trial or sentencing."[96]

The Appeals Chamber further held that "If an accused fails to put forward any relevant information, the Appeals Chamber does not consider that, as a general rule, a Trial Chamber is under an obligation to hunt for information that counsel does not see fit to put before it at the appropriate time."[97]

Nor should the Appeals Chamber do so at the appeals level, unless the following three situations were extant at the time of the trial proceedings: the accused is not represented by counsel at trial level; the accused refuses to recognise the court, and is convicted; defence counsel was less than helpful during the trial proceedings.[98]

The tests for admission of new evidence are the ones developed for appeals against verdicts.[99]

D. Grounds and Standards of Appeals for Interim Decisions

Just like the *ad hoc* tribunals, in the ICC Statute, the grounds of appeal and even less so, the standards of review for interim decisions under Article 82 are not provided.

i. Grounds of appeal for interim decisions

There is little doubt however that under these circumstances just as in the case of the ad hoc tribunals, "any question of fact or law can be invoked as a ground for an appeal under Article 82".[100]

ii. Standards of review for interim decisions

From the recent appeal jurisprudence of the ICC, it does not come up yet any specific *uniform standards of review* for attending or denying an appeal submission alleging errors of law or procedural unfairness.

But the tendency is towards developing standards that match *mutatis mutandis* those developed at the *ad hoc* tribunals regarding either errors of law (*correctness* test), errors of fact (*abuse of discretion* test), errors of procedure or based on other grounds of unfairness (*prejudice* test).

In one of its very first decisions on the Defence appeal challenging the Decision of the Pre-trial Chamber in the case *Prosecutor v. Thomas Lubango Dyilo*, decided in December 2006, the ICC Appeals Chamber rejected the Defence allegations of prejudice to the accused on account of the Pre-Trial Chamber permission to the Prosecutor to use summaries of witness statements at the confirmation stage without disclosing the identity of the relevant witnesses. The Appeals Chamber found it permissible and held that "the presentation of summaries at the confirmation hearing, without disclosure of the identities of the relevant witnesses to the defence, as envisaged by the Pre-Trial Chamber, is not *per se prejudicial or inconsistent* with the

96 *Kupreškić* Sentencing Appeal, para. 408.

97 *Kupreškić* Sentencing Appeal, para. 414.

98 *Kupreškić* Sentencing Appeal, paras. 413, 414.

99 See *supra*, Section 2 (C)(ii).

100 Robert Roth & Marc Henzelin, "The Appeal Procedure of the ICC", at 1551.

rights of the accused and a fair and impartial trial."[101]

When it reviewed the Defence allegations of errors of facts the Appeals Chamber while recognizing that "Decisions of the Pre-Trial Chamber authorizing the non-disclosure to the Defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning", also noted nonetheless that "the extent of the reasoning *will depend on the circumstances of the case*, but it is essential that it indicates with sufficient clarity the basis of decision. Such *reasoning will not necessarily require reciting each and every factor* that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusions."[102] Therefore, it appeas that the Appeals Chamber defined an "abuse of discretion standard of review" for such cases.

Similarly, while reviewing the Defence allegations of error of law, the Appeals Chamber held that "In relation to the second ground of Appeal, the Appeals Chamber considers that for the reasons set out below, it is not in a position properly to review the *correctness* or otherwise of the application of the principle of necessity and proportionality in the Impugned Decision."[103] The Appeals Chamber appears to have set in such cases a "correctness test" of review.

V. Grounds of Revision v. Standards of Revision

While appeals and revisions are both contemplated review procedures under chapter VIII of the ICC Statute, one of the essential distinctions between them lies in the entity allowed to review an initial decision: in appeals the entity is necessarily distinct from the one that has rendered the initial judgement, whereas in revision procedures the entity will normally be the same to reconsider its own previous decision (the same Appeals Chamber), unless the decision has not been appealed before.

Another distinction between appeals and revisions is that contrary to appeals procedures, revisions are only allowed for *final* judgements on convictions or sentences.[104] There are no revision procedures available for judgements on acquittals or for interim decisions. Under Article 84(1) of the ICC Statute, a Decision becomes *res judicata* either because of the exhaustion of all possible remedies, expiry of time limits for appeal, or waiver of a right of appeal.

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101 *Prosecutor v. Thomas Lubango Dyilo,* Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I "entitled first Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" , Case No. ICC-01/4-01/06 (OA5), 14 December 2006, para. 50. (hereinafter, *Lubanga Dyilo* First Appeal Decision).

102 *Lubanga Dyilo* First Appeal Decision, para. 20.

103 *Lubanga Dyilo* First Appeal Decision, para. 32.

104 This position departs from the one adopted in the ICTY Statute, where reviews of any final judgements are allowed including acquittals. The Prosecutor has, however, a timely restriction of one year to present new evidence imposed by Rule 119 (A) of the Rules of Procedure and Evidence.

A. The grounds for revision: 'new evidence' or 'new facts' or both

Since revisions are only allowed for *res judicata*, it becomes crucial the type of evidence that needs to be put forward in order to force a Chamber to disturb findings of law and facts that have already become *res judicata*.

The jurisprudence of the *ad hoc* tribunals has held that this only happens when a moving party is able to prove that there was a "new fact" and the following three additional conditions are cumulatively met:

a) the new fact was not known to the moving party at the time of the original proceedings;
b) the failure to discover the new fact was not due to a lack of due diligence on the part of the moving party; and
c) the new fact could have been a decisive factor in reaching the original decision.[105]

In exceptional circumstances, when ignoring it would result in a miscarriage of justice, the new fact may still be considered even if the second or third criteria are not satisfied.[106]

The ICC Statute presents the grounds of review in a slightly different way. In addition to a reference to i) "new evidence" Article 84(1) of the ICC Statute lists two other purportedly distinct grounds of revision: ii) Decisive evidence, upon which the conviction depends, is newly discovered as having been false, forged or falsified; iii) Newly discovered evidence of serious misconduct of judges that convicted the accused.

I can see a problem with this listing since these distinct additional grounds under the *ad hoc* tribunals' formulation of the ground of revision, would amount to the same "discovered new facts" that if available at trial might have affected the verdict reached. They would not be considered as distinct grounds of revision. One can only wonder why these two types of 'new facts' have been singled out in the ICC Statute, if not perhaps only to show the importance that the drafters of the ICC Statute attach to these particular forms of unfair behaviour.[107]

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105 See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006, para. 7 (hereinafter, *Blaškić* Review Decision). See also *Prosecutor v. Elieser Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Review, para. 4 (hereinafter, *Niyitegeka* Review Decision).

106 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Request for Review, 30 July 2002, para. 26,27 (hereinafter, *Tadić* Review Decision), *Blaškić* Review Decision, para. 8, *Niyitegeka* Review Decision, para. 4.

107 One should note, however, that other authors have interpreted the grounds of revision listed in Article 84 in a different way. See for example, Anne-Marie La Rosa '*Revision Procedure under the ICC Statute*' in The Rome Statute of the ICC: A Commentary (eds. A. Cassese) at 1569 (noting that the two new grounds "were not contemplated by the International Law Commission in its Draft Statute of 1994. Neither are such grounds to be found in the Statutes of the ICTY and ICTR. These grounds were raised during the discussions of the Preparatory Committee which preceded the Rome Conference, as well as others, such as, *inter alia*, the fact that the conduct upon which the conviction was based no longer constituted a crime under the Statute, the sentence being served exceeded the maximum penalty currently provided in the Statute, or that the Court

While the second and third grounds of revision do not offer serious issues of interpretation, the same cannot be said in relation to the *first ground ('new evidence')*.

A crucial issue has been what is understood by "new evidence". Some commentators are enthusiastic to read "new evidence" as a notion limited to "new facts". These commentators rely upon the French text of the ICC Statute (which uses the word 'faits'), and also upon the text of the statutes and earlier jurisprudence of the *ad hoc* tribunals.[108] However, these authors perhaps would be less enthusiastic if they knew that today even the judges of the *ad hoc* tribunals are no longer that happy with the interpretation that they have given before to what is meant by "new facts" under the statutes of the *ad hoc* tribunals.

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rendered a decision that necessarily also invalidated the judgement in the case at hand. However, the grounds which pertain more to enforcement (namely the fact that the incriminated conduct is no longer a crime or that the sentence is *ultra vires*), as with the application of the principle *non bis in idem* (in the case of a later decision invalidating the challenged judgement), were abandoned at the Rome negotiations.").

In this author's opinion, if this is the prevailing reading of the grounds of revision, then this would mean that States have provided an exhaustive list of facts, which should not be case. There are two ways in which to interpret "new evidence" in the ICC Statute, and in both situations La Rosa's findings would be self-contradictory.

a) 'new evidence', could mean only 'freshly discovered evidence' of the same facts already submitted at trial. (Under this interpretation the list of facts would be limited to those that were available at trial, plus the two additional ones. But then if this is the way 'new evidence' should be interpreted, La Rosa's own finding would be contradictory since she is of the opinion that "new evidence' is intended to mean any "new facts" relevant to the case).

b) 'new evidence' could mean indeed any "new facts". But then this would also contradict La Rosa's own finding that the list of grounds in Article 84 was intended to be restricted to the two additional factual basis included in the ICC Statute, and not the other listed facts that La Rosa states were abandoned at the Rome Conference. In view of these contradictions this author thinks justified to assume that the so-called additional grounds were included merely as an indication of the particular importance attached to those unfair practices described in Article 84 rather than to diminish the merit of any other new facts not specifically listed. In particular, as the law is interpreted presently by the *ad hoc* tribunals, there is nothing that would prevent them from granting review to any of those so-called *new additional* grounds of Revision in Article 84 of the ICC Statute, since they can justly be considered as types of new facts, rather than specific distinct grounds of Revision. The same could be said of the ICC that can also entertain any such new fact listed by La Rosa as abandoned at the Rome Conference (i.e. not specifically included as a ground), but just as a new fact.

108 *Prosecutor v. Zoran Zigić*, Case No. IT-98-30/1-A, Decision on Zoran Zigić's "Motion for reconsideration of Appeals Chamber Judgement delivered on 28 February 2005, 26 June 2006; *Prosecutor v. Elisier Niyitegeka,* Case No. ICTR 96-14-R, Decision on Request for Reconsideration of Decision on Request for Review, 26 September 2006, pp. 1-2 (hereinafter, *Niyitegeka* Second Reconsideration Decision).

B. The interpretation given to the terms "new facts" and "new evidence" in the jurisprudence of the ad hoc *tribunals and the standard of review*

The Appeals Chamber in the *Blaškić* Review Decision held that 'new fact' refers to "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings". Meaning that the new fact "must not have been among the factors that the deciding body could have taken into account in reaching its verdict." In other words, "[w]hat is relevant is whether the deciding body [...] knew about the fact or not" in arriving at its decision."[109]

It also defined the standard of review of "new facts" as being whether or not the new fact was "in issue" during the original proceedings.[110]

Defence teams (at the ICTR) and the prosecution teams (at the ICTY) have tried unsuccessfully to bolster the notion of "new facts" in revision proceedings. In the *Blaškić* Revision proceedings, for example, the Prosecutor unsuccessfully tried to prove that new facts should be construed narrowly and the test of being "in issue" should be confronted against "narrow facts" and not against "broader facts" reviewed at trial. The Prosecution argued it was essential to do so if the relevance of review proceedings was to be preserved, in the interests of justice.[111]

In similar terms the ICTR defence teams have variously argued for reconsideration of final judgements where new narrow evidence bolstered the persuasiveness of the alibi of the accused. The Appeals Chamber in both Tribunals have consistently rejected such a narrow approach and found that at issue was not any new fact, but new evidence of facts already adjudged at trial or appeal and rejected for insufficiency of evidence.[112]

Moreover, in the *Blaškić* case the Appeals Chamber ruled that even if new facts are found, they can only enable review of the impugned final judgement , and not any other decision in which the disputed point has been lost for lack of additional facts. The Appeals Chamber held:

> [t]he scope of review proceedings before the International Tribunal does not extend to decisions reached during the ongoing proceedings in a case prior to the rendering of the final judgement or final decision." "... Review proceedings are, by their very nature, extraordinary and exceptional because they allow for the re-opening of a closed case and thus, are limited to the final judgement or decision in a case, especially in light of the fact that there is no time-limit for an accused seeking review. If decisions reached prior to the final judgement or final decision were also subject to review, the outcome of a case would always be in question and the parties would never reach resolution.

However, the issue of new evidence bolstering the persuasiveness of previously litigated facts is becoming increasingly important and judges are themselves becom-

109 *Blaškić* Review Decision, para. 14.

110 *Blaškić* Review Decision, para. 15.

111 *Blaškić* Review Decision, paras. 16, 18.

112 *Blaškić* Review Decision, paras.16,17,18; *Niyitegeka* Second Reconsideration Decision, paras. 20,24,28.

ing discomforted with applying so rigid a test that threatens amounting to a clear miscarriage of justice. Just how important these issues can be is seen from the case *Niyitegega* at the ICTR:

> *Niyitegeka* was a cabinet minister who was convicted of genocide. At trial he put forward an alibi that at the days and time he was alleged committing genocide in one place, he was actually attending a meeting of the Cabinet in a far distant place and therefore could not have been there. At trial and appeal, *Niytegeka* was unable to prove his *alibi* any better for lack of convincing evidence. Later however, he managed to discover a BBC video footage of his presence in the meeting in the days and time indicated. The Appeals Chamber nonetheless rejected to review his case, alleging that the new evidence went to bolster a fact already litigated unsuccessfully at trail and appeals level an did not prove a new fact. However when recently further new evidence, (a memo pad of the former prime minister at the time confirming the meetings and the list of cabinet ministers present again seemed to confirm his *alibi* and he again sought for the second time a review of his case) the Appeals Chamber again rejected his motion, but it did so with two judges appending separate opinions in which they show their discomfort with situations that basically amount to a procedural stone in the way of apparent justice.[113]

Judge Shahabudeen opined that he continued "to see merit in the idea that the Appeals Chamber should, in a possible case, have the option to consider new evidence proffered by an appellant that does not amount to a new fact, if its exclusion would lead to a miscarriage of justice."[114]

Similarly, Judge Meron opined that "A situation might someday arise in which new evidence that does not amount to a new fact under our jurisprudence would nonetheless demonstrate the presence of a serious miscarriage of justice. To pose a hypothetical situation, suppose that an accused is convicted of murdering a victim. Suppose further that a fact at issue at trial was whether the victim was in fact dead – the Prosecution presented several eye-witnesses who testified to seeing the victim's dead body, whereas the Defence responded with an eye-witness who claimed to have later seen the victim alive. If the victim should turn up alive after the issuance of all final judgements in the case, a clear miscarriage of justice would result from letting the murder conviction stand. This would be true even though under the distinction created by our precedent this new evidence of the victim's state of being would likely be "additional evidence" that bolsters the Defence's claim at trial that the victim was alive and not a "new fact".[115]

Based on this experience, it might be worth interpreting the ICC Statute as stating that not only a 'new fact' but also *new evidence* if it can prevent a miscarriage of justice should be a valid ground of revision.

This seems to be the approach taken in the Regulations of the Court, in which Regulation 66 reads:

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113 See *Niytegeka* Second Reconsideration Decision.

114 *Niytegeka* Second Reconsideration Decision, Separate Opinion of Judge Shahabudeen, para. 1.

115 *Niytegeka* Second Reconsideration Decision, Separate Opinion of Judge Meron, para. 3.

> An Application under Article 84(1) (a) shall set out the *new facts or evidence* unknown or unavailable at the time of trial and shall indicate the effect that the production of such *facts or evidence* at the trial might have had upon the decision of the Court.[116]

116 ICC Regulation 66: Procedure leading to the determination on revision, Regulations of the Court, 26 May 2004.

Part IV

ICC Relationship with States, International Organizations and other Issues in General (Miscellaneous)

Section 18

Cooperation of States with the Court

Chapter 42

Cooperation with the Court on Matters of Arrest and Surrender of Indicted Fugitives: Lessons from the *Ad Hoc* Tribunals and National Jurisdictions

Daniel Nsereko

I. Introduction

While the ICTY[1] and the ICTR[2] are entirely international both in the law they apply and their staff, the SCSL[3] is hybrid. It administers both international humanitarian law as well as Sierra Leone law. It is also staffed by both international and Sierra Leone judges. However, these few differences notwithstanding, all the three tribunals serve to advance the cause of peace by bringing violators to justice and thereby enabling the process of national reconciliation to take place in the three countries.

However, as international judicial bodies and, except for the SCSL, with seats located in countries that are different from those where the violations took place, the tribunals face logistical problems. Unlike nation-states, the United Nations does not as yet have its own police force or law enforcement agency with powers to arrest and transfer suspects to the tribunals or to execute other orders of the tribunals. They must willy-nilly depend on state authorities to perform these and other tasks on their behalf. For this reason they must enjoy the good will, support and cooperation of states, both members and non-members of the UN.

It must nevertheless be emphasised that in cooperating or assisting the tribunals, states do not do so as a matter of favour or courtesy. They have an obligation to do so, imposed by the UN Charter. According to the Charter, when the Security Council, in exercise of its peace-keeping mandate, makes a decision, states are duty bound to accept and to carry out that decision as well as decisions of its subordinate organs.[4] This then explains the peremptory tenor of the provisions of the Council resolutions establishing the ICTY and ICTR. The provision in respect of the ICTY reads as follows:

1 The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by UN Security Council Resolution 827 of 25 May 1993.

2 The International Criminal Tribunal for Rwanda (ICTR) was established by UN Security Council Resolution 955 of 8 November 1994.

3 The Special Court for Sierra Leone (SCSL) was established by a bilateral Agreement between the UN and Sierra Leone in 2002.

4 Article 25 of the UN Charter provides that "The Member of the United Nations agree to accept and carry out decisions of the Security Council in accordance with the present Charter."

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> All States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the statute of the Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the statute, including the obligation of States to comply with requests for assistance or orders issued by the trial Chamber under article 29 of the Statute."[5]

This chapter discusses the experience of the ICTY, ICTR and SCSL in the area of arrest and surrender of suspects and accused persons. It examines the relevant provisions of the tribunals' Statutes and Rules and discusses documented instances of alleged non-compliance with these provisions. It particularly focuses on illegal arrest and surrender as well as abductions abroad. In doing so it compares the jurisprudence of the tribunals with that of national courts germane to this study. The chapter also highlights the lessons that the International Criminal Court (ICC) might derive from the tribunal's experience as it endeavours to carry out its mandate under the Rome Statute.

II. Arrest and Detention

A. Arrest and its Purposes

According to the jurisprudence of national courts and of the international tribunals, an arrest is the deprivation of an individual of his personal liberty. It is accomplished by "physical restraint, conduct or word of mouth that indicates to that individual that he is not free to leave."[6] Short of creating that impression in the mind of the prisoner, there is no arrest.[7]

One of the purposes of arrest is to secure the presence of the accused person in court to answer the charges he is alleged to have committed. The other is to ensure that he does not impede ongoing investigation, or endanger witnesses or commit other crimes. However, where these goals can be attained without resort to arrest, then, it is not necessary to resort to it. In that case the accused may simply be summoned to appear on a stated date and time to answer the charges against him. Similarly, where the individuals wanted by the court for trial voluntarily surrender themselves to the court, there is no need for arrest. This has been the case in a

5 Paragraph 4 of the operative part of the resolution. For a similar provision see para. 2 of the operative part of the Council resolution in respect of the ICTR.

6 See Decision of the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v. Mle Mrškić, Miroslav Radić, Veselin Sljivvancahnin and Slavko Dokmanović,* Case No. IT-95-13a-PT, 22 October 1997, at para. 28. See also *Murray v. Minister of Defence* [1988] W.L.R 692.,

7 See for example the South African case of *Rex v. Tiro* [1951] 3 S. Afr. L. Rep. 390 where the issue was whether there had been an arrest and, if so, whether the appellant had escaped from lawful custody. The court observed as follows." I do not think it is enough in a case such as this to say, 'I arrested him and he jumped about and ran off.' The only evidence of any act that there is that the constable told the accused 'I arrest you'. That by itself is not enough; he must have laid his hand upon him – actually touch him or confined his body – to constitute a lawful arrest, unless (of which there is no evidence in this case) there was a submission to custody by word or action."

number of cases before the ICTY and the ICTR when accused persons have voluntarily surrendered to the tribunals. Nevertheless, in the majority of cases the suspects or accused persons have had to be brought before the tribunals under arrest.

Assuming that an arrest is called for, then, how is it validly effected? There are generally two methods of effecting a valid arrest. One is by way of a warrant. The other is without warrant.

B. Arrest with Warrant

The Statutes of the ICTY, ICTR and the SCSL vest in the Prosecutor power to investigate and prosecute persons suspected of having committed the crimes within their respective Statutes.[8] On receiving credible information from any source, including victims, governments, UN organs and from governmental and non-governmental organisations, the Prosecutor carries out some preliminary investigation with a view to determining whether "there is sufficient basis to proceed."[9] If the Prosecutor determines that there is such a basis then he proceeds to carry out the necessary investigation into the allegations. If, after the investigation, he determines that the evidence he unearths discloses a *prima facie* case of an offence or offences having been committed,[10] he prepares an indictment against the persons he suspects to have committed them. It must, however, be emphasized that before he prepares the indictment he must be satisfied that the offence or offences disclosed meet the threshold of seriousness required under the Statute and that the person he indicts is one that "bears the greatest responsibility" for committing such offences.

The next step is for the Prosecutor to transmit the indictment to a Judge of the Trial Chamber for review and for issuance of an arrest warrant. Article 19 of the ICTY Statute, in similar terms with provisions of the ICTR and the SCSL, provides as follows:

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8 Article 16 of the ICTY Statute, article 15 of the ICTR Statute, and article 15 of the SCSL.

9 Article 18 of the ICTY Statute, article 17 of the ICTR Statute and Rule 39 of the SCSL Rules of Procedure and Evidence.

10 As for the meaning of the term *prima facie* case see ICTY, Decision on the Review of the Indictment, *Prosecutor v. Kordić*, Case No. IT-95-14-4, 10 November 1995, p.3 where Judge McDonald defined the term as "a credible case, which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge." This definition was followed in ICTY, Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević, Milutinović, Šainović, Ojdanić and Stojiljković*, Case No. IT-99-37-I, Judge Hunt, 24 May 1999. For other variations see ICTY, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, *Prosecutor v. Milošević, Milutinović, Šainović, Ojdanić and Stojiljković*, Case No. IT-99-37-I, Judge Hunt, 29 June 2001, par.a 3 and ICTY, Order Granting Leave to file an Amended Indictment and Confirming the Amended Indictment, *Prosecutor v. Mladić*, Case No. IT-95-5/18-1, Judge Orie, 8 November 2002, para. 26. According to Rule 47 (E) of the SCSL Rules of Procedure and Evidence a *prima facie* case is established if "the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment."

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If he is satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of the of persons, and any orders as may be required for the conduct of the trial.[11]

The review proceedings serve several purposes. First, by insisting that the material presented by the prosecutor must disclose a *prima facie* case before the indictment is confirmed, the proceedings serve to protect innocent members of the public from harassment from frivolous, oppressive or trumped up charges – a practice that is rife and rampant in totalitarian states. As Judge Orie of the ICTY observed, "standing trial is a difficult experience and an accused should not be put to trial if, from the outset, a conviction is unlikely."[12]

Second, by declining to confirm charges that are misconceived, unsubstantiated or unmeritorious, the Review Judge helps to spare the court's precious time and valuable resources that would otherwise be spent on entertaining such charges. Lastly, the proceedings form the basis for the decision to issue or not to issue a warrant. A warrant is the formal written document authorizing the Office of the Prosecutor to arrest and detain the person named therein.

Ultimately, then, review proceedings serve to protect innocent people from arbitrary arrest and unwarranted invasion of their liberty. Where the Review Judge confirms the indictment and issues the arrest warrant there is at least assurance that at the arrest is authorized by a judicial officer after careful and unbiased scrutiny of the available evidence. This way, they also serve as an antidote to arbitrariness in law enforcement and to uphold legality and the rule of law.

C. Execution of the Warrant

The tribunals do not have police or other officers of their own who are vested with coercive powers. Even if they did, such officers would not have extraterritorial powers to execute the tribunals' orders on the territory of sovereign states. They must therefore be assisted by national authorities in the country where the suspect or accused might be residing. National authorities, more than anyone else, are the most knowledgeable of the geography, terrain, conditions and language spoken in their countries. They are therefore the best placed to execute the tribunals' processes. As already indicated, assistance to and cooperation with the tribunals is required of all states under the UN Charter. The Statutes of the tribunals further elaborate the detailed ramifications of the cooperation. For example, article 29 of the ICTY provides as follows:

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11 For parallel provisions see articles 18 of the ICTR Statute and Rule 47 of the SCSL Rules of Procedure and Evidence.

12 Order granting leave to file an Amended Indictment and confirming the Amended *Indictment, Prosecutor v. Mladić*, Case No. IT-95-5/18-1, 8 November 2002, para. 22.

1. States *shall cooperate* with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
   (a) the identification and location of persons;
   (b) the taking of testimony and the production of evidence;
   (c) the service of documents;
   (d) the arrest or detention of persons;
   (e) the surrender or the transfer of the accused to the International Tribunal.[13]

Concerning the execution of arrest warrants, the tribunals' Rules of Procedure and Evidence contain elaborate instructions as to how they must be executed. Because of their importance to the present discussion they are set out *in extensio*. For example, Rule 55 of the ICTY Rules of Procedure and Evidence reads as follows:

(A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 21 of he Statute, and in Rules 42 and 43 mutatis mutandis, together with the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.
(B) Subject to any order of a Judge or Chamber, a warrant for the arrest of the accused and an order for the surrender of the accused to the Tribunal shall be transmitted by the Registrar to the person or authorities to which it is addressed, including the national authorities of the States in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language the accused understands and that the accused be cautioned in that language.
(C) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor's Office may be present as from the time of arrest.

Thus, where it is established that the arrest of the accused is considered necessary and a warrant of arrest has been sought and obtained, the warrant and other processes of the tribunals are normally sent to national authorities for execution. However, in the case of the ICTY, because some states were unwilling to cooperate with the Tribunal or lacked enabling legislation, the Judges had to devise alternative mechanisms for securing the arrest, detention and surrender of suspects. They amended the Rules of

13 See also Article 28 of the Rwanda Tribunal, and article 17 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. [Emphasis added]

Procedure and Evidence and provided for resort to international bodies for assistance.[14]

The Tribunal invoked the alternative mechanism in the *Dokmanović* Case. It addressed the warrant of arrest for the accused to the United Nations Transitional Administration for Eastern Slavonia (UNTAES). At the time of his arrest Dokmanovic resided at Sombor in the Serbian part of the Federal Republic of Yugoslavia (FRY). He challenged the legality of his arrest by the UNTAES, contending that the warrant for his arrest ought to have been addressed to the authorities in the FRY where he resided. Although the FRY Constitution forbids the extradition of its nationals, Dokmanović was not an FRY national. There was therefore no legal impediment to his surrender by the FRY. The Tribunal nevertheless held that although that option was available to it, it was not the only one. It was at liberty to opt for the alternative mechanism that it had devised for itself, especially as the FRY had previously shown itself to be uncooperative and had not yet enacted enabling legislation.[15]

Similarly, in the *Dragan Nikolić* Case the ICTY directed the warrant of arrest for the accused to SFOR, an operational outfit set up under NATO and mandated to effect arrests on the territory of Bosnia and Herzegovina.[16]

There are two lessons that the International Criminal Court may derive from these two cases. The first is the need to ensure that states enact legislation that fully comports with the Rome Statute in the matter of cooperation. Luckily, the Statute specifically provides that "States shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part."[17] The second lesson is the need for the Court to conclude agreements of cooperation with peacekeeping and other intergovernmental bodies that may be operating in areas of conflict constituting situations with which it may be seised for purposes of executing its processes.[18]

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14 Rule 59 *bis* of the Yugoslav Tribunal authorises it to do so. It provides as follows:

> Notwithstanding 55 to 59, on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for the prompt transfer of the accused to the Tribunal in the event that the accused be taken into custody by that authority or international body or the Prosecutor.

15 Decision on the Motion for Release by the Accused Slavko Dokmanovic, *Prosecutor v. Mle Mrksić Mirošlav Radić, Veselin Sljivvancahnin and Slavko Dokmanović,* Case No. IT-95-13a-PT, 22 October 1997, at para. 39.

16 Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, 9 October 2002.

17 Article 8.

18 The Court has already concluded such an agreement with the African Union in respect of the Darfur situation in Western Sudan. See Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR Res. 1593(2005).

D. Rights of the Prisoner during Arrest

Though not spelt out in the Statutes or the Rules, the arrest of the prisoner, where the warrant is addressed to national authorities, has to be executed in accordance with the laws of the state concerned. Needless to say, however, that law must be consonant with fundamental principles of fairness and with internationally accepted standards. In this respect, the Rules pointedly require that the warrant of arrest must be accompanied with, not only a copy of the indictment, but also with a statement of the rights of the prisoner as spelt out in the Statutes.[19] One of these rights is the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[20] The Rules also require that the indictment and the statement of rights be read out to the prisoner at the time of the arrest. To satisfy these requirements, then, it is necessary that at the time of the arrest the persons carrying out the arrest must have in their possession the warrant, a copy of the indictment and the statement of rights. Possession of the warrant is important because it constitutes the authority on the basis of which the persons carrying out the arrest, arrest the prisoner. It is also on the strength of that authority that the prisoner submits to the arrest. Without disclosure of that authority the prisoner is entitled to treat the arrest as illegal and an unwarranted or unauthorized invasion of his personal liberty and, using reasonable force, to resist the arrest.[21]

It is noteworthy that the Rules insist that the person carrying out an arrest not only give to the prisoner the warrant, indictment and statement of rights but must also read them to him in a language that he understands. This serves to underscore the importance of the accused person's right to full information. Where the person carrying out the arrest does not have the documents in his possession he will not be able to satisfy the requirements of the Rules. This would be a serious violation of the prisoner's rights, and he would be entitled to treat the arrest as illegal.[22] Nevertheless,

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19 For similar provisions see Rule 55 of the ICTR Rules of Procedure and Evidence and Rule 55 (C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

20 See ICTY Statute, article 21, para 4(a), article 20, para 4(a) of the ICTR Statute, and article 17, para. 4 (a) of the Statute of the Special Court for Sierra Leone.

21 In the English case of *Galliard v. Laxton* (1862) 2 B.F.S. 363; 5 L.J. 835; 121 E.R. 1109, a police constable who had been issued with a warrant for the arrest of the appellant did not have it with him when he effected the arrest. He left it with his superior officer at the police station. Although the appellant did not ask the constable to show him the warrant when he arrested him, it was all the same held that the arrest was illegal. The important point here is that if requested the constable was bound to produce the warrant; the keeping of the arrested person in custody after such a request was made and failure to comply with the request would render the arrest illegal. For a similar holding see *R v. Chapman* (1871) 12 Cox C.C. 4.

22 Concerning this matter Viscount Simon of the English House of Lords said the following in *Christie v. Lechinsky* [1947] 1 All ER 567, at p 572-73; [1947] A.C. 573, at pp. 587-88:

> The requirement that he [the prisoner] be informed does not mean that technical or precise language need be used. The matter is one of substance and turns on the elementary proposition that in this country a person is *prima facie* entitled to freedom and is only required to submit to restraint on his freedom if he knows in substance the reason it is claimed the restraint should be imposed.

where the prisoner himself creates a situation either by resisting or putting up a fight, as to make it impracticable for the officer carrying out the arrest to show or to read to him the documents then he will have himself to blame. As Viscount Simon of the English House of Lords said,

> The person arrested cannot complain if he has not been supplied with the above information as and when he should be if he himself produces a situation which makes it particularly impossible to inform him, e.g. by immediate counter-attack or by running away."[23]

E. Modalities of Arrest

Neither the Statutes nor the Rules of the ICTY, ICTR or the SCSL spell out the actual modalities of carrying out an arrest. Here, again. it is assumed that they leave it to the laws of the countries where the arrest is made.[24] However, such law must be in accord with generally accepted international standards, particularly the Code of Conduct for Law Enforcement Officials.[25] An example of such law is the Botswana Criminal Procedure and Evidence Act. It provides as follows:

1. In making an arrest the peace officer or other person authorized to arrest shall actually touch or confine the body of the person to be arrested unless there is submission to the custody by word or action.
2. A peace officer or other person arresting any person under the provisions of this Part may search such person and shall place in safe custody all articles (other than necessary wearing apparel) found on him.
3. Whenever a woman is searched on her arrest, the search shall only be made by a woman and shall be made with strict regard to decency. If there is no woman available for such search who is a police officer or is a prison officer, the search may be made by any woman specially named for the purpose by a peace officer.[26]

In case of forcible resistance or attempt to evade the arrest, the Act authorizes the arresting officer to use "all means necessary to effect the arrest." [27] However, to avoid any impression that the law is authorizing arresting officers to use wanton force, the provision hastens to add that:

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23 Ibid.

24 It is instructive to note that the Rome Statute of the International Criminal Court specifically defer to national laws. Article 59, para. 1 reads as follows: "A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9."

25 See General Assembly Resolution 34/169 of 17 December 1979.

26 Laws of Botswana, Chapter 08:02, section 46.

27 Ibid., section 47.

> Nothing contained in this section shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.[28]

The force used, then, must be proportionate to the force used by the offender. Where the offender submits to the custody or where he does not resist, there would even be no need to handcuff him or to use other instruments of restraint. Regarding the use of lethal weapons, such weapons should be resorted to only where the prisoner offers armed resistance, [29]or he cannot otherwise be arrested. Short of that, other means short of use of lethal force must be employed, unless they are not sufficient to arrest or restrain the prisoner or where the life of the arresting officer or of somebody else is in danger.[30] Use of wanton or excessive force not only exposes the person who uses it to civil suits by the victim,[31] but also to criminal prosecution for murder, manslaughter.[32]

F. Arrest Without Warrant

i. Rationale

The law in many countries authorizes law enforcement agents and even private persons to arrest suspected criminals without warrant under certain circumstances. One of these circumstances is where there exist cause or reasonable grounds to suspect that the person to be arrested has committed or is about to commit an offence of a serious nature. The other is where there exists reason to believe that a warrant for his arrest has already been issued. The third is when the person to be arrested commits a breach of the peace in the presence of a police officer.

The rationale for permitting arrest without warrant in such circumstances is urgency and expediency. Were a warrant to be insisted on under the circumstances, then, by the time it is sought and obtained from the court the suspected criminals would have disappeared from the scene. Such a result would be against the interest of the public to ensure that suspected criminals are brought to justice. It would also

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28 Ibid.

29 For an example of an incident where wanton force used by security officers where there had been no resistance or armed resistance at all, see the *Guerrero* case from Colombia. *Guerrero v. Colombia* 1 UN Doc. CCPR/DR XV/R. 11/45, 1982.

30 A commentary to article 3 of the Conduct for Law Enforcement Officials reads as follows:

> The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. . In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

31 Section 50 of the Botswana Act, *supra*, provides that: "Nothing in this Part contained shall, save as is otherwise expressly provided, be construed a taking away or diminishing any civil right or liability of any person in respect of any wrongful or malicious arrest."

32 See for example *S v. Purcell-Gilpin* [1971] S. Afr. L. Rep. 548, and *S v. Miller* [1974] S. Afr. L. Rep. 33.

undermine public confidence in the criminal justice system. Nevertheless, in permitting arrest without warrant in these circumstances, the law insists on certain conditions being satisfied as a safeguard against possible abuse of the procedure.

ii. Safeguards against Abuse

The first safeguard is the requirement that the offence for which arrest without warrant is permitted should be sufficiently serious as judged by the maximum penalty that it attracts. In some jurisdictions offences of this kind are referred to as "felonies," or "arrestable" or "indictable" offences. In other words, not every offence on the criminal calendar calls for arrest without warrant. Only "serious" offences should. The second safeguard is that the person who effects the arrest must have reasonable grounds to suspect that the person to be arrested has committed or is about to commit one of those arrestable offences. This requirement minimizes arbitrariness, impulse and overzealousness in matters that involve the liberty of other people. The third safeguard is that where the person carrying out the arrest is a law enforcement agent, then, he must have a certain level of seniority. Seniority ensures that the agent can be trusted to judge the situation and to exercise his discretion responsibly.

However, where the person effecting the arrest is a private citizen, he or someone else closely connected to him must be personally affected by the crime. The fact that that person or somebody else close to him is affected and that he has had ocular inspection of the offence guards against mere busybodies interfering with other people's rights. The last safeguard is that the person who makes the arrest must take the prisoner to the police station immediately after the arrest. The police must, in turn, charge the prisoner with some definite offence and, without any due delay take him to court to be dealt with by the court.

The law in some jurisdictions limits the period during which the prisoner is kept in police custody to 48 hours or thereabouts. Custody at the police station is deemed necessary to enable the police to carry out some preliminary investigation and to determine whether the prisoner has actually committed any offence and, if so, to charge him with the offence.[33] If they do not charge and take him to court within that time, then, they must release him forthwith.[34]

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33 See for example, the English case of *Dallison v. Caffery* [1965] 1 Q.B. 348, at p.367 where Lord Denning stated as follows: "When a constable has taken into custody a person reasonably suspected of a felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says he was working, for there he may find persons to confirm or refute his alibi. The constable can put him up on an identification parade to see if he is picked by the witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice ... The measures must, however, be reasonable."

34 Detaining an individual at the police station beyond the prescribed period renders the detention illegal or unlawful custody. See for example the South African case of *Rex v. Mtungwa* [1931] T.P.D. 466.

iii. Procedures under the Tribunals

The Statutes and Rules of the Tribunals adopt these principles and similarly provide for arrest of persons suspected of committing crimes within the jurisdiction of the tribunals without warrant.

For example, Rule 40 (A) (i) of the ICTR Rules of Procedure and Evidence provides that in case of urgency the Prosecutor may request any state to arrest a suspect provisionally, seize physical evidence, or take all necessary measures to prevent the escape of a victim or witness, or the destruction of evidence. The Prosecutor may make such request either in writing or orally. Because of the urgency, the Prosecutor is not required to include with the request an arrest warrant, statement of the prisoner's rights, instructions on the procedures, or let alone an indictment. Unlike the requirements under many national laws, the Prosecutor also does not have to show that he has cause or reasonable grounds to suspect the person to be arrested has committed a crime within the Tribunal's jurisdiction.

It is sufficient if he possesses "reliable information" which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction.[35] The requested state is not entitled to demand to know the source or details of the information or to question the credibility of the sources or the reliability of the information. Its only duty is to comply with the request and to carry out the arrest forthwith. It is also not open to the accused to say that there was no urgency in the matter.[36] That is a matter within the exclusive prerogative of the Prosecutor.

What happens after the arrest is a matter of great concern. The Rules of both the ICTY and ICTR provide that the Prosecutor may apply to the Tribunal for an order for the transfer of the prisoner to the seat of the Tribunal or to some other designated place. However, they do not impose a time frame within which the Prosecutor must make the application. Consequently, national authorities have arrested individuals at the behest of the Prosecutor and detained them in their custody for months without any charge or request for their transfer to the seat of the Tribunal.[37] Such deten-

35 For similar provisions see Rule 40 of the ICTY Rules of Procedure and Evidence and Rule 40 of the Rules of Procedure and Evidence of the SCSL.

36 See for example, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, *Prosecutor v. Nzirorera,* Case No. ICTR-98-44-T, 7 September 2000.

37 See for example, Decision *Prosecutor v. Barayagwiza,* Case No. ICTR-97-19-AR72, 3 November 1999 where the accused was arrested by the authorities in the Cameroun and kept in their custody for 19 months before he was transferred to the Tribunal's seat in Arusha, Tanzania. See also Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44-1, 8 May 2000. In this case the accused was detained by Benin authorities on 5 June 1998 at the request of the Prosecutor. The Prosecutor applied for his transfer to the Tribunal on 29 August 1998; he was subsequently transferred to the Tribunal's Detention Facility in Arusha on 9 September 1998, 95 days after his initial arrest. See also Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, *Prosecutor v. Rwamakuba and others*, Case No. ICTR-98-44-T, 12 December 2000. The accused was arrested by Namibian authorities on 2 August 1995; on 22 December 1995 the Office of Prosecutor contacted the authorities and asked that the accused be kept in custody pending further information; on 18 January

tions smack of preventive detention, an abhorrent practice that obtains in totalitarian states. This, notwithstanding, when the affected individuals complain about their arrest and detention being illegal or about the violation of their rights, such as being informed about the reasons for the arrest, or the conditions of the detention, the tribunals, particularly the ICTR, respond that "the Tribunal has consistently held that it has no jurisdiction over the conditions of any arrest, detention or other measures carried out by a sovereign State."[38]

The ICTR has also stated that "the Tribunal is not competent to supervise the legality of arrest, custody, search and seizure executed by the requested State. The laws of the requested State may not require an arrest warrant or impose other legal conditions."[39] On the issue of remedies the Tribunal has held that "the Trial Chamber therefore, considers it cannot provide any remedy concerning such arrest and custody as these are still matters within the jurisdiction of the requested State."[40]

By this stance the Trial Chamber has condoned state conduct that fell below internationally acceptable standards. If it were left to stand the stance would send an unfortunate signal to requested states that encourages them in their aberrant conduct. It would, in the minds of many, also ultimately undermine the integrity of the Tribunal as a guardian of legality and justice. It is submitted that having triggered the state conduct in question the Tribunal's management must also share some blame for that conduct. Were the Tribunal to provide the requested states with guidelines similar to those that accompany warrants of arrest and to impose time frames within which the Prosecutor must apply for the transfer of prisoners to the seat of the Tribunal, the offensive conduct would be minimized. Fortunately, and in accord with the views expressed here, the Appeals Chamber has recognized the injustice occasioned to suspects and held the prosecution responsible for the cooperating states' transgressions.

This it did in *Kajelijeli v. Prosecutor*[41] when it reversed the decisions of the Trial Chamber and held the Office of the Prosecutor responsible for the Benin authorities' failure to inform the appellant promptly of the reasons for his arrest and detention;[42] for the appellant's initial illegal detention in Benin;[43] and for denying appellant his

1996 the Office notified the authorities that they had no evidence that the accused had committed a crime within the jurisdiction of the Tribunal; the authorities subsequently released him on 8 February 1996. On a complaint by the accused that his initial arrest was illegal the Tribunal held that the Prosecutor was not responsible, as the Namibia authorities acted on their own, and not on the request of the Prosecutor.

38 See *Prosecutor v. Rwamakuba and others*, ibid, at para. 22.

39 Decision on the Release of the Accused, *Prosecutor v. Ngirampatse*, Case No. ICTR-97-44-I, 10 December 1999, at para. 56. See also Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, *Prosecutor v. Nzirorera,* Case No. ICTR-98-44-T, 7 September 2000, at para. 27.

40 Decision on the Release of the Accused, *Prosecutor v. Karemera*, Case No. ICTR-98-44-I, 10 December 1999, at para. 4.3.1.

41 *Kajelijeli v. Prosecutor,* Case No. ICTR-98-44A-A, Judgment 23 May 2005.

42 Para. 227.

43 Para. 231.

right to counsel prior to his appearance before the Tribunal.[44] It also held the prosecution solely responsible for failing to produce him before the Tribunal without delay.[45] In doing all this the Appeals Chamber invoked the "constructive custody" theory, which it initially formulated in the in the *Barayagwiza* case.[46] Under that theory the Prosecutor is held vicariously responsible for a requested state's conduct.[47]

As for remedies for the violation of the rights of suspects or accused persons whilst under requested states' custody, the Appeals Chamber held, in accord with the maxim *ibi jus ibi remedium*, that affected people were entitled to the remedies and that the Tribunal was duty bound to grant them. Thus in the *Kajelijeli* case the Chamber took into account the violations and reduced the sentences that it otherwise would have imposed.[48] It also intimated that had the violations that the appellant suffered been egregious the Chamber would have been prepared to decline jurisdiction and would have permanently stayed the proceedings.

To avoid or to minimize the kind of transgressions that took place in the *Kajelijeli* case, it is suggested that both the ICTY and ICTR consider adopting a Rule similar to Rule 40 of the Special Court for Sierra Leone. That Rule requires the Prosecutor to apply to the Designated Judge for an order to transfer the suspect to the Court's Detention Facility within 10 days from the date of the initial arrest. The Rule further requires the Tribunal to release the suspect if the Tribunal rules so, or the Prosecutor fails to apply for the order of transfer within the prescribed period of 10 days.[49] This Rule is salutary. It shows sensitivity to the suspected person's right to

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44 Para. 237.

45 Para. 250.

46 See *supra* note 37.

47 The Appeals Chamber stated at para. 220 that "Under the prosecutorial duty of due diligence, the Prosecution is required to ensure that, once it initiates a case, 'the case proceeds to trial in a way that respects the rights of the accused."

48 Para. 255.

49 Rule 40 of the SCSL Rules of Procedure and Evidence provides as follows:

(A) In case of urgency, the Prosecutor may request any State:
   i. To arrest a suspect and place him in custody in accordance with the laws of the State;
   ii. To seize all physical evidence;
   iii. To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence."

(B) Within 10 days from any arrest under Sub-Rule (A) above, the Prosecutor shall apply to the Designated Judge for an order pursuant to Rule 40 *bis* to transfer the suspect to the Detention Facility or to such other place as the President may decide, with the advice of the Registrar, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the authorities concerned, and the Registrar.

(C) The suspect shall be released if:
   i. the Chamber so rules; or
   ii. the Prosecutor fails to apply for an order under rule 40 bis within ten days of the arrest.

personal liberty. It also saves the Court from possible accusations of condoning the obnoxious practice of preventive detention. Meantime, the Appeals Chamber in the *Kajelijeli* case has also underscored the Prosecutor's duty in the following terms:

> The Prosecutor is under a two-pronged duty. The request to the authorities of the cooperating State has to include a notification to the judiciary, or at least, by way of the Tribunal's primacy, a clause reminding the national authorities to promptly bring the suspect before a domestic Judge in order to ensure that the apprehended person's rights are safeguarded by a Judge of the requested State ... In addition, the Prosecution must notify the Tribunal in order to enable a Judge to furnish the cooperating State with a provisional arrest warrant and transfer order.[50]

III. Surrendering the Prisoner to the Tribunals

A. Procedure

When the Tribunal, acting on the request of the Prosecutor, orders that the prisoner be transferred to the Tribunal, then the national authorities must promptly do so. They must not keep the prisoner in their custody for a period that is longer than is reasonable in the circumstances. Again, once the prisoner is in the custody of the Tribunal he must be produced before a Trial Chamber "without delay" to be dealt with by the Chamber.[51] It is submitted that "without delay" must be read to mean "without unreasonable delay", since some delays may be inevitable or unavoidable or beyond anybody's making or control.

Unreasonable delay in transferring the prisoner to the Tribunal or to produce him before the Trial Chamber amounts to a violation of the prisoner's right to have his guilt or innocence determined by the Tribunal within a reasonable time. As is always the case, what is unreasonable delay must turn on the facts of each case, including the conduct of the parties, prosecution and defence. In this respect, too, the conduct of the ICTR Office of Prosecutor has, on some occasions, left much to be desired.

The case of *Prosecutor v. Kajelijeli* is, again, a good example. In addition to the appellant's initial illegal detention whilst in Benin, he was not produced before the Trial Chamber until 211 days after his transfer to the Tribunal's Detention Facility at Arusha.[52] The Tribunal condoned this delay on the ground that the Registry experienced difficulties in identifying suitable counsel to assign to the appellant and that the appellant contributed to the delay by repeatedly choosing counsel not on the Registrar's list and by his counsel asking for postponement of the initial appearance.

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50 Para. 222. The Appeals Chamber buttressed its decision by citing the following words of Judge Vohrah in *Semanza*, Decision, 31 May 200, Declaration of Judge Lal Chand Vohrah, para. 6: "If an accused is arrested or detained by a state or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible."

51 Article 20, para. 4(2) of the ICTR Statute and Rule 62 of its Rules of Procedure and Evidence.

52 *Supra* note 37.

For similar reasons the accused in *Prosecutor v. Rwamakuba* was not produced before the Tribunal until after six months after his transfer to Arusha.[53] In that case the Trial Chamber, again, opined that "no initial appearance could have taken place in the absence of Counsel for the Accused."[54]

It is submitted that, counsel or no counsel, the accused must be produced before the Chamber as soon as he arrives at the seat of the Tribunal. His appearance enables the Tribunal to ascertain whether his rights are being observed. It also enables the Chamber to learn from the Prosecutor or other organs of the Tribunal the problems that they may be experiencing regarding the case. Also important, timeous production of the prisoner before the Chamber enables the Judges to see the prisoner and to give him an opportunity to voice his concerns about the way the case is being handled or the way he is being treated at the Detention Facility.

On this issue, again the Appeals Chamber disapproved of the Trial Chamber's approach. It held in the *Kajelijeli* case that the Trial Chamber should not have relied on the absence of assigned counsel to condone what the Appeals Chamber considered to be "extreme undue delay" in producing the accused person before the Tribunal after his transfer to the Detention Facility.[55] The Appeals Chamber opined that the Trial Chamber ought to have appointed duty counsel to hold the fort whilst the Registry continued to find assigned counsel of the accused person's choice. Indeed for failing to do so the Trial Chamber violated the accused person's right to counsel.[56]

B. Need for National Enabling Legislation

Ordinarily, and particularly for states that follow the dualist doctrine on the law of treaties, there should be laws at the national plane that provide for the arrest, detention and surrender of suspects or accused persons to the Tribunal. However, as the states' obligation in this respect derives from the UN Charter, absence of such laws does not excuse states from carrying out that obligation. According to a well established rule of the law of treaties, states cannot set up their national laws, the absence or inadequacy of such laws, as an excuse for failing to carry out their treaty obligations.[57] For example, states must not refuse to surrender suspects or accused persons to the Tribunal on the pretext that they have no treaties of extradition with entities other than states or that their constitutions forbid them to surrender their nationals.[58] Indeed, Rule 58 of the ICTY Rules of Procedure and Evidence explicitly provide that:

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53 *Supra* note 37.

54 *Supra* at para 36.

55 Para. 250.

56 Para. 245. Note that Rule 44*bis* D of the ICTR Rules of Procedure and Evidence makes it mandatory for duty counsel to be appointed. It provides that "If an accused, or suspect transferred under Rule 40b*is*, is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused or suspect until counsel is engaged by the accused or suspect, or assigned under Rule 45."

57 See article 27 of the 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S.331.

58 For example, aaccording to the Trial Chamber in the *Dokmanović* Case, note 15 *supra*, at

> The obligation laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the states concerned.[59]

In this regard it so happens that most states have to date not enacted legislation setting forth the modalities for carrying out their obligations under the Statutes at the domestic level. When occasion arises some of them simply arrest and surrender wanted individuals to the Tribunals without resort to any legal processes and sometimes in contravention of their law. This practice is unfortunate. It undermines the principle of legality and of the rule of law. It also undermines the integrity of the tribunals and taints the subsequent proceedings before them.

C. Abductions

i. *mala captus bene detentus*

Normally, a state that wishes to secure for trial a fugitive offender who is outside its jurisdiction must have an extradition treaty or other reciprocal arrangements with those states on whose territory the offender may be found. In the case of international tribunals there must be arrangements such those discussed above. Absent such treaty or arrangements, states are under no obligation to extradite or surrender the offender.

Abduction is action on the part of prosecuting authorities, be they national or international, by which they circumvent these requirements and, without the consent of the states concerned, send agents to the territory of those states to forcibly capture and to bring the offender back home for trial. *Ex facie,* this kind of conduct is illegal under international law, as it constitutes a violation of the affected state's territorial integrity and national sovereignty.

However, according to the *mala captus bene detentus* principle, [literally meaning "badly captured well detained"], once the fugitive offender is produced before the court, the court does not concern itself with how he was brought before it. No matter how he is brought, the court will assume jurisdiction and try him provided that there is a recognised basis for assuming such jurisdiction.[60] Thus the accused might have been abducted and forcibly brought within the court's jurisdiction, as was the

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para. 39, "The FRY has failed to pass implementing legislation that would permit it to fulfill its obligations under Article 29. It has taken the position that its constitution bars the extradition of its national to the Tribunal, and thus legislation which provides for the surrender of Yugoslav nationals would e unconstitutional ..." The Rome Statute tried to overcome this problem by drawing a distinction between "surrender" and "extradition." According to article 102, surrender means "the delivering up of a person by a State to the Court, pursuant to this Statute." On the other hand, extradition means "the delivering up of a person by one State to another as provided by treaty or national legislation."

59 For an identical provision see Rule 58 of the ICTR Rules of Procedure and Evidence.

60 The bases for the jurisdiction may be the fact that the accused committed the offence within the court's territorial jurisdiction, or that he or the victim is a national of the forum state or that he committed an international crime, *delict jus gentium*, over which universal jurisdiction can be assumed.

case with *Adolph Eichmann* who was abducted from Argentina to Israel,[61] *General Manuel Noriega* who was abducted from Panama to the United States,[62] and *Godfrey Miyanda* who was abducted from Zaire to Zambia.[63] The accused might also have been forcibly brought within the court's jurisdiction in violation of existing extradition treaty stipulations, as was *Dr. Humberto Alverez-Machain* who was abducted from Mexico to the United States,[64] *Ebrahim* who was abducted from Swaziland to South Africa,[65] or *Bennett* who was illegally deported from South Africa to the United Kingdom.[66]

To the complaint by the victims that abductions violate international law, the courts that assume jurisdiction in such cases respond by saying that individuals are not subjects of international law, and are not entitled to invoke it to their aid.[67] To the complaint that abductions infringe other states' territorial integrity and national sovereignty and endanger international peace and security, the courts retort that that is a matter for the executive branch of government; it is not justiciable by the courts before which an alleged offender has been brought; it can only be resolved through diplomatic channels between the states concerned.[68] To the complaint that abductions violate existing treaties, the courts respond that not being party to treaties, individuals do not derive any direct rights from them.[69] Regarding the individual's violated rights that abductions entail, the courts refer such individual to his right to claim damages in civil proceedings in the courts of the appropriate country.

ii. Abuse of process Principle

Emboldened by a growing national and international human rights culture, courts in a number of countries, and even international tribunals, are increasingly showing inclination away from the *mala captus mala detentus* principle. In cases of abduc-

61 *Adolf Eichmann v. Attorney General of Israel* 36 Int'l L.Rep. 277 (1962).

62 *United States v. Noriega* 746 F. Supp. 1506 (S.D.Fla. 1990). See also *Ker v. Illinois* 119 U.S. 436 (1886).

63 *Godfrey Miyanda v. The Attorney-General* [1983] Zamb. L. Rep. 78.

64 *Alvarez-Machain v. United States* 112 S.Ct. 2188 (1992). See also *United States v. Matta-Ballesteros* 71 7.3d 754 (1995).

65 *S. v. Ebrahim* [1991] 2 S.A. 553(A).

66 *R v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A. C. 42.

67 A German court in *In re Garbe* [1948] Ann. Dig. 419 (No. 125), said: "The breach of international obligations gives rise only to the responsibility of states and not individuals, for states only are subjects of international law. The individual has rights and duties only in relation to the law of his state."

68 See the *Eichmann* and *Alvarez-Machain* cases, *supra* notes 61, 64.

69 In another German case of the *Spanish-German Extradition Treaty* [1925-6] Ann. Dig. 308 (No. 234) the appellants impugned the jurisdiction of the court to try them because the offence in respect of which they had been extradited from Spain was of a political character, contrary to the Spanish-German Extradition Treaty. Rejecting their contention the Reichsgericht said as follows: "The court is not competent to examine whether the accused were extradited in accordance with the extradition treaty. That treaty does not confer rights upon the extradited persons as such; it regulates solely the duties of the two States in matters of extradition. It grants them the right not to extradite political offenders; it does not impose upon them the duty not to extradite them."

tion, they decline jurisdiction over the abducted person. In doing so, they invoke the abuse-of-process principle to their aid. A New Zealand court explained the principle in the following terms:

> The yardstick is not simply fairness to a particular accused. It is not whether the initiation and continuation of the particular process seems in circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court's process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of process of the court.[70]

According to this principle, courts have power to decline jurisdiction in cases where (1) it will be impossible (usually by reason of delay) to give the accused a fair trial, or (2) it wound offend the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[71] The sources of that power are (i) the inherent powers of the courts to supervise the executive branch of government[72]; (ii) their inherent powers to regulate their proceedings and to prevent a perversion of their processes; and (iii) provisions in national constitutions or in international human rights or constitutive instruments of tribunals that guarantee the rights of the accused and empower the courts to enforce them in the case of breach.[73]

The application of the principle then changes the maxim *mala captus bene detentus* to *mala captus mala detentus*. Four decisions from courts in South Africa, Zimbabwe, and the United Kingdom as well as from the ICTY illustrate this point.

In the South African case of *State v. Ebrahim* the South African police forcibly abducted the accused, an ANC activist, from Swaziland to South Africa and charged him with treason. Invoking the *mala captus bene detentus* principle, the trial court assumed jurisdiction, tried and convicted him. However, on appeal the appellate court nullified the proceedings. In doing so it stressed the need to protect and promote the dignity of the judicial system, saying that he who comes to justice must come with clean hands. It also stressed the need to observe international law and good relations between states. It nevertheless drew a distinction between abduction by private citizens, on the one hand, and by agents of the state on the other. While it might not decline jurisdiction in the former case, it would decline it in the latter, because to do so would be to "sanctify international delinquency by judicial condonation."[74] While this decision has been cited and followed by the courts of other countries such as Zimbabwe, and Britain, its value is somewhat diminished by the

70 *Moevao v. Department of Labour* [1981] NZLR 464, at p. 482

71 *R v. Horsefery Magistrates' Court, Ex Parte Bennett* [1994] 1 A.C. 42 at 74.

72 In this respect Lord Griffiths of the English House of Lords said that courts must "accept a responsibility for the maintenance of the rule of law that embraces a willingness *to oversee executive action* and to refuse to countenance behaviour that threatens either basic human rights or the rule of law." Ibid, at p. 62.

73 See article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia, article 21 of the Statute of the International Criminal Tribunal for Rwanda and article 67 of the Statute of the International Criminal Court.

74 [1991] 2 S.A. 553.

distinction that the court drew between action by private and official agents.[75] This point is addressed later on in this chapter.

In the Zimbabwe case of in *S v. Beahan*[76] the appellant, a fugitive offender from Zimbabwe charged with terrorist offences, entered Botswana illegally. Members of the Botswana Defence Force arrested him and handed him over to the Botswana police. On it being established that Zimbabwean authorities wanted him back to face charges of terrorism, the Botswana police handed him in over to the Zimbabwe police who promptly arrested him. In doing so the Botswana police did not follow any formal extradition proceedings; there existed no extradition treaty between Botswana and Zimbabwe. The Zimbabwe Supreme Court followed the *Ebrahim* decision, saying that not only was it founded on the inherited principles of Roman-Dutch common law which Zimbabwe shared with South Africa, but had "the added quality of being in accord with justice, fairness and good sense."

The Court was also concerned with the need to "promote confidence in and respect for the administration of justice", to "preserve the judicial process from contamination" and not to encourage States "to become law-breakers in order to secure the conviction of a private individual."[77] However, on the facts of the case, the court did not decline jurisdiction. It held that the conduct of the Zimbabwean authorities did not amount to abduction and was not an affront to the sovereignty of a foreign state. Additionally, the fact that the Botswana authorities did not take recourse to proper extradition procedures did not constitute a bar to the Zimbabwean courts' exercise jurisdiction over the appellant.

In the British case of *ex parte Bennett* the appellant was charged with obtaining by false pretences and fraud.[78] He was forcibly removed from South Africa and taken to Britain in total disregard of the extradition arrangements between the two countries. The lower courts dismissed his application for review of the decision to try

75 The value of the decision as a precedent was, however, whittled down by a subsequent decision in *S v. December* [1995] 1 SACR 438. Here the court held that as long as state agents have not used force or tricks to bring an individual from a foreign country the court is not precluded to try him for crimes committed within its jurisdiction. The courts will not insist, as earlier decisions indicated, that state agents had authority to enter another country and investigate a crime that was committed within South Africa. For a criticism of the decision see John Dugard, "Does the Appellate Division Care about International Law?" 12 *S. Afr. J. Human Rights* 324 (1996).

76 [1992] 1 SACR 307.

77 Gubbay, C.J., said at p. 317 as follows:

> In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State. There is an inherent objection to such a course both on the grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means thereby encouraging States to become law-breakers in order to secure the conviction of a private individual.

78 *R v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A. C. 42.

him, holding that they had no power to inquire into the circumstances under which he came under their jurisdiction. However, the House of Lords reversed, holding that the courts had the power. Citing the *Ebrahim* case, *supra*, Lord Griffiths said:

> The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.[79]

Regarding abductions abroad Lord Griffiths declared as follows:

> In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities has been a knowing party.[80]

Note should be taken of Lord Griffiths' requirement of the police, prosecuting authorities or other executive authorities being "a knowing party." Therefore, according to the learned judge, where prosecuting authorities have not participated in the objectionable conduct the English courts, as in *Ebrahim,* will not decline jurisdiction

The *Dokmanović* case also involved complaints of indirect abduction by tricks. The accused sought to be released, contending that his arrest and subsequent surrender to the ICTY were illegal.[81] The accused, along with others, was charged by the ICTY with crimes against humanity, grave breaches of the Geneva Conventions and with war crimes. He lived Vukovar, in Eastern Slovenian in Croatia, a region that was placed under the control of the United Nations Transitional Administration for Eastern Slavonia (UNTAES) by the Security Council. However, at the material time he had moved to Sombor, in the Serbian part of the FRY. On 3 April 1996 the Trial Chamber issued a sealed warrant of arrest, directing the UNTAES to search for, arrest and surrender the accused to the Tribunal.

Unaware of the existence of the warrant of arrest the accused intimated to the personnel of the Office of the Prosecutor his willingness to give evidence relating to the alleged atrocities committed by Croats against Serbs in the area of Vukovar. The Office of Prosecutor seized on this offer to lure the accused to move to the Eastern Slovenia on the territory under UNTAES where they could arrest him. Pretending that they were taking him to meet and talk to General Klein of the UNTAES about his offer, the Prosecutor's staff drove the accused across the Danube River Bridge to the Eastern Slovenia. No sooner had the vehicle conveying the accused and a companion crossed over to Eastern Slovenia than that the UNTAES personnel in the company of representatives of the Office of the Prosecutor searched and handcuffed the accused at gun point.

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79 Ibid., at p. 62.

80 Ibid.

81 See *supra* note, 15.

They also took away his jacket and handbag and placed a hood over his head. In stead of taking him to General Klein they drove him to an airfield, put him on a UNTAES plane and flew him to the ICTY seat at The Hague. Minutes after the plane took off for The Hague the representatives of the Office of the Prosecutor provided the accused with a copy of the arrest warrant, a copy of the indictment and a statement of his rights.

The accused challenged the legality of his arrest and transfer to the Tribunal on the ground that, *inter alia*, he was abducted from the FRY. In response to the accused's challenge the Prosecution invoked the *mala captus bene detentus* principle. However, the Chamber did not find the principle applicable, since it held that the conduct of the Prosecutor's staff did not amount to abduction. It held instead that the accused was not arrested in the FRY, as arrest has been defined herein.[82] His liberty was not taken away from him whilst in the FRY. According to the Chamber's finding, the accused entered the UNTAES vehicle that carried him to Erdut of his own free will, and not under any compulsion. It also found that he was "free to get off the bus" if he wanted. From these findings, the Chamber concluded that the accused was arrested and detained only after he arrived at Erdut in Eastern Slovenia.

To this writer, whether or not the accused was free to leave the bus must be determined in the light of the Prosecution's admissions. The Prosecution unabashedly told the Chamber that it used trickery and a ruse to arrest the accused. It candidly declared to the Chamber that it was its intention from day one to arrest him – probably by hook or crook. This candid confession notwithstanding, the Chamber proceeded to hold, in effect, that even if the Prosecution's trickery amounted to abduction, conditions that influence some national courts to depart from the *mala captus bene detentus* principle did not exist in this case. First, the accused was not mistreated in any way on his journey to the Erdut base; he was not subjected to cruel, inhumane and outrageous conduct that would shock the conscience of the international community; his arrest was "an ordinary arrest by ordinary standards."[83]

Secondly, unlike the *ex parte Bennett* and other national cases, there was no extradition treaty that the prosecuting authorities circumvented in transferring the accused from the FRY. The prosecuting authorities could have invoked the procedure under Rule 55 of the Rules of Procedure and Evidence to secure the accused's arrest and transfer from the FRY. However, as already discussed above, that was not the only mechanism that was available to them. Third, the Chamber, following its earlier decisions, was prepared to depart from decisions of national courts that hold that violation of a state's territorial integrity and national sovereignty is no concern for an individual. Nonetheless, on the facts of the case the Chamber held that the prosecuting authorities did not violate the FRY territorial integrity, since, according to its earlier holding, the accused was arrested in Croatia.[84]

Lastly, as to the assertion by the accused that the Office of Prosecutor had promised him safe conduct from the FRY to Croatia and back, the Chamber held that no such promise was ever made to him. Even if it was, it was not binding on the Tribunal, since it is only a Judge that had authority to grant it. Even then, safe

82 See *supra* note 15.

83 At para. 75.

84 Para. 75.

conduct is only issued to witnesses to ensure their availability to give evidence before the Tribunal.[85]

iii. Involvement of the Prosecuting Authorities

It has been noted that those national courts that were inclined to reject the *mala captus mala detentus* principle would only do so where prosecuting or other state authorities were involved in the abduction of the accused. The ICTY in *Prosecutor v. Dragan Nikolić* also adopted this stance.[86] The accused was indicted on 24 counts of various crimes under the jurisdiction of the Tribunal. On or about 20 April 2002, unknown individuals arrested him on the territory of the FRY and transferred him to Bosnia and Herzegovina where they handed him over to SFOR. On receiving the accused SFOR did, in turn, hand him over to the Prosecutor of the Tribunal for arraignment and trial. On being brought before the Tribunal the accused challenged Tribunal's jurisdiction to try him, on the ground that his arrest was illegal, he was abducted and that his human rights were thereby violated.[87]

Concerning the accused's arrest and abduction, the Tribunal's Trial Chamber found as a fact that SFOR played no part in it and did not know the individuals who did it. It held that in handing him over to the Tribunal SFOR was simply performing its duty.[88] It could not therefore be held vicariously responsible for the arrest and abduction. The Chamber also rejected the thesis advanced by the Defence that by receiving and arraigning the accused, the Prosecution thereby ratified or adopted his prior illegal arrest and abduction. It held that the receiving of the accused by the Prosecutor was merely fortuitous and not planned.

Undaunted, the Defence further submitted that whether or not the perpetrators of the arrest and abduction were "state-sponsored" or were acting in their private capacity was irrelevant. It urged the Tribunal to come to the conclusion that "international law has to some degree been breached and that the violation of some fundamental principle – state sovereignty, international human rights and the rule of law – needs to be protected above all other considerations."[89] The defence called upon the Chamber to reject the *mala captus bene detentus* principle by declining to exercise jurisdiction. The Chamber also rejected these submissions. It held that this was not one of those cases in which it was proper to decline jurisdiction. For example, there was no violation of state sovereignty by a state – the ICTY was not a state. Consequently, there was no violation of international law. Additionally, the Prosecutor's Office was

85 Para. 84.

86 Case No. IT-94-2-PT, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002.

87 According to the Defence Motion, para. 11, he said that "in this case, and any case involving, in effect, kidnapping, the taint of that degree of illegality and breach of fundamental human rights is so pernicious, and the dangers of the appearance of condoning it to any degree so much a hostage to unpredictable consequences and fortune, that a judicial body set up with, inter alia, the objectives of preserving human rights can have no proper option but to make it plain that jurisdiction will not be entertained in such circumstances."

88 Para. 67.

89 Para. 71.

not complicit in the illegal arrest and abduction of the accused – and, according to the jurisprudence of national courts, the involvement of the forum state or its agents was an essential prerequisite to the court's decision to decline jurisdiction.[90]

Lastly, there was no attempt on the part of the Prosecution to circumvent available means of bringing the accused within the jurisdiction of the Tribunal, as was the case in *Bennett*, supra. As to the alleged violation of the accused's human rights and the need to protect the integrity of the judicial process, the Chamber held that it attached great importance to the protection of such rights and to fully respect the due process of law and that due process includes the question how the accused has been brought into the jurisdiction of the Tribunal. However, relying on the ICTR decision in *Barayagwiza,* it said that it would only use violation of the accused's rights as a ground for staying the proceedings only where the violations were egregious.[91] On the facts, however, the Chamber was not satisfied that "the treatment of the Accused by the unknown individuals ... was of such an egregious nature."[92]

A significant contribution of the Tribunal to the existing jurisprudence on this point was its view that had it been established that the accused had been subjected to mistreatment of an egregious nature, it would not have mattered whether the perpetrators were private or official agents of the prosecuting authorities. The Chamber stated as follows:

> The Chamber holds that, in a situation where an accused is very seriously mistreated, may be even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. *But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated.* [93]

Generally speaking, the distinction that the courts, both national and international, make between the acts of governmental or official and private actors in abduction cases is unfortunate. It allows the courts to ignore the illegal actions of private agents, however outrageous, and enable the state or prosecuting authorities to benefit from them. By so doing the courts place their imprimatur on such actions. They encourage, albeit unwittingly, lawless cross-border activities by "private" individuals and other "voluntary agencies."

They also create an appearance of judicial condonation of activities of powerful and lawless individuals and organizations carried out on the territory of other states.

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90 At para. 101 the Tribunal stated "At no time prior to the Accused's crossing the border between the FRY and Bosnia and Herzegovina were SFOR and/or the Prosecution involved in the transfer. In addition, from the assumed facts the conclusion must be drawn that there are no indicia that SFOR or the Prosecution offered any incentives to these unknown individuals."

91 See paras. 110-112.

92 Ibid.

93 Para. 114 [Emphasis added].

Such activities not only denigrate the sovereignty of those states but also degrade the administration of justice. Again, given the fact that the state or in the case of international tribunals, the Office of the Prosecutor, is the ultimate beneficiary of these activities, one cannot rule out state or prosecutorial complicity under the cover of intelligence operations.[94] It is to be noted in this respect that intelligence operations are by nature covert and often involve the employment of private agents. Worse still, intelligence agencies that are involved in these operations are generally not accountable to anyone outside themselves.

For these reasons, therefore, it is urged that courts, whether national or international, should not make any distinction between official and unofficial acts of the abductors. In the interests of legality and the rule of law, the courts should decline jurisdiction in all cases where it is demonstrably shown that the accused is brought before them as a result of abduction.

In case the above suggestion is not accepted, then, it is further suggested, in the alternative, that a Tribunal, before assuming jurisdiction, must be satisfied beyond reasonable doubt that there has been no collusion between private individuals or agents and state or prosecuting authorities. And the onus must be on the prosecution so to satisfy it.

IV. Concluding Remarks

The Statutes and Rules of Procedure and Evidence of the ICTY, ICTR and SCSL prescribe the procedures or guidelines to be followed in arresting and surrendering suspects or accused persons. In the opinion of the present writer these procedures and guidelines represent best practices and are generally in accord with accepted international standards. They endeavour to strike a balance between the rights of the suspect or accused persons on the one hand, and those of the public on the other.

However, as is to be expected and as the cases discussed in this chapter demonstrate, the powers that be do not always comply with these procedures and guidelines. Suspects or accused persons are often prejudiced as a result. For this reason and in accord with the principle that *ibi jus ibi remedium*, the tribunals' Rules of Procedure and Evidence allow a party who alleges prejudice as a result of non-compliance with the procedures to petition the tribunals for a remedy. For example, Rule 5 of the ICTR Rules of Procedure and Evidence provides that any aggrieved party to the proceedings before it who alleges non-compliance with the Rules may lodge a complaint before the Tribunal "at the earliest opportunity."[95] Persons who allege to have been illegally arrested or surrendered to the Tribunal may thus petition the Tribunal. It is, however, important to note that such petition "shall be upheld, and the act declared null, *only if the act was inconsistent with the fundamental principles of*

94 The reading of *Prosecutor v. Dragan Nikolić*, *supra*, leaves the impression that the Chamber glossed over the facts and was not as thorough as it ought to have been in inquiring into the conduct and connections of the "unknown" private individuals as it could have been.

95 Rule Rule 5 of the ICTY Rules of Procedure and Evidence. For identical provisions see Rule 5 of the ICTR Rules of Procedure and Evidence and Rule 5 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

fairness and has occasioned a miscarriage of justice"[96]

Thus, not every act of non-compliance will result in the nullification of the act complained of. It is only those acts amounting to violations of a "fundamental rule of fairness" and occasioning a miscarriage of justice that will be nullified. In other words, only flagrant violations, resulting in serious prejudice to the complainant will attract remedies from the tribunals.

In *Prosecutor v. Rwamakuba,* for example, the ICTR Trial Chamber found that the Registrar's failure to provide the accused with duty counsel pending assignment of his counsel resulted in the accused not having legal representation for over an extended period of time. It found this failure to be in breach of the Statute and of the Rules. Said the Chamber: "However, the Trial Chamber does not consider that the said delay in providing the Accused with legal representation and thus, in the Accused's initial appearance, has caused him a serious and irreparable prejudice."[97]

In *Prosecutor v. Barayagwiza,* on the other hand, the accused was kept in pre-trial custody without charge or trial for as long as 19 moths. The Appeals Chamber found such custody to constitute egregious violation of the accused's rights, resulting in gross miscarriage of justice.[98] Additionally, as has been indicated, although abduction per se will not automatically result in the nullification of an arrest and surrender, it will end up that way at least if it is accompanied by inhumane treatment of the victim. Quite commendably, as the ICTY opined, in situations of this kind, it will not be material whether the abduction was carried out by private or official agents. This is a veritable contribution to the development of the law in this area by the ICTY.

The Rules are silent as to the remedies that are available to a victim of an act that has been nullified. Regarding illegal arrest and surrender the obvious remedy that has frequently been sought has been release and permanent stay of the proceedings or acquittal "with prejudice to the prosecution." Given the serious nature of the offences that accused persons before the tribunals are charged with, these remedies have not been easy to obtain from the tribunals.

The contribution of the ICTY, ICTR and SCSL to procedural criminal law, then, is that the tribunals have been able to adapt existing national law in this area, from both the common law and civil law traditions, and to construct it into an international code of criminal procedure. Their Rules and jurisprudence have been of inestimable value to the International Criminal Court as a model for its own Rules. The Tribunals have undoubtedly been trail blazers for the ICC.

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96 *Op. cit.*

97 *Supra*, at para. 44.

98 The Chamber stated at para. 112 thus:

> "The Tribunal – an institution whose primary purpose is to ensure that justice is done – must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case ... Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals – including those charged with unthinkable crimes – would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results."

Section 19

Relationship of the Court with International Organizations

Chapter 43

The International Criminal Court and the International Court of Justice: Some Points of Contact

Shabtai Rosenne

I. Introduction

The aim of this chapter, dedicated to the memory of Igor Pavlovitch Blishchenko, is to indicate some points of contact between the International Court of Justice (ICJ) and the International Criminal Court (ICC).

The ICJ is a principal organ of the United Nations by virtue of Article 7, paragraph 1, of the Charter. It is also the principal judicial organ of the Organization following Article 92 of the Charter although there is no adumbration of what that means. The ICC, created and established by the Rome Statute of the International Criminal Court of 17 July 1998[1] is, according to the preamble of the Rome Statute, established as an 'independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole'.[2] That relationship has been formally created through the Relationship Agreement between the United Nations and the International Criminal Court of 13 September 2004, adopted by the Assembly of States Parties to the Rome Statute on 7 September 2004 and by the General Assembly of the United Nations in resolution 58/318 of 13 September 2004 (hereafter 'Relationship Agreement').

In considering these matters, the different functions performed by the two Courts must be kept in mind. The function of the ICJ is 'to decide in accordance with international law such disputes [between States] as are brought before it' (Statute of the ICJ [annexed to the Charter of the UN], Article 38, paragraph 1), and 'to give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter ... to make such a request' (Statute of the ICJ, Article 65, paragraph 1). The function of the ICC is 'to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred

1 2187 UNTS 3; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Official Records* (hereafter, *Rome Official Records)*, vol. I (A.CONF.183/9). All the preparatory work for this Statute was undertaken within the framework of the United Nations, especially the General Assembly and subsidiary organs that the General Assembly established, including the International Law Commission. The Statute is in every respect a 'United Nations Convention'.

2 It is not clear what is meant by 'United Nations system' in this context. On this concept, see Sh. Rosenne, *The Perplexities of Modern International Law* 399 (2004).

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 1003–1012.

to in [the] Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute' (Rome Statute, Article 1). By Article 2 of the Relationship Agreement:

1. The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court recognizes the responsibilities of the United Nations under the Charter.
3. The United Nations and the Court respect each other's status and mandate.

One consequence of these different functions and of the mutual recognition of the respective areas of operation of the United Nations and the ICC is that should either one be faced with a situation which the other has previously had before it, it is not a necessary consequence that the earlier precedent, whether judicial or otherwise, in any way binds the second organ, however persuasive the precedent might be. It also follows that having regard to the completely disparate functions of the two Courts, there can be no 'overlapping jurisdiction' between them. If questions of general international law should arise before the ICC, that Court should no doubt be guided by any relevant pronouncements of the ICJ. Likewise, should questions of international criminal law that are within the jurisdiction of the ICC come before the ICJ, the ICJ would no doubt pay due heed to any relevant pronouncements of the ICC. The ICJ is an organ of the UN and Article 3 of the Relationship Agreement brings the activities of each Court within the scope of that mutual recognition of each organization by the other.

The basic texts of the ICC contain two direct references to the ICJ.

Article 119 of the Rome Statute provides:

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 5, paragraph (b) (ii) of the Relationship Agreement requires the Registrar of the ICC to

> Furnish to the United Nations, with the concurrence of the Court and subject to its Statute and Rules, any information relating to the work of the Court requested by the International Court of Justice in accordance with its Statute.

Before proceeding further with this article, it should be recalled that under the Statute of the ICC as it stands at present, three crimes are specified as coming within that Court's jurisdiction: the crime of genocide under Article 6, crimes against human-

ity under Article 7, and war crimes under Article 8. Of these, the crime of genocide is regulated in detail in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.[3] Crimes against humanity and war crimes, while they have a treaty basis in the Geneva Conventions of 1949 and the Additional Protocols of 1974, are to a very large extent the product of a long series of judgments which include the Nuremberg and Tokyo Judgments in the immediate aftermath of the Second World War, judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and some judgments of national courts. The principal treaties of today's international humanitarian law which covers both crimes against humanity and war crimes do not contain any provision conferring jurisdiction on the ICJ.[4]

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3 78 UNTS 277. It is a curious feature of the drafting of the Rome Statute that it does not refer to the Genocide Convention by name, in contrast to the specific reference to the Geneva Conventions of 1949 in connection with war crimes. The ICJ has examined this Convention in several cases, including: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* advisory opinion, ICJ Reports 1951, 15; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia & Herzegovina *v.* Yugoslavia), Provisional Measures and Further Provisional Measures cases, ibid. 1993, 3, 325, Preliminary Objections, ibid. 1996-II, 595, Counter-claims and withdrawal, ibid. 1997, 243, 2001, 572, Merits, judgment of 26 February 2007; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia *v.* Yugoslavia), ibid. 1999-II, 1015 (pending); ten *Legality of Use of Force* (Provisional Measures) cases, ibid. 1999-I and II, Yugoslavia *v* Belgium, 124, Canada, 259, France, 363, Germany, 422, Italy, 481, the Netherlands, 542, Portugal, 656, Spain, 761, United Kingdom, 826, United States of America, 916, (Preliminary Objections), judgments of 15 December 2004 in the cases against Belgium, Canada. France, Germany, Italy, Netherlands, Portugal, United Kingdom, ibid. 2004, 279-1307; *Armed Activities on the Territory of the Congo* (New Application) (Rwanda) (Provisional Measures), ibid. 2002, 219 at 244 (para. 68), merits ibid 2006, 3 February; *Armed Activities on the Territory of the Congo* (Uganda) (Provisional Measures), ibid. 2000, 111, merits ibid. 2005, 19 December. These cases concern international responsibility for alleged breaches of the Conventions. In the *Application of the Genocide* (merits) judgment of 2007, the Court made a series of findings against Serbia involving responsibility for violation of different obligations deriving from the Genocide Convention. These findings include failure to transfer to the ICTY different individuals indicted for genocide and to co-operate fully with that Tribunal. In addition charges of individuals for crimes of genocide have been made in the following cases: in ICTY – *Jelisić* (IT-95-10-T, 14 December 1999 and IT-95-10-A, 5 July 2001) case,), *Kristić* (IT 98-33-T, 2 August 2001 and IT-98-33-A, 19 April 2004), and *Stakić* (IT-97-24-T, 31 July 2003) cases; and in ICTR *Akayesu* (ICTR-96-4-T, 2 September 1998, and appeal, 1 June 2001), and others. The Security Council, acting under Chapter VII of the Charter, in Resolution 1593, 31 March 2005 decided to refer the situation in Darfur since 1 July 2002 to the ICC. The Office of the Prosecutor of the ICC has opened investigations into three situations in Africa, in Darfur, in the Congo and in Uganda. ICC website http://www.icc-cpi.int/cases.html, accessed 8 November 2005. These could lead to criminal actions in the ICC.

4 The ICJ has three times been asked to accept jurisdiction said to be grounded in the customary and conventional international laws of war and international humanitarian law. However, in the absence of any provision in the texts enumerated conferring jurisdiction on it, the Court has only acted if the impugned acts could be brought within the scope of the title of jurisdiction as invoked. If not, it has declined to act on that basis. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia & Herzegovina *v.* Yugoslavia (Serbia and Montenegro) (Further Requests for

II. Rome Statute, Article 119

The report of the Preparatory Committee on the Establishment of an International Criminal Court, which constituted the 'basic proposal' for consideration by the Rome Conference under Rule 29 of the Rules of Procedure,[5] dealt with the settlement of disputes in its article 108 (renumbered 119 in the final engrossment of the text of the Statute), misplaced in Part 13 as one of the final clauses.[6] There were four options. Option 1 proposed that any dispute concerning the interpretation or application of the Statute should be settled by the decision of the Court. Option 2 was more complex, and distinguished between disputes relating to the competence of the Court concerning disputes relating to its judicial activities and any dispute between two or more States Parties relating to the interpretation or application of the Statute.

The Court's jurisdiction in a particular case is regulated in a series of complicated provisions of the Rome Statute regarding admissibility and challenges to the jurisdiction, and is a substantive matter in every case to come before the Court. The Preparatory Committee's proposal for article 108 was limited to disputes between States Parties relating to the interpretation or application of the Statute, and aimed to leave untouched the issues concerning the Court's competence in any particular case.

Giving broad expression to that approach, Option 2 read:

> Without prejudice to the competence of the Court concerning disputes relating to its judicial activities as is established in accordance with this Statute, any dispute between two or more States relating to interpretation or application of this Statute which is not resolved through negotiations [within a reasonable time] [within ... months] shall be referred to the Assembly of States Parties which shall make recommendations on further means of settlement of the dispute.

Option 3 proposed simply that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. Option 4 proposed that there should be no article on dispute settlement as far as concerned disputes between States Parties over the Rome Statute while leaving undisturbed the provisions regarding the Court's jurisdiction in a particular criminal case.

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the Indication of Provisional Measures), ICJ Reports 1993, 325, 341 (para, 13)); *Armed Activities on the Territory of the Congo* (Congo *v*. Uganda) (Provisional Measures) case, see previous note; *Armed Activities on the Territory of the Congo* (Congo *v* Rwanda) (New Application) (Provisional Measures), see previous note, jurisdiction declined, 3 February 2006.

5 For that report (A/CONF.183/2) see *Rome Official Records*, vol. III. For the Rules of Procedure (A/CONF.183/6), see ibid. vol. II.

6 Sh. Rosenne, 'When is a final clause not a final clause?' 98 AJIL 546 (2004). The final clauses are the provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters necessarily arising before the entry into force of the treaty. These provisions apply from the time of the adoption of the text of the treaty. In the case of the Rome Statute, the text of the Rome Statute was adopted at the 9th plenary meeting on 17 July 1998, See *Rome Official Records*, vol. II.

The Rome Conference did not consider the question of the settlement of disputes as an item in itself but together with the final clauses (in the proper sense of the term). Part 13 of the Preparatory Committee's text was examined at the 19th, 20th, 33rd and 41st meetings of the Committee of the Whole.[7] Opening that discussion at the Committee's 19th meeting, the Coordinator said that there was no consensus in favour of any one of the four options for article 108. He explained that the effect of option 3 would be to make the International Criminal Court judge of its own jurisdiction. Option 2 would not exclude the possibility of reference by the Assembly of States Parties of a dispute over the interpretation or application of the Statute to the International Court of Justice. That is the only element of interpretation to be found in the published *Official Records* of the Rome Conference.

In the course of that discussion, Mexico proposed an amendment to article 108 reading:[8]

> Any dispute between two or more States Parties relating to the interpretation or application of this Statute which is not resolved through negotiations within three months, shall be settled by one of the means of settlement of disputes chosen by the parties to the controversy, and if this is not possible also within three months, it shall be sent to the International Court of Justice for consideration in accordance with the Statute.

The two paragraphs of Article 119 express the two types of dispute that it addresses. Paragraph 1 is the equivalent of Article 36, paragraph 6, of the Statute of the International Court of Justice, the *competence de la competence* adapted to the requirements of the Statute of an international criminal court. It is however broader than that, and addresses any dispute concerning the Court's judicial functions, not merely a dispute arising in the course of the judicial proceedings as to whether it has jurisdiction or whether the suit is admissible. As stated, the Statute makes provision for disputes as to whether a particular case that is brought before the Court comes within its jurisdiction or is admissible. That would not be a dispute between two or more States Parties but an independent issue that the accused person can raise in the course of the proceedings or which the Court itself may raise *proprio motu* having regard to Article 19, paragraph 1, of the Rome Statute. The Statute does not make provision for any other dispute that may arise between States Parties relating to its judicial functions.[9]

Paragraph 2 is a combination of Option 2 and the Mexican amendment. Although couched in imperative language ('shall be referred') it should be read as an optional proceeding chosen either by the States between whom the dispute exists

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7 Id. For the rolling texts and the recommendations of the Coordinator (A/CONF.183/C.1/L54/Rev.2 and L.61 and Corr.1) and the report of the Drafting Committee (A/CONF.183/DC/R.191-R.194), ibid. vol. III. The Coordinator for Part 13 and the Preamble was T.N. Slade (Samoa). There is no public record of the negotiations that he conducted on article 108 and no statement on the record giving any interpretation of that provision.

8 A/CONF.183/C.1/L.14/Rev.1, ibid.

9 For an interpretation of this expression, see Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 1243 (1999).

or by the Assembly of States Parties as part of its approach to the settlement of the dispute.

Paragraph 2 is open to two principal interpretations. It can be read as a conferment of jurisdiction on the International Court of Justice under Article 36, paragraph 1, of the ICJ Statute. If the referral of a dispute to the ICJ is obligatory, it must have a purpose that the ICJ can address, and that means that the other party to the dispute, if it is a State and if it is a member of the United Nations or has otherwise accepted the position of a party to a contentious case before the ICJ, is obliged to accept the jurisdiction of the ICJ. That seems to be the interpretation placed on that provision by Triffterer.[10] At the same time he recognizes that a duly authorized body (which might eventually include the Assembly of States Parties) could initiate, directly or indirectly, a request for an advisory opinion.[11]

The obligation on the parties to any dispute relating to the interpretation or application of the Statute that is not settled by negotiation is to refer that dispute to the Assembly of States Parties. For its part, the Assembly of States Parties may make recommendations on further means of settlement 'including referral to the International Court of Justice'. It cannot do more than that. It cannot itself refer any dispute to the International Court of Justice and it cannot compel any State Party to the Statute to refer any such dispute to the Court. The most it can do is to recommend such referral. Here the provision of Article 119, paragraph 2, would seem to track Article 36, paragraph 3, of the Charter of the United Nations.[12]

There are three ways in which a case can be referred to the ICJ. Article 40 of the Statute indicates how a contentious case can be referred to the Court, by the notification of a special agreement or by a written (unilateral) application. Article 65, paragraph 2, sets out the procedure for initiating advisory cases in the Court; that has to be read together with Article 96 of the Charter regarding the organs authorized to request an advisory opinion. The Assembly of States Parties is not authorized to request advisory opinions. It is an open question whether the General Assembly could grant it the necessary authorization under Article 96, paragraph 2, of the Charter. Article 119, paragraph 2, of the Rome Statute thus keeps open all three methods of referring a dispute to the International Court of Justice, all requiring an appropriate recommendation from the Assembly of States Parties. Since the Assembly of States Parties is only empowered to make recommendations in this respect, there is no element of compulsion in this form of proceedings, and if contentious proceedings are instituted unilaterally by the filing of a written application the State Party to which that application is addressed is under no obligation to accept it.

The obligation imposed on the Registrar of the ICC under the Relationship Agreement to furnish information relating to the work of the Court requested by the ICJ is not matched by any corresponding direct obligation on the Registrar of the ICJ at the request of the ICC. Neither the reasons for this one-sided obligation nor

10 Op. cit. at 1248.

11 Ibid.

12 The Security Council has made use of that provision only once since 1946. That was in connection with the *Corfu Channel* case, referred to the Court by unilateral application in implementation of the recommendation contained in Security Council resolution 22 (1947), 9 April 1947.

its implications are clear. The *chapeau* of Article 5, paragraph 1, of the Relationship Agreement lays down a general principle that the United Nations and the ICC shall, to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest.

Usually the documents relating to a case in the ICJ become generally accessible on the commencement of the hearings in a case and it does not need a formal agreement for them to be made directly available to the ICC (or any other court or tribunal for that matter).[13] At the Rome Conference Mr Corell, Legal Counsel of the UN, made an important statement regarding the confidentiality of documents and information in the United Nations. Referring more particularly to deliberations of closed meetings of the Security Council, he requested that any provision in the Statute for the protection of sensitive national security information should be made applicable to the United Nations *mutatis mutandis*. He did not mention the International Court of Justice, which also has arrangements to protect sensitive national information, and of course any information regarding its deliberations is and remains secret under all circumstances.[14] Article 74, paragraph 4, of the Rome Statute likewise provides that the deliberations shall remain secret. There is thus an important limitation on the exchange of information between the ICC and the UN (and all its organs).

III. Question of evidence and witnesses

The two formal links between the two Courts are peripheral. The main problems that sooner or later will have to be faced are substantial and may have a direct bearing on the ability of one or other of the two Courts to exercise its functions. Those problems concern evidence and witnesses.

International litigation since 1945 has encountered two sets of problems which hardly ever arose in international arbitrations and litigation before that period, namely disputes over the facts, and the hearing of witnesses. As a result, the law, although fragmentary still, has developed into the field of evidence.[15] What the developing law on evidence has not yet faced is the existence of cases in two (or more) international courts and tribunals arising out of the same disputed sets of facts, one court or tribunal having to deal with 'normal' cases of state responsibility for breach of a treaty (sc. the Genocide Convention) and the other with criminal prosecutions for violations of the law declared in that same treaty.

On the first issue, disputed facts in cases in different tribunals arising from the

13 In the *Access to Information under Article 9 of the OSPAR Convention* arbitration between Ireland and the United Kingdom, the question arose of access to one of the pleadings in the MOX Plant arbitration under Annex VII of the UN Convention on the Law of the Sea, before that pleading became generally available. The parties jointly requested that Arbitral Tribunal to permit disclosure in the OSPAR proceedings of material from Ireland's memorial in the Annex VII arbitration, to which that Tribunal agreed. See the Final Award of 2 July 2003, para. 63, in the OSPAR arbitration, available on the website of the Permanent Court of Arbitration, www.pca-cpa.org.

14 Statement at the 8th plenary meeting (para. 94), 18 June 1998, in *Rome Official Records*, vol. II.

15 Cf. C.S. Amerasinghe, *Evidence in International Litigation* (2005).

same incident, with too much speculation it is submitted that one court or tribunal cannot take 'judicial knowledge' of a finding of facts by another tribunal. Unless the parties have reached agreement on stipulated facts, the facts have to be properly established to the satisfaction of each tribunal, having regard for the precise nature and function of each tribunal. There may be to some degree an element of general knowledge of widely and accurately reported facts of a general nature and that general knowledge might be sufficient to support a claim of international responsibility based on an alleged breach of a relevant treaty – for example the case of the American hostages taken from the U.S. Embassy in Tehran, leading to the *United States Diplomatic and Consular Staff in Tehran* case, before the International Court of Justice between the years 1979 and 1981.[16]

As Article 69, paragraph 6 of the Rome Statute puts it, the ICC shall not require proof of facts of common knowledge but may take judicial notice of them. Nevertheless, a general picture of that nature is hardly sufficient to support a guilty verdict in a criminal trial, where the accused's criminal responsibility has to be established 'beyond reasonable doubt' following a presumption of innocence until proved guilty.[17]

More important is the question of witnesses, where at least two sets of problems can be foreseen. The first is where the evidence of an individual is required in a case in the International Court of Justice, but that evidence could incriminate the witness in criminal proceedings, whether in the witness' national court or in the International Criminal Court or any other international or national criminal court. In the ICC, Rule 74 of the Rules of Procedure and Evidence protects a witness against self-incrimination.[18] There is no similar provision in any of the texts at present governing the procedure in the International Court of Justice, nor, so far as is known, is this specifically provided for in the Universal Declaration of Human Rights or any of the Human Rights treaties and conventions.

But since it has now been formally incorporated in international criminal law, it would smack of incompatibility if it were not applied equally in other non-criminal international courts and tribunals. In international criminal law this appears as one of the basic rights of any individual called to give evidence in an international criminal court, and it may now be regarded as a basic human right incorporated in international criminal law. As such, it should have precedence in the International Court of Justice even if that might prejudice one party's case in that Court, or make it impossible for the Court to satisfy itself that the claim of the party concerned is well founded.

In this connection, there is a major difference between the two Statutes in the matter of evidence and witnesses, and this in turn may become a factor, especially for the ICJ. The Statute of the ICJ has very little to say on this element of international litigation, no doubt because in the international arbitrations as they had developed up to the drafting of the Statute of the Permanent Court in 1920 there had been

16 International Court of Justice Reports 1979 7 (Provisional Measures), 1980 3 (Merits), 1981 45 (Discontinuance).

17 Rome Statute, Art. 66.

18 For the Rules of Procedure and Evidence adopted by the Assembly of States Parties in accordance with Article 51 of the Rome Statute, see Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, *Official Records*, Part II, A (doc.ICC-ASP/1/3, 2002).

little experience of the handling of disputed facts, of witnesses and even less of the credibility of evidence submitted by one or other of the Governments involved in the litigation.[19] Article 48 of the Statute empowers the ICJ to 'make all arrangements connected with the taking of evidence'. Article 52 sets out the time period within which a party may present oral or written evidence. That is about all.[20] In particular, the ICJ Statute contains no provision regarding judicial assistance from national courts such as is frequently regulated for internal litigation, and the ICJ is afforded no protection against what the Rome Statute designates as *Offences against the administration of justice* (Article 70) and *Sanctions for misconduct before the Court* (Article 71).[21] In both Courts the trials are in principle public.[22]

Experience will show whether and to what extent in appropriate cases the stricter rules regarding evidence and witnesses of the Rome Statute will have any direct impact on the ICJ, for example in cases involving allegations of breach of the Genocide Convention when there are also past or pending criminal prosecutions in the ICC arising out of the same incident or set of causes.

This outline is sufficient to indicate that, given their entirely different functions and jurisdiction, both the formal relations between the International Court of Justice and the International Criminal Court and their more intangible substantive interconnections are likely to prove extremely sensitive and delicate.

IV. Postscript

The judgment on the merits in the *Application of the Genocide Convention* case between Bosnia & Herzegovina and Serbia provided the first opportunity for the International Court of Justice to face head-on major issues of its relations with an international criminal court created by the Security Council – the International Criminal Tribunal for the former Yugoslavia (ICTY).[23] About one third of this long

19 Cf. G. Marston, 'Falsification of Documentary Evidence before International Tribunals, An Aspect of the *Behring Sea* Arbitration, 1892-1893', *British Year Book of International Law*, vol. 74, 357 (2001).

20 On the hearing of witnesses in the ICJ, see Sh. Rosenne, *The Law and Practice of the International Court 1920-2005*, vol. III, 1305 ff (Leiden, Martinus Nijhoff, 2006).

21 In its judgment on the merits of the *Corfu Channel* case, the ICJ made a finding '[w]ithout deciding as to the personal sincerity of the witness [X], or the truth of what he said'. ICJ Reports 1949, 4, 16. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Bahrain challenged the authenticity of 81 documents filed by Qatar. In due course Qatar abandoned those documents. See the judgment on the merits of that case, ICJ Reports 2001, 40, 46 (paras. 15 to 23). Further on this aspect, see Sh. Rosenne, previous note, vol. III, 1247.

22 ICJ Statute, Art. 46; Rome Statute, Art. 64 (7).

23 26 February 2007. The application introducing these proceedings in 1993 alleged violations of the Genocide Convention by the country then known as Yugoslavia in the bitter hostilities that followed the death of President Tito and the dissolution of the Socialist Federal Republic of Yugoslavia. After disposing of relevant preliminary matters and outstanding questions of jurisdiction, the main part of this judgment, paras. 142 to 470, addresses the substance of the applicant's principal claim. President Higgins has aptly described this case as 'extremely fact-intensive'. Statement to the Press after delivery of the judgment, available on the Court's website.

and fact-intensive judgment (170 pages) is devoted to analyzing the thousands of pages of documentary evidence and making detailed findings of fact. Paragraphs 202 to 230 explain in general terms the Court's approach to questions of proof, in particular the burden of proof, the standard of proof and the methods of proof. This involved the Court's use of proceedings in the ICTY.

While the Court reasserted that it must make its own determination of the facts that are relevant to the law which the applicant claimed the respondent had breached, it nevertheless pointed out an unusual feature of the case: 'Many of the allegations ... have already been the subject of the processes and decisions of the ICTY' (paragraph 211). ICTY's fact-finding process fell within the ICJ's formulation of evidence obtained by examination of persons directly involved tested by cross-examination, the credibility of which has not been challenged subsequently (paragraph 214). The Court noted that ICTY's actions and decisions fell into several distinct processes: (1) the Prosecutor's decision to include or nor certain charges in an indictment; (2) the decision of a judge to confirm the indictment and issue an arrest warrant or not; (3) the issuance of an international arrest warrant; (4) the decision of a Trial Chamber on a motion for acquittal; (5) the judgment of a Trial Chamber after full hearings; (6) the sentencing judgment of a Trial Chamber following a plea of guilty. After explaining the weight to be given to decisions at each of these different stages, the Court reached the general conclusion (paragraph 223) that it should in principle accept as 'highly persuasive findings of fact made by the Tribunal at trial', unless upset on appeal.

An important section of this judgment deals with the question of responsibility for events at Srebrenica (paragraphs 377 to 415). That tragedy had been the subject of several judgments of ICTY, in particular *Tadić* where the Appeals Chamber had not followed a relevant precedent of the International Court of Justice.[24] The Court explained why, in its opinion, the Appeals Chamber had erred in not following that precedent (paragraphs 403 to 407).

> ... [T[he Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends to persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. ... [T]he Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it [paragraph 403].

The procedure in the ICC will be broadly similar to the procedure in the ICTY, and we may assume that the International Court of Justice would adopt a similar attitude towards unappealed factual and legal findings by the ICC.

24 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, judgment, 15 July 1999.

Section 20

Miscellaneous

Chapter 44

International Humanitarian Law and Its Implementation by the Court

Robert Kolb

I. Introduction

The Statute of the ICC entered in force too recently to enable us to provide any stock taking of any Court's action in the field of international humanitarian law. Thus, after a short review of the Court's powers *ratione materiae* in that field, under Article 8 of the Statute, it may be appropriate to focus on the *acquis* the two *ad hoc* tribunals leave to the ICC. The jurisprudence of the ICTY and the ICTR are indeed very rich, and on some points impressively progressive, or even revolutionary, as far as international humanitarian law is concerned. The main contribution of the two tribunals was to reaffirm and strengthen the obligations of that branch of law. Thus, the tribunals often set out the law by referring to the Hague Conventions, the Geneva Conventions or the Additional Protocols of 1977, thereby confirming their controlling nature and often also their customary status. That already is a contribution of some importance, especially in fields such as the attacks on civilian populations,[1] where the rules of Protocol I (1977) are actually put under strain, or in the definition of proper treatment of detained persons,[2] an area equally facing attack. However, there are some areas where the *ad hoc* tribunals went further. They progressively developed the law, as any jurisprudence is called to do. The importance of jurisprudence in the development of the law need hardly be stressed. It has a constitutive role in areas such as international criminal law where the law is uncertain on many points and where previous decisions were rendered on the basis of differing legislation and legal systems.

Looked at closely, the jurisprudence has made four important contributions to the development of humanitarian law. Some of these developments are true "constitutional" developments of the law. First, there is the progressive merger between the law of international and non-international armed conflicts (of which Article 8 of the ICC Statute is an offspring). Second, there is the definition of internationalized armed conflicts through some form of foreign control. Third, the definition of protected civilians under Article 4 of the fourth Geneva Convention (1949) must be mentioned. Fourth, a most elaborate doctrine of reprisals, especially against civilians, has been presented, laying an almost total ban on them. As to smaller contributions,

1 See e.g. the *Galić* case (2003), ICTY, § 13ff.

2 See e.g. the *Delalić* (*Čelebići*) case (1998), ICTY, § 245ff, 267ff; or the *Kordić* case (2001), ICTY, § 237ff, 273ff.

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out of the innumerable, two examples shall be discussed. First, the elaboration on the principles governing forced labor of detained persons. Second, the question of the existence (or not) of a gap between Geneva Conventions III and IV: if a person is not protected under Conventions I to III, does he automatically fall under the protection of Convention IV? These examples are taken as a sort of *pars pro toto*; many other contributions cannot be discussed here for reasons of space.

II. International Criminal Court and War Crimes: Article 8 of the ICC Statute[3]

The provisions on war crimes are based on a negative definition. They are legally not more than the other side of the coin of the law of armed conflict; they are secondary or derived rules.[4] Indeed, since the XIXth century, a war crime is defined as a violation of the laws and customs of war.[5] There is thus no completely autonomous definition of war crimes in international law: one has rather to look to the rules as they exist in the law of armed conflict, *i.e.* to the positive side of the coin. The serious breach of any substantive rule of that law (having a certain importance) gives rise to the qualification as war crime. Article 8 of the ICC Statute contains a list of such war crimes.

This is not the place to review in detail Article 8 off the Statute. That is a huge provision indeed, on which the present commentator spent one year of work at the ICRC. Some general remarks must suffice; for the rest, a *renvoi* to the commentaries and the literature indicated there seems appropriate.

A. Exhaustiveness of the War Crimes Listed

1. Article 8 of the ICC Statute, under the title of "war crimes", is the most elaborate and comprehensive provision ever drafted as an attempt to capture in a list the most variegated types of violations of the laws of customs of war. It comprises 50 headings, in which conduct contrary to the law of warfare is listed, for international and non-international conflicts. The types of acts prohibited can be grouped in certain categories: (1) violence against life and limb of protected persons (*e.g.* Article 8, § 2, letter a, i- iii); (2) violation of protections and immunities accorded under the Geneva Law (*e.g.* Article 8, § 2, letter a, v-vi); (3) unlawful methods and means of warfare under

3 See generally: M. Bothe, "War Crimes, Commentary to Article 8 of the ICC Statute", in: A, Cassese / P. Gaeta / J. R. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, Oxford, 2002, p. 379ff; O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, 1999, p. 173ff. On the elements of crimes, see also K. Dörmann (with the collaboration of L. Doswald-Beck and R. Kolb), *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge, 2003 (it deals specifically with the war crimes provision).

4 That branch of the law is today generally called international humanitarian law, not always properly. On these terminological questions, see R. Kolb, *Ius in bello, Précis de droit des conflits armés*, Basle/Brussels, 2003, p. 9ff. On the dialectic between international humanitarian law and the war crimes law, see also Bothe, *op. cit.*, p. 381.

5 That is no more than an umbrella term, since it is not possible to list all the possible violations of the law of armed conflict in a sufficiently short compass. The Hague Conference of 1899 coined the term: its fourth Convention bore the title 'Convention respecting the Laws and Customs of War'.

the Hague Law in general (*e.g.* Article 8, § 2, letter b, i ff); as a particular category of the Hague law, prohibition of the use of unlawful weapons (*e.g.* Article 8, § 2, letter b, xvii ff).

However elaborate, the list is not exhaustive. This lack of completeness has two sides, one being static, the second being dynamic. From the static point of view, *i.e.* from the *de lege lata* perspective, the Conference made much efforts to be as comprehensive as possible when it laid down its list. However, it could not reach absolute completeness more than any human endeavor can reach perfection. Thus, certain minor criminal infractions were forgotten: an example is the scuttling of ships that have surrendered; such a scuttling has given rise to convictions in the post-Word War II case-law.[6]

Moreover, there is the dynamic, or *de lege ferenda* perspective. As war crimes do not constitute anything more than the negative side (or the secondary rules) of the law of armed conflict, the evolution of the last must also entail some difference in the first : then, either the category of war crimes is extended, new crimes being added; or it is restricted, some crimes being deleted. This evolution cannot be foreseen at the moment of the drafting of a treaty. Consequently, the list drawn up cannot lay any claim of completeness as to the future.

2. Thus, the list of Article 8 is not to be – and cannot be – regarded as a legally exhaustive enumeration of war crimes. However, the list is exhaustive as far as the jurisdiction of the ICC is concerned since the ICC has jurisdiction only over the listed crimes. In order to extend its jurisdiction to other war crimes, they have to be added to the list of Article 8 by a revision of the treaty. Outside this jurisdictional aspect, the controlling factor in determining war crimes is still mainly customary international law:[7] if a conduct comes to be prohibited under general customary law of armed conflict, this will give rise to a war crime under international law. And if it is added to the list of Article 8, the ICC may assume jurisdiction over it. The ICC Statute is thus characterized by a public order approach in attempting to limit strictly the jurisdic-

6 See the *Scuttled U-Boats Case*, in: United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. I, London, 1947, p. 55ff.

7 As to a specific context, treaty law suffices to overcome the hurdle of the *nullum crimen* principle. The *nullum crimen* requirement is satisfied as soon as the criminal prohibition applied at the time of commission of the offence(s) and at the place where such offence(s) were committed. To that extent, a treaty applicable on the State on whose territory the acts were committed is sufficient to trigger criminal responsibility, if it was in force at the relevant time and if it was properly inserted within the municipal legal order. Thus, the ratification by Yugoslavia of the two Additional Protocols of 1977 to the Geneva Conventions of 1949, and the Agreement concluded among the warring parties of the Bosnian War under the auspices of the ICRC (by which a series of obligations under the law of armed conflicts were accepted), are instruments sufficient to found a criminal liability as far as the *nullum crimen* requirement is concerned. See R. Kolb, "The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes", *BYIL*, vol. 71, 2000, p. 260ff. Contrary to the *ad hoc* tribunals, however, the ICC has a universal scope of action. It is therefore normal that customary law is of greater importance for it than for a tribunal with local jurisdiction. This does not mean, however, that in face of a specific case, which is necessarily locally limited, special sources may not suffice: they may overcome the *nullum crimen* hurdle, but not necessarily found the jurisdiction of the court. Jurisdiction and *nullum crimen* requirements are linked, but they are at the same time quite distinct.

tion of the court to a set of listed crimes. It is centered upon the idea of a "code" of criminal law. It is fundamental to understand that the *nullum crimen sine lege* (*praevia*) principle did not compel such an approach. The *nullum crimen* principle would have been satisfied if the crimes to be punished were part of customary international law or of treaties applicable to the territory of the parties involved. Such is the position of the *ad hoc* tribunals, as is confirmed by their jurisprudence. The Statute thus aimed at more than simply to satisfying the *nullum crimen* principle. It added to it the idea of a codification of criminal international law, whence the idea of jurisdictional exhaustiveness. Conversely, the evolution of criminal law may now be heavily influenced by that "code", which can prove highly useful in the process of municipal law legislation.

B. War Crimes in International and in Internal Armed Conflicts

1. If one compares the list of war crimes applicable in international and in non-international armed conflicts, one finds that a distinction is maintained between the two types of conflict and that the crimes committed in the context of internal conflicts are quite significantly more limited: only 16 counts out of 50 refer to internal armed conflicts. As we shall see, one of the major contributions of the ICTY has been the progressive interrelation of the two categories of armed conflicts from the point of view of criminal law (this course retro-acting evidently on the substantive humanitarian law). The ICTY held since its very beginnings that war crimes could be committed also in internal armed conflicts;[8] and that was a revolutionary novelty. Moreover, it held that the war crimes applicable in internal armed conflicts should as much as possible be the same as those applicable in international armed conflict.[9] The reason behind that statement is one of humanitarian nature: "what is inhumane and consequently proscribed in international wars, cannot but be inhumane and inadmissible in civil strife".[10] In one word: *ubi eadem ratio, idem ius*. However, that is precisely what States had up to the 1990's resisted strenuously to do, when maintaining inflexibly the distinction between the law of international and of non-international armed conflicts. The determination of the ICTY is thus a creative piece of jurisprudence.

2. Where does the ICC Statute stand from that point of view? It is easy to respond that it stands somewhere in between the old law and the new law. The old law plainly limited war crimes to international armed conflicts. But it contained at least some substantive rules on internal armed conflicts in the Second Additional Protocol of 1977, whereupon some criminal responsibility could be engrafted following the Nuremberg logic on 'men and abstract entities'.[11] The new law, still *de lege ferenda*, seems largely to attempt a progressive merger of the rules of conduct under

8 See T. Meron, "International Criminalization of Internal Atrocities", *AJIL*, vol. 89, 1995, p. 554ff.

9 With the exception of some rules which by their very nature cannot apply to purely internal armed conflicts: e.g. the provisions on occupied territory. However, in mixed internal and international armed conflicts, even such rules could apply.

10 See *Tadić* (Jurisdiction, 1995), § 119.

11 See the celebrated passage of the IMT-judgment: "[C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (see *AJIL*, vol. 41, 1947, p. 220).

the two branches of the law, the law of international armed conflicts and the law on non-international armed conflicts, except for certain areas, such as prisoners of war (combatant status) or belligerent occupation. As already stated the ICC Statute takes a middle ground position.

3. The provisions on non-international armed conflicts in the Statute mirror those contained under the heading of international armed conflicts. As to the other provisions, *i.e.* the provisions to be found only under the heading of international armed conflicts, their absence in the law of internal armed conflicts is to be explained either by the fact that they can apply by their very content only to international armed conflicts;[12] or, conversely, on a legislative timidity, preferring to exclude a criminalization which has not as yet reached a sufficient level of political acceptance.[13] The greatest loophole left in the law of non-international armed conflicts is the one on prohibited weapons: there, the States of the Rome Conference did not feel the courage to operate the transfer from international to internal armed conflicts.

4. There is one further difference as far as the provisions of Additional Protocol II of 1977 are concerned. The Protocol limits its substantive obligations to the dealings between the governmental armed forces and the rebels. It does not cover the relations between different groups of rebels, even if they fight each other.[14] Article 8 of the ICC Statute, in § 2, letter f, disposes differently of that matter by the words "protracted armed conflict between governmental authorities and organized groups *or between such groups*" (emphasis added). Thus, a major and unreasonable restriction of Protocol II has been overcome, at least as far as criminal law is concerned. The reach of the law has been broadened to the dealings *among* rebel groups.

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It may be appropriate at this place to enter into the major developments in the field of international humanitarian law of these last years, as catalyzed by the *ad hoc* tribunals, and especially by the ICTY. At the very first place, we must return on the question of progressive interrelation of the two main branches of the law, that of international armed conflicts and that of non-international armed conflicts, since the point is of capital importance.

III. The Progressive Interrelation of the Law of International Armed Conflict and of Non-International Armed Conflict[15]

1. The traditional law of warfare, as it existed for centuries in the era of so-called classical international law, was a law relating to armed conflicts between States. It

12 See e.g. Article 8, § 2, letter b, viii, referring to occupied territory and the transfer of population across the international boundary; or *ibid.*, no. xiv, dealing with the right to fair trial of the nationals of the hostile party.

13 See especially the provisions on prohibited weapons: Article 8, § 2, letter b, nos. xvii ff. See contra: *Tadić* (Jurisdiction, 1995), § 124, referring to chemical weapons.

14 See Article 1(1) of Additional Protocol II.

15 On this question, see e.g. L. Moir, *The Law of Internal Armed Conflict*, Cambridge, 2002, p. 133ff.

was devoted only to international armed conflicts with their aspects of land and sea warfare. The law was for a long time centered on the powers and duties of the belligerents. A huge part of it were the rules of sea warfare and neutrality, since the sea traffic was at those times essential for the wealth and strength of nations. In any event, the law was State-centered; it was functional to distributing rationally the respective powers between the parties to the conflict, including their relations with the non-parties (neutrals). The humanitarian idea was largely absent in it, albeit it was not completely unknown. As is known, it is only in the XIXth century, through the Red Cross Movement of Henry Dunant that the humanitarian bedrock was brought back into the law.[16] Thenceforward, it shared the place with the functional view of war, both being the constitutive foundations of the law of warfare. However, as the humanitarian principle emerged and strengthened itself, the pull to give some international regulation also to internal armed conflicts was inescapable.

The basic momentum for this pull is the simple idea that if the law of warfare is designed (at least also) to relieve human suffering, how then could there be a total discrimination according to the nature of the conflict? Do human beings not suffer equally in conflicts which take place within the borders of a State? And hence, must there not be some regulation to alleviate this suffering? One understands that some effort was made in said direction. Thus, when the American Civil War broke out, Professor Francis Lieber drafted instructions for the Government of Armies of the United States in the Field; these rules were eventually promulgated as General Orders number 100 by President Lincoln on 24 April 1863.[17] They regulated the conduct of the federal army in the field. Their content was heavily drawing on the law of international armed conflict. The need to extend rules of warfare to internal conflicts intensified in the XXth century in episodes such as the Russian Civil War, the Spanish Civil War and the innumerous civil wars with external intervention taking place during the cold war era.

2. The extension of principles from international armed conflicts to internal armed conflicts, however, proved difficult and burdensome. The reason is that the States, who are the ultimate guardians of the state of the law, were unwilling to allow such extension and were but little moved by the lofty considerations of humanity. States were ready to accept that rules must exist for international conflicts. The matter of such international conflicts is delicate, true, since the point is often fighting for survival ; but the phenomenon of war is undoubtedly international and therefore it is natural that there must be some rules, which are at the advantage of any belligerent and whose breach in any event always remains a factual option. As for internal conflicts things present themselves very differently. For the territorial State where armed struggle breaks out between its regular forces and rebels, the rebels remain its own citizens breaking its constitutional and criminal law order; they are seen as nothing more that bandits or law-breakers, whatever their political designs. In such a context, the State is all too ready to shield the matter by claiming strict respect of the principle prohibiting intervention in internal affairs. It will shy away most strongly

16 See P. Boissier, *Histoire du Comité interantional de la Croix-Rouge, De Solférino à Tsoushima*, Genève, 1978, p. 7ff.

17 See D. Schindler / J. Toman, *The Law of Armed Conflicts*, 4th ed., Leiden / Boston, 2004, p. 3ff.

from any international regulation and *droit de regard*, which can only strengthen the cause of the rebels by giving them some international political status and allowing their political friends from the outside to put pressure on the government.

One therefore understands that the Russian civil war gave rise only to agreed and sporadic (but important) action undertaken by the ICRC.[18] The Spanish Civil war saw a vast action by the ICRC,[19] being again wholly based on special agreements, since there were no conventional rights on which to draw. After the Second World War, in recollection of the horrendous Spanish Civil War, Article 3, common to the four Geneva Conventions, was introduced in order to safeguard a minimum of humanity in any type of armed conflict, and particularly in non-international armed conflicts. That was the essential breakthrough of the humanitarian principle. Albeit modest in its proportions, Common Article 3 was a basis for innumerable actions in the field of non-international armed conflicts which have become so frequent in the years following the war. The door had been opened; the point was now to unfold the scope of application of the principle of humanity, as enshrined in Common Article 3, and as derived, ultimately, from the Martens clause.

3. During the cold war period, there were few international armed conflicts and a myriad of non-international armed conflicts in which foreign powers, especially the two superpowers, intervened in one way or another (wars by proxy). Thus, the concept of purely internal wars progressively disappeared from the practice. In effect, all conflicts became in some way mixed, internal and international. The law therefore proved somewhat unsatisfactory and artificial when it drew its *summa divisio* between international and non-international armed conflicts. In order to bring it better in tune with the realities, the concepts of internationalized (or mixed) armed conflict was created. It was considered that a series of devices could legally make out of an internal armed conflict an international armed conflict, either in whole, or at least in part. Such devices were: (1) civil wars with recognition of belligerence;[20] (2) civil wars with a succeeded secession; (3) and civil wars with some foreign intervention, especially by troops of a foreign power fighting on the spot.[21] The third category was by large the most important one. It brought about terrible complications in determining the proper scope of application of the two branches of the law. In an internal armed conflict where there was external implication, the law required a splitting-up perspective, taking into consideration the forces involved in a particular act of fighting for determining the law applicable to them.[22] Therefore, for example, different sets of law are applied, in the same conflict, between:

18 See F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, Geneva, 1986, p. 284ff, with further references. See also A. Durand, *Histoire du Comité international de la Croix-Rouge, De Sarajevo à Hiroshima*, Geneva, 1978, p. 78ss, 160ff.

19 Bugnion, *op. cit.*, p. 307ff; Durand, *op. cit.*, p. 264ff.

20 However, this device fell into obsolescence in the XXth century, where it was hardly used any more.

21 Or if forces of an international organization intervene, as did the United Nations Forces in the Congo conflict (1960-2). On the whole question, see e.g. R. Kolb, *Ius in bello, Précis de droit des conflits armés*, Basle/Brussels, 2003, p. 85ff.

22 See e.g. the authority of the ICJ, *Nicaragua* case (1986), § 219.

- the Government and the rebels: Law of non-international armed conflicts;
- an intervening foreign State and another intervening foreign State, fighting for the other side: Law of international armed conflicts;
- the Government and an intervening foreign State (fighting on the side of the rebels): Law of international armed conflicts;
- an intervening State (for the Government) and the rebels: Law of non-international armed conflict;
- if an international organization intervenes, the law to be applied to its dealings with the rebels is controversial; if there is fight with the government, the Law of international armed conflict would apply.
- if more than one rebel group fights each other, the Law of non-international armed conflict applies (but not Additional protocol II of 1977), unless one or both of these groups are under the overall control of a foreign power;
- if there is an internationally non-recognized boundary, or a *de facto* boundary, the situation is further complicated. See *e.g.* the situation in Vietnam.[23]
- if there are special agreements among some parties, the law is modified among them along the lines of the agreements, unless these agreements are derogatory of rights held under the Geneva Conventions;
- if the different parties to an armed conflict have not ratified the same conventions, there is further complication. The matter of customary law then comes to the fore, but one knows how complex its specific determination in the law of armed conflicts has been;
- to the extent the conflict merges into a big and wholly interrelated fighting, it is claimed that foreign intervention may internationalize it *en bloc*; but the exact threshold of such internationalization is not explained generally, as it is extremely circumstantial.

Such a picture may suffice to grasp the complexities of the matter. Moreover, one sees how unsatisfactory it may be to apply one set of the law to some fighters while at the same time denying it to others, according to their respective formal status.

This situation gave rise to such conundrums and rendered so difficult the application of international humanitarian law (one may just quote the Vietnam precedent) that since the 1970's claims to abandon the distinction between the two branches of the law and to merge them into a single whole were voiced. Such voices came not only from legal writings; they came also from States. Thus, the ICRC, but also Norway, during the Conference leading to the adoption of the two Additional Protocols of 1977, proposed a merger of the law of international and non-international armed conflicts.[24] However, these proposals were rejected.

4. It was only in the 1990's that the tendency to merge the rules obtained new lymph. The practical guide to that achievement were thenceforward the two essential arguments (i) of achieving a simplification of the law and of the threshold of its application, and (ii) of obtaining a further humanization of internal conflicts without

23 See e.g. R. A. Falk (ed.), *The International Law of Civil War*, Baltimore / London, 1971, p. 348ff.

24 See D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RCADI*, vol. 163, 1979-II, p. 150-1, 153ff.

any improper discriminations according to formal status.

a) The Security Council of the United Nations faced the whole crisis in the former Yugoslavia inspired by this new approach. The said approach was then endorsed by the ICTY. The question was: in order to secure prosecution by the Tribunal, must the conflict be an international armed conflict, or is it sufficient, subject to express exceptions, that there is an armed conflict, be it international or internal? The Chamber held that the Statute of the Tribunal referred indistinctly to international *and* to internal armed conflicts (and thus *a fortiori* to mixed armed conflicts), with the only exception of Article 2, the grave breaches régime, which according to Additional Protocol I and customary law applies only to international armed conflicts.[25] This opened the way for war crimes *equally applicable in international and in internal armed conflicts*. There are a series of rules on warfare that apply to both types of conflict, and their number is increasing (perhaps there is even some presumption of 'community').

b) The finding of the Tribunal is based mainly on a teleological and an implied powers argument. The purpose of the Security Council to prosecute all the persons responsible for serious violations of international humanitarian law could not be served otherwise than by extending the jurisdiction of the Tribunal to the entirety of the conflict, in its international and in its internal aspects. That aim commands an extensive interpretation. Moreover, as the Security Council knew that the conflict was of a mixed international and internal character, it must by necessary implication have granted the Tribunal jurisdiction also for the internal part of the conflict. Otherwise, only a part of the persons responsible for serious violations of international humanitarian law could have been prosecuted. This was precisely what the Security Council wanted to avoid: it would have been absurd to treat differently horrific cruelties according to the fortuitous fact of having been committed before or after a specific date, by one person or another, or at one place rather than another on the territory of the former Yugoslavia. This non-discrimination argument is rooted directly in humanitarian considerations; and it was essential in the reasoning.

   For the purposes of this new customary law on the obligations of participants in any armed conflict, the Chamber set out the single yardstick on which it measures the existence of an armed conflict. It thus gave the following definition of armed conflict: "[An armed conflict exists] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[26] For the purposes of this new customary law, the reference is thus a single concept of armed conflict and not directly the traditional distinction between the international and internal armed conflicts.

c) Now, it may be contended that the whole point was superfluous as the conflict in former Yugoslavia was at all the material times an international armed conflict (a position that recommends itself). But if one starts from the assumptions accepted by the Chamber, *i.e.* that the conflict was a mixed armed conflict, one may grasp the extent of international legislation attributed to the Security

25 *Tadić* (Jurisdiction, 1995), § 71ff, 81-3.

26 *Tadić* (1995), § 70.

Council by the Chamber in *Tadić*. Under the influence of criminal law, a strong tendency to merge the law relating to international and internal armed conflicts was inaugurated.[27] And this course could not but retroact decisively on the substantive law of armed conflicts: in this case, to some extent, it is the criminal branch which has been the positive side of the coin, or the primary rule, and international humanitarian law its negative, or secondary rule.

5. It is obvious that this *exposé* of the law remains to some extent simply seminal or *de lege ferenda*. We have already seen how the ICC Statute reflects it only in part, *e.g.* as to the non-inclusion of war crimes related to prohibited weapons in internal armed conflicts. However, the path is set and the movement is put into motion. Some concrete results have already made themselves felt. Thus, recent instruments criminalize alike offences committed both in international and internal armed conflict. One example is the Additional Protocol on Cultural Property of 1999 (to the Hague Convention of 1954);[28] or the revised additional Protocol II to the Conventional Weapons Convention of 1980 (1996).[29] The situation can be analyzed as a progressive breakthrough of the humanitarian principle with respect to the State-centered principle of distribution of war powers and limitations on these powers. This is one aspect of what has been called the "humanization" of the law of armed conflict,[30] of which we shall see further examples.

The merger-evolution opens a new era of the law of armed conflicts and of international humanitarian law in particular.

IV. The "Widening" of the Scope of International Armed Conflict through the Overall Control Test

1. In some areas of the law the merger-tendency could not completely succeed. Thus, in the field of the 'grave breaches' régime, the Geneva Conventions themselves require the existence of an international armed conflict. The ICTY decided to follow this condition, albeit some of its members dissented.[31] But even in this area, the Tribunal contributed to a considerable evolution of the applicable law.

2. a) The question if the armed conflict was international for the purposes of Article 2 of the Statute (grave breaches régime) first arose, albeit indirectly, in the *Tadić* (1997) judgment of the Trial Chamber. The Chamber focused on the second

27 There is no evidence that the Security Council itself intended to extend the scope of existing substantive law.

28 See V. Mainetti, "De nouvelles perspectives pour la protection des biens culturels en cas de conflit armé: l'entrée en vigueur du Deuxième Protocole relatif à la Convention de La Haye de 1954", *International Review of the Red Cross*, vol. 86, 2004, p. 358ff.

29 See T. Meron, " International Law in the Age of Human Rights", *RCADI*, vol. 301, 2003, p. 155ff.

30 *Ibid*., p. 24ff.

31 Judge G. Abi-Saab, in his Separate Opinion to the *Tadić* case (1995), was prepared to apply the grave breaches régime equally in internal armed conflicts. His argument is rooted in the growing practice moving in that direction. There is in his view a subsequent practice, modificatory of the conventional provisions on this aspect, and having also the strength of a new rule of customary international law.

condition necessary to the application of Article 2, *i.e.* the status of the victims as protected persons. The reasoning of the Chamber is the following. According to Article 4 of Geneva Convention IV of 1949, a civilian is a protected person (and thus the grave breaches régime is applicable) if he is in the hands of a party to the conflict of which he is not national. After the withdrawal of the JNA[32] from Bosnia on 19 May 1992, the Bosnian-Serb armed forces were a legal entity distinct from the FRY. The adverse civilians it took in custody could only be considered in the hands of a party whose nationality they did not possess if the acts of the Bosnian-Serb armed forces could be imputed to the FRY. Otherwise, (Muslim) Bosnian civilians would have been held by (Serb) Bosnian military forces: under that perspective, no difference of nationality exists. According to the Chamber, the acts of the Bosnian-Serb army (VRS) could be imputed to the FRY only if they acted as *de facto* organs of that State. As has been held by the International Court of Justice in the *Nicaragua* (*Merits,* 1986) case,[33] under customary law a person or entity can be considered a *de facto* organ of a State if there is an *effective control* by the State over that person or entity. There must thus be a great dependency on the one side, power of control on the other; there must be a specific agency, a possibility to give orders which are followed. The relationship between the JNA and the VRS after the 19 May 1992 did not involve, however, more than a general level of coordination of the activities. This was consonant with the respective position of the parties as allied forces in the Serbian war effort. The FRY or the JNA did not direct the military operations of the VRS, even if there was support by equipping, maintaining and staffing. Therefore, no effective control can be found; in other words, no attribution of the acts of the VRS to the FRY was possible. Thus the victims were not in the hands of a foreign power and could not be regarded as protected persons. The Chamber concludes that Art. 2 of the Statute was inapplicable.[34]

b) This decision and its reasoning were quashed on appeal, in the *Tadić* (1999) judgment. The Appeals Chamber now considered the question of the attribution of the acts of the VRS to the FRY under the requirement that there must exist an international armed conflict. This difference in approach is not really explained but is one of considerable relevance. According to the Appeals Chamber, the question turns on the issue whether the VRS could be considered a *de iure* or *de facto* organ of the FRY. For answering this question, one must refer to the legal criteria for the imputability to a State of acts performed by individuals not having the status of State officials. This legal mechanism of imputability is the same under the law of international responsibility and for the purposes of criminal international law because it is a general legal technique. However, the effective-control-test propounded by the International Court of Justice in the *Nicaragua* case was held to be at variance with general international law because it was too narrow. Contrary to the holding of the ICJ, the ICTY explains, international law does not know an exclusive and all-embracing test of attribution for *de facto* organs.

32 The army of the FRY.

33 ICJ, *Reports*, 1986, p. 64-5, § 115.

34 *Tadić* (1997), § 584ff. *Contra*, Sep.and Diss.Op. McDonald, § 268ff.

The degree of control required varies in relation to different types of situations. Several reported cases[35] show that in the context of military or paramilitary groups acting in the interest of a State an *overall control* over the group is sufficient for the purposes of attribution. It has not to be shown that each activity was specifically requested or directed by the State, or that there was any form of direct control on the actions. It is sufficient to show that the State equipped and financed the group, or coordinated and helped in the general planning of the military activity.[36] The Appeals Chamber found that in the present case the FRY exercised the requisite measure of overall control over the VRS.[37] Hence, even after the 19 May 1992 the armed conflict in Bosnia was international in character. As the Appeals Chamber found that the victims were also protected persons,[38] it concluded that the grave breaches régime was applicable to the case at hand.[39]

c) Thenceforward, the criterion of 'overall control' has been constantly applied by the jurisprudence of the ICTY: one may quote the *Blaskić* (2000),[40] the *Delalić* (Appeal) (2001),[41] *Kordić* (2001)[42] and the *Brotanin* (2004)[43] cases.

3. It may be asked whether this construction, going through the constraints of the concept of attribution as it was developed in the law of international responsibility, was really useful for determining the existence of an international armed conflict. This merger of criteria proper to the law of State responsibility and the determination of the international character of an armed conflict does not necessarily seem warranted. Attribution and control are necessary if an entity is legally sought *to respond for acts performed by third persons as if it were its own*. But that is not required for establishing the existence of an objective state of things, *i.e.* the existence of an international armed conflict. Here it must only be shown that there is, in fact, a substantial implication of foreign powers. The question is precisely not if these foreign

35 As the *Stephens* case, the *Yaeger* case, the *Loizidou* case or the *Jorgić* case. See *Tadić* (1999), § 125-9.

36 *Tadić* (1999), § 122-3, 131, 137 : "The control required by international law may be deemed to exist when a State (...) has a role in organizing, coordinating or planning the military actions of the military group ...". For individuals not organized into military structures the threshold for attribution is higher : there must be specific instructions or *ex post* approval ; the Chamber here quotes the *Teheran Hostages* case (ICJ, *Reports* 1980, p. 29-30), *ibid.*, § 132.

37 *Ibid.*, § 146ff. The Chamber mentions the transfer of JNA officers to the VRS and the payment of the salaries of the members of the VRS by the FRY; the fact that military operations of the VRS were supervised by organs of the FRY; the fact that members of the FRY's armed forces took part in combats in Bosnia; the fact that the military goals were still formulated by the FRY. The political settings of the Dayton Agreement also confirmed the control of the FRY over the Republica Srpska.

38 *Tadić (1999), ibid.*, § 163ff.

39 *Tadić (1999), ibid.*, § 171.

40 *Blaškić* (2000), at § 73ff.

41 *Delalić* (Appeal) (2001), at § 14ff.

42 *Kordić* (2001), at § 36ff.

43 *Brotanin* (2004), at § 121ff.

powers have to respond for the acts of the local armies as if they were their own; the question is if their involvement is of sufficient intensity to broaden the scope of the conflict into an international armed conflict. It may be appreciated that the two situations are not at all identical. The threshold must be higher for the first than for the second. To that very extent, it is understandable that the ICTY lowered the standard from effective control to overall control; but if the overall control is now retro-projected into the body of the law of responsibility, the standard of attribution could well become too large. These aspects were correctly felt by Judge Shahabuddeen who points out that the question was whether the FRY was using force in Bosnia, not the distinct one whether the FRY *was responsible* for any breaches of humanitarian law committed by the VRS.[44]

Be that as it may, it is apparent that the circle of international armed conflicts was raised to all mixed conflicts where there is some form of external involvement by way of flexible overall control criteria. That is an important cornerstone of the law.

4. The concept of overall control is not necessarily limited to that of qualifying a conflict as international. It can extend to many other branches of the law. An example of such a potential extension can be found with respect to *belligerent occupation*. In the *Blaškić* case (2000), the ICTY Chamber had held that the extensive destruction of Muslim property by Bosno-Croat troops could violate Article 53 of Geneva Convention IV, which applies only to occupied territories, since Croatia could legally be considered an occupying power. This unexpected result was reached by applying the overall control test to the issue of occupation: if Croatia controlled the local Bosno-Croat militias, then it could be held that it exercised belligerent occupation by virtue of that control.[45] The Chamber thus moved a wholly new standard in international law, namely the concept of belligerent occupation *longa manu* or 'constructive belligerent occupation', not by effective authority over the territory, but by overall control over those who effectively control the territory. There is here a sort of dilution of the chain of effective control: indirect control is equated to direct control.

This reasoning was neatly rejected in the *Naletilić* case (2003). The first point made by the *Naletilić* Chamber is that if one followed the *Blaškić*-approach this would lead to a multiplication of the notion of occupation: there would be one concept of occupation under the Hague Regulations of 1907, namely under Article 42, which requires effective authority of the invading army; and there would be a different concept of occupation under Geneva Convention IV, in particular Article 6, which would not require such effective authority but could satisfy itself with constructive occupations.[46] Then the Chamber moves to the essence: it states that the

44 Sep.Op. Shahabuddeen, *Tadić* (1999), § 17.

45 *Blaškić* (2000), § 149.

46 This reasoning is not necessarily compelling. It is based on the text of the two mentioned provisions, and in particular on the fact that the text of the Hague Regulations seems to exclude any type of indirect control. However, the text is not sacrosanct in the sense that it could not be read in a more contextual or updated way. Thus, for example, the ICTY has held that the protected persons under Article 4 of Geneva Convention IV do not need to meet the nationality-criterion mentioned therein; it stated that allegiance is enough in the context of internationalized armed conflicts like that taking place on the territory of Bosnia (see below, in the text). This holding was a piece of teleological and dynamic interpretation, which could be followed – if it was wished – also in the context

overall control-criterion is not applicable to the determination of the existence of an occupation.[47] Occupation necessitates a direct and effective degree of control, since it imposes on the occupying power also a series of onerous duties.[48] Moreover, the Geneva Convention IV is a supplement to the Hague Regulation; in the absence of an autonomous definition of occupation it must be held to refer back to the Hague Regulations and to endorse its definition of occupied territory.[49]

Thus, it is the old criterion of effective and direct control which applies;[50] or, in the words of article 42 of the Regulations of 1907, to be occupied, the territory must be "actually placed under the authority of the hostile army." The occupation must not extend to the whole territory: it may apply only to the geographically limited areas where it is effectively displayed. The Chamber added: "There is no requirement that an entire territory be occupied, provided that the isolated areas in which the authority of the occupied power is still functioning 'are effectively cut off from the rest of the occupied territory.'"[51] This last finding is of interest if one thinks of the situations as prevailed in Afghanistan, and to some extent also in Iraq, notwithstanding the interventions of the Security Council under Chapter VII of the Charter.

As to the general point raised by the *Blaškić* and *Naletilić* Chambers, it appears that the concept of 'constructive occupation' was somewhat bold and would have had a potentially enormous series of consequences, the effect of which was not sufficiently reflected as yet.[52] It might easily have overstepped the boundaries of reasonable responsibility, since most rights and duties in the area are legally predicated upon the idea that there is effective control. If there is no such direct control, the construction of imputability is quickly overburdened; overall control is in such situ-

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of occupation. In order to avoid the multiplication of occupations concepts, it would then have been necessary to affirm that the occupation by indirect control has become customary law in the context of internationalized armed conflicts like that of Bosnia, and that in consequence the Hague Regulations of 1907 have to be read in such a modified way. The question if such in effect is the state of customary law, or if such a holding would have been wise, is another point.

47 *Naletilić* (2003), § 214.

48 *Naletilić* (2003), *ibid.*

49 *Naletilić* (2003), *ibid.*, § 215.

50 *Naletilić* (2003), *ibid.*, § 218.

51 *Naletilić* (2003), *ibid.*, § 218.

52 This is the case even if one limits the reach of constructive occupation to internationalized armed conflicts only. It must not be forgotten that the overall control criterion (relaxing the effective control criterion of *Nicaragua*) was adopted to be able to qualify an armed conflict as being international in nature. That is a purely objective qualification, which does not entail that any party bears international responsibility for the acts of another entity with which it has some degree of relations. But the law of occupation is not concerned with the objective qualification of a situation for the purposes of criminal law: it means imputability of acts to one party notwithstanding these acts being committed by another entity. One understands that the *ratio* and the reach of the first situation are not at all the *ratio* and reach of the second, and that therefore one must be slow to slide from the first to the second. If, moreover, the concept is not limited to internationalized armed conflicts, but imported into other situations of "occupation" (as to the many types of occupation and the fringing borders of the concept: A. Roberts, "What Is A Military Occupation ?", *BYIL*, vol. 55, 1984, p. 249ff), the problems are all the more conspicuous.

ations often too wide a circle for responsibility; possibly, only effective control of the intermediary entity, as envisaged in the *Nicaragua* case, would then suffice to make constructive occupation acceptable, if at all.[53] It seems therefore that the more conservative approach in *Naletilić* was warranted. This is the more so, since the acts incriminated, even if they cannot be indicted as grave breaches, will be still prosecutable as war crimes. Consequently, there does not seem to be any real contempt to justice by choosing the more cautious approach.

One may expect with some curiosity to see to what extent the overall control criterion can make further real or putative contributions to the development of the law of armed conflicts.

V. The "Widening" of the Scope of Geneva Convention IV through a Broad Definition of the Protected Persons

1. The Geneva Conventions of 1949 define precisely what persons are protected under their régime. Article 4(1) of the Geneva Convention IV on the protection of civilians in times of war covers all persons in the hands of a party to the conflict or occupying power of which they are not nationals. One will appreciate the difference with the human rights approach: the Convention does not purport to protect all civilians whatsoever; it protects only those civilians which are held to need the protection because, being essentially civilians of the *adverse party*, there is a strong tendency of the other power to consider them as being dangerous to its cause and to take restrictive measures against them.

The Geneva Convention is thus not based on a general human rights logic, but aims more specifically at protecting those civilians that are considered to be "enemy civilians", *i.e.* civilians in their dealings with the hostile power. Consequently, for example, Article 4(2) of Geneva Convention IV excludes from the circle of protected persons all the nationals of co-belligerent States having each one normal diplomatic relations with the other. It was considered that only these civilians were in jeopardy of seeing their rights infringed because of the obvious conflict of interest. In the case of co-belligerent States, it was anticipated that the nationals of allied parties would not need any conventional protection.[54]

2. In the *Tadić* (1999) judgment, the Appeals Chamber adopted a teleological approach to the definition of protected persons. It started by reminding us that the formal bond of nationality has never been crucial under Article 4 (Geneva Convention IV): the intention of the drafters, as revealed by the *travaux préparatoires*, was to cover also refugees or stateless persons, *i.e.* all persons who could not enjoy the diplomatic protection of a third State.

In modern wars, which are legally almost in all cases mixed armed conflicts,

53 Thus, if any type of constructive occupation is ever envisioned, it must be founded on the criterion of effective control of an entity, since then there is – according to *Nicaragua* standards – the possibility to attribute the acts of that entity to a foreign power as being its own.

54 The condition of a regular diplomatic representation was apparently added for such cases as that of Italy during the second world war, where co-belligerency did not correspond at any time with diplomatic relations, a fact which puts into danger the protection even of co-belligerent nationals.

such an approach departing from formal nationality is indeed warranted. In a conflict which remains essentially internal in its concrete reality, the persons fighting each other have in most cases the same nationality. Thus, for example, Muslim Bosnians may fight Serb Bosnians, or Croat Bosnians; nationality, as a formal bond, is here the same (Bosnian). In the conflicts of the type described, ethnicity or other criteria become controlling at the place of nationality. Taking into consideration the foregoing, it becomes apparent that it would frustrate the object and purpose of the Convention if nationality were kept as the only criterion. Rather, the paramount aim of effectiveness of protection suggests real *allegiance* as the essential criterion.[55]

The same line of argument was adopted by the Trial Chamber in the *Delalić* case (1998).[56] The Chamber stressed that the aim of Article 4 (Geneva Convention IV) is the protection of persons in real combat situations; it would pervert the law to make out of formal requirements of nationality according to municipal law the bedrock of legal protection. The broader approach is said to be also better consonant with human rights law. As in the case under consideration the persons were arrested on the basis of their Serb identity, they must be considered protected persons under a teleological interpretation of the law.[57] This course was followed also in the later case-law.[58]

3. The strongly teleological approach adopted in the *Tadić* (1999) Appeal judgment and in the following cases is to be welcomed. Nationality is a means and not an end; it has to be interpreted accordingly. The Conventions of 1949 were drafted under the paradigm of inter-State wars. In such a context the criterion of nationality had its proper and obvious place. It was the adequate legal vehicle for protection – which is the ultimate aim – under such factual assumptions. During the fifties and sixties this assumption proved insufficient in the light of the outbreak of endemic civil wars and wars by proxy. The legal system adapted its requirements and *inter alia* broadened the scope of the concept of international armed conflict by extending it to civil wars with external interventions. Unfortunately the letter of the Geneva Conventions was not itself updated to meet these novelties. In any event, nationality for the purposes of Article 4, Geneva Convention IV, is still a workable criterion for traditional armed conflicts, but not for those which are structurally internal, becoming international only by legal qualification (internationalized or mixed armed conflicts).

In such structurally internal, but now legally international conflicts, the nationality criterion leads to an almost complete ineffectiveness of the law, opening up disastrous gaps in protection. As the protection was always the cardinal criterion

55 *Tadić* (1999), § 163ff.

56 *Delalić* (1998), § 247ff.

57 The Chamber also considered the question if the victims were prisoners of war in the sense of Article 4 of Geneva Convention III and thus protected persons under that Convention. Article 4 of Geneva Convention III was drafted narrowly according to the conception of war current in 1949. The conditions of Article 4(A)(2) or (6) of Geneva Convention III are hardly fulfilled in the present case. The victims were neither carrying arms openly, nor was there an invading force. Thus the victims were only civilians in the sense of Geneva Convention IV. They were all covered by Geneva Convention IV since there is no gap between the Conventions number III and IV (*ibid.*, § 267ff.). On this last point, see below.

58 See *Blaškić* (2000), § 124ff. *Kordić* (2001), § 147ff. *Blaškić* (Appeal, 2004), § 167ff.

and the nationality-requirement only a technical means to that end, it must be considered that the legal internationalization of structurally internal armed conflicts led to an implicit modification the nationality-requirement. This operation is rendered unavoidable by elementary considerations of *effet utile,* and of practicability. "Nationality" must be read in certain situations as meaning "allegiance", lest the law be largely frustrated. Thus, in internationalized conflicts, a civilian is protected if he is in the hands of the "adverse party."

4. The openly legislative effect of such a re-reading of Article 4, Geneva Convention IV is great in its practical effect, but quite limited in the leap which had to be overcome by the judge: that interpretation is indeed compelled if the protection is not to become useless. In such cases, the inference (even if legislative in nature) is ordinarily granted to courts of justice. The step to be taken is small and assured enough through the technique of *effet utile* to be conceded without necessitating a fresh consideration by the legislator.[59] That means in practice that the grave breaches régime could find general application to the crimes perpetrated on the territory of Bosnia-Herzegovina, and to any similar conflict in future. The broadening of the scope of humanitarian law and the progressive humanization of the law are here again the essential hallmarks of the jurisprudential hermeneutics.

VI. The Permissibility of Armed Reprisals against Civilians

1. On this old *vexata quaestio*, the *Kupreškić* case (2000) brought most notable developments. It sets the path of the ICTY's doctrine on reprisals, which is marked by an almost total outlawry of this device. This is thus a further high-water place for the absoluteness of obligations under humanitarian law, for their non-reciprocity and *ius cogens* character, in one word for the progressive "humanization" of the law of armed conflicts. The Chamber starts by stating in peremptory terms that there is no place for reciprocity or reprisals in the field of contemporary international humanitarian law. Its protective obligations are absolute ones: "[One must stress] the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law".[60]

Moreover, there is an absolute character of the prohibition of reprisals against civilian populations.[61] The Chamber recalls that the *tu quoque* argument has in this context been rejected in the post World War II jurisprudence.[62] According to the Chamber, it is a flawed principle, since it envisions international humanitarian law as being based on a bilateral exchange of rights and obligations, whereas it in real-

59 Alternatively, if one wishes to avoid such a course, the finding of a *de facto* organship (overall control) between the VRS and FRY can acquire its importance. It provides an autonomous basis for concluding that the victims were protected persons, since it means that being held in the hands of the VRS may legally be equated to being in the hands of the FRY.

60 *Kupreškić* (2000), § 511.

61 *Ibid*., § 513.

62 On that point see also: *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV, London, 1949, p. 177-182.

ity lays down absolute obligations, unconditional and not based on any reciprocity.[63] To that effect, common Article 1 of the Geneva Conventions was also quoted. The Chamber itself stressed the idea of progressive humanization of the law of armed conflict: it reflects the fact that humanitarian law norms are seen as designed to benefit individuals as human beings and not simply States interests.[64] Thus, there is here a translation of a Kantian categorical imperative into the law. As a further consequence, the obligations at stake are due to the international community as a whole (*erga omnes*).[65] These norms of international humanitarian law are also *ius cogens* norms, non-derogable and overriding.[66]

2. These principles are then more specifically applied to the question of *reprisals against civilians*.[67] The reasoning of the Chamber may be summarized as follows (§ 2) before we come to an evaluation of it (§ 3). The Chamber recalls that Geneva Convention IV prohibits such reprisals for all civilians in the hand of the adverse party. For civilians in combat zones, Article 51(6) of Additional Protocol I is applicable. Does that provision reflect customary international law? This is an area where customary law is shaped more heavily by *opinio iuris* than by *usus*, *i.e.* mainly by demands of humanity and dictates of public conscience, even if practice is scant (Martens Clause).[68] Reprisals against civilians are an inherently barbarous means of warfare. They are contrary to fundamental human rights, which heavily contributed to shape modern humanitarian law.[69] Moreover, reprisals are not any more justified, as in the past, as sole effective means of ensuring compliance of the law by the enemy: there is now national and international prosecutions of crimes committed.[70]

Where is the *opinio iuris* of such prohibition of reprisals to be found? One has to refer to: (1) military manuals, which limit reprisals to enemy armed forces and thus *a contrario* exclude them for civilians; (2) United Nations General Assembly Resolutions, especially Resolution 2675 (1970) on Basic Principles for the Protection of Civilian Populations in Armed Conflicts; (3) the absence of claims for such reprisals in State practice (except Iraq and the UK); (4) the work of the ILC on State responsibility in the field of admissibility of counter-measures, which prohibits counter-measures contrary to fundamental human rights; (5) Article 3 common of the Geneva Conventions, applicable *a fortiori* in international armed conflicts.[71] Even if held to be admissible (*quod non*), reprisals would be limited, according to the Chamber, by several principles: (i) last resort (*ultima ratio*); (ii) special precaution, *e.g.* the decision-making would have to take place at the highest political and military level; (iii) proportionality; (iv) elementary considerations of humanity.[72] It may be added that the *Kunarac* Appeals Chamber (2002) founded itself on the same reason-

63 *Ibid.*, § 517.
64 *Ibid.*, § 518.
65 *Ibid.*, § 519.
66 *Ibid.*, § 520.
67 *Ibid.*, § 527ff.
68 *Ibid.*, § 527.
69 *Ibid.*, § 529.
70 *Ibid.*, § 530.
71 *Ibid.*, § 531ff.
72 *Ibid.*, § 535.

ing to reject reprisals in the field of crimes against humanity.[73]

3. Such is the abolitionist doctrine of the ICTY. This is a most weighty contribution to the law if one bears in mind the heavily controversial state of the matter. On the admissibility of reprisals, the views have always been extremely split. The Anglo-Saxon States (namely the US and the UK) were traditionally attached to maintain the legality of reprisals, in which they saw the only practical means to enforce an application of the relevant norms by the enemy. Conversely, the so-called third world States were fiercely attached to the outlawry of reprisals (especially against civilians) which they considered a barbaric means.[74] For a long time the state of the law has been rather permissive.

At the beginning of the XXth century, legal writings allowed reprisals in an often quite unchecked way. Thus, the leading textbook of Oppenheim stated in its third edition of 1921: "[R]eprisals between belligerents are admissible for any and every act of illegitimate warfare, whether it constitutes an international delinquency or not". It is added that even prisoners of war may be made the object of reprisals, and that there is "hardly any doubt" on that matter.[75] The *refoulement* of reprisals then began through the Geneva law: reprisals were forbidden with respect to protected persons.[76] At the same time, reprisals were still permitted in the Hague law, as the bombing practice of the Second World War tends to show.[77] It is only in the 1970's that a further step was taken: by Additional Protocol I of 1977, the prohibition of reprisals entered expressly the body of rules of the law on the conduct of hostilities: see especially Article 51(6) of that Protocol. The point, however, remained controversial, and some Anglo-Saxon States refused or hesitated to ratify or to accede to the Protocol. With the step taken by the ICTY, the prohibition is held to have been completed: the ship has steered as much towards absolute prohibition as Oppenheim's statement had gone towards absolute permission.

4. One will note that the statements by the ICTY rest essentially on the moral

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73 *Kunarac* (Appeal, 2002), § 87.

74 See F. Kalshoven, *Belligerent Reprisals*, Leyden, 1971; F. Kalshoven, "Belligerent Reprisals Revisited", *NYIL*, vol. 21, 1990, p. 43ff. See also S. Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949", *ICLQ*, vol. 37, 1988, p. 818ff; C. Greenwood, "The Twilight of the Law of Belligerent Reprisals", *NYIL*, vol. 20, 1989, p. 35ff; E. David, *Principes de droit des conflits armés*, 2. ed., Brussels, 1999, p. 362ff.

75 L. Oppenheim (R. Roxburgh, editor), *International Law, War and Neutrality*, vol. II, London, 1921, p. 337, in the text and in footnote 2. For the law of the XIXth century, see *e.g.* the elaborate statements by A. Pradier-Fodéré, *Traité de droit international public européen et américain*, vol. 8, Paris, 1906, p. 824ff, deploring that undetermined state of the law which permits almost everything.

76 See e.g. Article 2(3) of the Geneva Convention relative to the Treatment of prisoners of war (1929); and the four Geneva Conventions of 1949: Article 46 Convention I; Article 47 Convention II; Article 13 Convention III; Article 33 Convention IV. The legality of reprisals in strict law (at least for the aggressed State) has been maintained even thereafter, but with the advice not to use the faculty because of humanitarian considerations: see G. Schwarzenberger, "Legal Effects of Illegal War", in: *Essays in Honour of A. Verdross*, Vienna, 1960, p. 251-2.

77 See E. Stowell, "Military Reprisals and the Sanctions of the Laws of War", *AJIL*, vol. 36, 1942, p. 643ff. See also A. R. Albrecht, "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949", *AJIL*, vol. 47, 1953, p. 590ff.

argument of a Kantian imperative: torts suffered do not allow you to commit further torts; innocents cannot be weighed up against other innocents. That argument is certainly true. But the nerve of the matter lies also in the principle of equality of belligerents, which is a fundamental principle:[78] if one disallows reprisals completely, one thereby tends to sharpen inequality, since it will in fact be possible for one side to violate the law, whereas the other will be bound by the full record of the applicable rule (and not only Geneva law).

This, from the point of view of many powerful States, tends to weaken in an excessive way the possibility of enforcing the law. The fact that there might be criminal prosecution, an argument advanced by the ICTY, is obviously not of much avail: that is a post-conflict matter, which moreover is wholly speculative since very often such prosecutions are hampered in one way or another. Thus, the preventive effect of criminal law is minimal with respect to warfare matters. We are finally left with a bold and morally correct statement of the ICTY, which may, however, arouse some doubts as to its practicability and especially as to its acceptance by some of the most frequently warring States, whose practice is to that very extent particularly visible. Let us take up the point and look with studious attention to the further developments.

VII. The Question of Forced Labor by Detained Persons

1. An interesting discussion took place on that matter in the *Naletilić* case (2003). As it proved impossible to distinguish between civilians detained and prisoners of war proper, the Chamber decided to apply throughout the régime of Geneva Convention III because it was more favorable to the accused (it allowed more restrictive measures of detention). Article 49 of that Convention permits compulsory labor of prisoners of war, but under stringent conditions: (1) the work must be in the interest of the prisoner; (2) it must not be connected with war operations; (3) it must not be unhealthy or dangerous; (4) there must be suitable working conditions, *e.g.* as to accommodation and food. Consequently, are permissible, *e.g.*: work in the camp administration, in agriculture, in commerce, in arts and crafts, in domestic services; in some industries, not directly connected with the war effort, in public works, in transport, etc., provided always that there is no military character and purpose.

An incidental benefit of the services to the military authorities when the work normally serves to maintain civilian life does not render it illegal. On the other hand, are typically impermissible, *e.g.*: forced work in metallurgical, machinery and chemical industries; humiliating work. To the extent the work is of non-military character, the prohibition can be cured only by free consent, leaving a real choice. The *mens rea* required is intent that the victim would be performing prohibited work. Thus, the offence is defined as follows: "[A]n intentional act or omission by which a prisoner of war is forced to perform labor prohibited under Articles 49, 50, 51 or 52 of Geneva Convention III".[79]

2. These explanations are of some interests, since it is the first time that the

78 See H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, 1970.

79 *Naletilić* (2003), § 245ff, quotation taken from § 261.

ICTY considered the offence of forced labor. It thereby largely followed the régime of the Geneva Convention III. It is interesting to note that the Convention leaves open to doubt some important questions, notably the reach of consent of the prisoner. In effect, Article 52 of the Convention, which mentions consent, does so only with respect to unhealthy and dangerous labor. Can the reach of consent be extended to other categories than unhealthy or dangerous work? Can work of military nature be accepted if the consent is free? Different lines of argument could be followed. It is possible to argue that the construction of consent has to be strict because of the obvious danger of abuses. In the light of Article 7 of the Convention, which forbids voluntary renunciation of rights,[80] the result would be that any consent to work other that unhealthy or dangerous would be illegal and criminal. It could be added that the prohibition of such military work is due also to the State of origin of the prisoner, since its interests are also directly affected. Thus, a double consent should be required, if any: that of the prisoner and that of the home State. The prisoner could thus not dispose of the rights of his State of origin alone.

But it is possible to take also a more liberal view, holding that the criminality of the acts is to turn on the compulsive element rather that on the very nature of the work. The mention of consent would then be taken by analogy from Article 52 into other provisions (*e.g.* Article 50, letter b), since that analogy is favorable to the accused. It could moreover be argued that the criminality of the act was not apparent to the accused, since the whole point involves a subtle question of interpretation of the Convention; and that such doubts have to go to the advantage of the accused.

It does not seem that the problem was addressed during the *travaux préparatoires* in 1949. Thus it would be useful to give some authoritative interpretation on this point in order to clarify the law. To state a preference involves really a legislative choice, balancing experiences leading to mistrust on the one hand, and respect for individual self-determination on the other (if it is held to be possible in such a context).

VIII. The Existence or Not of a Gap between Geneva Conventions III and IV

1. The question of the exhaustiveness of protection under the Geneva Conventions has always been a debated one. The most critical point is to define the status of the so-called "irregular combatants." These are persons who participate in the fighting without being entitled to do so according to the rules of Article 4 of Geneva Convention III and of Articles 43-44 (inasmuch as they are applicable or customary in nature) of Additional Protocol I (1977). These persons are not legally recognized as combatants; they are thus not entitled to the protections under Geneva Convention III. Moreover, being factually combatants (albeit irregular ones), they are on the face of things not "civilians", and could thus be excluded also from the scope of Geneva Convention IV. If that line of argument is taken, such persons are entitled to nothing more than the minimum guarantees (under customary international law)

80 This Article reads as follows: "Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be".

of Common Article 3 of the Geneva Conventions, and of Article 75 of Additional Protocol I; to these protections, the human rights guarantees, especially as enshrined in the two Covenants of 1966, can be added.

2. But the point is precisely to know if such irregulars are excluded from both Geneva Conventions. The exclusion from Convention III seems incontrovertible: Article 4 defines very clearly the persons falling under its protection, and irregulars do not. If that is true, only Convention IV offers itself as a sort of subsidiary safety net. It is therefore not surprising that the ICRC and a whole series of authors inspired by humanitarian ideals held that the general aim of the Geneva codification is to leave nobody outside any type of protection. Consequently, all persons not falling under Convention III must automatically fall under Convention IV, to the extent that they fulfill the nationality-criterion (or allegiance) under Article 4 of Convention IV.[81] On this view, there could be no gap in between the Conventions III and IV. This view can indeed be based on the drafting history of the Geneva Conventions; but it was, even at that time, not uncontroversial.

The fact that Convention IV speaks of civilians is in itself no insurmountable obstacle. Legal concepts are relative to a certain juridical context and legislative aim.[82] The proper meaning of "civilian" under Convention IV is not only a matter of grammatical construction but depends on general teleological and systematical elements, such as, precisely, its proper and sensible relation with Convention III. Conversely, it could obviously be held that such irregulars enjoy the minimum of Common Article 3 and Article 75 as quoted above, and that this is a proper protection, sufficient in itself.

3. The question of the status of irregular combatants is again of great actuality since the war in Afghanistan (2003) and the detainees in Guantanamo Bay. These persons are denied any defined status under the law of warfare, while being labelled "unlawful combatants".[83] The policy of the United States of America is in this respect systematically one of lowering the standards of protection in order, it is claimed, to better fight international terrorism.[84] It is against that highly political background that the statements of the ICTY have to be seen; one then grasps their real legal and political importance. Already in 1998, before September 11th, the ICTY had stressed in the *Delalić* (*Celebići*) case,[85] that there was no gap between Conventions III and IV: any person not entitled to protection under Convention III could claim to fall under Convention IV, to the extent the nationality or allegiance criterion is fulfilled. Moreover, in 2004, in the *Brotanin* case,[86] that statement was repeated, this time after

81 See on the whole question K. Dörmann, "The Legal Status of 'Unlawful / Unprivileged' Combatants", *International Review of the Red Cross*, vol. 85, 2003, p. 45ff.

82 See K. Engisch, *Einführng in das juristische Denken*, 3. ed., Stuttgart, 1964, p. 1ff (many new editions since).

83 See e.g. A. de Zayas, "The Status of Guantanamo Bay and the Status of the Detainees", *University of British Columbia Law Review*, vol. 37, 2004, p. 277ff, 308ff, with many references.

84 On the inanity of this argument, see L. Condorelli/Y. Naqwi, "The War Against Terrorism and *Jus in bello*: Are the Geneva Conventions out of Date?", in: A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Oxford, 2004, p. 25ff.

85 *Ćelebići* (1998), at § 267ff, § 271.

86 *Brotanin* (2004), at § 125.

the events of September 11th. There is here a clear policy statement alongside the legal qualification: the ICTY disavows the position of the present American administration, which in this point, as on others, has engaged in excessive unilateralism. The position of the Tribunal can also be seen as a further hallmark of the "humanization" of the law of armed conflict, since the very basis of the finding at hand is the attempt to secure a better and more complete protection.

IX. Conclusion

The foregoing analysis shows that the *ad hoc* tribunals (and especially the ICTY) have left a rich gift to the ICC. The most striking point of the heritage is the attempt at constant strengthening of international humanitarian law. One important aspect of this strengthening is the displacement of the point of gravity of the law of armed conflict *from State-centered distribution of powers among belligerents to a human-being centered extension of protections*. This process has been called the "humanization" of the law of armed conflict. It is indeed a paramount aspect of the recent jurisprudence. It remains to be seen to what extent such a shift will prove workable in practice. Thus, for example, the repelling of any type of reprisal against civilians may be welcomed on humanitarian grounds; however, it is remote from the position always taken on this point by the US and partially by the UK, and also by other States, and may prove impractical. More generally, one may that there is a tension between such holdings and the claims of some powerful States habituated to the conduct of hostilities. In their practice, they have *e.g.* refused to presume the civilian status of objects which are ordinarily civilian objects, invoking problems of proof;[87] they used incendiary[88] and chemical[89] weapons; or, more anciently, they bombed towns by nuclear weapons, claiming military advantages.[90] All this is not really in the vein of humanization of the law.

As a general proposition, the law as expounded by the ICTY may be sound; but it remains to be seen how severely such principles can be applied in practice outside the context of the former Yugoslavia. If the States refuse to concur in a non-State centered law of armed conflict, the generous jurisprudential statements will remain somewhat in a legal limbo. But that is not to say that the attempt was not worth to be made. It is probable that these statements may to some extent catalyze some evolu-

87 See e.g. the statement by the US Military Command in the first Gulf War: *US Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of the War*, 10 April 1992, in: *International Legal Materials*, vol. 31, 1992, p. 627.

88 The US and the UK have ordinarily defended the use of such weapons. See E. David, *Principes de droit des conflits armés*, Bruxelles,2. ed., 1999, p. 336ff.

89 As to both types of weapons, incendiary and chemical (e.g. Agent Orange), see the conduct of hostilities of the US in Vietnam: M. Bothe, *Das völkerrechtliche Verbot des Einsatzes chemischer und bakteriologischer Waffen*, Köln / Berlin, 1973, p. 303ff, 328ff.

90 As to Hiroshima and Nagasaki, see the already very skeptical view of J. M. Spaight, *Air Power and War Rights*, 3. ed., London/New York/Toronto, 1947, p. 273ff., 276: "To the present writer it seems that to approve atom bombing would be to confess that all the denunciation of indiscriminate bombardment at The Hague and elsewhere was nothing but hypocrisy and insincerity. International law cannot trim its sails so quickly to the winds of expediency as that. It should hold to the view that, while target-area bombing comes close to the border-line of permissibility, atom bombing definitely oversteps it".

tions in the law, prompt more readiness to accomplish some progress, or even inform to some extent actual behavior. If that happens, it will represent, by any standards, a success. And then, may one not hope that the ICC, with its institutional backing, may lend some further perhaps more prudently balanced support to such a strengthening of the law of armed conflict?

Chapter 45

The International Criminal Court: Reviewing the Case (An American Point of View)*

Ruth Wedgwood

A tour of the Hague recalls history's ambitions for international courts. Andrew Carnegie's Victorian "Peace Palace," with its formal gardens and imposing roof, houses the International Court of Justice. The ICJ's docket of state-to-state complaints in civil cases includes matters such as maritime boundaries, land borders, and questions of state responsibility. There is no compelled jurisdiction; states must agree to the methods by which cases are referred, and the court must rely on the United Nations Security Council to enforce its decisions. But the ICJ is useful to states parties as a way to turn down the volume in fractious disputes, giving governments an occasion to defer provocative issues and yield to compromise. The civil court and its predecessor have not stopped wars; the international court's forebear – a "permanent" court of justice – collapsed in World War II. But the Peace Palace survived the war, and the ICJ has since done an increasing volume of business.

A less magnificent venue up the road houses the UN Tribunal for the former Yugoslavia, established nine years ago to address the crimes of the Balkan wars. The UN Security Council used its extraordinary powers to create this special-purpose tribunal to prosecute the atrocities committed in Bosnia, Croatia, and as it later turned out, Kosovo. The court has enjoyed strong American backing and has made measured progress, convicting 31 defendants. The centerpiece is the trial of Slobodan Milosevic for terrorist attacks against civilians in three nationalist wars. Handed over by Serbian Prime Minister Zoran Dinotić after Belgrade's defeat in the NATO air campaign in 1998, Milošević has since tried to use the courtroom for his own political purposes. But he is clearly flailing in the face of changed regional politics. The Yugoslav tribunal has had to create a distinctive procedure acceptable to both civil-law and common-law countries and has explored a number of thorny legal and moral issues. One such question involves the degree to which factors like duress and state of mind contribute to the commission of war crimes. Yet the Yugoslav tribunal's work did not deter the ongoing atrocities of the Balkan conflicts; the autocrats who sponsored the Srebrenica massacre and ethnic cleansing in Kosovo were fully aware of the tribunal's jurisdiction. The hope is that the prosecutions will have an effect on other leaders contemplating a career in nationalist violence. Charged by the UN Security Council with the further task of supervising prosecutions connected to the

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1994 genocide in Rwanda, the Hague tribunal tries to craft common standards for the Yugoslav trial chambers and a UN sister court in Tanzania.

The Hague also hosted a trial involving the 1988 Libyan-sponsored bombing of Pan Am Flight 103. With terrorism, as with war crimes, "giving it to the lawyers" has been part of a strategy of deterrence. After years of negotiation with Libya and sanctions imposed through the UN Security Council, an agreement was reached to convene a so-called "mixed" tribunal to try two suspects in the bombing. The eight-month trial began in May 2001 at a nearby military base, with Scottish judges applying Scottish law (since the bomb had detonated in Scottish airspace over the town of Lockerbie). A vigorous trial defense and the court's split verdict demonstrated just how hard it is to gather usable courtroom evidence on terrorist networks. Even as the conviction of Abdelbaset Ali Mohmed al Megrahi, a Libyan intelligence agent, made it clear that Tripoli was involved in the civilian murders, Col. Muammar el-Qaddafi was effectively protected.

Finally, The Hague has now offered to take aboard yet a fourth tribunal, the so-called permanent International Criminal Court, created by a treaty agreement negotiated at Rome in 1998. The revival of a permanent criminal court, a fifty-year-old idea, is rooted in our shared dismay at the decade past. Ethnic cleansing and deliberate attacks upon civilians seemed unimaginable in a post-Maastricht Europe. The genocide in Rwanda rattled a world that had supposed such ethnic ferocity was irrational. The ICC is designed to hear cases of serious war crimes, genocide, crimes against humanity, and – in the future – cases of alleged aggression. The court came into formal existence in July 2002. European capitals were busily culling their ranks of law professors, prosecutors, ministers, and judges to propose candidates for judges of the ICC. It should come as no surprise that politics has something to do with the choices, even for a court that purports to abolish politics.

ICC participants also discovered that voice votes in the midst of a UN conference are easier to win than formal treaty ratifications. A significant number of major military powers and regional leaders remain outside the treaty regime, including China, India, Pakistan, Indonesia, Malaysia, Egypt, Israel, Kenya, and Chile. The Russian Federation is "studying" the matter. Relatively few countries in Asia and Africa have ratified. The commitment to govern national military operations by the decision making of an as-yet unknown court has inspired caution in more than a few capitals.

This leaves the question of the United States, which has not ratified the treaty. Some unhappy critics have attributed American skepticism about the court to supposed ambitions for empire or hegemony, or a headstrong pursuit of unilateralism. The inference is unfair. Washington has well-grounded and rational concerns about the ICC, its structure, and how its operations could affect the execution of America's responsibilities around the globe, particularly its efforts to maintain strategic stability in key regions, including (in the long term) Europe. Parliamentarians who talk in private to their own military lawyers and senior commanders may discover that even some Europeans share concerns about the effect of the court on military planning.

In war fighting and peace enforcement, there is an acknowledged need to balance restraint and efficacy. Military law is designed to spare civilians from war's cruelties, while permitting countries to protect their citizens. There are some clear "no-go" lines in the conduct of any conflict – "red lines" that any responsible com-

mander will not cross. The norms against massacres are part of the customs of war and do not depend for their mandatory force on any treaty rule or UN mandate. Some matters in legitimate warfare, however, are harder to regulate with bright-line rules. Peace enforcement includes operational norms that are often contentious in practical application.

Scholars distinguish between two different spheres of the law of armed conflict – so-called Geneva law and so-called Hague law (each named after the treaty venue that first enunciated the norms). Geneva law protects groups that are *hors de combat,* such as women, children, the sick and wounded, and surrendered soldiers. Most of its rules are widely accepted, and have plain application – at least in traditional conflicts. Hague law, rather, concerns the difficult operational choices to be made on the battlefield and in air campaigns. Hague standards are often closer to principles than to rules; they involve questions of balancing that are morally uncertain and factually sensitive.

The first Hague norm concerns "discrimination" – safeguarding the distinction between military assets and civilian objects. Any well-trained soldier knows that only military targets can be destroyed. The difficulty arises in defining military objects. A second Hague norm concerns "proportionality" – in an attack on military targets, incidental harm to civilians must be limited. It is easy to inscribe such norms on paper. But in the planning and execution of a military campaign, in landscapes where military and civilian sectors share a common infrastructure, both principles prove harder to apply.

NATO's air campaign in Kosovo gives some striking examples of the difficulty of adapting Hague norms to real-life combat situations. What should qualify as a military target? NATO lawyers exhaustively discussed whether and how to strike at Yugoslavia's oil refineries, electrical grids, television and radio transmission towers, port facilities, railroad spans, and highway bridges. In the legal doctrine of World War II, each of these objects was classified per se as a military target. There are practical reasons why attacks on infrastructure still remain a part of military planning. Safety for allied aircraft and pilots requires shutting down an adversary's anti-aircraft radar, and air dominance is necessary for ground campaigns as well as air campaigns. Yet even smart weapons may not find mobile anti-aircraft units that are hidden under the lee of a hill; their radar links may most practicably be countered by disabling the adversary's electrical grid. So, too, cutting off the adversary's oil and gas supplies is the most reliable way to immobilize his battle tanks and fighting vehicles, including armored personnel carriers. In cloudy weather and hilly terrain, against an adversary skilled at camouflage, battle armor can be extremely hard to find and target directly. Likewise, there are tactical reasons for damaging highway and rail bridges, to prevent the resupply of ammunition and fresh troops, and to limit the adversary's freedom of maneuver.

The moral difficulty in targeting is that the same transportation infrastructure and energy sources may sustain the civilian community as well. It is exceedingly difficult to fight effectively against an adversary's armed forces without also causing unwanted hardship to the civilian population. The measures taken in Kosovo were part of an effort to counter the Serb campaign of ethnic cleansing – to protect Kosovar Albanians from the depredations of Serb nationalist paramilitaries. The plangent dilemma of balancing harms is not limited to the Balkans.

Some academic commentators would like to imagine a perfect method of warfare, with complete success in pinpoint strikes that directly disable an adversary's mobile military forces. Other commentators would like to shelter all portions of a country's infrastructure in an armed conflict, regardless of how this prolongs the fighting. Some would like to hold military commanders to a duty of "just-in-time" targeting – waiting until the very moment the adversary proposes to use a particular bridge or railroad. But military commanders who are thwarted by real-life weather, terrain, strategic deception, and mobile weapons may conclude that an effective campaign requires striking at the underlying military infrastructure, including an adversary's energy sources and transportation system.

American commanders are trained to take their ethical and legal responsibilities with great seriousness. The American military sends judge-advocates to the field to advise area commanders on targeting decisions and choice of weapons. They consult computer analyses of possible collateral damage to minimize the harm to civilians. Commanders engage in debate within alliance structures, and American military planners, treatise writers, and trainers also engage with their counterparts. The debates even continue amid the urgent circumstances of a perilous conflict. But one should not assume that the clarity and specificity of criminal law easily fits some of the choices that must be made.

Many countries engage in international peacekeeping under UN or regional auspices. The classical model of peacekeeping demands that troops be deployed only where the conflicting parties have agreed to the mission, where neutrality can be maintained, and where minimal force need be used. Countries as diverse as Fiji, Guatemala, Estonia, India, Pakistan, and Bangladesh, as well as our NATO allies, have made valuable contributions to peacekeeping. The decision of the German Constitutional Court now permits Germany to engage in these missions, with the permission of the Bundestag.

By contrast, "peace enforcement" has few takers. It is the task of a very few countries that have the economic power to pay for the necessary military capability, and a historical role acceptable to their neighbors. The term "peace enforcement" was offered by former UN Secretary General Boutros Boutros-Ghali in his important *Agenda for Peace* to describe the necessarily robust use of military power to displace an aggressor or turn back an invasion. Because of history, Japan and Germany – the world's second and third largest economies – are still hesitant to participate in such missions. Europe has under-invested in military capacity, some would claim. And in its commitment to regional peace, Europe is undecided about a broader global role.

The US faces a number of crucial and hazardous military tasks in which it may have few operational allies. These include the defense of South Korea, strategic stability in the Taiwan Straits, balance in the Middle East, and measures against international terrorism. NATO allies may or may not choose to share in these responsibilities. With a commitment to maintaining security in key areas of the world, Washington is logically concerned with preserving realistic standards for military operations. Innovative proposals for new battlefield standards and the use of advanced technology to save innocent lives will always warrant serious discussion among responsible governments, humanitarian agencies, religious thinkers, military analysts, political commentators, and the public. But they do not routinely belong in the escalated rhetoric of a criminal tribunal. With 220,000 military personnel serv-

ing in overseas deployment, it is not surprising that Washington should be cautious about the ICC's broad wingspan.

As witting political observers know, an adversary can characterize the law opportunistically, trying to hobble an act of self-defense or humanitarian intervention. At the beginning of the Kosovo air campaign, Slobodan Milošević sent his lawyers to the International Court of Justice, charging in a civil suit that almost all of NATO's combat methods were forbidden. Indeed, the Kosovo air campaign was reviewed by the UN tribunal for the former Yugoslavia, and no criminal investigation was opened. But it is worth recalling that this particular tribunal was the creation of the UN Security Council, in coordination with NATO's goal of stopping ethnic cleansing. The scope of the ICC is far broader. It will hear complaints from a host of countries, organizations, and individual sources. It operates outside the UN's existing security architecture, independent of the UN Security Council. Moreover, its judges are not required to have any experience in military operations or military law, even though the ICC's competence would encompass both the contested issues of Hague law and the clearer standards of Geneva law. A jurist's view on how to balance operational efficacy and unavoidable civilian hazards may be subtly influenced by unspoken beliefs about the necessary role of military strength in protecting societies against intimidation.

The American interest in framing intelligent standards for the use of force extends to issues such as humanitarian intervention and preemption of terrorist networks, as well as to the role of regional organizations in Africa and elsewhere. The addition of the crime of "aggression" to the ICC's docket may thwart the very forms of intervention that are supported by the human rights community. Though aggression was a historical crime that fit the Nazi war machine in the context of the Nuremberg Trials, the label can also be mobilized for sharply contested political ends. Some ICC supporters say that this part of the court's docket is purely symbolic. Yet even now, some treaty states propose displacing the UN Security Council from its central role in evaluating aggression. Legitimate acts of humanitarian protection or anticipatory self-defense could be jeopardized by a reckless definition of the crime.

Each ally is free to posit a cure for transatlantic irritations. But the ICC controversy deserves to be analyzed on its own merits, not as part of a mélange of transatlantic concerns that includes global warming, steel exports, or the relationship of NATO to the EU. It also does not advance common understanding to assume that an interlocutor is proceeding in bad faith. Some European critics would ascribe US concerns about the ICC to a heedless desire to operate without norms or limits. But, as described above, the US has justifiable concerns about an unrealistic reading of the law of armed conflict, indeed because of the very asymmetry of military power in the world and its unique international responsibilities.

It is reasonable to point out that the ICC statute has some safeguards that attempt to prevent misuse of the court's powers. "Complementarity" requires the court to defer to national decisions about war crimes, unless the particular state is "unwilling or unable genuinely" to investigate or prosecute an allegation. Where there are good-faith doctrinal differences, this is no protection. For example, the US will by definition be unwilling to prosecute its pilots or military commanders for carrying out missions that it believes to be lawful.

When there are doubts about a proposal or a new institution, the usual course of

action is to watch and see how it works in practice. The stars have not been in alignment here. As both Democrats and Republicans in Congress have noticed, there is no safe "look-over" period. The insistence that the court should have power over third-party countries, even without Security Council decision, is of deep concern to lawmakers. Washington's bipartisan view is that the ICC has no right to claim jurisdiction over the citizens of a state that has chosen not to ratify the treaty without the Security Council's concurrence. This was the view taken by President Clinton when he signed the treaty on December 31, 2000, and it is a view shared by the Democratic Senate, the Republican House of Representatives, and President George W. Bush. One may or may not agree with some of Washington's methods of pursuing the point, but it is just as well that ICC treaty states not labor under any misapprehension about the importance of the issue to the US. There will be plentiful work for the ICC docket in the exercise of more traditional theories of jurisdiction.

Constructive things can be done, even at present, to help mend the relationship between the ICC and the US. It would be useful if some of the judges nominated to the court were chosen from among military lawyers and judge advocates, to bring some practical judgment and military experience to the court's deliberations. So, too, the appointment of deputy prosecutors should include people with a working background in Hague law, as well as more traditional international and criminal lawyers. (One could even be daring and choose an American.) The court may also wish to have a roster of military experts chosen from responsible militaries for use as expert witnesses. Secondly, the new ICC prosecutor may wish to announce guidelines for case selection. The experience of the Yugoslav and Rwanda tribunals has shown that international courts can only handle a limited caseload, and constructive engagement in undisputed areas could be reassuring. Thirdly, it would be within the prosecutor's prerogative to clarify the components of decisions on complementarity, in particular, to make clear that the court will apply the European idea of deferring to good-faith national interpretations of the law of armed conflict, with a "margin of appreciation."

The NATO alliance and other coalitions for peace enforcement will require practical standards for joint operations in the future. A coordinated defense requires planning, reasonable interoperability, and, not least, a workable consensus on what the law allows. Thus, a continuing North Atlantic conversation on the legal and ethical principles that govern the use of armed force is in our common interest. Our current differences on the modes of enforcement should not distract us from the ambition of our shared normative commitments.

Ruth Wedgwood replies

I appreciate the comments of Judge Goldstone, Dr. Ambos, and Professor Thomas, and the opportunity to offer some reflections in reply.

The recent German elections have once again taught that the use of political language requires care and attention. A tub-thumping phrase may rally the faithful but can also demonize good-faith differences in view and interfere with the working relationships important to allies. This is a lesson that may have equal application to discussions of the International Criminal Court.

A sense of caution in changing international security architecture and its govern-

ance is also warranted. It is striking that, in the earnest negotiations for a permanent court, not a single country ever proposed the creation of retrospective criminal jurisdiction for the tribunal. The sins of our shared past – whether in Algeria, Namibia, or elsewhere – are still off-limits. We will, it seems, become virtuous – but only tomorrow.

There is a third lesson, derived from our fledgling attempts at international justice – namely, the importance of diplomatic, economic, and military support from the major powers. To bring defendants and witnesses before the Yugoslav tribunal in The Hague has required the muscle of states wielding influence in the Balkans. At its greater distance, the Rwanda tribunal has sometimes been thwarted by the Tutsi government in Kigali. The court is unable to access crime scenes or witnesses from the Hutu-led genocide without government consent, and the tribunal has even faced threats that cooperation will be withdrawn if it looks too hard at the Tutsi-led military activities of 1994. The ability of the war crimes tribunals to gain "cooperation" has often depended on the willingness of the larger powers to put the actors in a cooperative frame of mind.

This is why it was curious and sad that the delicate negotiations for a permanent criminal court were held captive to a millenarian schedule. In a five-week-long forced march, the conference leadership at Rome summarily refused an urgent American request for a much-needed adjournment, forbidding continued discussion of the hard issues that were preventing agreement. The American request for more time was again made at high levels on the last day of the conference, as delegations struggled to absorb the complicated draft of the court statute. (The chairman's draft was not available for inspection until 2 a.m. the night before, and its last-minute circulation precluded any conceivable approval through the American inter-agency process.) The court became an unwanted Rorschach test for the rivalries of the American-European relationship; perhaps it was even conceived as a test case to show that Europe could go it alone in security matters. The combative attitude of some Canadian politicians toward their neighbor to the south also had an influence – an inappropriate transposition of local politics to a fateful international setting.

One cannot undo these missteps. The question now is how to proceed in a way that does not damage alliance relationships while advancing a shared commitment to humanitarian law. I appreciate Professor Thomas' remark that the suggestions at the conclusion of my essay are "concrete and constructive." The soon-to-be-elected prosecutor of the ICC will have an important opportunity to mend fences and dedicate the court to its true vocation of thwarting future criminal regimes that flirt with genocide and civilian atrocities.

I offer here a few observations toward that effort. One obstacle to reconciliation is uncertainty about whether any practical reading of the ICC treaty can be relied upon. It would make sense for the Rome Statute to respect the traditional division of responsibility for disciplining visiting armed forces, honed over fifty years of NATO and United Nations history. The "status of forces" agreements for both institutions provide that criminal prosecutions of official acts should be undertaken by the country that sends the visiting forces. The responsibility for discipline has been an important issue to the US Congress. (Indeed, political veterans remember that Congress was highly skeptical of the original NATO status-of-forces arrangements even in 1954.) The language of the Rome Statute's Article 98 (2) suggests

that this division of labor and retention of responsibility should continue under the ICC. Yet it has taken months of wrangling to gain any general acknowledgement that individual members of the EU are free under the Rome Statute to preserve the jurisdiction of the sending country in their peacetime status-of-forces arrangements with Washington.[1] This would not displace any traditional jurisdiction of the civilian courts of the host country. Contrary to Dr. Ambos' inference, there is no "territorial" principle that would be violated. Civilian courts have not generally handled military crimes related to on-duty acts, whether in war or in peace. Nuremberg was a mixed military tribunal. Article 84 of the Third Geneva Convention of 1949 guarantees a captured soldier the right to be tried in a military tribunal in preference to a civilian court. Except when soldiers are captured in war, trials are remitted to the military tribunal of the sending country.[2]

Some supporters of the ICC, such as Italian law professor Flavia Lattanzi, have constructively observed that the deference due to the national courts of a sending country under the ICC principle of "complementarity" also extends to custody of a suspect. If a person were apprehended by an overseas power and turned over to the ICC, the suspect would have to be immediately returned by the ICC to the country of his nationality while the prerogative of national investigation was exercised.

Hence, the provocative claim that ICC treaty-states should have the right to arrest overseas Americans who are not sheltered by a status-of-forces agreement proves to be a theological point, by the treaty's own terms – if Professor Lattanzi's wise reading becomes the prevailing interpretation. Much *Sturm und Drang* in the American-European relationship would be avoided by acknowledging this.

Let me also revisit the question of transparency and criminal law. It is an age-old tenet that criminal law should be defined with clarity, for the sake of fairness to the individual. After Nuremberg, Gustav Radbruch asserted a coordinate principle: that in cases of genocide and gross atrocities, human beings know that the positive law of a criminal regime is not justifiable. But in ordinary times, in the operation of a responsible military, there will be many real questions on how to balance reasonable military efficacy with the maximum protection of civilians. In the work of the Yugoslav tribunal, some court personnel have expressed concern at the proffered view that the court should "progressively develop" the law in the context of an individual criminal case. This benign turn of phrase, so-called "progressive development," can mean applying harsh criminal sanctions for conduct that was not clearly prohibited at the time of its occurrence. This itself poses questions of human rights and due process in the courtroom. A responsible commander who believes an attack is proportional may indeed object to a criminal sanction that could not be anticipated.

Nor does the role of criminal "intent" solve the problem, contrary to Dr. Ambos' suggestion. In most criminal prosecutions, there is no required showing of "intent to violate the law" as opposed to "intent to carry out the action" that will save a com-

1 See *Annotated Agenda,* General Affairs and External Relations Council, Brussels, 30 September 2002 Press Release: Brussels (27/9/2002). Available at *http://ue.eu.int/pressData/en/fc/72291.pdf.*

2 See also George A. Finch, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes," *American Journal of International Law 14* (1920): 218–23.

mander from the murkiness of battlefield law. A commander may face an adversary who is perfidiously misusing a protected civilian facility as a weapons platform, and indeed wonder what to do.

As Judge Goldstone points out, the ICC is required to defer to any national investigation or prosecution conducted in good faith. But the end of a local investigation, where no charges are filed, will not be neatly accompanied by the "reasoned opinion of a US (military) court." Dr. Ambos misapprehends the procedures for exercising discretion in a common law system and under the Uniform Code of Military Justice. It is a national prosecutor, not a court, who will have the discretion to decline a case, based on a professional judgment of the law and the facts. It is not customary to broadcast the detailed reasons for doing so – in part to avoid defaming an individual. Inviting an international panel to inquire into the internal decision-making processes of a criminal justice system presents questions about witness confidentiality as well as protections for individual reputation. Even the US Congress is ordinarily discouraged from requesting criminal case files concerning individuals.

No one has proposed placing American troops "outside the rules of international humanitarian law." In this, Judge Goldstone is simply wrong. Indeed, the deployment of American judge advocates in the field to give advice to military commanders amid hazardous conditions shows quite the opposite, as does the careful training of American personnel on rules of engagement, and ongoing alliance debates on air and land warfare. But a president and commander-in-chief is also responsible for protecting his personnel against unwarranted accusation. One may lament that in some international circles there is little inclination to ascribe any good faith to American leaders. And closer to home, it is not clear how one insulates an international court from these attitudes. The brickbats hurled westward across the Atlantic do indeed reflect more than "simple questions of law," as Kai Ambos observes.

Wisdom on both sides of the ocean will be needed to advance the common vocation of international law – using shared norms, the desire of responsible countries for good reputation, and the ultimate availability of armed force as a deterrent to the malevolent behavior of dictators. The law is not self-executing. The genocides of the 1990s proved that point. The role of responsible military power in protecting innocent lives – and in thwarting the calculating leaders who profit from ethnic conflict and terrorism must not be ignored in the desire for a heavenly *Rechtsstaat*.

Chapter 46

The Dynamic but Complex Relationship between International Penal Law and International Humanitarian Law

Yves Sandoz

Introduction

International humanitarian law has been defined as "international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by the conflict".[1] Throughout its history international humanitarian law – or the law of war, as it is also known – has been criticized mostly for the weakness of the means of enforcing it. This reality has even raised the question of whether we can even call it *law*. In an oft-quoted warning, Hersch Lauterpacht told lawyers involved in developing this law to work "with a feeling of humility springing from the knowledge that if international law is in some ways at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law".[2]

Though this obvious flaw has much to do with the reality of an international system based on the sovereignty of each State, it has always posed a challenge to the defenders of humanitarian law. Among the possible means of boosting the law's implementation and authority, at both the national and international levels, penal sanctions have always seemed promising. The present article will study this possibility and, in particular, recent and important developments in international penal justice, while examining certain difficulties inherent to penal sanctions and the dilemmas faced by humanitarian organizations, in particular the ICRC.

1 Y. Sandoz, C. Swinarski, B. Zimmermann, ed., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, p. xxvii.

2 Lauterpacht, Hersh, "The problem of the revision of the law of war", *The British Year Book of International Law*, 1952, 29th issue, pp. 360-382, at pp. 381f.

José Doria et al. (eds.), The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko
 ISBN 978 90 04 16308 9. pp. 1049-1069.

I. Historical background

A. The origins of international humanitarian law

The beginnings of modern international humanitarian law are found in the mid-nineteenth century. War has naturally existed as long as homo sapiens has walked the earth. As Geoffrey Best has written, "an inclination towards restraints and prohibitions in war (is) a normal aspiration, more or less as old as war itself".[3] Since ancient times there have been numerous rules – sometimes customary – ensuring the protection of people affected by war and setting limits to the means of warfare used, though rules intended to alleviate suffering caused by war were either religious in nature or introduced in ad hoc bilateral treaties.[4]

What constituted an innovation from the mid-1800s on was the goal of codifying a body of rules valid for the whole of mankind, to do this in the form of multilateral treaties open to signature by all States (though at that time, universality was still a relative concept given the distinction between what those States considered the "civilized nations" and the rest of the world).

Four documents may be viewed as belonging to the texts that gave birth to the era of modern international humanitarian law:

- the 1856 Paris Declaration Respecting Maritime Law;
- the 1863 Instructions for the Government of Armies of the United States in the Field;
- the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field; and
- the St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.[5]

The Paris Declaration is important because, even if its subject matter – harmonization of rules governing the capture of property at sea – was relatively limited, it appears to have been "the first open-ended multilateral treaty which, according to its terms, was open to accession by other states".[6]

The 1863 Instructions were drawn up by Francis Lieber at the request of President Abraham Lincoln during the US Civil War and then signed into law by Lincoln. They represent "the first attempt to codify the laws of war".[7]

The original Geneva Convention, adopted following publication of Henry

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3 Best, Geoffrey, *War and Law since 1945*, Clarendon Press, 1994, p.15.

4 This text does not deal with the historical background to international humanitarian law. Among many fine publications on the subject, readers are referred to the useful summary presented in Chapters 1 to 4 (pp.23-97) of the recent book by: Harouel-Bureloup, Véronique, *Traité de droit humanitaire*, Presse Universitaire de France, Paris, 2005.

5 Those texts may be found in: Schindler, Dietrich and Toman, Jiri, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, Leiden/Boston, 4th edition, 2004, respectively pp. 1053 f, pp.3 f., pp. 365 f. and pp. 91 f.

6 Roberts, Adam and Guelff, Richard, *Documents on the Laws of War*, Oxford University Press, third edition, 2000, p.5.

7 See Schindler and Toman, op. cit. footnote 3, p.3

Dunant's shocking book relating his experience at the horrific Battle of Solferino,[8] was the basis for today's four Geneva Conventions which, along with their Additional Protocols, serve as the very core of current humanitarian law applicable to armed conflict.

The St. Petersburg Declaration, finally, was adopted at a diplomatic conference convened by Czar Alexander II. It was the "first major international agreement prohibiting the use of a particular weapon in warfare".[9]

This text will confine itself to international humanitarian law *stricto sensu*, i.e. starting in the middle of the nineteenth century, when the above-mentioned four texts were adopted.

B. Proposing penal provisions in humanitarian law treaties

The first international humanitarian law treaties had no provisions concerning their implementation. *Pacta sunt servanda* was deemed to suffice until reality proved that this principle was not enough. International humanitarian law was poorly respected during the Franco-Prussian War[10] and this failure drew two types of reaction.

The first was increased skepticism on the part of those who did not believe in humanitarian law. For them, any attempt to soften the consequences of war was hopeless. Some pacifists were also opposed to such law for a different reason, fearing that progress in that direction would weaken their efforts to banish war altogether.[11]

The second reaction was to strengthen the law. Replying to the skeptics, Gustave Moynier (another founder of the ICRC and its longest-serving president, from 1864 to1910) argued that, on the contrary, it was necessary to add implementing measures, in particular penal sanctions. It is interesting to note that as early as 1870 Moynier expressed it as an idea, then formally proposed it two years later: creating an international criminal court.[12] This provoked numerous responses from eminent international lawyers such as Lieber and Westlake, who were interested in the idea but found it too audacious.[13]

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8 Dunant, Henry, *A memory of Solferino*, first published in French in 1862. English version first published by the American Red Cross in 1939 and reprinted by the ICRC, Geneva, 1986.

9 Roberts, op.cit. note 2, p.53

10 For a detailed description of the problems encountered by the Geneva Convention during this war, see: Boissier, Pierre, *From Solferino to Tsushima*, Henry Dunant Institute, Geneva, 1985, p. 241 f.

11 This objection cannot be taken seriously, since any possible mitigation of the suffering caused by war has never been, and will certainly never be, a consideration in favour of waging it. Those who promote international humanitarian law have always been defenders of peace. Louis Appia, one of the five founders of the International Committee of the Red Cross, was already very clear on this point in the report he wrote on the Schleswig-Holstein conflict the year when the original Geneva Convention was adopted. See *Secours aux blessés: Communication du CICR suite aux compte –.rendus de la Conférence internationale de Genève*, Frick, Geneva, 1864.

12 Boissier, op.cit. note 10, pp.372 f.

13 Ibidem, p.374. It is interesting to note that the discussions which then followed between these eminent lawyers were behind the creation of "Institut de droit international" in Ghent in 1873.

This initial proposal of what was finally achieved in 1998, with the adoption of the Statute of the International Criminal Court, was far in advance on its time. But it raised awareness of the fact that some implementing measures had to be introduced into the law, among them penal sanctions. In the resulting discussion, however, the sovereignty of the States prevailed, and nothing more could be achieved other than a recommendation to punish at the national level those violating humanitarian law (see Art. 84 of the *Manual on the laws of war on land* adopted by the Institute of International Law at its meeting in Oxford in 1880). A delegate to the 1874 Brussels Conference had previously made a proposal for harmonization of national penal legislation, but this had been rejected.[14]

Article 3 of the 1907 Convention Respecting the Laws and Customs of War on Land (a new provision not included in the 1899 version)[15] lays down the belligerent's responsibility "for all acts committed by persons forming part of its armed forces" but does not establish penal sanctions. The revised version of the 1864 Geneva Convention adopted in 1906 went a step further. Without creating an international system, the new Convention contained two articles by virtue of which States Parties with inadequate legislation committed themselves to taking or recommending to their legislature the measures needed to repress misuse of the emblem (Art.27) or "in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies" (Art.28).[16]

The determination to punish war criminals gathered strength during the First World War, with France setting up a commission as 2 December 1914 to investigate crimes committed by the enemy in terms of the international law of nations as early. The preliminary peace conference organized at the end of the war set up a 15-member commission to inquire into the responsibility of those who had started the war and means of punishing them. Articles 228 to 230 of the Treaty of Versailles provided for punishment of Germans accused of committing acts in violation of the laws and customs of war. The principle of primacy of national courts was upheld but the idea of a "High Tribunal" was nevertheless mentioned. In practice, as time passed the Germans were less and less inclined to respect their obligation to punish violators and the Allies failed to insist on this. As for the international tribunal, the US delegation opposed the idea and if a special court was nevertheless finally set up, it was for the sole purpose to trying Kaiser Wilhelm II who, in the end, failed to be extradited by the Netherlands.[17]

The two Geneva Conventions of 1929 introduced some new implementing measures, such as the system of protecting powers and the introduction of an inquiry procedure. But the revised Conventions were not very innovative as regards penal sanctions: they merely mentioned once again the need for the State Parties to introduce, should their penal law be inadequate, the provisions necessary to punish not only special breaches but "any act contrary to the provisions of the Convention" (this

14 See Sandoz, Yves, "Penal aspect of international humanitarian law", in: *International Criminal Law*, 2nd edition, Cherif Bassiouni ed., Transnational Publishers, Inc, Ardsley, New-York, 1999, pp. 393-415, in particular p.p.394 f.

15 See Schindler and Toman, op. cit. note 3, p. 62.

16 Ibidem, pp.390-391.

17 See Sandoz, Yves, op. cit. note 14, pp.397 f.

last rule being the only, slight, progress achieved).

II. Penal sanctions in positive international humanitarian law

A. The 1949 Geneva Conventions

When discussion of international humanitarian law resumed following the Second World War, the state of mind of those taking part had changed radically owing to the horrors committed during that war.[18] There was a broad consensus that the individuals bearing the main responsibility for the worst crimes could not go unpunished. In addition, the international penal courts set up in Nuremberg and Tokyo not only bolstered the idea that the international community could not tolerate impunity in cases of particularly heinous crimes –they also made a remarkable effort to define them by drawing up a list of war crimes and of crimes against humanity.

The Nuremberg and Tokyo tribunals were nevertheless ad hoc bodies and firmly anchored in the context of the Second World War. The idea of establishing a permanent criminal court was not yet ripe when preparatory discussions began for the drafting of new humanitarian law treaties. There were probably two main reasons for this. The first was the conviction that the United Nations would prevent, if not all crimes, at least atrocities of the magnitude of those committed during the Second World War. The second was likely once again the fear of a permanent court jeopardizing the sacrosanct principle of national sovereignty.

The 1949 Geneva Conventions were nevertheless innovative in the penal domain. The introduction, in an article common to all four, of the principle of universal jurisdiction for war crimes was an important step forward.[19] In each of the four Conventions, war crimes are identified and exhaustively enumerated in the category of "grave breaches".[20] Those crimes are distinguished from other violations of Conventions in two ways.

First, the Conventions make it obligatory to punish those who have committed grave breaches.[21] We see here the logical consequence of the moral idea that the international community as a whole cannot tolerate particularly heinous crimes going unpunished. On the other hand, the Conventions require only that the States "take necessary measures for the suppression of all acts contrary to the provisions" not included in the list of grave breaches.[22] Of course, nothing prevents the States from including in their national legislation penal sanctions for those other viola-

18 On this progression, see i.a. Bassiouni, Cherif, "From Versailles to Rwanda in 75 years: the need to establish a permanent international criminal court", *10 Harvard Human Rights Journal*, 1 (1996).

19 Art. 49, 50, 129 and 146 of, respectively, the First, Second, Third and Fourth Geneva Conventions. On the discussions which took place after and during the diplomatic Conference of 1949, see Pictet, J. ed., *Commentary of the IVth 1949 Geneva Convention*, ICRC, Geneva, 1958, pp. 583 f.

20 See Art. 50, 51, 130 and 147 of, respectively, the First, Second, Third and Fourth Geneva Conventions.

21 Ibidem.

22 Ibidem.

tions,[23] though nothing compels them to do so. The Conventions leave the States free to choose the best method of suppression.

The second difference is linked to the principle of universal jurisdiction, which basically requires the States party to the Geneva Conventions to do one of the following: either extradite (subject to the granting of judicial guarantees) anyone who has committed a grave breach to a State requesting extradition and having a more direct interest in his prosecution, or prosecute that person themselves (principle *aut dededre aut judicare*).[24]

B. Poor implementation of the penal provisions in the 1949 Geneva Conventions

However, the major innovations mentioned above were poorly implemented. It is not possible to establish exact figures for cases in which soldiers who have violated the Geneva Conventions have been brought before the courts of their own country. But there has always been a certain reluctance, in particular in military circles, to condemn excesses committed by one's own troops. The fact cannot be ignored that the Nuremberg and Tokyo Tribunals were set up only to try war criminals from the side that had lost the war. More recently we have seen secretiveness and cover-ups organized by the hierarchy to protect guilty subordinates in the case of French soldiers who committed excesses during a mission in the Ivory Coast.

This reluctance is motivated by the fear both of demoralizing soldiers being sent into combat and of eroding popular support for military undertakings. But these arguments fail to stand up to the fact that, especially nowadays with the emergence of a free press featuring investigative journalism, the truth will eventually come to light. For ethical reasons, of course, but also in terms of sound policy, it is therefore better in the long term for the authorities to face the truth and in so doing to demonstrate to its own soldiers, to its population and to world public opinion its willingness to comply strictly with humanitarian law. Even the best cause is jeopardized if grave violations of that law – torture, looting, rape – are tolerated during hostilities. Respect for the law is indispensable to recognition of any cause as morally just.

The fact remains that few war criminals have ever been convicted by courts in their own country. Still rarer are cases in which persons suspected of being war criminals have been arrested by other States in application of the universal jurisdiction. The main reason for this is probably that following the Second World War everything was interpreted through the prism of the Cold War. The principle of good faith was misused and the independence of the judiciary often illusory. Exploiting for political gain violations of international humanitarian law committed by either of the two Cold War camps was considered a risky venture, a consideration that took precedence over the ideal of fair and independent international justice. And indeed, any attempt to arrest a war criminal from the other camp would have inevitably

23 Regarding incorporation in national legislations of the penal norms of international humanitarian law, see Pellandini Cristina, ed., *National measures to repress violations of international humanitarian law (civil law system)*, ICRC, Geneva, 1998; and Segall, Anna, ed., *Punishing violations of international humanitarian law at the national level: a guide for common law States*, ICRC, Geneva, 2001.

24 See articles mentioned in footnote 20.

given rise to reprisals in the manner of the tit-for-tat expulsion of diplomats that one repeatedly saw during the Cold War. And obviously, persons from one side who had committed war crimes would not readily venture onto territory under the control or influence of the other side.

But there are also two purely legal reasons for this disappointing record of implementing the principle of universal jurisdiction. The first is that the Geneva Conventions – which today have been all but universally adhered to and most of whose provisions are considered part of customary law[25] – came into force only gradually, through the process of ratification or adhesion in the various States. The second is that the vast majority of the conflicts that occurred during this period were non-international, even if they were often encouraged and sustained by the great powers. And the concept of war crime – like the application of the principle of universal jurisdiction – was viewed as valid only for international armed conflicts.

C. The 1977 Protocols additional to the Geneva Conventions

The reluctance to recognize as war crimes – that is, to accept the criminalization at the international level – of acts committed in internal armed conflicts was still very strong at the 1974-1977diplomatic conference. This reluctance extends even to acts committed by a State against its own citizens, as we can see in Article 11, paragraph 4 of Additional Protocol I of 1977, which concerns international armed conflict. In the two first paragraphs of this article on the protection of persons, the principle is established that "mental health and integrity" must be safeguarded of all persons "detained or otherwise deprived of liberty as a result" of an international armed conflict. This definition does not exclude the citizens of a State party to a conflict who might have been detained as traitors or even simple opponents of the conflict. But in Article 11, paragraph 4, it is pointed out that violations of this obligation not to endanger the physical or mental health of a detained person is considered a grave breach (that is, a war crime) only in the case of "any person who is in the power of a Party *other than the one on which he depends*" (my emphasis). In other words, this provision prohibits violations of the above-mentioned obligation by a State with regard to its own citizens, but does not give to such acts the status of war crimes and does not recognize them as international crimes.

It goes without saying then that the status of war crime was not attached by Additional Protocol II to any violation of international humanitarian law committed during non-international armed conflicts, in which the participants are in principle citizens of the same State. This reluctance demonstrated the great fear which still existed at the time of weakening any aspect of national sovereignty. It was particularly pronounced among the governments of States that had just gained their independence.

The system established by the Geneva Conventions thus underwent no change in the Additional Protocols. However, the Protocols reaffirmed and developed humanitarian law, in particular the principles and rules governing the conduct of hostilities laid down in the 1899 and 1907 Hague Conventions (and left out of the

25 See: Henckaerts, Jean-Marie and Doswald-Beck, Louise, eds., *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005.

Geneva Conventions) and added to the list of grave breaches defined by the Geneva Conventions.[26] In addition, the Protocols expressly defined as war crimes all crimes listed as grave breaches.[27]

In the short term, the adoption of the Additional Protocols had no real effect on the implementation of the penal provisions of international humanitarian law.

D. Recent developments

i. The ICTY and the ICTR

As we have seen, it is generally in response to particularly heinous acts that international humanitarian law and human rights law have been developed. In the past 15 years, outrages committed during the wars in the former Yugoslavia and the genocide in Rwanda have given new impetus to ensuring the penal repression of war crimes. World public opinion felt strongly that particularly horrifying crimes committed during these wars, such as large-scale murder and rape, should not go unpunished. This powerful sentiment, probably combined with a certain sense of guilt at not having acted more vigorously to prevent these horrors, prompted the Security Council in 1993 to set up the ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY)[28] and, a year later, the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (ICTR).[29]

ii. Semantic developments

The initial resolution adopted by the Security Council to create the ICTY, that Tribunal's formal title, Article 1 of its Statute (Competence of the International Tribunal – defining as its mandate the prosecution of "persons responsible for serious violations of international humanitarian law") – all these go beyond the categories set out in the Geneva Conventions, i.e. "breaches" and "grave breaches". It is the same for the ICTR, which also mentions "genocide and other serious violations of international humanitarian law" in its title. This might in future open the door to crimes considered as international being extended to cover violations of international humanitarian law not listed in the Geneva Conventions and their additional Protocol I.

The Tribunal's statute makes clear the reason for this wording. The crimes included in its jurisdiction are listed in Article 2 of the Statute and include the grave breaches (this expression being used) set out in the Geneva Conventions. Article

26 Article 85, Additional Protocol I.

27 See Art. 85, para. 5.

28 By its resolution 808 of 22 February 1993.

29 By its resolution 955 of 8 November 1994.

3 mentions "violations of the laws or customs of war", Article 4 "genocide", and Article 5 "crimes against humanity". In reality, Articles 3 and 4 concern crimes which should not have been considered as part of international humanitarian law *stricto sensu* because they may occur outside armed conflict.

It is an open 'semantic' question whether crimes against humanity, genocide and violations of international human rights law committed in armed conflicts must all be placed in the category of violations of international humanitarian law. Generally speaking this is not the case, in particular as regards human rights law, and it seems to me preferable, with a view to avoiding false impressions, that human rights law should in a sense be "absorbed" by international humanitarian law when its is applied to armed conflict. In any case, the implementing mechanisms of each corpus of law are clearly separate: the applicability of humanitarian law in a given situation does not prevent the UN Human Rights Committee in particular from inquiring into human rights violations in any situation. A distinction should therefore be drawn between the application of international human rights law to armed conflict and the application of international humanitarian law, crimes against humanity and genocide being separate categories. It is therefore legitimate to be critical of the fact that international humanitarian law is mentioned only in the Article 1 of the ICTY Statute.

Asking whether crimes against humanity, genocide and violations of international human rights law committed in armed conflicts must all be placed in the category of violations of international humanitarian law is not a pointless exercise because it reveals the differences of approach that lie behind it. In my view we have seen that it is wrong to claim that international humanitarian law substitutes for international human rights law when it comes to armed conflict. But in the late 1970s there was a trend in the other direction, that is a tendency to consider international humanitarian law as nothing more than international human rights in armed conflict. At the International Conference on Human Rights, held in Teheran in 1968, a resolution was adopted on "human rights in armed conflicts".[30] This mentioned the Geneva Conventions, thus implying that international humanitarian law was part of human rights law. A similar resolution was adopted the same year by the UN General Assembly.[31]

And there was more to this than a simple semantic question – there was the desire to assign the UN the competence to prepare further development of international humanitarian law, then to organize diplomatic conferences for the purpose of adapting or developing that law. The General Assembly resolution invited in particular the Secretary-General to study "the need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts"[32].

Although the Secretary-General was invited to do this "in consultation with the International Committee of the Red Cross and with other appropriate inter-

30 See Resolution XXIII of the International Conference on Human Rights, Teheran, 12 May 1968.

31 Resolution 2444 (XXIII), Respect for human rights in armed conflicts, of 19 December 1968.

32 Ibidem, para. 2 and 3.

national organizations", the mandate given to him was clearly an attempt to depart from what had been the traditional procedure since the original Geneva Convention of 1864, that is to let the ICRC prepare such developments by means of meetings of experts, then to let the Swiss government, depositary of the Geneva Convention, prepare and convene subsequent diplomatic conferences in order to allow the States to study, amend and adopt the proposed amendments or additions.

Such a change of approach would have involved the risk of inserting more political content into international humanitarian law. The unique and seemingly strange system of assigning to a private organization – the ICRC – the task of preparing changes to international humanitarian law is based not on logical political and legal theory but rather on positive practical experience. The ICRC started out playing this role, and it is only because it did so successfully that it has been allowed to keep it. Moreover, the monitoring mandate given to the ICRC by the Geneva Conventions and their Additional Protocols[33] ensures its presence in practically all situations of armed conflict and places the organization in an ideal position both to observe the problems encountered when applying international humanitarian law on the ground and to draw conclusions as to the possible desirability of amending or developing that law. Lacking a bountiful mandate for this task, the ICRC is forced to work effectively and with patent honesty and impartiality.

Without pretending in any way that the international system could conceivably be based on such a model, one should recognize that this ad hoc system – the special role of both the ICRC (in the preparatory phase) and the Swiss government (as depositary in convening and managing diplomatic conferences) – is worth preserving since it involves a sphere that, more than others, must be kept well clear of politician considerations. To be sure, the States have the final word at the diplomatic conferences, but experience shows that this method of bring them about increases the chances of practical results.

iii. The reason for this semantic development

That said, if one possibly regrets, for the above-mentioned reason, the label "international humanitarian law" for the law covering human rights, crimes against humanity and genocide, there were nevertheless sound and logical grounds for departing from the traditional expression "grave breaches", which cover only those violations specifically enumerated in the Geneva Conventions and Additional Protocol I.

Article 3 of the ICTY (Violations of the laws and customs of war) was needed for two reasons. The first was to cover violations of Additional Protocol I, which was not binding, as a treaty, on all the parties concerned in the period covered by the Tribunal's Statute. Since the diplomatic conference that drafted and adopted the Additional Protocols was on the "reaffirmation and development" of international humanitarian law, it was necessary to clarify which provisions were considered a reaffirmation of customary international humanitarian law and which were considered new developments. In fact, many of the grave breaches listed in the Additional

33 See Articles 9 and 10; 9 and 10; 9 and 10; 10 and 11 common to, respectively, the First, Second, Third and Fourth Geneva Conventions, and Article 5 of the Additional Protocol I.

Protocol I were considered part of customary international law, but there was, and remains, a degree of uncertainty about some of them.[34]

The second reason is that some rules of customary international humanitarian law are not expressly set out in the Geneva Conventions or their Additional Protocols. For the prohibition or restriction of the use of some weapons, in particular, Additional Protocol I reaffirms certain basic principles but does not mention specific weapons. This is the case in particular for the prohibition of poison or poisonous weapons, which is found in the Hague Conventions of 1899 and 1907[35] and is today part of customary international law.[36]

Article 4 of the ICTR Statute ("Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II") is another very good reason to depart from the traditional distinction drawn in the Geneva Conventions. The horrors that occurred in Rwanda were a decisive incentive to deal with all crimes committed in that non-international armed conflict and not to limit the Tribunal's mandate to crimes covered by the Genocide Convention. The fear of weakening national sovereignty – a fear that had restrained the States from introducing the concept of war crimes into a multilateral treaty in 1977 – was dispelled in the face of the atrocities committed in Rwanda.

Setting these precedents was also made easier by the fact that the decision was not taken by all States in the framework of a diplomatic conference, but rather only by the members of the Security Council. Thus there was not yet any decision to develop international law, the "raison d'être" of those ad hoc Tribunals being that the impunity regarding crimes of the magnitude of those committed in Rwanda and the former Yugoslavia would pose a threat to international peace.

iv. Influence of ICTY and ICTR jurisprudence on humanitarian law

Once created, the two Tribunals emancipated themselves and, by virtue of their decisions on individual cases, interpreted international law, to the extent of providing "*orbiter dicta*", very influential for interpreting humanitarian law. This interpretative function is indispensable in the case of provisions that are vague (largely owing to the fact that they have been adopted by consensus, a process requiring compromise frequently reached at the expense of clarity). The judges therefore made an "usage résolu de cette fonction interprétative".[37] The Tribunals have made numerous contributions to the interpretation of international humanitarian law, in particular as regards the classification of armed conflicts, the definition of non-international armed conflict and concepts essential to rules on the conduct of hostilities such as

34 On this issue, see in particular Henckaerts and Doswald-Beck, op.cit. note 25.

35 At article 23, lit.a of the 1899 and 1907 Regulations annexed to the Convention Respecting the Laws and Customs of War on Land : see Schindler and Toman, op. cit. note 5, p.61.

36 See Henkaerts and Doswald-Beck, op. cit. note 25, Vol. 1, p.251.

37 Quéginer, Jean-François, "Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie : évaluation de l'apport de sa jurisprudence au droit international humanitaire", *International Review of the Red Cross (IRRC)*, Vol. 85, No.850, June 2003, pp.271-310, on p.273.

the precautionary principle and the proportionality principle.[38]

We must nevertheless note that on one occasion at least, the prosecutor herself abandoned her investigation after accepting the argument of an ad hoc commission that international humanitarian law was not clear enough for her to continue.[39]

But there is a service rendered by the Tribunals that I consider their most decisive contribution to international humanitarian law, one that could be said to go beyond interpretation and possibly lead to major development of the law.

v. A decisive innovation: The concept of war crimes in non-international armed conflict

In its decision on the Tadic case, the ICTY stated that certain crimes committed in non-international armed conflicts actually were war crimes, subject to international prosecution.[40] To achieve this, the ICTY did not simply apply its Statute, which assigned it the mandate to prosecute such crimes in a given situation with clear geographical and temporal delimitations; it went further and proclaimed an *orbiter dictum* that recognized the existence of a customary rule of international humanitarian law which had absorbed the concept of war crimes and applied this to non-international armed conflicts. In other words, the ICTY said that above and beyond the *ad hoc* nature of its mandate under the Statute, there was a general international obligation to prosecute certain particularly serious violations of international humanitarian law committed in any armed conflict.

This affirmation goes much further than a simple interpretation of treaty-based international humanitarian law. As we saw above, at the 1974-1977 diplomatic conference the States remained unwilling to introduce that concept of war-crimes into non-international armed conflicts, not even for acts committed by a party to an international armed conflict against its own citizens.

Did the ICTY have the authority to proclaim such an *orbiter dictum* or was it exceeding its mandate? In any case it did so, and we may imagine that some members of the Security Council were not enthusiastic about this audacious decision, and surely felt rather like Dr Frankenstein watching his creature doing things on its own initiative and thus escaping his control.

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38 For details on these contributions from the ICTY, see i.a. Quéginer, J.-F., op. cit.

39 See the Final Report to the Prosecutor by the Commission established to review the NATO bombing campaign against the Federal Republic of Yugoslavia, The Hague, 13 June 2000, final paragraph.

40 See *The prosecutor v. Duško Tadić*, Case No. IT-94-AR 72. On this case, among many other publications, see Quéginer, op. cit. note 36; Pejic, Jelena, "Accountability for internatonal crimes: from conjecture to reality", *IRRC*, Vol. 84, No. 845, March 2002, pp.13-33; Bolaert-Suominen Sonja, "The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts", *Leiden Journal of International Law*, Vol. 13, Issue 3, pp.630 sq.; Sassoli, Marco / Olson, Laura M., "Prosecutor v. Tadić (judgement)", *American Journal of International Law*, July 2000, pp. 571-578; Wagner, Nathalie, "The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia", *IRRC*, Vol. 85, No. 850, pp. 351-383.

A. From the ICTY and ICTR to the ICC

The opinions of the ICTY are, of course, not binding on all States. Even the advisory opinions of the International Court of Justice are not compulsory. But they nevertheless have great influence, together with the *dicta* of the ICJ on international humanitarian law.[41] In this particular case, the opinion certainly strengthened the trend that was developing inside the international community against impunity for serious crimes. The logical consequence of this trend was that, rather than confining themselves to setting up ad hoc jurisdictions, the States would create a permanent international criminal court with the ability to prosecute all serious violations committed in any armed conflict, including non-international ones. And that is exactly what they did by adopting, in 1998 in Rome, the Statute of the standing International Criminal Court, which has the jurisdiction to prosecute as war crimes serious violations committed in non-international armed conflicts. Adopted as it was by a diplomatic conference open to all States, the Rome Statute definitively confirmed the concept of war crimes in non-international conflict.[42]

This development was the practical manifestation of a general trend toward ending impunity. As we know, the ICC – in addition to confining itself to cases "not of sufficient gravity to justify further action by the court" – merely has complementary jurisdiction, which restricts its action to cases where the State concerned is unwilling or unable to carry out the investigation or the prosecution.[43] This subsidiary competence allows the court – and in particular the prosecutor – great latitude in assessing cases and indirectly assigns it a general monitoring role, first assessing the quality of what has been done in a given State before taking a final decision on whether to become involved. In this sense, Article 18 seems particularly appropriate, allowing as it does a State to open its own investigation – and thus bring about a deferral of the ICC investigation – upon notification by the ICC prosecutor of his intention to investigate. A State that is "unwilling" to prosecute the crimes listed in the Statute or whose judiciary hands down judgements that amount to obvious connivance – i.e. intended to allow the perpetrators of serious crimes to escape international prosecution – are therefore placed squarely before their responsibilities.

This ICC's monitoring role should therefore be an incentive for States to act in accordance with their obligations and help strengthen international justice. Far from resulting in a weakening of action taken at the national level, the Court should lead to stronger action, with both systems functioning in a complementary manner to reinforce each other.[44] More should be done to achieve the complementarity that becomes possible when there is prosecution at all levels combined with the various "truth and reconciliation commissions", the general idea being that amnesties cannot

41 On this, see Chetail, Vincent, "The contribution of the International Court of Justice to international humanitarian law", *IRRC*, Vol. 85, No. 850, June 2003, pp. 235-269.

42 On the drafting of the Rome Statute and the ICC, see Lee, Roy, ed., *The International Criminal Court: the Making of the Rome Statute*, Kluwer Law International, The Hague, 1999.

43 See article 17 (issues of admissibility) of the Rome Statute.

44 On this complementarity, see in particular Solera, Oscar, "Complementary jurisdiction and international criminal justice" *IRRC*, Vol. 84, No. 845, March 2003, pp. 145-171.

cover war crimes or other crimes listed in the Rome Statute.[45]

We have also seen that all this movement away from impunity has been accompanied by a heightened awareness of the responsibility assigned by international humanitarian law to the States to pursue war criminals everywhere. Indeed, the ICJ even had to temper the enthusiasm of one State (Belgium) by setting limits to this principle.[46]

The ICC was meant to supplement the setting up of ad hoc international courts, a few of which have been created since 1998 for various reasons, in particular the lack of retroactive jurisdiction in the case of the ICC,[47] and the fact that *ad hoc* tribunals mixing local and international law were considered more adequate. This is not the place to analyse those courts.[48]

All these developments obviously boost the credibility of humanitarian law which, like any body of law, cannot hope to be effective without the fear of sanctions. Without denying in any way the positive character of the above-mentioned developments, however, when one looks more closely at the reality of the present situation, one must temper one's enthusiasm. To achieve a real long-term gain in the effectiveness of international humanitarian law on the ground, those positive developments should meet certain conditions.

III. What is needed to strengthen the credibility and effectiveness of international penal justice?

To have a truly preventive effect, the punishment of war criminals should be broadly perceived first as impartial and independent of political pressures; second as part of a coherent system of international sanctions; and third as in accordance with a general sense of justice. These conditions are today far from being perfectly met and therefore have to be considered as ongoing challenges rather than achievements. It is worth taking a brief look at certain aspects of those three challenges.

A. Independence and impartiality of penal justice

Like any other international treaty, the Rome Statute was the fruit of difficult negotiations and compromise. The strong trend toward eradicating impunity was balanced both by fear of weakening national sovereignty and by the willingness of some permanent members of the Security Council to keep the international punishment of war crimes and other international crimes as a political instrument linked to their mandate to preserve or restore international peace.

45 See in particular Olson, Lara, "Mechanisms complementing prosecution" *IRRC*, Vol. 84, No. 845, March 2003, pp. 173-189; and Stahn, Carsten, "United Nations peace-building, amnesties and alternative forms of justice : A change in practice?" ibid., pp. 191-205.

46 See the Judgement of the International Court of Justice of 14 February 2002 in the case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) (General list No. 121).

47 See Art.11 of the Statute.

48 See in particular Linton, Suzannah, "New approaches to international justice and East Timor", *IRRC*, Vol. 84, No. 845, March 2002, pp. 93-119; and McDonald, Avril, "Sierra Leone's shoestring Special Court", ibid., pp. 121-143.

This balancing force manifested itself in the form of major concessions that had to be made to States fearing for their national sovereignty: the complementary role of the ICC,[49] a restriction on the prerogatives of the prosecutor (who must obtain the authorization of a preliminary Chamber) to initiate proceedings,[50] limitations to the list of crimes included in the Statute[51] and the possibility for a State, by virtue of becoming bound by the Rome Statute, to make a temporary derogation of the Court's jurisdiction regarding alleged crimes committed by one of its own citizens or on its territory.[52]

As for preserving the role of the Security Council, the key concession is in Article 16 of the Statute: a Security Council resolution adopted under Chapter VII of the UN Charter can block any investigation or prosecution by the Court. The validity of such a resolution is 12 months, but it can be renewed without an absolute limit being fixed. The idea is that prosecuting war crimes or other international crimes in situations threatening international peace might jeopardize the efforts of the Security Council to find a political resolution of those situations. One might also suspect that some permanent members of the Security Council viewed this as a means to protect themselves against possible prosecution in connection with situations in which they are directly involved. Of course, one might argue that this limitation is not so severe if we accept that in any case a majority of all Security Council members is needed to adopt such a resolution and that the veto may, according to the wording of Article 16, be used not to prevent action by the Court but rather to prevent a Court investigation or prosecution from being blocked. But at all events it is doubtful that a majority of the Security Council members would be willing to impose an investigation or prosecution on an unwilling permanent member. It therefore constitutes a major infringement of the principle of the independence of the judiciary.

We must simply accept that this corresponds to the reality of the world today, in which international justice does not yet (or at least rarely) have the last word. What is therefore important in the short term is that the Security Council not abuse its power and that it use the blocking mechanism provided by Article 16 only in cases where – for a limited period – it is really deeply involved in a search for political means of restoring peace. We should bear in mind that the UN today agrees in principle with the position set out by the Secretary-General in his report on the setting up of the Special Court for Sierra Leone: "Amnesties cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law".[53]

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49 See Art.17 of the Statute.

50 See Art. 15 (in particular para. 4 and 17) and Art.18.

51 The main difficulties have to do with both the inclusion of aggression in the Statute – for which no definition has been agreed and on which the jurisdiction of the Court is therefore postponed (see Art. 5, para.2) – and the lack of consensus on the express inclusion of nuclear weapons among the means of warfare prohibited, which effectively limits the Court's jurisdiction regarding the use in international conflicts of prohibited weapons to those enumerated in an annex to be drafted later (see Art.8, para. 2,b,xx). Far thornier is the inclusion of prohibited weapons in the list of war crimes established for non-international armed conflicts (see Art.8, para. 2-d sq.).

52 See Art. 124.

53 UN Doc. S/2000/915, para. 22.

Should the Security Council act differently, the credibility of the whole system of which the ICC is part would be seriously jeopardized. For the same reason, it is important that the Court itself, in particular the prosecutor, not practise self-censorship by avoiding cases that deserve its attention only because they imply great powers. And that includes cases where citizens of a country not party to the Rome Statute have committed crimes covered by it on the territory of a State bound by that treaty.

The United States is engaged in a regrettable campaign to reach agreements with States party to the Statute that they will never transfer US citizens to the Court.[54] Of course, one can view this as the result of skepticism regarding the quality and independence of the Court (and fear that the hesitation today remaining as to the precise definition of certain violations of international humanitarian law in the conduct of hostilities might lead to an unwarranted trial of high-ranking military officers) rather than a willingness to protect criminals. Without judging its advisability, one can also understand the fact that the world's only superpower – one very active on the international scene (with or without the UN's consent) – might particularly fear that its citizens could be unduly prosecuted and convicted. However, this attitude sends an unfortunate signal, which can only aggravate suspicions among States that fear the Court being used as an instrument of the great powers. It is therefore of primary importance that the ICC demonstrate without delay that those fears and suspicions are both wrong and that it deserves everyone's confidence. It is certainly a positive sign that the United States has agreed to the Security Council giving the ICC a mandate to investigate the atrocities committed in Darfur with a view to prosecuting the perpetrators.[55]

Finally, it should be pointed out that the Court's credibility as an effective instrument of international penal justice will also depend on its universal recognition. The high number of States that have adhered to or ratified the Rome Statute after only seven years is encouraging,[56] but it is to be hoped that the effort will be stepped up to increase that number and in particular to bring about the adhesion of all the great powers. The quality of the Court's work – its impartiality and independence – will naturally depend in the long term on it being universally accepted and recognized. One must therefore hope that the States genuinely committed to eradicating impunity understand the importance of giving the Court all the means it needs to achieve its difficult mandate.

B. Consistency in the international system of sanctions

The international system of penal sanctions focuses nowadays on exceptional situations: war (for war crimes), genocide and "widespread or systematic attack directed against any civilian population" (for crimes against humanity). In the long term this is not enough.

54 In the case where an American citizen would commit a war crime on the territory of a Party to the statute (see art. 12, para. 2, lit.a).

55 See Resolution 1593 (2005) of the Security Council, of 31 March, 2005.

56 At the end of 2005, there were 100 States parties to the ICC Statute.

The recent discussion about terrorism has shown how important it is that every State cooperate in the fight against this plague. Some have also suggested that terrorism as such should be added to the list of international crimes dealt with by the ICC. Both these questions must be taken into due account in discussion on the future of international penal law.

The need for close cooperation between all States has been highlighted in connection with the fight against terrorism, but this also applies to prosecuting crimes that are already expressly included in the Rome Statute. And beyond penal sanctions, the growing interdependence between all States makes cooperation increasingly vital in numerous aspects of international life.

Pollution of air, soil and water, human migration, transport, water management – these are just a few examples of areas requiring strict international regulations and strong States to implement them.

Weak and "failed" States (as they are sometimes called) enfeeble the whole system. The creation, or restoration, of States capable of fulfilling their traditional role of ensuring the security, health, education and welfare of their populations and serving as the implementing agents of international rules is one of the major challenges faced today by the international community. This is naturally a long-term challenge linked to the fight against poverty and underdevelopment since no government can have that ability in a chronically underdeveloped country in which large parts of the population live in poverty.

This stepped up cooperation between States and restoration of strong governments where needed requires the involvement of competent and honest individuals. Though there is no remedy for incompetence other than the popular vote (at least in democratic States), in a world where all States need to cooperate closely, in a world calling out for increased solidarity on the part of the richest toward the poorest, it seems indispensable that dishonesty – corruption in particular – among senior political leaders must be punished. Honest leaders are indispensable for the harmonious development of the world community in general, and for the fight against impunity in particular.

As mentioned above, it has been suggested that terrorism be included in the list of international crimes dealt with by the ICC. While this is not the place to discuss the as yet unresolved question of a definition for terrorism, one should not forget that terrorism – in its commonly accepted meaning of acts intended to terrorize the population for political purposes by means of indiscriminate violence (such as bombs in public places) – is already considered a war crime if committed during an armed conflict.[57] Therefore, including it in the list and requiring prosecution in all instances would necessitate a departure from the present system, which is limited to certain specified situations. If this is done for terrorism, there is no reason not to include other crimes as well: as corruption or trafficking in human beings, in drugs, in other dangerous substances and in weapons.

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57 Such acts are clearly covered by the provisions defining grave breaches in the Geneva Conventions and their Additional Protocols – see supra, footnote 20. See also Sandoz, Yves, "L'applicabilité du droit international humanitaire aux actions terroristes", *Les Nouvelles frontières du droit international humanitaire*, Jean-François Flauss, ed., Bruylant/Nemesis, Bruxelles, 2003, pp. 43-77.

C. A general sense of justice

In addition to true independence on the part of the ICC and consistency in the system of international sanctions, a third component is needed to build the credibility of the ICC: a sense that this Court is part of an international system genuinely founded on justice, in conformity with the objectives of the UN Charter. The question of a worldwide sense of justice and confidence in the international system should naturally be studied at different levels before conclusions are drawn.

At the level of each State, the ability of governments to ensure the security of their population, the level of corruption, the performance of the democratic system, the level of concern for the poorest members of society shown by the legal and social systems, the independence of the judiciary – all these factors, and more, promote or jeopardize the people's confidence in the institutions and persuade them either that justice is also possible at the international level or that skepticism is justified. As pointed out above, that is the reason why a strengthening of the international system cannot be seriously considered without improvements at the national level.

This reality cannot, however, be allowed to serve as a pretext for avoiding a critical look at the way the international system works. For the results of such an examination are not encouraging – it suffers from a poor image. Among the reasons for this are the following.

Since no consensus could be found on how to define aggression, for the time being the ICC has no means of prosecuting cases of aggression.[58] There is little likelihood of this changing in the near future. In any case, the process will not have been facilitated by the NATO bombing in Kosovo, to say nothing of the intervention in Iraq by the US and its allies (both of which actions were taken without the consent of the Security Council), issues related to the re-emergence of the concept of "humanitarian intervention" as a legal basis to for war (and used in at least the case of Kosovo).[59] While this is not the place to discuss the legality of those actions, it is clear that they are broadly perceived, Iraq in particular, as being based on nothing more than the principle that might is right. Hired apologists would doubtless be able to advance a number of legal arguments, but who would take them seriously?

The fact that the Security Council subsequently decided to give a mandate to those who had acted without its consent will – even if one feels that, at that point, it was the only possible course of action – do nothing to alter this impression.

But the inaction or at least inadequate action of the Security Council in some other situations – the genocide in Cambodia at the time of the Khmer Rouge, the massacres in the former Yugoslavia during the period that led to its dismantlement, the genocide in Rwanda – also has the effect of bringing the idea of international justice into disrepute. It creates the impression that, far from defending peace and the fundamental values of the international community, far from preventing the worst atrocities, the Security Council's monopoly in dealing with situations that threaten international peace and security – and the special status accorded the five permanent

58 See art. 5, para.2, of the ICC Statute and supra, note 51.

59 On the notion of "humanitarian intervention, see i.a. Abiew, F.Kofi, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Kluwer, The Hague/London/Boston, 1999.

members – is used in fact to protect the interests of the permanent members.

The lack of serious response by the Security Council to flagrant violations of its decisions – in the Middle East in particular – is also perceived as the proof of a double standard.

And what should be said about the lack of any serious follow-up to advisory opinions from the International Court of Justice, such as those on the legality of the threat or use of nuclear weapons or on the legal consequences of the construction of a wall in the occupied Palestinian territory? The world's highest judicial authority gives its opinion on legal issues and makes recommendations. There follow a multitude of books and articles commenting on them, with the international lawyers enthusiastically studying the Court's innovations, analysing in detail each of its arguments as well as the separate or dissenting opinions and the declarations of the judges. But this energy on the part of the lawyers is nullified by the grand indifference of the politicians or, at least, a total absence of action in response to the ICJ's work and recommendations. Given this contempt for international law (one of the main roles of the ICJ being, precisely, to provide an authoritative interpretation of that law), how can we expect people to believe in international justice?[60]

And there is no shortage of other confidence-undermining examples.

IV. Apparent contradiction in the ICRC's attitude toward international criminal courts

As the "guardian of international humanitarian law",[61] the ICRC has always endeavoured to find ways to improve implementation of that law and, to this end, to incite the States to fight against impunity for war crimes. It did much to bring about the creation of the ICC, contributed to the drafting of the Rome Statute and even to the important discussion about how to define the elements of crimes.[62]

It might therefore appear paradoxical that the ICRC went to such lengths to obtain testimonial immunities in one ICTY case, that it worked so hard to influence the drafting of the ICC's rules of procedure and evidence for the same purpose, and that it has made such a point of securing these immunities in the drafting of its own headquarters agreements with host States.[63] The main reason is that an obligation to testify would certainly jeopardize the ICRC's ability to discharge the mandate it has received from the international community to "endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection

60 See Art. 36, para. 2 of the ICJ Statute.

61 See Sandoz, Yves, "Le Comité international de la Croix-Rouge gardien du droit international humanitaire", *Revue yougoslave de droit international*, Vol. 43, 1-2, Beograd, 1996 (also available in English at the ICRC, Geneva).

62 See Dörman, Knut, with the contribution of Doswald-Beck, Louise, and Kolb, Robert, *Elements of war crimes under the Rome Statute of the ICC, Sources and Commentary,* ICRC/ Cambridge University Press, Cambridge, 2002.

63 On this, see Jeannet, Stéphane, "Testimony of ICRC delegates before the International Criminal Court", *IRRC*, No. 840, December 2000, pp. 993-1000; and Rona, Gabor, "The ICRC's privilege not to testify: Confidentiality in action. An explanatory memorandum", *IRRC*, Vol. 84, No. 845, March 2002, pp.207-219.

of and assistance to military and civilian victims of such events and of their direct results".[64]

Even when the ICRC has a legal right to take humanitarian action connection with armed conflict – and still more when it has only the right to offer its services – it has no tool other than persuasion to convince States or other parties to armed conflict to accept its work. It is clear that many warring parties would refuse this offer if they knew that the ICRC might be compelled to testify before criminal courts. There can be no doubt that this would undermine the relationship of confidence so indispensable to working in such circumstances. The ICRC must remain predictable and therefore must remain its own master.

For an organization so active in its support for the development of international justice, it was no easy matter to explain this view and to convince the ICTY in a specific case and the world in general when the ICC's rules of procedure were being drafted. A detailed memorandum was presented to the ICTY, setting out the legal basis for an ICRC exemption from giving evidence, the reasons for the ICRC's policy in this respect and the consistency of the right of non-disclosure with commonly accepted principles of justice. In the end the ICTY finally accepted the ICRC's arguments, just as an acceptable solution was ultimately found for the ICC rules of procedure.[65]

Conclusions

The critical tone and possibly pessimistic-sounding nature of the views set out above on the independence of the penal justice system and lack of consistency of the international system of sanctions and international justice should not be misinterpreted and viewed as grounds for inaction. As one is already hearing from those who must now implement the Rome Statute, their priority is to put it into practice as it stands –already an enormous task. This is an understandable view. The timing of any future initiative must therefore be carefully thought out in order to avoid eroding a system which has been implemented more rapidly than even the most optimistic among international lawyers could have hoped 20 years ago.

But it remains important to maintain a long-term vision, and the discussion reflected above is part of that vision. Everything is interrelated. Therefore, nowadays international penal justice, even with its numerous imperfections, will tend to move things in a positive direction. But we must remember that our work to improve it cannot be viewed in isolation from efforts to reform or at least improve the functioning of the Security Council, to expand the role played by the international justice system, and even, more broadly, to combat poverty and underdevelopment.

The positive influence of international penal law on the implementation of international humanitarian law will also depend of developments in these other areas. At a meeting organized by the ICTR, I was struck by the words of a woman representing victims of the genocide. She mentioned the fact that some individuals

64 Art. 5, para. 2-d of the Statute of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross in 1986, of which the States party to the Geneva Conventions are members).

65 See International Criminal Court, Rules of Procedure and Evidence, Rule 73.

bore particular guilt for heinous crimes that ranged from cold-blooded murder to rape with the deliberate intention of infecting the victims with AIDS. In addition to having enjoyed all the relevant judicial guarantees, she said, they were now housed in very comfortable prisons. If that person was infected with the AIDS virus, he would receive all suitable medical care.

At the same time, other people in Rwanda were being held in extremely poor conditions and tried in the traditional "gacaca" system, which is not really equipped to deal with crimes like those committed during the genocide and does not respect all judicial guarantees. But this woman was most outraged by the neglect of the genocide victims themselves, as women raped and infected with HIV who hardly received any medical care, in marked contrast to the perpetrators of violations who were HIV-infected.

What should we make of this? It is quite clear that international justice has no other choice than to apply the highest standards of treatment and ensure all judicial guarantees for the persons in its hands. But the system cannot be developed without taking into account the surrounding realities. To remain with the example above, it is not enough to create a court such as the ICTR to judge one or two hundreds cases with all the requisite international standards if one ignores the practical difficulties faced by a country like Rwanda in dealing with more than 100,000 prisoners awaiting judgement and, even more importantly, if one fails to demonstrate – in a concrete manner – one's compassion for and solidarity with the victims. To be credible, penal justice must be one part – only one – of a consistent worldwide system founded on justice and solidarity.

While one welcomes the remarkable development of international penal justice in recent years, therefore, we must remember that it cannot continue to progress in isolation, that it must be used to advance development of the entire international system.

The same view can be taken of international humanitarian law. Developing the international penal justice system and combating impunity certainly have a positive effect on the development of international humanitarian law. However, if no solution is found in particular to the problem of defining the crime of aggression, it is clear that the long-term credibility of the ICC could be jeopardized and that this could even negatively affect international humanitarian law. The basic idea of separation between *jus ad bellum* and *jus in bello* could be contested in situations like in Iraq, where States intervened without the consent of the Security Council. Those who believe that this constituted a violation of the prohibition on using force (*jus ad bellum*) could, if no sanctions are applied, be strengthened in their conviction that this in turn justifies their own violation of international humanitarian law, particularly if they believe that this is the only way to weaken their enemy.

To sum up, I would say that the emergence of international criminal justice is to be hailed as a very positive step in strengthening compliance with international humanitarian law. However, if it is to maintain its credibility and effectiveness, that process of justice must not isolate itself from other sorely needed measures to bring peace and afford greater justice, honesty and solidarity across the world.

Chapter 47

Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions

Lyal S. Sunga

I. Introduction

In so many countries plagued by civil war or dictatorship, serious human rights violations have been committed with impunity on a systematic and widespread basis. Thankfully, such dark chapters in the political history of a nation do not last forever. Once the violence ends and conditions favour the installation of democratic governance, an important issue must be addressed: what should be done about the violations?

On the one hand, it seems obvious that the restoration of democracy, full respect for human rights and the rule of law, requires the criminal prosecution of perpetrators of genocide, mass murder and rape, systematic torture, and other violations of similar gravity. It is difficult to imagine how society can liberate itself from a past in which impunity, lawlessness and abuse of power have prevailed, unless respect for the basic principle of individual criminal responsibility is resurrected. It seems axiomatic that a climate of 'impunity' (from the Latin *impunitas* literally meaning 'lack of punishment') cannot be dispelled unless fair and effective criminal prosecutions are carried out to remove the threat of criminals at large from society, provide redress and deter further violations.

On the other hand, the establishment of democracy, full respect for human rights and the rule of law, might not be feasible unless practical measures are taken to foster a minimum level of reconciliation and peace among people of various religious, ethnic, racial and political backgrounds who may long have been in conflict if not at war. When political conditions change, stirring hope for a return to democracy, pressure can grow quickly for the new government to launch an officially sanctioned process of thorough and transparent investigation, documentation, and reporting on human rights violations committed in the past. Often in such situations, victims and survivors feel that they first need to learn what, how, when, where and why, violations were committed before their sense of dignity can be restored. They need to learn the details surrounding the violations they suffered and to have these facts recognized publicly. Society at large may also encounter greater difficulty in moving towards a more constructive future unless and until facts and responsibilities are clarified about the past. In such circumstances however, criminal prosecution of the perpetrators of past political violence may be out of step, or even at odds, with a new regime's effort to unify the country. To this end, a number of governments in transitional societies

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have established national truth and reconciliation commissions (which we hereinafter refer to as 'truth commissions'), either as an alternative to, or as a complementary process with, criminal prosecutions.

Criminal prosecutions and truth commissions each seek to investigate, document and clarify facts and responsibilities relating to violations, but their aims, approaches and procedures, differ. At certain points, they may be complementary and mutually supporting, and at others, incompatible in principle and practice. Truth commissions could uncover facts which facilitate or lead to criminal prosecutions. Criminal prosecutions might prove instrumental in settling accounts so as to pave the way towards eventual reconciliation between or among former enemies – complementary roles. On the other hand, the threat of criminal prosecutions from an emergent democratic regime could convince military leaders to hang on to power rather than to negotiate an end to war, delaying an end to hostilities and prolonging human rights violations. In such case, national reconciliation, peace, democratic governance, respect for human rights and the rule of law, all get postponed indefinitely. Here, criminal prosecution and reconciliation efforts conflict. To complicate matters further, a grant of amnesty by the new regime to protect perpetrators of past atrocities from criminal prosecution might figure as a key element in the transition to peace. If war could be brought to a swifter end, and thousands of men, women and children saved from genocide or other such horror, by trading amnesty from prosecution in exchange for a surrender of power and an end to violence, would it not be immoral to insist on criminal prosecutions at such high cost? Once peace has been restored, an extension of amnesty from prosecution might also prove necessary to draw out cooperation and truthful testimonies from perpetrators about how and why violations were committed. Yet, amnesties constitute an obvious denial of criminal justice, and a particularly serious one where they involve genocide, war crimes or crimes against humanity. At the moment when a country is trying to move itself beyond impunity, amnesties pull in the exact opposite direction.

Do truth commissions promote criminal justice, or to the contrary, do they hinder, obstruct or subvert it? Under what kinds of circumstances or arrangements do truth commissions and criminal prosecutions conflict, and how could such conflicts be resolved? Does international law allow countries to use truth commissions as alternatives to criminal prosecutions? Where does amnesty from prosecution fit into this puzzle? In short, can truth commissions and criminal prosecutions be reconciled, and if so, how?

This paper compares and contrasts the functions of truth commissions and criminal prosecutions and proposes some considerations for optimizing the relationship between the two. To do this, we first situate the rise of truth commissions in the historical context of international relations. We then consider the role and value of truth commissions in relation to the inadequacy of criminal prosecutions in societies struggling with the aftermath of major violence. Next, we highlight points where truth commissions conflict with criminal prosecutions in principle and in practice, focussing mainly on the use of amnesties. Following this discussion, we take account of the international community's renewed commitment to combat impunity for serious crimes, and how this conditions the degree of freedom States have to establish a truth commission as an alternative to criminal prosecutions. Finally, we propose ten general principles for reconciling truth commissions and criminal prosecutions with a view to

optimizing their respective contributions to justice, peace and human rights.

II. The Rise, Role and Value of Truth Commissions

A. The Rise of Truth Commissions in International Context

Frequently in the context of civil war, military rule or dictatorship, the Government, rebel movements, and even private citizens, violate human rights in ways that escape justice. In many situations of mass violence, individuals holding public office in the political and legal institutions of the State have failed to stop, were complicit in, or have even perpetrated, serious violations. In Rwanda in 1994, for example, State organs and officials, together with militia and many ordinary citizens, joined together to exterminate around a million mainly Tutsi men, women and children, apparently with little fear of ever having to face criminal justice. In the conflicts in the former Yugoslavia, Burundi, Darfur, and in so many other places, mass violence plunged society into utter chaos. Even once the violence has ended, and prospects return for peace, stability and respect for human dignity, the State may be unable or unwilling to prosecute the perpetrators of serious human rights violations. The establishment of truth commissions in transitional societies reflects political will to reckon with the past and move towards democratic governance, respect for human rights and the rule of law.

The phenomena of civil war, military dictatorships and serious human rights violations, do not by themselves explain the rise of truth commissions however. These situations have plagued political society since time immemorial, whereas truth commissions to deal with past violations in transitional societies have been established only since the early 1980's.[1] Even national commissions dealing with historical violations committed decades ago date only from the early 1990's.[2]

What factors then, explain the rise of truth commissions in countries experiencing the aftermath of mass violence?

First, from the end of the Second World War until 1991, there was a marked increase in the number of civil wars[3] during which human rights violations were

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1 The United States Institute of Peace website, visited on 1 August 2006 listed truth commissions that had been established in 24 countries: Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro (formerly Federal Republic of Yugoslavia), Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay and Zimbabwe.

2 Under the title "'Historical' Truth Commissions", Hayner lists: the United States Commission on Wartime Relocation and Internment of Civilians covering the years 1942-1945, established in 1981, the Canadian Royal Commission on Aboriginal Peoples dealing with the situation of indigenous communities from before 1500 until 1996; the United States Advisory Committee on Radiation Experiments covering the period 1944-1974, established in 1994; and the Australian Human Rights and Equal Opportunity Commission's Inquiry into the separation of aboriginal and Torres Strait Islander Children from their families, established in 1996. *See ibid.* at Chart 2 of Appendix 1 at 312-313.

3 *See* the Human Security Report 2005: War and Peace in the 21st Century (2005) at 8, which notes that: "Between 1946 and 1991 there was a twelve-fold rise in the number of

committed on a severe and systematic basis. Violence perpetrated along ethnic, racial or religious lines, seems in many countries to have been a recurring phenomenon, particularly where past violations have gone unaddressed.[4] The increased number of situations in which civilians were directly targeted, created greater demand from victims, survivors, and society at large, to see the establishment of official commissions dedicated to clarifying the truth and promoting national reconciliation, once peace was at hand.

Second, in the late 1970's, the Carter Administration emphasized human rights as an explicit part of US foreign policy[5] and, working through the Organization of American States and the Inter-American Commission on Human Rights, pressured the Governments of Argentina, Bolivia, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay and Peru, to improve their human rights records.[6] With encouragement from the US and active support of the Inter-American Commission on Human Rights, NGOs in Latin America found greater margin to mobilize public opinion against the right-wing dictatorships that were in place, and to highlight, monitor and report on the extent and character of violations being perpetrated.[7] The US delegate to the UN Commission on Human Rights, Mr. Jerome Shestack,[8] together with representatives of many other like-minded Governments in the Commission, established the UN Working Group on Enforced or Involuntary Disappearances in 1979-1980 – the first thematic special procedure mandate.[9] Soon, other Commission on Human Rights thematic mandates under ECOSOC resolutions 1235 and 1503 were established to monitor, investigate, and discuss publicly, the human rights situation in any part of the world.[10] These advances in the international

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civil wars – the greatest jump in 200 years. The data suggest that anti-colonialism and the geopolitics of the Cold War were the major determinants of this increase."

4 Ethnic, racial or religious violence has erupted often as part of a pattern of recurring mass violence stretching over decades or even centuries in countries all over the world. *See generally* David A. Lake and Donald S. Rothchild (eds.), The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation (1998); Donald L. Horowitz, Ethnic Groups in Conflict: Updated Edition (2000); Ted Robert Gurr and Barbara Harff, Ethnic Conflict in World Politics (2000); Michael E. Brown (ed.), Ethnic Conflict and International Security (1993); and Irwin Deutscher, Preventing Ethnic Conflict: Successful Cross-National Strategies (2005).

5 The Carter Administration (1977-1981) suspended economic and military assistance to Chile, El Salvador, Nicaragua, and Uganda, to register its concern over serious human rights violations.

6 *See* Cristina Eguizabal, *Latin American Foreign Policies and Human Rights*, in David P. Forsythe, (ed.), Human Rights and Comparative Foreign Policy (2000) 276-309 at 291.

7 *See* Melissa Ballengee, *The Critical Role of Non-governmental Organizations in Transitional Justice: A Case Study of Guatemala,* 4 (Fall/Winter) UCLA Journal of International Law and Foreign Affairs (1999-2000) 477-506.

8 *See* David Weissbrodt and Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: the Case of Argentina, 1976-1983,* 75 Minnesota Law Review (February 1991) 1009-1035 at 1031.

9 In his book, NGOs and the Universal Declaration of Human Rights: A Curious Grapevine (1998) at 253, William Korey provides an interesting account of the UN Commission on Human Rights session that led to the establishment of the Working Group on Enforced or Involuntary Disappearances.

10 *See* Lyal S. Sunga, *NGO Involvement in International Human Rights Monitoring,* in

monitoring of human rights, together with the rising effectiveness and professionalism of human rights NGOs, helped to spotlight gross human rights abuse and delegitimize dictatorships in many countries.

Third, in the early 1980's, a sharp reduction in the number of armed conflicts around the globe afforded countries emerging from a period of mass violence the opportunity to develop measures to foster peace, stability, democratic governance and the rule of law. As the Human Security Report, 2005, observes:

> By the early 1980's the wars of liberation from colonial rule, which had accounted for 60% to 100% of all international wars fought since the early 1950's, had virtually ended. With the demise of colonialism, a major driver of warfare around the world – one that had caused 81 wars since 1816 – simply ceased to exist.[11]

Human rights norms and implementation had become more precise and consolidated at global and regional levels than ever before, which helped victims and human rights NGOs better recognize violations as well as to articulate clearer demands for compensation, official apologies and the enforcement of criminal responsibility.

Fourth, the end of the Cold War ended US and Soviet support for proxy wars in Africa and Latin America, and many civil wars ran out of steam.[12] This reduced the overall level of violence, and expanded political space beyond Cold War ideological constraints at domestic and global levels to address violations and support democratic governance, human rights and the rule of law. A rise in inter-ethnic violence within the borders of single States in the 1990's as compared to inter-State violence, such as in the former Yugoslavia, Rwanda and East Timor, made clear that international community had to focus more clearly on solutions tailored to the particular exigencies at the local level. By this time, truth commissions had met with varying degrees of success in Bolivia, Argentina, Uruguay, Zimbabwe, Uganda, Nepal and Chile, drawing the international community's attention to this approach. The UN brokered a peace agreement to end the El Salvadoran civil war and set up a truth commission there in July 1992[13] as well as in Guatemala in 1994.[14]

International Human Rights Law and Non-Governmental Organizations (2005) 41-69. The UN Commission on Human Rights has been replaced by the UN Human Rights Council pursuant to General Assembly resolution 60/251 of 3 April 2006. The new Council held its first session from 19 to 30 June 2006.

11 Human Security Report 2005: War and Peace in the 21st Century (2005) at 8.

12 *See* the Human Security Report 2005: War and Peace in the 21st Century (2005) at 8 which notes that: "With the colonial era and then the Cold War over, global warfare began to decline rapidly in the early 1990's. Between 1992 and 2002 the number of civil wars being fought each year plummeted by 80%. The decline in all armed conflicts – that is, wars plus minor armed conflicts – was 40%. The end of the Cold War not only removed a major source of conflict from the international system, it also allowed the UN to begin to play the security-enhancing role that its founders had intended, but which the organization had long been prevented from pursuing."

13 *See* "From Madness to Hope: The 12-Year War in El Salvador", report of the Commission on the Truth for El Salvador, annex to a Letter dated 29 March 1993 from the UN Secretary-General to the President of the Security Council, UN Doc. S/25500 of 1 April 1993.

14 *See* the Agreement on the Establishment of the Commission to Clarify Past Human

Fifth, the dissolution of the Soviet Union in December 1991[15] exposed former Eastern Bloc regimes to popular demand for democracy, transparency and the rule of law and swept away many dictatorships. Rather than to rely mainly on criminal prosecutions, the new Governments of Albania, Bulgaria, Czechoslovakia, Estonia, the German Democratic Republic, Hungary, Latvia, Lithuania and Poland, enacted laws of lustration to prevent individual collaborators of the former Communist governments from taking up public office as a way to break cleanly from past oppression.[16] In 1992 however, a truth commission was established with respect to East Germany "to analyze the structures, strategies and instruments of the SED dictatorship, in particular the issue of responsibilities for the violation of human and civil rights and for the destruction of nature and the environment".[17]

Finally, in the 1990's and early 21st Century, a number of old dictatorships and corrupt regimes in Asia[18] and Africa[19] were replaced by more democratic and pluralist Governments, improving the international climate on human rights and rule of law issues generally.

Thus, while mass violence is nothing new, the rise of truth commissions in many parts of the world can be explained by the increased targeting of civilians by repressive governments as the number of civil wars rose sharply from the end of World War Two to the 1990's, and the international community's response to such violations through strengthened UN and regional human rights law and implementation. The subsequent sharp decrease in the number of international armed conflicts with the end of the Cold War, together with a relative rise in civil war and ethnic conflict, as well as the rise of democracy movements in Eastern Europe, Asia and Africa, provided greater need and opportunity to address past violations more in line with human rights standards focussing on victims and survivors.

Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, *signed*, 23 June 1994, in Oslo. *See also* General Assembly resolution 48/267 of 19 September 1994 on the "Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala" which indicates the UN involvement in the peace process.

15 The Union of Soviet Socialist Republics was formally dissolved on 8 December 1991 with the conclusion of the Belavezha Accords, *signed* in Belarus, by the Presidents of Russia, Belarus and Ukraine, and replaced with the Commonwealth of Independent States.

16 *See* Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc,* 59 Law and Contemporary Problems (Fall 1996) 181-194. *See also* Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, Law and Social Inquiry (Spring 2003) 387-439. *See further* Myroslava Antonovych, *The Human Rights Accountability of Ukraine's Communist Regime,* 8 Ius Gentium (Fall 2002) 39-48.

17 *See* the Law Creating the Commission of Inquiry on "Working Through the History and the Consequences of the Sed Dictatorship"; Act No. 12/2597, *adopted* 14 May 1992, by the Parliament of the Federal Republic of Germany.

18 One can recall for example, democratic reforms in Mongolia, South Korea, Indonesia, the Philippines and more recently, in Kyrgyzstan.

19 Momentum for political pluralism and democracy was strongly felt , for example, in Benin, Democratic Republic of Congo, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Madagascar, Mali, Mozambique, Rwanda, Sierra Leone, South Africa, Togo, Tunisia and Zambia.

B. The Role and Value of Truth Commissions in Relation to Criminal Prosecutions

i. Situations Where Truth Commissions Might Be Needed

Not in every situation of serious violations will truth commissions necessarily be better placed than criminal prosecutions to uncover the truth, and meet the needs of victims, survivors and society at large. Where the judiciary remains independent from the Executive and criminal prosecutions function effectively before, during and following a period of violence, there would be less need for the establishment of a truth commission. Where the rule of law, general respect for human rights, and the ways and means of democratic governance continue to be upheld, or the courts can resume their functions quickly and effectively, even systematic, widespread and severe human rights violations could be addressed adequately. After all, criminal prosecutions are designed to expose facts and responsibilities surrounding violations and to deter the commission of further violations. Although primarily retributive in character, in many countries, the courts can go beyond the rendering of a guilty verdict to provide victims and survivors of serious human rights violations with redress, through adjudication connected directly to criminal findings of guilt, such as in *partie-civile* procedures, or in separate civil law trials. Redress might take the form of compensation for harm suffered, restitution of property unlawfully taken by the perpetrator, as well as assistance to receive physical or psychological therapy and rehabilitation or official apologies.[20]

Similarly, truth commissions might not be necessary in situations where facts and responsibilities surrounding violations might be known sufficiently or amenable to being uncovered adequately through the criminal prosecution of relatively few individuals. Here we could recall the military coup in Greece on 21 April 1967 led by Colonel George Papadopoulos, purportedly to prevent an impending communist takeover. During the ensuing seven year period of military rule (1967-1974), the regime systematically persecuted political opponents and committed serious human rights violations including torture. Once the military regime fell from power in 1974, after having failed to topple the Makarios Government of Cyprus, around one hundred individuals responsible for the military take-over and subsequent violations were prosecuted and stiff prison sentences were handed out.[21] The system of criminal justice played a more than adequate role in prosecuting the guilty individuals and allowing Greece to move beyond its military past toward the consolidation of peace and democratic governance. The establishment of a truth commission became unnecessary once the regime had fallen and democracy was restored. Moreover, the Council of Europe played a critical role in exposing the abuses of the military regime shortly after the coup took place,[22] and the European Commission on Human Rights

20 *See generally* Ilaria Bottigliero, Redress for Victims of Crimes under International Law (2004).

21 *See generally* Christopher Montague Woodhouse, The Rise and Fall of the Greek Colonels (1985).

22 The Council of Europe's Consultative Assembly comprised of Member State parliamentarians, denounced the coup already on 26 April 1967 and over the next several years, applied considerable political pressure on the military regime to step down.

Judgement in *The Greek Case* provided an impartial and independent ruling that documented the character and extent of human rights violations as well as the State's responsibility for them.[23]

Consider the situation in Northern Ireland between August 1971 and March 1975 which presents a borderline example. There, around 1,100 people were killed, over 11,500 were injured and more than £140,000,000 worth of property was destroyed. Security personnel of the United Kingdom resorted to extrajudicial arrests, arbitrary detention and internment as well as ill-treatment of persons deprived of their liberty. Despite all this, the courts were still able to address violations effectively in a number of ways. Prosecutions of security personnel affirmed the principle of individual criminal responsibility, deterring and preventing further violations. The courts also ensured redress for victims and documented facts and responsibilities. In addition, the European human rights framework played a key role in establishing facts and in holding the UK Government to account.[24] Concrete measures to promote reconciliation between Protestants and Catholics in Northern Ireland were established as part of negotiated peace settlements between the Government of the United Kingdom and the Irish Republican Army. Even with all these measures and initiatives however, the Government of the United Kingdom still felt compelled to appoint a special one-person commission "to examine the feasibility of providing greater recognition for those who have become victims in the last thirty years as a consequence of events in Northern Ireland, recognising that those events have also had appalling repercussions for many people not living in Northern Ireland."[25]

Clear examples where criminal prosecutions were considered insufficient and a truth commission necessary, are found in the more extreme situations in El

23 In September 1967, Denmark, Norway, Sweden and The Netherlands lodged the first ever inter-State complaint against another High Contracting Party of the Council of Europe with the Parliamentary Assembly which took the view that the Contracting States had a duty to lodge an application pursuant to Article 24 concerning serious violations of the European Convention on Human Rights, *adopted* 4 November 1950 in Rome, *entered into force* 3 September 1953. *See* Denmark, Norway, Sweden and The Netherlands v. Greece Applications 3321, 3322, 3323, 3344/67 of September 1967; IX Yearbook of the European Convention on Human Rights (1968).

24 As explained in the European Court of Human Rights Judgement in Ireland v. The United Kingdom; 5310/71 [1978] ECHR 1, 18 January 1978, there was "no suggestion that the domestic courts were or are anything other than independent, fair and impartial". There were 2,615 complaints made against the police between 9 August 1971 and 30 November 1974 out of which 1,105 alleged ill-treatment or assault. This resulted in 23 prosecutions that brought about 6 convictions leading to fines and one instance of conditional discharge. Between 31 March 1972 to 30 November 1974, there were 1,268 complaints concerning shootings or assaults. Between April 1972 and the end of January 1977, 218 members of the security forces were prosecuted which resulted in 155 convictions. Disciplinary hearings were held in respect of a further nearly 1,800 soldiers. There were also procedures in place to obtain compensation in respect of ill-treatment from the security forces which provided compensation totalling £302,043 to settle 473 civil claims in respect of wrongful arrest, false imprisonment, and assault and battery committed between 9 August 1971 and 31 January 1975. In addition, a series of commissions were set up to look into specific issues.

25 *See* We Will Remember Them: Report of the Northern Ireland Victims Commissioner, Sir Kenneth Bloomfield KCB, April 1998, commissioned on 19 November 1997 by Secretary of State for Northern Ireland Marjorie Mowlam.

Salvador,[26] Guatemala,[27] Chile,[28] Argentina[29] and South Africa,[30] where the judiciary became largely subordinate to the will of the Executive and serious human rights violations were perpetrated with impunity on a mass, systematic and widespread basis. The principles that 'no one is above the law' and 'all are equal before the law' did not function in South Africa with an explicitly discriminatory apartheid system, nor in Chile, where the abuse of power by State officials during the Pinochet regime was rampant. In El Salvador and Guatemala, democratic governance, human rights and the rule of law, were largely absent during the military dictatorships where the army and right-wing death squads systematically perpetrated murder, torture and rape, terrorizing the political opposition and public at large.

ii. Exposing the Truth

Turning to the value of truth commissions in relation to criminal prosecutions, as Kiss points out:

> Truth serves justice in a basic sense stressed by the Argentinian truth commission in its report *Nunca Mas*: without truth one cannot distinguish the innocent from the guilty. Less directly, truth serves justice by overcoming fear and distrust and by breaking the cycles of violence and oppression that characterize profoundly unjust societies.[31]

While the truth is always partial and tentative to some extent, the central point is that in transitional societies, a lack of objectively ascertained, truthful accounts makes open, democratic and informed debate about violations more difficult. Truth commissions could provide a valuable means by which to raise the quality of society's understanding about the violence suffered, so that informed and constructive policies to deal with the past could be developed through a more accountable, transparent and democratic manner, with a view to ensuring a peaceful future.

As a practical matter, it is almost always more difficult to identify perpetrators than victims. Even in the case of involuntary or enforced disappearances, a victim's

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26 *See* Thomas Buergenthal, *The United Nations Truth Commission for El Salvador,* 27 (October) Vanderbilt Journal of Transnational Law (1994) 497-544.

27 *See* Nathanael Heasley et al., *Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases,* 16 American University International Law Review (2001) 1115-1194.

28 *See* Jorge Correa, *Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship,* 67 Notre Dame Law Review (1992) 1455-1485.

29 *See* Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law,* 18 (Spring) Emory International Law Review (2004) 317-370.

30 *See* Ronald C. Slye, *Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission,* 20 (Winter) Michigan Journal of International Law (1999) 267-300.

31 Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints,* in Truth v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 68-98 at 71.

body may never be recovered, but at least family and friends of the victim are likely to know that he or she has disappeared. Perpetrators on the other hand, particularly those backed with State authority and power, frequently can destroy or cover up evidence needed to convict them. Criminal prosecutions might not be very effective in bringing out the truth surrounding violations without the active cooperation of the perpetrators themselves because in many cases, they may be the only ones who know the factual details about, motives behind, and responsibility for, violations they and their co-perpetrators committed. In many cases, evidence of hierarchical structure and command responsibility might exist in the form of written decisions and orders that may be scattered among millions of documents in vast State archives, as in the case of the Stasi, East Germany's secret police.[32] To deal with such situations, a truth commission could marshal expert knowledge in the ways and means of the bureaucracy in order to locate, open up and examine evidence in an efficient, orderly and comprehensive manner.

Even where there remains a functioning judiciary that can operate independently and impartially, criminal prosecutions still might not be adequate to uncover truth and foster reconciliation for several reasons. First, criminal trials often get bogged down in procedure. Because of the high standard of fair trial guarantees that have to be met, such as the presumption of innocence, right to prepare an adequate defence, right to an appeal, and right to be tried before an independent and impartial tribunal, and above all, that the burden remains on the Prosecution to prove its case beyond a reasonable doubt, criminal trials might produce few convictions and only after considerable time has elapsed. Second, criminal trials consume considerable prosecutorial resources, forensic expertise and scarce public funds, at the expense of other priorities that press upon Government, particularly in a time of transition from conflict to peace. In Rwanda, where some 80% of judges and lawyers had been assassinated, criminal prosecutions, at least at the domestic level, could not be carried out. In other situations, such as Somalia since the overthrow of dictator Siad Barre in 1991, at least until the time of this writing, State institutions seemed not to function at all. Even were peace to return to Somalia today, domestic criminal prosecutions would likely not be feasible for a considerable time in this 'collapsed State'. Third, where the remnants of a prior abusive regime continue to influence the country's political and legal institutions, the administration of justice is likely to remain particularly weak. Even where criminal prosecutions could possibly be undertaken, they might be less effective in dispelling rumours swirling around a frightening past, or in clarifying facts and responsibilities with regard to gross violations because of a lack of political will. In Serbia, for example, the post-conflict Government seemed largely unwilling to prosecute because many high-level perpetrators continued to exercise considerable influence over the country's political and legal establishment. Tellingly, numerous high-level war crimes suspects such as Radovan Karadic and Ratko Mladic still had not been apprehended by the time of this writing, although more than a decade had passed since their alleged involvement in the massacre of some 7500 civilians in

32 *See* Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa,* 40 Columbia Journal of Transnational Law (2001) 89-141.

Srebrenica in 1995, and the shelling of Sarajevo in 1995.[33] Where high profile perpetrators of mass violence remain relatively secure in the countries they committed their crimes, prospects for effective criminal justice in general are likely to remain poor. In such a situation, by exposing the extent and character of violations, a truth commission might help the new regime to distinguish itself morally from the old one. Fourth, by focussing narrowly on the question of legal guilt of a limited number of persons, criminal prosecutions may not adequately clarify the bigger picture of the events that led to the abuse of power, or of the scale and character of violations committed in general. In some situations, truth commissions could assist society to reckon with the violence of the past more effectively than criminal trials could do alone. Finally, in some situations, criminal trials might be used to throw the blame on a few in order to save higher-level officials and obscure what in fact might have been a concerted and organized abuse of power involving the highest echelons of the State. Here again, truth commissions could provide a fuller and more accurate picture for victims, survivors and the general public.

iii. Recognizing the Dignity of Victims and Survivors

Exposing the truth could help victims heal and move on with their lives[34] whereas the adversarial procedure of criminal trials often seems to accord comparatively little recognition to victims themselves. Kiss contends that truth commissions serve justice in this sense much better than do traditional criminal prosecutions by shifting the focus to the restoration of victims and survivors:

> Prosecution witnesses at trials undergo constant interruption and aggressive cross-examination; they are not treated with the deference and respect that truth commissions can accord to victims giving testimony. In the TRC hearings, the testimony of witnesses was not treated as 'arguments or claims in a court of law', but rather as 'personal or narrative truth' providing 'unique insights into the pain of South Africa's past.[35]

Crocker points out that the South African Truth and Reconciliation Commission "took more than 22,000 testimonies from victims or their families, made its sessions public, encouraged extensive media coverage, including extensive radio coverage and nightly and weekly TV recaps of highlights and maintained a web site."[36] For many

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33 *See* the Indictments of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia against Ratko Mladić and Radovan Karadzić; Case No. IT-95-5/18-I.

34 David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society,* in Truth v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 99-121 at 100-101. Crocker contends that truth serves justice by fulfilling the moral right of victims and survivors to know the truth about the violations they suffered.

35 Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints,* in Truth v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 68-98 at 74.

36 David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society,* in Truth

survivors, recounting details of violations to an official commission helped them gain respect and recognition and to heal.[37]

iv. Contributing to Criminal Prosecutions

If provided with sufficient authority, time and resources, a truth commission could contribute to criminal prosecutions by uncovering factual details that would ordinarily remain beyond the reach of even the most competent prosecutor. A truth commission might clarify the role of particular government departments, army and police units, and detention centres, in violating human rights, which could guide prosecutors in identifying individual perpetrators working inside or alongside these bodies.

The arguments above highlighting the role and value of truth commissions in relation to criminal prosecution indicate ways in which truth commissions could function on a complementary basis to promote truth, justice and reconciliation in transitional societies. None of these elements detract in any way from the general principle that all perpetrators of serious human rights violations should be prosecuted and punished for their crimes. Rather, they are based on the importance of establishing truth and reconciliation, exposing the truth, recognizing suffering caused by violations, and the fact that in transitional societies, criminal prosecutions may be inadequate or ill-suited to serve these goals.

Some commentators take this argument further, contending that truth commissions might be even more effective than criminal prosecutions in establishing justice and accountability in transitional country situations. To be made effective however, truth commissions must be equipped to grant amnesties as a means by which to secure the cooperation of perpetrators themselves – an issue we discuss next.

III. Where Truth Commissions and Criminal Prosecutions Conflict

The most contentious issues in regard to the relationship between truth commissions and criminal prosecutions arise over the question of the grant of amnesties from criminal prosecution. On the one hand, truth commissions are likely to be more effective where they can offer amnesty from criminal prosecution as leverage to uncover the truth about serious violations. On the other hand, amnesties from criminal prosecution contradict the principle of individual criminal responsibility and undermine the country's efforts against impunity. At this juncture, we consider the points at which truth commissions and criminal prosecutions conflict by focussing mainly on the issue of amnesties, but also on the general question of using truth commissions as alternatives to criminal prosecutions.

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v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 99-121 at 102.

37 As Hayner says: "Remembering is not easy, but forgetting may be impossible. ... Only by remembering, telling their story, and learning every detail about what happened and who was responsible were they able to begin to put the past behind them. In South Africa, time and again I heard survivors say that they could forgive their perpetrators only if the perpetrators admitted the full truth." Priscilla B. Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions (2002) at 2.

A. Arguments in Favour of Amnesty from Criminal Prosecution

Arguments in favour of granting amnesty from criminal prosecution to individuals implicated in serious violations of human dignity basically boil down to the following points.

First, where amnesty could help bring war or dictatorship to an end and avoid exposing thousands of persons to threat of immediate harm, they should be used as the lesser of two evils. While individual criminal responsibility ranks of great importance as a principle, the protection of human life must prevail when it comes under direct threat. An objection might be that the fact that a regime feels weakened to the point that it must negotiate for an amnesty from prosecution in some situations signals not that insurgents should compromise, but that they should instead harden their resolve to overthrow the government and then prosecute perpetrators of serious violations. The difficulty with this objection from a moral and practical point of view is that the true capacity of a dictatorship to cling to power by force and threat cannot be known with much certainty at the moment. Often, a dictatorship seems to commit the most serious violations when it feels most insecure, weak or in danger of losing its grip on power. While this point may come near the end of its rule, even then, it might still retain enough power to commit serious human rights violations on a mass scale.[38]

The decision therefore for democratic forces to compromise under the circumstances, rather than to continue fighting, has to be taken in the context of the uncertain and shifting balance of power. In South Africa, for example, since the apartheid regime's ascent to power in 1948, the Government demonstrated its willingness and ability time and time again to resort to violence to maintain power. Not to negotiate a peaceful transition from apartheid to democracy with the help of amnesties, while President FW de Klerk was still in power and Nelson Mandela had not passed from the scene, could perhaps have meant the continuation of apartheid for many more years, costing future generations their right to self-determination, freedom and independence.[39] Depending on the situation then, the use of amnesty from prosecution

38 More people were killed between 1990 and 1994 when apartheid was nearing its end in South Africa, than during the whole decade of the 1980's, despite the high level of insurgency and State repression during that period. *See* Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (2001) at 63. One can recall also the increasingly large-scale massacres of Christian minorities that challenged the rule of the Porte as the Ottoman Empire's power crumbled in the late 19th Century, such as the Massacre of the Bulgars, and the slaughters of the Armenians in 1915. *See generally* Lord Kinross, The Ottoman Centuries: The Rise and Fall of the Turkish Empire (1977).

39 Boraine relates that in the case of South Africa: "Mbeki made it absolutely clear, in a private interview with President Nelson Mandela, that senior generals of the security forces had personally warned him of dire consequences if members of the security forces had to face compulsory trials and prosecutions following the election. According to Mandela, they threatened to make a peaceful election totally impossible. Some compromise had to be made and, in the postamble of the Interim Constitution, provision was made for the granting of amnesty to advance reconciliation and reconstruction and for its legislative implementation." *See* Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way,* in Truth v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 141-157 at 143-144.

to facilitate a dictatorship to give up power, unsavoury as it must be from a moral and legal point of view, may be the lesser of two evils, and remains defensible on humanitarian grounds.

Second, amnesties granted on a conditional, case-by-case, individualized basis, are likely to offend the principle of individual criminal responsibility less seriously than 'blanket amnesties' which suspend criminal prosecutions for an entire group or class of people with few or no conditions. The South African example offers valuable lessons for future practice:

> First, amnesty had to be applied for on an individual basis – there was no blanket amnesty. Second, applicants for amnesty had to complete a prescribed form that called for very detailed information relating to specific human rights violations. Third applicants had to make a 'full disclosure' of their human rights violations in order to qualify for amnesty. Fourth, in most instances applicants had to appear before the Amnesty Committee in open hearings. Fifth, there was a time limit set in terms of the Act. Only those gross human rights violations committed in the period 1960 to 1994 were considered for amnesty. Then, there was a specified period during which amnesty applications had to be made, from the time of the promulgation of the Act, which was in December 1995, to 10 May 1997. Finally, a list of criteria laid down in the Act determined whether the applicant for amnesty would be successful.[40]

Boraine, who served as Vice-Chairperson of South Africa's Truth and Reconciliation Commission, contends that the commission should not be considered merely as a substitute for criminal justice, but instead, as an indispensable tool for getting at the truth. Similarly, Rotberg argues that:

> To meet those goals – to encourage the kinds of testimony that would reveal apartheid at its moral worst – the TRC had to find a way to compel the real culprits to come forward and confess. Amnesty was the result, as the postamble to the interim constitution prefigured: perpetrators, black and white, would receive perpetual immunity from prosecution if they testified fully and candidly about their terrible deeds and if they could demonstrate (by the loose standards that the TRC used pragmatically) that their crimes were political; that is, that they served political ends or were motivated by political beliefs.[41]

Blanket amnesties, granted *en bloc* to promote reconciliation, lack the saving grace of drawing out truth because individuals do not have to compete with one another by offering valuable information to get an amnesty.

Third, the use of amnesties could be critical in gaining the cooperation of suspected perpetrators of serious human rights violations in order to expose facts and

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40 Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way,* in Truth v. Justice: The Morality of Truth Commissions eds. Robert I. Rotberg and Dennis Thompson) (2000) 141-157 at 148.

41 Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation,* in Truth v. Justice: The Morality of Truth Commissions (2000) 3-21 at 7-8.

responsibilities for the benefit of victims and survivors.[42] Knowing the truth could in itself constitute an essential catalyst for victims and survivors to heal psychologically, which in turn could contribute to the process of national reconciliation as well.

Finally, the grant of amnesty from prosecution to certain key individuals could bring to light evidence to enable successful criminal prosecution of other perpetrators, perhaps at higher numbers and levels of criminal responsibility than would otherwise have been possible. In this respect, some commentators have argued that truth commissions might even be more effective than criminal prosecutions at establishing individual criminal responsibility.[43] Slye, for example, contends that in the case of South Africa, where evidence was hard to get at without offers of amnesty: "there is no doubt that the quantity, and probably also the quality, of the information elicited from the amnesty hearings was higher than what would have been elicited from criminal trials."[44]

B. Have Amnesties Actually Led to Criminal Prosecutions?

Among the more striking claims put forward for the use of amnesties is that they uncover a large volume of information that could be used as probative evidence, substantially raising the number of successful criminal prosecutions. Imagine where a grant of amnesty to a key mid-level military commander affords access to written orders, decisions, financial accounts, eyewitness testimony, audiovisual recordings of violations, and other sources of information, that implicate hundreds of subordinates in murder, rape, torture, forced disappearances or other violations. This information might also implicate superiors who knew of or ordered such violations to be committed.

While this scenario sounds very attractive, the actual practice of truth commissions thus far has been less encouraging. In Argentina, around 2,000 criminal complaint cases were launched against junior officers of the military forces in 1984, but as the truth commission was collecting information, military officers registered their discontent by staging an uprising. Following the publication of the truth commission report which had implicated hundreds of military officers in serious human rights violations, President Carlos Menem (1989-1999) issued a blanket amnesty for all law enforcement officers and members of the military.[45] In this case, the truth commis-

42 *See* Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?* 86 (Summer) Harvard International Law Journal (2005) 295-345.

43 One could add here that widely accepted criminal prosecution practice allows prosecutors to plea bargain with criminal suspects in order to gather evidence against other criminal suspects for prosecution and in some cases, to drop charges entirely against some suspects in order to secure evidence against others – a practice in this respect to some kinds of amnesty agreements.

44 Ronald C. Slye, *Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process*, in Truth v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 170-188 at 177.

45 In September 1983, the Argentinean military regime adopted the Law of National Pacification, giving itself an amnesty, but this was ruled to violate the Constitution in December 1983. In 1987, the Alfonsín Government adopted the Full Stop Law (No. 23,492 (1986)) and the Due Obedience Law (No. 23,521 (1987)) granting amnesty from prosecution to the majority of military officers. In 1989, President Menem pardoned mil-

sion's contribution to criminal prosecutions seems doubtful. The Argentinean truth commission report named suspected military and police perpetrators all at once, which may well have sharpened their common interest to threaten to launch another coup, in turn forcing President Menem's hand in granting them amnesties. On the other hand, perhaps without the truth commission process, which at least signaled a clear end to the period of political repression, there would not have been much chance of criminal prosecutions in any case. By the same token however, it is hard to find other examples where truth commissions have contributed concretely to criminal prosecutions, partly because in many countries, amnesties have been granted on a blanket basis.[46]

Even the sophisticated South African truth commission seems to have offered at best an ambivalent contribution to criminal prosecutions. General Magnus Malan, who had been chief of the army and defense minister, was brought to trial following truth commission testimony indicating his involvement in ordering hit squads and exterminations, but he was acquitted after a trial lasting eighteenth months and costing twelve million Rand.[47] Another illustrative case concerns the notorious Dr. Wouter Basson, former head of the apartheid Government's secret biological and chemical warfare programme called "Project Coast". In truth commission testimony, a number of former senior security officers heavily implicated Dr. Basson in the deliberate poisoning of anti-apartheid activists. Criminal proceedings were launched against him on 64 charges including involvement in 229 murders, drug possession, illicit trafficking, fraud and embezzlement. In April 2002, at the end of a criminal trial that lasted 30 months and cost 40 million Rand, he was acquitted. In late 2005, the South Africa's Constitutional Court ruled that prosecutors could reopen the case, but it was unclear at the time of writing whether they would do so.[48]

When the constitutionality of the South African truth commission's amnesty was challenged by the families of Steve Biko and Griffith Mxenge, the Constitutional

itary officers and some 200 guerillas, as well as former military leaders who had already been convicted. *See further* Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law,* 18 (Spring) Emory International Law Review (2004) 317-370; and William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation,* 42 (Summer) Harvard International Law Journal (2001) 467.

46 One can recall for example: the amnesty President Augusto Pinochet of Chile granted himself in 1978; the 1990 Bulgarian Law on Amnesty and Restoration of Confiscated Property which extends amnesty in respect of political crimes committed between 1945 and 1989; the Law of General Amnesty and the Consolidation of Peace which El Salvador adopted in 1993 for perpetrators of 'political crimes' as well as certain common crimes; Hungarian Law No. 11, 1992, which nullified convictions in respect of certain serious crimes committed between 1944 and 1990; the Nicaraguan Law on General Amnesty and National Reconciliation, adopted in 1990; the South African National Reconciliation Act, 1995; and the Uruguayan Law Nullifying the State's Claim to Punish Certain Crimes, 1986.

47 Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints,* in Truth v. Justice: The Morality of Truth Commissions (eds. Robert I. Rotberg and Dennis Thompson) (2000) 68-98 at 77.

48 *See further* Albie Sachs, *War, Violence, Human Rights, and the Overlap between National and International Law: Four Cases before the South African Constitutional Court,* 28 (January) Fordham International Law Journal (2005) 432-476.

Court of South Africa upheld the Constitution's postamble authorizing the grant of amnesty from criminal prosecution, opining that it did not violate international law. The Constitutional Court also held that the amnesty arrangement protected perpetrators from civil liability, making the affront to basic principles of moral and legal justice all the more stark, particularly for victims and survivors, who otherwise could have hoped for compensation, rehabilitation or other forms of redress.[49] Where an amnesty protects perpetrators from civil liability, then at least other means have to be put in place to ensure effective redress for victims. Again, the South African truth commission seems to have failed as regards restorative justice. As Wilson explains:

> The TRC made clear that victims should expect little from the process and only a fraction of what they might have expected had they prosecuted for damages through the courts.[50]

The elimination of civil as well as criminal liability not only goes much further than necessary to gain the cooperation of the perpetrator, but runs counter to international standards on victims' redress that seek to maintain in central focus the rights of parties injured by serious human rights violations.[51] In short, truth commissions that employ amnesties eliminating civil as well as criminal liability severely undercut the claim that truth commissions honour restorative justice better than do criminal trials. Moreover, the extent to which truth traded for amnesty actually contributed to reconciliation in South Africa remains unclear because the Amnesty Committee's work continued long after the Truth and Reconciliation Commission had issued its final report. Amnesties granted after the final report was already issued could not possibly have contributed to this key element of the truth and reconciliation process.[52]

While the contribution of truth commissions to criminal prosecutions may have been less than hoped for thus far, this could change in future. The more important point however is that jettisoning criminal justice on grounds that amnesties actually contribute more to criminal justice than they take away, appears thus far to be unsupported by practice.

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49 *See* Anurima Bhargava, *Defining Political Crimes: a Case Study of the South African Truth and Reconciliation Commission,* 102 (June) Columbia Law Review (2002) 1304.

50 Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (2001) at 22.

51 *See* Ilaria Bottigliero, Redress for Victims of Crimes under International Law (2004) which examines norms and implementation relating to the victims' right to redress in respect of crimes under international law in international human rights law, humanitarian law and international criminal law.

52 *See* Amy Gutmann and Dennis Thompson, *The Moral Foundations of Truth Commissions*, in Truth v. Justice: The Morality of Truth Commissions (2000) 22-44 at 25-26. *See also* Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (2001).

C. Do Amnesties Violate the Principle that 'The Punishment Should Fit the Crime?'

The arguments in favour of granting amnesties are based largely on the inadequacy of criminal prosecutions following a period of mass violence where the judiciary remains unwilling or unable to enforce criminal responsibility on a fair, effective and impartial basis. Where criminal justice does not function, truth commissions seem comparatively more attractive, but one must ask whether the use of amnesties from prosecution is one step too far. There is a great moral difference between, on the one hand, establishing truth commissions to support criminal prosecutions that are weak or ineffective, and on the other hand, nullifying criminal responsibility entirely for certain individuals through amnesty. In the first case, truth commissions could help to promote national reconciliation with more or less success, according to the prevailing conditions of the time. Once law and order can be reestablished and the prosecutor's office and judiciary can be brought into line with the *ethos* of the new regime in a way that hopefully reflects the values of democracy and human rights, perpetrators should continue to be hunted down. The use of amnesties, in contrast, undermines the basic principle of individual criminal responsibility because amnestied perpetrators do not have to worry about eventual prosecution even for such serious violations as genocide, war crimes and crimes against humanity.

Another basic difficulty in terms of morality, legal equality and fairness, is that the grant of amnesty to certain individuals in order to obtain evidence to convict others means that those fortunate enough to make deals with the prosecutor get away without punishment. The prosecutor then targets other perpetrators who could be tried and punished. This approach can introduce a large measure of arbitrariness in the sense that individuals can escape prosecution, regardless of the degree of their legal culpability, as long as they can bargain well with prosecutors.

Perhaps worst of all, the provision of amnesty from prosecution to high level perpetrators of serious violations insidiously distorts the scale of punishment and introduces fundamental imbalance throughout the country's whole administration of criminal justice. A repeat small time thief or a person convicted for possession of a small amount of narcotic drugs, might face six months or even years in prison. In contrast, an amnestied military commander or police officer who perhaps ordered thousands of murders, rapes and tortures, as part of a government campaign of mass violence, not only avoids spending even a single day in jail, but can rest assured he or she will never be punished. Amnesties cause palpable inequality and injustice, and they violate the principle that 'the punishment must fit the crime'.

D. Do Amnesties Promote, or Instead Undermine, Truth and Reconciliation?

As argued above, the provision of amnesty from prosecution to those in a position to end war might be a necessary evil to avoid further infliction of human misery. It undeniably contradicts the principle of individual criminal responsibility however and, because it often relates to such cruelties as mass murder, mass rape, and systematic torture, does so in a particularly blatant way. It also introduces gross unfairness into the administration of justice and, if amnesty is acquired also in respect of civil liability, it denies the rights of victims and survivors to restorative justice as well.

Another damning aspect of the use of amnesties is that they might even undermine truth and reconciliation in some cases because perpetrators who are left unprosecuted might continue to pose a threat to the country's future peace and stability. It will always be difficult to know whether and to which extent compromising on individual criminal responsibility actually contributes to the recurrence of political violence. Before a sense of confidence can return however, victims and society in general, need to see that justice will be meted out to perpetrators of mass violence. A general failure to establish criminal justice for serious violations can stoke the fires of private vengeance and inter-communal violence for the future and perpetuate insecurity throughout the country. Criminal trials on the other hand, can exert a powerful deterrent effect on the commission of future crimes and help dissuade potential violators from committing serious violations, although the extent of this is also very difficult to measure empirically. The larger point is that criminal prosecutions should not be sacrificed lightly on morally or factually ambiguous grounds: the use of amnesties must remain highly suspect.

E. Could Truth Commissions That Do Not Use Amnesties Still Undermine Criminal Justice?

Aside from the blatant and obvious contradiction that amnesty from prosecution poses to criminal justice in principle and practice, truth commissions – whether or not they grant amnesties – could interfere with or undermine criminal prosecutions in several other ways. Truth commissions often accept hearsay evidence and hear allegations with few admissibility restrictions in order to get at the truth. Suspected perpetrators might not be accorded sufficient opportunity to rebut statements that inculpate him or her in a crime, or to offer an explanation that could be carefully and impartially considered by a judge. In this sense, truth commissions might prevent a named person from the benefit of a fair and impartial trial. Admittedly, truth commissions typically allow an alleged perpetrator also to present his or her side of the story, and in some cases, can require the presence of the suspect by subpoena. Still, there are likely to arise many situations where an individual's legal guilt or innocence would be much more fairly judged before a criminal court rather than before a truth commission.

The requirements of fairness in criminal trials also open up greater possibilities for suspected perpetrators to play off a truth commission against the criminal prosecution process. As Wilson recounts, in South Africa, five security police officers were about to be arrested for their involvement in 27 murders. These alleged perpetrators ran to the truth commission's Amnesty Committee where they received amnesty in respect of their crimes and the suspension of criminal prosecution, even as regards the torturing of an African National Congress activist to death by electric shock.[53]

Finally, it has to be kept in mind that, like criminal prosecutions, truth commissions suffer from other serious shortcomings. Weak mandates, lack of staff, insufficient time and resources to carry out their work, and in many cases, lack of dissemination or implementation of recommendations or reports, have limited the

53 Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (2001) at 24.

effectiveness of many truth commissions.[54] Moreover, if a truth commission arrives at an officially sanctioned version of the truth in a way that ends up stifling rather than encouraging rational debate, then the effect may be to produce a one-sided version of events that suits the political winds of the day and obscures other aspects unpalatable for public consumption. A disturbing example of political convenience is found in the South African truth commission's handling of Chief Mangosuthu Buthelezi, who was head of the Inkatha Freedom Party. The commission did not find him responsible for having authorized even one of some 9,000 serious human rights violations committed by Inkatha, despite voluminous evidence indicating his personal responsibility. Buthelezi was not even subpoenaed by the truth commission. Wilson opines that the Commission was simply intimidated by the prospects that Inkatha would oppose the new African National Congress Government.[55]

Ultimately, the practical dilemma for societies seeking transition from a period of mass violence remains a serious one because of the brutal reality that the criminal justice system simply does not function for whatever reason at a time when it is particularly needed. At this point, domestic solutions reach an impasse and international solutions have to be considered, bringing us to the question of the international community's renewed commitment to combat impunity.

IV. The International Community's Renewed Commitment to Combat Impunity

A. Transnational Criminal Law

The end of the Cold War and the democracy movements that swept through Africa, Asia, Eastern Europe and Latin America, shifted the focus of Governments from an almost exclusive reliance on domestic policy to fight impunity, towards much greater engagement with the international community on this issue. This shift is reflected in a number of UN General Assembly and Commission on Human Rights resolutions that highlight the connection among democracy, human rights and the rule of law, and in this context, stress the threat of impunity and the importance of criminal prosecutions in a general way.[56] The International Conferences of New or Restored

54 *See generally* Priscilla B. Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions (2002), Chapters 14 and 15 concerning problems and challenges facing the practical operation of truth commissions.

55 Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (2001) at 71-72.

56 *See* General Assembly resolution 55/96 *adopted* 4 December 2000, entitled "Promoting and Consolidating Democracy" at paras. 1(c)(vii) and 1(f)(ii) as regards criminal prosecutions; and Commission resolutions 1999/57 *adopted* 27 April 1999 at para. 2(c) on the rule of law, on "Promotion of the Right to Democracy", 2000/47 *adopted* 25 April 2000 on "Promoting and Consolidating Democracy" at para. 2(c) on ensuring appropriate civil and administrative remedies as well as criminal sanctions for human rights violations, 2001/41 *adopted* 23 April 2001 on "Continuing Dialogue on Measures to Promote and Consolidate Democracy" at para. 3 emphasizing the mutual interdependence of democracy, development and respect for human rights, and 2002/46 on "Further Measures to Promote and Consolidate Democracy" *adopted* 23 April 2002 at para. 1 stressing the rule of law and human rights as essential elements of democracy.

Democracies, convened since 1988, recognize impunity more specifically as a threat to democracy, human rights and the rule of law, in connection with organized crime, money laundering, drug trafficking, corruption, terrorism, the crime of aggression, war crimes, crimes against humanity, genocide, and the systemic challenge of ensuring civilian control over the military.

Recalling that countries that had been dominated by military rule or totalitarianism had to "consolidate their democratic achievements and reconciliation, to hasten economic and social reforms and to revitalize the civil society organizations that had little or no participation in governance during the period of military rule", the Bucharest Declaration[57] emphasized the need for stronger human rights promotion and protection, judicial reform, and measures to fight corruption and organized crime. Four years later, the Cotonou Declaration condemned "all military coups d'état, all forms of terrorism and violence against democratic, freely elected Governments" and affirmed the principle of accountability of all public authorities for their acts[58] – a point reiterated yet again in the Ulaanbaatar Declaration in 2003.[59] Reflecting regional concerns over the threat of impunity, the Managua Declaration focussed more on the lethal combination of money laundering, drug trafficking, organized crime and corruption, and urged greater international cooperation to assist Governments in addressing these problems.[60]

Impunity for serious violations of human rights and humanitarian law has also been the subject of UN expert study in: the Final Report of Mr. Louis Joinet on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political),[61] the report of Professor Diane Orentlicher on Impunity[62] which took

57 Progress Review and Recommendations for Strengthening Policies and Principles Addressed to the Governments of the New or Restored Democracies *adopted* at the Third International Conference of New or Restored Democracies on Democracy and Development, Bucharest, 2-4 September 1997; A/52/334 of 11 September 1997.

58 Declaration and Final Report, *adopted* at the Fourth International Conference of New or Restored Democracies, Cotonou, 4-6 December 2000; A/55/889 (2001) of 5 April 2001. *See* paras. 14 and 15 of the Declaration.

59 Declaration and Plan of Action, *adopted* by the Fifth International Conference of New or Restored Democracies, Ulaanbaatar, 10-12 September 2003; A/58/387 of 23 September 2003 at para. 16.

60 Progress Review and Recommendations *adopted* at the Third International Conference of New or Restored Democracies on Democracy and Development, Bucharest, 2-4 September 1997; 11 September 1997, A/52/334 (1997), Part I(D).

61 This report, submitted to the Sub-Commission on the Promotion and Protection of Human Rights, pursuant to Sub-Commission decision 1996/119, analyzes the question of impunity and proposes a set of principles for the protection and promotion of human rights through action to combat impunity that comprises: the victims' right to know; the victims' right to justice; and the victims' right to reparations; E/CN.4/Sub.2/1997/20 of 26 June 1997.

62 *See* Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, which reviews best practices and recommends that the Commission on Human Rights appoint an independent expert to update the Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity with a view to their adoption by the Commission.

into account the Joinet Principles as revised,[63] and the reports of Professor Theo van Boven[64] and Professor Cherif Bassiouni[65] on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms.

Thus, while individual States have resorted to truth commissions, at the same time, the international community at large has been concentrating more on strengthening the role of criminal prosecutions at the domestic level. Because transnational criminal law has always developed on an incremental basis through the web of inter-State treaty agreements on extradition, counterfeiting, illicit traffic in narcotic drugs, and various other matters of mutual concern, it generally involves only marginal adjustments to domestic criminal law, unlike international criminal law, which we consider next.

B. International Criminal Law

The establishment of the ICC in July 2002[66] represents a major achievement in the architectural edification of international criminal law, symbolizing the international community's political resolve to prosecute individuals regardless of rank or official capacity for the most serious crimes of international concern. The ICC is designed to seize jurisdiction over cases of genocide, war crimes and crimes against humanity, and eventually over the crime of aggression as well, where States with prime responsibility to prosecute, are unwilling or unable to do so. As such, the ICC represents the international community's most important means by which to enforce criminal responsibility in countries reeling from atrocities that may be perpetrated along national, racial, ethnic or religious lines. As a permanent, standing institution, established by a treaty that allows no reservations,[67] the ICC is equipped to enforce criminal responsibility relatively quickly with regard to transitional country situations, and to symbolize criminal justice on a continuous basis.

The degree to which the ICC will actually deter further atrocities and help foster conditions for national reconciliation and peace may be impossible to quantify accurately, just as it is difficult to ascertain the contribution of the ICTY or ICTR in this regard. Since the ICC's establishment and the ratification of its Statute by 100 States Parties however, it is hard to believe that rational political and military

63 The revised version of the Joinet Principles is the "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" (E/CN.4/Sub.2/1997/20/Rev.1, annex II).

64 *See* Final report submitted by Mr. Theo van Boven, Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, E/CN.4/Sub.2/1993/8 of 2 July 1993.

65 Final report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, submitted pursuant to Commission resolution 1999/33, E/CN.4/2000/62 of 18 January 2000.

66 Statute of the International Criminal Court, *adopted in Rome in a non-recorded vote*, 120 *in favour*, 7 *against* and 21 *abstaining*, on 17 July 1998, *entered into force* on 1 July 2002; (A/CONF. 183/9). As of 1 July 2006, there were 100 States Parties to the Statute.

67 Article 120 of the Statute provides that: "No reservations may be made to this Statute."

commanders will feel they can discount completely the eventuality of facing ICC prosecutions should they implicate themselves in serious violations. As such, the ICC seems likely now to form part of the rational calculus of the potential perpetrator, particularly at high levels of policy making, planning and organizing. Where the ICC successfully deters crimes under international law, the world may never come to know of it because the crimes will not have been committed.

While criminal trials must focus on the question of the criminal responsibility of alleged offenders, rather than on educating society on the history of events that led to mass violence, nothing prevents courts and tribunals from expanding on the larger picture as well. The Judgements of the International Military Tribunals at Nuremberg and Tokyo, and those of the ICTY and the ICTR, for example, not only detail the facts and responsibilities relating to individual perpetrators, but also place the crimes in larger political and historical narrative. Of course, one has to wonder about the extent to which the general public is likely familiarize itself with any of the voluminous judgements of the Nuremberg and Tokyo Tribunals, or those of the ICTY or ICTR. In any case, some truth commission reports have managed to expatiate only very little on the larger picture of mass violence, and so their value as compared to criminal trials in this regard may be doubted. A number of commentators have noted that the South African truth commission focussed less on victims than on perpetrators, and moreover, moved away from providing a comprehensive narrative of the historical context of violations. This was also true of the Argentinean and Chilean truth commission reports, in contrast to the Guatemala report.[68]

In light of the ICC's operating principle of complementarity with domestic jurisdictions, perhaps the ICC's most far reaching influence will be seen at regional and domestic levels of criminal law enforcement. In order to become parties to the Statute, States have to ensure that their domestic law, policy and practice are brought into line with the Statute's obligations. In addition to the wide range of legal obligations outlined in Part 9 of the Statute concerning modes and extent of the State Party's cooperation with the ICC and with other State Parties, there is a general and indirect – yet very significant – obligation upon all States Parties to observe international human rights standards pertaining to the administration of criminal justice.[69]

Practically speaking, like the International Military Tribunals at Nuremberg and Tokyo, and the ICTY and ICTR, the ICC process will probably produce relatively few convictions. As the UN Secretary-General noted:

> The two ad hoc tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars – equivalent to more than 15 per cent of the Organization's total regular budget. Although trying complex legal cases of this nature would be expensive for

68 *See further* Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State (2001) at 51-55 and at 60.

69 Part 9 of the Rome Statute on International Cooperation and Judicial Assistance imposes mandatory obligations on States Parties. Article 86 provides that: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court". Article 88 obliges States Parties "to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

> any legal system and the tribunal's impact and performance cannot be measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions.[70]

By July 2006, after 13 years of operation, only 47 individuals had been found guilty at the ICTY. At the ICTR, in operation since 1994, there were only 17 completed cases.

The ICC was never intended nor designed to be a supranational criminal court of final appeal, a global human rights court, or a truth commission. It would be unrealistic therefore to consider the ICC capable of single-handedly overcoming the complex obstacles to peace and national reconciliation. Rather, the ICC has to be viewed as an important part of the broader solution.

The obvious conclusion to be drawn is that criminal law enforcement remains a necessary but insufficient means by which to reestablish justice and foster national reconciliation as catalysts for peaceful and democratic governance based on human rights and the rule of law in transitional societies. All the same, as discussed above, truth commissions do have a very valuable role to play in this process, which brings us to the question as to how truth commissions and criminal prosecutions (whether international, domestic or mixed) could be reconciled.

V. What Should be the International Community's Attitude to Amnesty from Criminal Prosecution?

We have argued that truth commissions and criminal prosecutions each help to establish facts and responsibilities with regard to past violations, but they do so with different aims and procedures. Truth commissions usually work to establish facts and responsibilities as a way of exposing violations, dispelling rumours, acknowledging the pain and suffering of victims and survivors, and symbolizing the community's resolve to ensure accountability, transparency, respect for human rights and the rule of law for the future. It remains the task of duly authorized criminal courts and tribunals however, rather than truth commissions, to ensure fair and effective criminal justice in respect of individual perpetrators. In order to consider what should be the international community's attitude to amnesty from criminal prosecution, it is valuable to reflect upon the following questions:

- first, what is the position of international law as regards the validity of domestic amnesties from prosecution for crimes of international concern?
- second, should international criminal courts and tribunals respect amnesties that were granted by domestic authorities?
- third, should Governments and courts of other countries respect domestic amnesty agreements?
- finally, are there circumstances under which the international community itself should provide amnesties to perpetrators of serious violations of human rights, perhaps as part of international peace negotiations?

70 Report of the UN Secretary-General on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies"; S/2004/616 of 23 August 2004 at para. 42.

A. What is the Position of International Law on Domestic Amnesties?

Customary international law concerning a State's obligation to prosecute or extradite perpetrators of serious crimes, dating far back in history, contradict the notion that a State is completely free to decide whether or not to prosecute. States have recognized universal jurisdiction for war crimes since the Middle Ages, and a mandatory obligation to prosecute war crimes has been enshrined in the grave breaches provisions of the 1949 Geneva Conventions.[71] Since the Congress of Vienna, 1815, universal jurisdiction has developed also for slave-trading and piracy. The number of criminal cases where universal jurisdiction has been invoked as the sole or main ground for prosecution has been small however,[72] indicating that States consider universal jurisdiction more as an optional (or permissive) ground for them to exercise their criminal jurisdiction, rather than as a mandatory obligation.

Protocol II additional to the Geneva Conventions, 1949, on non-international armed conflict, says in Article 6(5) that: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." The International Committee of the Red Cross Commentary to Article 6(5) considers that the "object of this subparagraph is to encourage gestures of reconciliation which can contribute to reestablishing normal conditions in the life of a nation which has been divided."[73] At the time Protocol II was drafted, serious violations committed during civil war were considered to give rise to individual criminal responsibility under domestic law only, and not under international law. As regards non-international armed conflict, there is no obligation on the Government to set up a prisoner of war system because the notion of 'combatant' does not apply in the sense of the Geneva Conventions. In civil war situations, martial law may be in force and many human rights guarantees are likely to have been suspended.

Protocol II addresses the kind of situation where thousands upon thousands of persons may be detained, as for example, in the case of Rwanda following the end of the 1994 civil war. For all these reasons, Protocol II's encouragement of amnesties in this connection was considered to make good humanitarian sense. It also falls in line with Article 3 common to the four Geneva Conventions, 1949, which leaves the question of criminal prosecutions squarely in the hands of the State Party. Indeed, the Constitutional Court of South Africa interpreted Article 6(5) in this way, holding that: "there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which

71 Geneva Conventions, *adopted* 12 August 1949, *entered into force* 21 October 1950. Articles 49, 50, 129 and 147 of Conventions I, II, III and IV, respectively, provide that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

72 *See generally* Cherif Bassiouni and Edward Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995).

73 Commentary to Article 6(5) of Protocol II at 1402, at paras. 4617-4618, International Committee of the Red Cross 1987.

would ordinarily be characterised as serious invasions of human rights".[74]

One must not lose sight of the fact however that Article 6(5) appears amid the rest of Article 6 which is devoted to criminal prosecutions. Articles 6(1) to 6(4) establish minimum standards relating to fair trial, and limit the use of the death penalty. The presumption behind Article 6 is that a High Contracting Party will in fact prosecute individuals for criminal violations, not that it will fail to prosecute entirely. Thus, Article 6, read as a whole, aims at ensuring fair trial and encouraging amnesties wherever appropriate so as to prevent criminal prosecution from being used as a *de facto* continuation of hostilities. Also, Article 6(5) encourages a State to grant an amnesty as regards 'persons who have participated in the armed conflict' or who have been deprived of their liberty 'for reasons related to the armed conflict'. These important qualifications guide a State to promote reconciliation by extending amnesty to persons caught up in the armed conflict, rather than to shield perpetrators of serious violations of human rights or humanitarian law in general from prosecution.

Second, the very fact that the Geneva Conventions, 1949, criminalize grave breaches – an obligation reiterated in Protocol I – shows that while the international community was not yet ready in 1949, or even in 1977, to recognize an international legal obligation upon High Contracting Parties to prosecute and punish violations of humanitarian law committed during time of non-international conflict, this cannot be construed as leaving total freedom to the State to grant amnesties on an arbitrary basis. Third, it is significant that Protocol I contains no similar provision obliging High Contracting Parties to grant amnesties in situations of international armed conflict.

The trend in international humanitarian law to narrow the State's discretion to grant amnesties is seen very clearly in the establishment of the ICTY, ICTR and ICC, which extend criminal responsibility under international law with respect to non-international armed conflict, first under the rubric of 'crimes against humanity' (Article 5 of the ICTY Statute and Article 3 of the ICTR Statute), then under 'violations of common Article 3 of the Geneva Conventions and of Additional Protocol II" (Article 4 of the ICTR Statute), and finally, under the Rome Statute's expanded category of 'war crimes' (Article 8(2) of the Rome Statute).[75]

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74 *See* Azanian Peoples' Organization v. the President of the Republic of South Africa, Case CCT 17/96 of 25 July 1996 at para. 30. The Court went on to say at para. 31 that: "It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction."

75 In particular, Article 8(2)(c) and Article 8(2)(e) provide for individual criminal responsibility in respect of 'serious violations of article 3 common to the four Geneva Conventions of 12 August 1949' and '[o]ther serious violations of the laws and customs applicable

Developments in international human rights law, most notably as regards the International Covenant on Civil and Political Rights, 1966,[76] the Judgements of the Inter-American Court of Human Rights and the practice of the UN Human Rights Committee also indicate the international community's decreasing tolerance for amnesty from criminal prosecution in regard to serious violations. In the *Velasquez-Rodrigues Case*, the Inter-American Court held that Article 1(1) of the Convention obliges States Parties to prevent, investigate, prosecute and punish perpetrators of violations, such that where "the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to guarantee the free and full exercise of those rights."[77] The Inter-American Human Rights Commission followed the *Velasquez* approach in the *Alicia Consuela Herrera et al.*,[78] *Las Hojas Massacre*,[79] and *Hugo Leonardo de los Santos Mendoza et al. Cases.*[80] These cases establish that amnesty from prosecution violates the rights of victims to a remedy as well as the State's obligation to prosecute and punish perpetrators of serious human rights violations.[81]

Similarly, the UN Human Rights Committee underlined in numerous cases the obligation of the State under Article 2(3) of the ICCPR concerning the right to a remedy, and its incompatibility with the grant of amnesty from criminal prosecution in respect of human rights violations. In the *Rodriguez v. Uruguay Case*, the Committee expressed its view that "amnesties for gross violations of human rights ... are incompatible with the obligations of the States Party under the Covenant." The Committee also said that amnesties preclude the possibility of investigations into past human rights abuses and negate the victim's right to a remedy. A number of other human rights treaties also oblige State Parties to ensure an effective right to a remedy. While these developments do not rule out amnesty from prosecution in all cases, the clear trend of the Inter-American human rights and UN Human Rights Committee practice has been to recognize that amnesties violate the international right of victims to an effective remedy.

As discussed above however, the grant of amnesty from prosecution may be necessary in order to avoid further atrocities. This raises questions of justice and moral-

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in armed conflicts not of an international character, within the established framework of international law'. *See further* Lyal S. Sunga, *The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10),* Vol. 6/4 European Journal of Crime, Criminal Law and Criminal Justice (1998) 377-399.

76 International Covenant on Civil and Political Rights, *adopted* 16 December 1966; *entered into force* 23 March 1976; U.N.T.S. 14668 (1976) at 171.

77 Velasquez Rodriguez Case, Judgment of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988) at para. 176.

78 Alicia Consuela Herrera et al. Case No 10,147 Annual Report of the Inter-American Commission on Human Rights 1992-3 at 41.

79 Las Hojas Massacre Case No 10,287, Annual Report of the Inter-American Commission on Human Rights 1992-3 at 83.

80 Hugo Leonardo de los Santos Mendoza et al Case No 10,029, Annual Report of the Inter-American Commission on Human Rights 1992-3 at 154.

81 *See further* Ilaria Bottigliero, Redress for Victims of Crimes under International Law (2004) at 139-141.

ity in a sense larger than those of criminal prosecutions and brings us to our second question.

B. Should International Criminal Courts and Tribunals Respect Domestic Amnesty Arrangements?

While there is a clear trend in international humanitarian and human rights law to view amnesties from criminal prosecutions, and by extension, truth commissions as alternatives to criminal prosecutions, as violations of justice and human rights, the Rome Statute makes no mention either of truth commissions or amnesties and cannot be read to rule them out. Some of the drafters of the Rome Statute recognized that there may be cases where truth commissions, and perhaps even amnesty from prosecution, serve the interests of justice in a larger sense. Sufficient consensus did not exist either to rule out truth commissions and amnesties entirely, or to explicitly authorize the ICC to recognize their validity. The issue arose in the ICC Preparatory Commission proceedings over the principle of *ne bis in idem* and the ICC's general complementarity framework. A proposal was made to include in the Statute a provision to allow the Court to try a person who was convicted by a domestic court, but who was then pardoned, paroled or granted commutation of sentence.

> Some delegations continued to argue that the Statute should not permit the Court to intercede in the administrative (parole) or political decision-making process (pardons, amnesties) of a State. A second, more practical, argument was that, given the resistance to the proposal, it could lead to a reopening of the entire package on the subject of complementarity. Finally, there were some who argued that the proposal was not absolutely necessary, as the provisions on admissibility could give the Court sufficient breadth to examine cases of pardons or amnesties made in bad faith.[82]

Accordingly, the Rome Statute does not address the issue of truth commissions or amnesties directly, and leaves wide margin to the ICC Prosecutor and Judges to recognize them in particular situations.

The Rome Statute maintains this flexibility in several ways. Article 16 of the Statute allows the UN Security Council to request the ICC not to commence or proceed on an investigation or prosecution for a period of 12 months, which may be renewed, by adopting a resolution under Chapter VII of the Charter of the United Nations. One could imagine a situation where the Security Council was conducting or sponsoring, peace negotiations that held out an incentive of amnesty, and it considered that ICC prosecutions would jeopardize these negotiations. Indeed, the Security Council has, at times, endorsed amnesties in a number of UN-spon-

82 John T. Holmes, *The Principle of Complementarity,* The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results (ed. Roy Lee) (1999) 41-78 at 60.

sored peace negotiations, for example, in regard to Haiti[83] and Sierra Leone.[84] Given the trend away from amnesties at the international level, as well as the difficulties involved in adopting a Security Council resolution under Chapter VII, the use of Article 16 to make room for amnesty arrangements would seem unlikely to arise often in future.

Another possibility could arise where, pursuant to Article 17(1)(d) of the Statute, the Court considered the case inadmissible on grounds that it was "not of sufficient gravity to justify further action by the Court". This provision might come into play where a State suspended criminal prosecutions in regard to violations that did not rise to the level of "the most serious crimes of international concern" as per Article 1 of the Statute. Suppose the Government offered to amnesty military officers who had tried, but failed, to overthrow it, in order to leave implicated individuals a way out and to avoid further military coup attempts. In such situation, amnestied individuals might have committed violations that fall within ICC jurisdiction, but were of insufficient gravity to warrant the ICC's action, for example, a single hostage-taking that lasted only for a brief duration, or the issuance of orders to displace a small part of the civilian population for reasons related to the conflict that neither security nor imperative military reasons really required. The Prosecutor could decide not to proceed because of the tenuous situation prevailing in the country despite the fact that both hostage-taking and forced displacement of the civilian population as such constitute crimes within the ICC's jurisdiction.

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83 *See* the Governors Island Agreement, *signed* on 3 July 1993. *See also* Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?,* 31 (Winter) Texas International Law Journal (1996) 1-41.

84 *See* Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, Togo, 7 July 1999 which provides a general amnesty as follows: "1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.; 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.; 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement". The matter was further complicated by UN Security Council resolution 1315, *adopted* on 14 August 2000, which recalls that the Special Representative of the Secretary-General appended to the Lomé Agreement the following statement: "that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law". Resolution 1315 goes on to reaffirm the principle of individual responsibility for serious violations of international humanitarian law and requests the Secretary-General to establish the Sierra Leone Special Court to prosecute perpetrators accordingly. *See further* William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience,* 98 American Society of International Law Proceedings (2004) 189-192. *See also* Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Court of Sierra Leone,* 19 (Summer) New York Law School Journal of Human Rights (2003) 849-858; and Sarah Williams, *Amnesties in International Law: the Experience of the Special Court for Sierra Leone,* 5 Human Rights Law Review (2005) 271-309.

Article 53 relating to the initiation of an ICC investigation pertains more directly to the issue of truth commissions and amnesty. It requires the Prosecutor to initiate an investigation after having evaluated the available information "unless he or she determines that there is no reasonable basis to proceed under this Statute". To make this decision, the Prosecutor must consider first, whether or not there is a reasonable basis to believe a crime within the ICC's jurisdiction has been committed, second, whether the case would meet the admissibility criteria under Article 17, and third, whether "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". Were the Prosecutor to conclude that there was no basis to proceed, then he or she must inform the Pre-Trial Chamber, as well as either the Security Council or the State which referred the case to the ICC in the first place, as the case may be. The issue that would then arise in a given instance would be whether the particular amnesty arrangements in question could qualify as sufficiently 'in the interests of justice' as to provide the Prosecutor with 'substantial reasons' not to initiate or proceed on an investigation.

We have argued above that an amnesty arrangement that has already been agreed upon in order to save thousands from serious violations could be the more ethical course of action. It does not follow however that at the stage amnesty negotiations are going on, that the ICC Prosecutor should stop or refrain from initiating an investigation. Accountability must remain an essential ingredient of the international community's message to those responsible for serious human rights violations. Criminal justice cannot be something to be bargained away so easily. At the time of writing, Joseph Kony, leader of the Lord's Resistance Army – a rebel movement operating in Uganda that has long been accused of terrorizing the civilian population by cutting the arms and legs off men, women and children, and committing many other serious violations – was bargaining for amnesty from prosecution in exchange for peace. The President of Uganda, Mr. Yoweri Museveni, promised to grant Kony amnesty from prosecution if he entered peace negotiations, responded 'positively to the talks ... and abandon[ed] terrorism'. Despite Uganda having ratified the Rome Statute, and itself having referred the situation to the ICC Prosecutor in December 2003, Museveni issued a statement declaring that "the United Nations had no moral authority to insist on Mr Kony's prosecution".[85] In Iraq, Prime Minister Nuri Kamal al-Maliki was holding out amnesty for insurgents not implicated in terrorism as an incentive for them to lay down their arms and join in the rebuilding of Iraq.[86] If the international community fails to stand for the fight against impunity, the battle will be lost by Governments that cave in to the considerable pressure of warlords who can commit crimes with impunity and then bargain for amnesty at their own political convenience.

Where, on the other hand, an amnesty agreement has been already reached with the pertinent domestic authorities, and the Government considered it would not be in the larger interests of justice to prosecute, then the ICC Prosecutor should definitely take this into account. The question becomes what criteria should guide the ICC Prosecutor's decision as to whether or not to proceed. As discussed above,

85 "'Amnesty' for Uganda Rebel Chief", *BBC News*, 4 July 2006.

86 "Insurgents are Offered Amnesty", *International Herald Tribune*, (International Edition) 26 June 2006 at 5.

amnesty arrangements granted more or less unconditionally on a blanket basis, should be treated with a great deal of skepticism because they contribute little to peace, justice, truth or reconciliation. Communities plagued by impunity are more likely to slide back into conflict, chaos and war.

To avoid sending mixed messages to would-be violators, the ICC Prosecutor should investigate all situations where there is a reasonable basis to do so, regardless as to whether there is an amnesty in place, or negotiations to arrange one. In this way, the Prosecutor could maintain the threat of criminal prosecutions while at the same time keeping apprised of the situation to determine whether or not to take the next steps towards indictment and eventually trial. The decision whether or not to indict particular individuals then has to be taken more carefully. At that stage, the effect of amnesty arrangements as regards particular individuals, and the question as to whether or not the interests of justice would be better served by proceeding to trial, could be much better assessed. Considering the interests of justice vis-à-vis amnesties later on in the prosecutorial phase has the advantage of keeping an eye on the situation as a priority, and not sharing the ICC Prosecutor's intention about proceeding or not, too early on in the game. If the threat of criminal prosecutions is to deter further violations, the ICC Prosecutor should not stop investigations at the mere talk of amnesties. Interestingly in this regard, after many years of waging a bloody insurgency and committing severe violations in Uganda, Joseph Kony suddenly started talking peace only once the ICC Prosecutor proceeded to investigate allegations of Kony's criminal responsibility.

In short, the ICC Prosecutor will have to determine on a case-by-case basis the instances in which prosecution of certain individuals might not serve the interests of justice. The Prosecutor will likely only be in a position to assess this carefully and responsibly however once some measure of investigation has been conducted. Therefore, the ICC Prosecutor should commence all investigations as regards those situations which meet all other admissibility requirements under the Rome Statute, regardless of amnesty arrangements that have been reached, or ongoing negotiations to obtain one. Then, the Prosecutor could decide the cases which might warrant prosecution in spite of amnesty arrangements, and which might not. In any event, if the international community becomes resolved, because of the threat of extreme violations, to prevent ICC prosecutions, then it could always act through the Security Council pursuant to Article 16 of the Statute to request the Prosecutor to defer the ICC's investigation as discussed above.

The issue of the international legal validity of a domestic amnesty agreement in fact arose with regard to the Sierra Leone Special Court. In the Decision on Challenge to Jurisdiction: Lomé Accord Amnesty of 13 March 2004, the Appeals Chamber of the Special Court for Sierra Leone ruled that the Lomé Agreement, reached on 7 July 1999 between the Government of Sierra Leone and the Revolutionary United Front (RUF), Article IX of which granted amnesty from prosecution, did not bind the Special Court. Unfortunately, as Cassese rightly points out, the ruling lacks logical coherence and complicates the issue more than it clarifies it.[87]

87 *See* Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty,* 2 (December) Journal of International Criminal Justice (2004) 1130-1140.

Truth commissions could contribute immensely to reestablishing peace, justice and stability in countries torn by serious violations, as long as they are employed in ways that do not hinder or subvert the functions and role of criminal justice.

C. Should Foreign Governments and Courts Respect Domestic Amnesty Arrangements?

Foreign governments and courts should not consider amnesty agreements reached in regard to a situation in another country as binding upon them, unless the foreign Government was itself a direct party to the agreement or unless the amnesty was concluded under international auspices in regard to ordinary crimes that did not qualify as crimes under international law, as discussed below.

All States should refrain from providing safe haven to perpetrators of crimes under international law. Although it may be doubted as to whether customary international law obliges States either to prosecute or extradite individual perpetrators of crimes under international law, universal jurisdiction for such crimes as piracy, slave-trading, grave breaches of the Geneva Conventions, 1949, and for war crimes in general, at least permits a State to assert its criminal jurisdiction in such cases. In addition, a number of multilateral conventions impose a duty on States Parties to prosecute or extradite alleged offenders with regard to specific crimes, such as torture,[88] slavery and slave-trading, aircraft hijacking, illicit traffic in narcotic drugs, theft of nuclear materials, corruption, mercenarism, etc. Were every State to decide, according to its own political preference, whether or not to recognize foreign amnesty agreements, perpetrators of serious violations would enjoy greater freedom to travel outside their home countries, undermining the international community's principled stance against impunity.

D. Should the International Community Provide Amnesties under Certain Circumstances?

Suppose a dictator threatened to use biological and chemical weapons to exterminate thousands of million people who may be living in a relatively isolated part of the country. The dictator seemed ready and able to carry out this threat and the international community seemed unwilling or unable to take any effective preventive action through the UN Security Council, regional arrangements, or through any other means. No individual State seemed prepared to intervene militarily to prevent the extermination. Suppose further that the dictator remained concerned for his or her own life and the eventuality of assassination attempts or the possibility of a future coup d'état. He or she would prefer to step down from power on condition that a UN Security Council-backed agreement guarantee him or her amnesty from prosecution by the ICC or any other international or domestic court. Even in such extreme cases,

88 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by consensus* by the General Assembly 10 December 1984 , *opened for signature* 4 February 1985, *entered into force* 26 June 1987. Articles 7 and 8 impose an obligation on State Party either to prosecute or extradite "a person alleged to have committed any offence" set out in the Convention.

the Security Council should not invoke Article 16 of the Rome Statute to defer an ICC prosecution. It is one thing for a successor regime in a particular country to grant an amnesty that the international community then tolerates as long as the perpetrator stays within the boundaries of his or her country. Sovereign States have to be left a certain margin of discretion as to how they should deal with past violations. It is quite another thing for the international community at large to be perceived as directly endorsing or granting amnesty from prosecution for crimes under international law.

As for crimes of lesser gravity, such as ordinary murder, theft, drug-trafficking and corruption, amnesties could be contemplated as an option, but then only through the adoption of a UN Security Council resolution under Chapter VII of the UN Charter, or duly authorized regional arrangement. The advantage of this approach would be to strike a balance between power and law, while maintaining highest regard for the sanctity of human life and dignity as well as a critical distinction between greater and lesser crimes. This suggested approach implies also that the ICC should not take upon itself to honour amnesty agreements that lack Security Council backing, except in the kinds of cases discussed above where, according to Article 53 of the Rome Statute, there is no reasonable basis to proceed and even there, as argued above, this should only apply to proceedings on an indictment and prosecution, not to the initiation of an investigation.

Truth commissions and amnesty arrangements could play a valuable role in exposing facts and responsibilities, recognizing the dignity and suffering of victims and survivors, and even in contributing to criminal prosecutions. They could support a country's quest for democratic governance, full respect for human rights and the rule of law, and foster conditions for national reconciliation, peace, stability and prosperity. Wherever truth commissions are considered or employed as alternatives to criminal prosecutions however, on balance, the damage to the image, principle and practice of criminal justice, is so great that truth commissions and criminal prosecutions cannot be reconciled.

VI. Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions

From the discussion above, we arrive at the following ten general principles to reconcile truth commissions and criminal prosecutions:

1. No Government or international authority, such as the UN or regional collective security arrangement, should ever grant blanket or unconditional amnesties from criminal prosecution because they negate criminal justice and contribute little to truth or reconciliation.
2. In the case that a Government has granted a blanket amnesty, no international or foreign court or tribunal should respect it. The danger to human life will already have been averted when a country's successor regime grants amnesties to allow leaders a way to relinquish power. No further advantage would be gained, except by the perpetrator, in recognizing a blanket amnesty granted by domestic agreement as binding internationally or in other countries. Moreover, such recognition could conflict with a State's treaty or customary international law obligations with regard to prosecuting or extraditing perpetrators of certain crimes of international concern.

3. Truth commissions should be vested with mandates to investigate violations and report on them in such a way that does not cause prejudice to eventual criminal prosecutions, even where the criminal justice system does not yet function adequately. Because the administration of justice takes time and resources to function, it should be strengthened, not abandoned.
4. Criminal proceedings should accord much greater attention to the rights of victims to an effective remedy. They should also encompass procedural means in order to avoid hostile cross-examination which could discourage testimony in court and further traumatize victims.
5. Criminal procedures should also incorporate principles of restorative justice, including those relating to civil liability, so as to complement the valuable role truth commissions play in fostering truth, justice and reconciliation.
6. The ICC Prosecutor should never refrain from commencing an investigation, or stop an investigation, into a case where there is a reasonable basis to proceed, and the other jurisdictional requirements have been met, on the sole ground that an amnesty agreement has been or may be concluded. The ICC must stand clearly for criminal justice and it must conduct at least a proper assessment, which requires that an investigation at least be started.
7. Apart from the situation of a Security Council deferral of an investigation through the Article 16 procedure, the ICC Prosecutor should not take the next step towards indictment or prosecution where this would not be in the interests of justice, particularly where it would seriously undermine peace in a country and pose a clear and immediate threat of harm to a large number of innocent lives.
8. The international community should never grant amnesties from criminal prosecution for aggression, genocide, war crimes or crimes against humanity.
9. The international community should consider granting amnesty for crimes of lesser gravity, in other words, crimes defined in domestic law that do not qualify as crimes under international law of international concern, and then only through the duly authorized procedures under Chapter VII of the Charter of the United Nations or through regional collective security arrangements, as authorized by the UN Charter, in cases where such agreement will likely save thousands from further misery and no other better and practical alternatives seem available. Any amnesties which the UN feels compelled to grant under these circumstances should be respected by all UN Member States and the relevant successor regime of the country concerned.
10. The UN should make every effort within the parameters of international law to apprehend perpetrators of crimes under international law, including those who attempt to extort, by force or threat, amnesty from criminal prosecution in regard to such crimes.

Chapter 48

The ICC Statute and the Ratification Saga in the States of the Commonwealth of Independent States

Aslan Abashidze and Elena Trikoz

The Agreement signed in December 1991 on the establishment of the Commonwealth of Independent States (CIS) and the Additional Protocol and Declaration of Alma-Ata have defined the principles on the basis of which the multilateral cooperation is to be established within the Commonwealth of Independent States. This is also reflected in the cooperation in particular areas, for example, the prevention and combating of organized crime.[1]

In the analytical paper "on the results of 10 years of activity of the Commonwealth of Independent States, and the tasks ahead", the state members of the CIS, in view of their geo-strategic positioning in the context of today's international situation, are in the forefront of the fight against international terrorism and extremism, narco-mafia, and other international crimes, that are an affront to the entire world.[2]

On the territory of the CIS member states several methods are used to conduct an effective fight against organized crime – from universal international conventions to other bilateral regional instruments. In particular a couple of joint inter-state programs on combating organized crime such as terrorism and extremism are underway.[3] To do this, states have agreed to establish an anti-terrorist centre as a specialized organ of CIS member states for the fight against terrorism and other manifestations of extremism. This organ is headed by the Council of Chiefs of security services of individual member states.

In the last period, in view of the increasing attention to the development of the concept of international crimes, in the countries of the former Soviet Union what has acquired particular importance is the issue of the speedy ratification of the 1998 ICC Statute by those states. For various reasons a synchronized ratification process in these states would be welcome. The campaign for the ratification of the ICC Statute in these states has some similarities but also some particularities. These par-

1 Problems of uniformization of the Criminal Law and Criminal Procedure Law in the member states of the Commonwealth of Independent States (CIS) 1Vestnik mezparlamentskoj Assambelej SNG, St. Pertersbug, 1996, pp. 48–80. (In Russian).

2 See Decision of the CIS Council of Heads of States , 30 November 2001.

3 In particular a CIS Member States plan against terrorism and extremism was established to implement a CIS member States Council Decision "on the fight against international terrorism in the light of the pertinent resolutions of the OCSE Istambul Summit" adopted on 25 January 2000.

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 ISBN 978 90 04 16308 9. pp. 1105–1110.

ticularities are conditioned by the internal and external political situation in each of the countries, their legal traditions but also the real possibilities of each of these states.

One particular reason why CIS states should struggle to ratify the ICC Statute is the need to reform the national judicial systems.

Indeed, the fact that states will have the right to address the ICC directly and the fact that general procedural rules have been established within the ICC, will have an impact on the need to strengthen the judicial system and the general quality of the judicial service in these countries.

However, some of those countries that are reluctant to ratify the ICC Statute also think that the establishment of the ICC represents a real threat to national interests and their state sovereignty. They tend to think that some of the far-reaching progressive positions in the ICC Statute are indeed a violation of both international and national law.

In the CIS member states of the Central Asian region, for example, only one country, Tadjikistan, has ratified the ICC Statute (on 5 May 2000). Kirgistan and Uzbekistan have signed but did not ratify the Statute. Whereas Turkmenistan and Kazakistan participated in the Rome Diplomatic Conference, they have refused to sign it.

In the CIS member states of the Caucasus region, only Georgia has ratified the ICC Statute (on September 5, 2003). It is hoped in Georgia that this could pave the way for criminal proceedings in The Hague for alleged acts of genocide committed against the Georgian people during the inter-ethnic conflict in the Abchasia region of Georgia in the 1990s.

It is difficult to advance any dates as to when Azerbaidjan would ratify the ICC Statute.

One of Azerbaidjan's biggest concerns is the question of immunity of the highest state officials, which is not recognized by the ICC Statute. However, it is interesting that Azerbaidjan itself on various occasions has pushed for criminal prosecution of the leaders of Armenia, a country with whom it has a longstanding border conflict and which it accused of genocide against the people of Azerbaidjan. However, so far officials in Azerbaidjan are not hurrying to use the opportunity given to them to do so, by adhering to the ICC Statute or allowing the Court to prosecute the purported crimes of Armenia on an *ad hoc* basis.

Even though Azerbaidjan has not yet ratified the ICC Statute, its parliament has tried to take into account provisions of the Statute in adopting new laws.

For example, in drafting the new 2001 Extradition Law of May 15, the parliament has included Article 1(3)(ii) according to which the law does not in any way limit the extradition to international judicial organs. Likewise a provision was introduced in this revised law according to which nothing in that law limits cooperation in criminal matters with the international judicial organs.

The Republic of Armenia signed the Rome Statute on 1 October 1999, and has expressed its readiness to cooperate with the international community in the fight against serious international crimes. However, there are serious discrepancies between the norms of the Statute and national laws. In particular, according to Article 20 (2) of the ICC Statute, no person shall be tried by another court for a crime for which that person has already been convicted or acquitted by the Court.

This provision, however, conflicts with provisions of Article 5(3) of the Penal Code of Armenia. According to it Armenian courts can try *de novo* a person of Armenian citizenship already tried abroad. Apart from that, whereas the ICC Statute provides for highest penalties of 30 years in prison and life sentence, the maximum penalty under the Armenian Penal Code is 20 years and there is no life sentence.

Ukraine is another country that has signed the Rome Statute, but has not yet ratified it. Provisions of the Statute were found to be in contradiction with national laws. According to a decision of the National Constitutional Court on 11 July 2001, the Rome Statute (para. 10 of the Preamble and Article 1) according to which the Court shall be complimentary to national criminal jurisdictions contradicts Article 124(1)(3) of the Constitution of Ukraine. Therefore ratification of the Rome Statute will be possible only after amendment of the Constitution.[4]

And finally Russia has also signed the Rome Statute but is at pains to ratify it. There are a number of both objective and subjective reasons for this.

Among the objective reasons are the following constitutional, penal and procedural obstacles: a) the question of immunities. The Constitution provides for immunities for certain state officials (the President, Members of the Parliament, and the Judges; b) the surrender of Russian citizens to the ICC (prohibited by Article 61(1) of the Russian Constitution, and Article 13 (1) of the Russian Penal Code, Article 464 of the Russian Penal Procedure Code); c) questions of amnesty and commutation of sentences (ignored by the Rome Statute, allowed by the Russian Constitution); d) criminal trials only by a court of assizes under the Russian Constitution.

We should note some of these concerns are not entirely justified. For example, the issue of immunities of heads of states is common to many other states; however, this has not prevented these states from entering the ICC. Lawyers of these countries rightly note for example that immunities are allowed under the national jurisdiction, but not under an accepted international jurisdiction, and that the immunities exemption has been rejected in cases of international jurisdictions such as the jurisdiction of *ad hoc* Tribunals.

The same goes in relation to the surrender of Russian citizens to the Court. Article 102 of the ICC Statute clearly refers to surrender and not extradition. Moreover, once ratified the Rome Statute becomes part of the Russian legal system, and in case of conflict with the national law it takes precedence according to Article 15 of the Russian Constitution. Therefore at least in relation to these two concerns there would be no need to change the Constitution.

Some other penal procedural problems which Russia might face if it ratifies the Rome Statute relate to the acts considered international crimes under Articles 5-8 of the Rome Statute. Among these only the crime of genocide has been incorporated into the Russian Penal Code in coincident terms with those of the Rome Statute.

It is clear that there is a need to amend provisions of the Russian Penal Code (part XII) incorporating the system of crimes against peace and humanity in order to reflect the ICC Statutory provisions on crimes against humanity and war crimes. This is needed since, for example, the requirement of a widespread and systematic attack against the civilian population for crimes against humanity is not incorpo-

4 See National Constitutional Court of Ukraine, Case No. 1-35/200, Decision, 11 July 2001.

rated into the Russian Penal Code.

In the case of war crimes the situation is similar. Although the inclusion of such crimes in the Russian Penal Code was a step forward, it is still behind international efforts to codify the war crimes as established under the Hague Law and the Geneva Law.

Among the subjective reasons preventing the ratification of the Rome Statute observers mention the war in Chechnia and the Russian authorities' fear that they might be among the first to appear on the accused's bench before the Court.

Generally it can be said that in most of the members of the Commonwealth of Independent States, the spirit is that of 'waiting to see' before more forward steps are taken to ratify the Rome Statute: 8 of the 12 states of the Commonwealth have signed the Statute (Russia, Georgia, Ukraine, Kirguistan, Moldova, Armenia, Tadjikistan, Uzbekistan) but only 2 among them have ratified it (Tadjikistan and Georgia).

This contrasts with the situation in the three former Soviet Union Baltic republics (Letonia, Lituania, Estonia)[5] that have all ratified the Rome Statute and all have implementing legislation in force.

An important role in the ratification process is played by the factor of political will that has been missing until now in most of these states, despite constitutional declarations about the need to build up a democratic society and the supremacy of international law. CIS States that have been thinking about ratification of the Rome Statute are today confronted with the need to adopt implementing measures which might precede the ratification process to ensure that national law conforms to the Rome Statute. A basis for this is the inclusion in the national legislation of these states the crimes falling under the ICC jurisdiction: crime of aggression, crimes against humanity, war crimes, genocide.

Crime of Aggression

The crime of Aggression as an exclusively very serious international crime that entails planning, preparation and the commission of acts of aggression, has been criminalized in the national legislation of most of the CIS members (Penal Codes of Azerbaidjan-Art.101; Belarus-Art.122; Georgia-Art. 104; Moldova-Art 139; Kazakstan-Art.156; Tadjikistan-Art 395; Ukraine-Art. 437).

However, there is a narrow list of situations when responsibility may attach in cases of aggression. One exception to this is the Penal Code of Ukraine, whose Article 437(1) provides for penal responsibility for planning, preparation and commission of an aggressive war or armed conflict and imposes criminal responsibility for the planning, preparation or beginning of an aggressive war or armed conflict, as well as for participation in a complot intended for the commission of these acts.

In the Penal Code of Uzbekistan this Article is titled "aggression" and in the disposition the terminology "war of aggression" is used. Apart from that, part 1 of Article 151, just as in the Penal Code of Ukraine, provides for criminal responsibility both for planning and preparation of a war of aggression, but also for participation in a complot for the realization of said actions.

5 Lituania ratified the Rome Statute of the ICC on 28 June 2002, Estonia, on 30 January 2002, and Letonia, on 12 May 2003.

Genocide

The CIS members that have ratified or acceded to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[6] in order to implement their obligations have introduced criminal responsibility for genocide in their penal codes.

In many of these Penal Codes Article 2 of the Genocide Convention is incorporated *verbatim* and they provide for life or long sentences.[7] Provisions of the Penal Codes adopted in the CIS Member States criminalizing acts of genocide match those of the Rome Statute of the ICC, and therefore the ratification of the Rome Statute does not require the adoption of any specific implementing legislation.

Crimes against Humanity

The same cannot be said, however, in relation to crimes against humanity. The fact remains that in most of the CIS Member States the Penal Codes do not list all of the acts characterized as crimes against humanity under Article 7 of the ICC Statute. The exception represents the Penal Code of the Republic of Azerbaidjan in which an entire chapter (16) is devoted to crimes against humanity. It gives the definition of crimes against humanity in the same way in which it is given in the ICC Statute and lists the following acts: extermination (Article 105) enslavement (Article 106) deportation or forcible transfer of population (Article 107), sexual violence (Article 108), enforced pregnancy (Article 108-1), persecutions (Article 109), enforced disappearance of persons (Article 110), apartheid (Article 111), imprisonment in violation of international law (Article 112), torture (Article 113).

The Penal Code of the Republic of Belarus partially covers crimes against humanity in Article 128, named "crimes against the security of humankind", and includes such acts as deportation, unlawful imprisonment, enslavement, widespread and systematic acts of lynching, enforced disappearance of persons, torture and other egregious acts, committed on racial, ethnic or national discriminatory grounds. The Penal Code of Georgia also contains a special provision on crimes against humanity with a list of acts which includes murder, extermination, deportation and other inhuman acts causing great suffering or serious injury to body and health (Article 408). Whereas the Penal Code of Georgia does not require any connection with an armed conflict, that of the Republic of Tadjikistan does require this. Its Article 403 lists certain acts considered crimes against humanity if committed during an armed conflict (deportation, apartheid and other inhuman and humiliating practices based on racial

6 The Republic of Azerbaidjan ratified the 1948 Genocide Convention on 16 August 1996; the Republic of Belorus, on 11 August 1954; the Republic of Georgia, on 11 October 1993; the Republic of Kazakistan on 26 August 1998; the Republic of Kirguistan on 5 September 1997; the Republic of Moldova on 26 January 1993; Ukraine on 15 November 1954. See information available at http//www.unh-chr.ch/html/menu3/b/treatylgen.html.

7 See Article 103, Penal Code of Azerbaidjan; Article 407 Penal Code of Georgia; Article 135, Penal Code of Moldova; Article 442, Penal Code of Ukraine; Article 153, Penal Code of Uzbekistan; Article 373, Penal Code of Kirguistan; Article 398, Penal Code of Tadzikistan; Article 127, Penal Code of Belorus; Article 160, Penal Code of Kazakistan.

discrimination resulting in death or serious injury to body and health, torture).

In the remaining CIS Member States their Penal Codes only list one or two acts as crimes against humanity (for example the Penal Code of Kazakistan lists only deportation). This means that in most of these States the implementation of the Rome Statute will require substantive legislative work, so that these Codes can cover all the acts prohibited under the ICC Statute as crimes against humanity including in some cases the elimination of the link to an armed conflict.

War Crimes

In relation to war crimes it is important to note that CIS Member States have all ratified or acceded to the Geneva Conventions[8] and therefore they have an obligation to enact legislation implementing those Conventions irrespective of the Rome Statute. Although most of the Penal Codes of these States have thus provisions regarding war crimes, it needs to be noted that only few such Penal Codes (namely those of Azerbaidjan, Belorus, Georgia, Tadjikistan) contain provisions that fully match Article 8 of the Rome Statute. Moreover, in certain cases Penal Codes contain a wider list of prohibited acts than Article 8 of the Rome Statute does. For example, these Penal Codes include the war crime of causing widespread, long-lasting and serious harm to the environment.[9]

In most cases, however, the Penal Codes only criminalize violations of the laws or customs of war, but do not contain a list of such acts, for example Article 438 of the Penal Code of Ukraine. This means that these countries will have to adopt implementing legislation to cover Article 8 war crimes after ratifying the Rome Statute of the ICC.

Recent Antecedents of Cooperation of CIS Member States in the Fight against War Crimes and Crimes against Humanity

It should be noted that even before the adoption of the Rome Statute the everyday life of small and big armed conflicts in these countries formed after the fall of the Soviet Union has forced them to adopt certain measures to protect victims of armed conflicts. Thus, on 24 September 1993, an Agreement on measures to protect victims of armed conflicts was signed by CIS Member States. Pursuant to this Agreement the parties have pledged themselves to bring their national legislation in accordance with the norms and principles of International Humanitarian Law, and to this end to prosecute and punish cases of serious violations of international humanitarian law in particular the criminal responsibility of all those who have organized, committed or ordered the commission of war crimes, or crimes against humanity.

8 The 1949 Geneva Conventions were ratified by the various CIS member States on the following dates: the Republic of Azerbaidjan on 1 June 1993; the Republic of Georgia, on 14 September 1993; the Republic of Belorus on 3 August 1954; the Republic of Moldova on 24 May 1993; the Republic of Kazakistan on 5 May 1992; the Republic of Kirguistan on 18 September 1992; Ukraine on 3 August 1954; the Republic of Uzbekistan on 8 October 1993. See detailed information available at the ICRC Website: http//www.icrc.org.

9 See Article 116.0.2 Penal Code of Azerbaidjan, Article 136 (2) Penal Code of Belarus).

Chapter 49

The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law

Hans-Peter Gasser

As of today, international criminal law, human rights law and international humanitarian law are perceived to be linked one to another. Nobody would deny today their close relationship or advocate the separate existence of these three chapters of international law.

This has not always been the case.

These few lines intend to throw a light on the way the relationship among these three chapters of international law developed.

1st period: lonely presence of international humanitarian law

International humanitarian law deals with victims of armed conflict. While its roots go back into Antiquity or before, its modern codification was set in motion by the Conference which met 1864 in Geneva and adopted in a few weeks time the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864). The dramatic experience of Henry Dunant on the battlefield of Solferino (Italy) and published in his *Memory of Solferino* set the goals for the Geneva meeting: ameliorating the fate of the wounded on the battlefield and protecting aid and relief efforts against violence. That covers personnel, field hospitals and medical transport, and included the adoption of the Red Cross on a white ground as a distinctive emblem for identification purposes. In short: The (historically speaking) first Geneva Convention developed the idea of charity into an international commitment to be respected in war time.

These topics remained on the agenda, as classical themes for any subsequent codification of international humanitarian law, at least of one of its chapters: the protection of victims of warfare, also called the Law of Geneva. No considerations based on human rights (in the modern sense) had any influence on the debate. Moreover, there was no attempt to criminalize violations of its obligations.

The year before the adoption of the Geneva Convention in Geneva President Lincoln promulgated in 1863 the Instruments for the Government of Armies of the United States in the Field (General Orders 100), the so-called *Lieber Code*. That text codified rules of behaviour on the battlefield or, in other words, rules on the conduct of hostilities, later to be known as Law of The Hague. It is law of war in its original sense. While the text refers to the obligation of States to punish violations of the law,

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the Code does not propose individual criminal responsibility under international law.

The Peace Conferences proposed by the Russian Tsar and convened in The Hague in the years 1899 and 1907 failed to reach consensus on significant measures for ensuring peace. Yet the gathering produced major developments of the laws of war by adopting a series of conventions on topics related to warfare. The most important treaty is, of course, the (Fourth) Convention Respecting the Laws and Customs of War on Land of 1907, with its annex, the so called *1907 Hague Regulations*. Part of the newly codified rules deals with aspects relating specifically to the conduct of hostilities. Yet two of its major chapters, i. e. Section I, Chapter II – on Prisoners of War – and Section III – Military authority over the Territory of the Hostile State: occupied territories – cover issues whose relations with human rights considerations are obvious, at least today. At that time, however, nobody referred to the larger context of the need to protect the dignity of human beings in general.

In the period between the two World Wars international humanitarian law progressed in fields like the prohibition of particularly cruel weapons (e. g. the 1925 Geneva Protocol on the prohibition of gas).

None of these international agreements provides for individual criminal responsibility in case of violation of a treaty provision or for the obligation of States to prosecute and punish violators.

During that same period first international texts protecting human rights took shape, such as the codification of rules on protecting labour standards, elaborated in the context of the International Labour Organization. Yet such emerging codification processes in other fields remained fully independent from international humanitarian law, and vice versa.

2nd period: continuing separate evolution of international humanitarian law and human rights law

The end of the 2nd World War brought about the beginning of the *human rights* era, which still characterizes our present time. The Universal Declaration of Human Rights (1948) set the starting point. The rights proclaimed by that document were later on codified by the two International Covenants of 1966 and elaborated under United Nations auspices, one on civil and political rights and the other on economic, social and cultural rights (1966). A considerable number of other treaties relating to one or the other human rights issue followed up. On a regional level, the protection of fundamental rights was codified by comprehensive treaties, particularly the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981).

None of these human rights codifications elaborates on problems relating to armed conflict.

Insofar as *international humanitarian law* is concerned, the period after 1945 brought two major developments: the Nuremberg Trials of major German war criminals and the rewriting of the Geneva Conventions.

The judgments of the International Military Tribunals at Nuremberg (1946) – and, to a lesser degree, the Tokyo trials – are considered today as starting point for the development of international criminal law applicable in armed conflict. Yet the

London Agreement of 8 August 1945 was concluded outside the realm of international humanitarian law. Moreover, it established an *ad hoc* criminal tribunal, with no jurisdiction over crimes other than those committed during the 2nd World War "by major war criminals of the European Axis countries". True, the International Law Commission of the United Nations General Assembly adopted in 1950 the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", which draw the necessary conclusions from the Nuremberg experience. But no follow up decision was taken to consolidate international criminal jurisdiction and institutionalize individual criminal responsibility on the international level.

The major event of the post war period was of course the convening of a conference which, based on the experiences made during the 2nd World War, was to codify a new international humanitarian law. The four Geneva Conventions of 12 August 1949 for the protection of war victims develop what has become to be known as the Law of Geneva, i. e. those rules which protect various categories of persons affected by excessive violence in war. Among that, the new law of the 4th Geneva Convention merits to be mentioned in particular. The Convention deals with the protection of civilian persons in the hands of the enemy and, in particular, with the situation of the inhabitants of occupied territories. These are clearly human rights issues for which adequate solutions had to be found for war time situations.

Article 3 common to the four Geneva Conventions is the result of another (undeclared) contact with human rights law. With its basic rules to be respected in a non international armed conflict Article 3 deals with a situation which governments still consider to be an internal affair.

What was the relationship between the development of international human rights law and humanitarian law in the first few years after the end of the 2nd World War?

A recent study has shown that the codification of human rights law and the further development of international humanitarian law after the 2nd World War occurred in almost complete independence.[1] The human rights documents, starting with the Universal Declaration of 1948, do not broach the issue of respecting human rights in armed conflict, and the Geneva Conventions fail to make an express link with human rights norms, also in the case of human rights issues. It appears that even the personnel engaged in the codification process in New York and in Geneva was not identical. This holds true for the representatives of participating governments or for the concerned international organizations. The study just mentioned has this to say to explain this surprising fact: "[T]he United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the ICRC, the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression."[2] The result was a separate evolution of the two branches.

1 Robert Kolb, The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, *International Review of the Red Cross*, September 1998, 409.

2 *Ibid*., 411.

To conclude, at this point: international humanitarian law, human rights law and international criminal law developed on different and separate tracks.

3rd period: realizing the close relationship between international humanitarian law and human rights law[3]

The situation changed with the International Conference on Human Rights, convened by the United Nations in Teheran in 1968, a few months after the Six Days War in the Middle East had awakened international concern for armed conflict. The Conference discussed the adequacy of international humanitarian law in modern circumstances and identified issues which called for further development. To identify their topic the delegates used the words "Human Rights in Armed Conflict" for what was generally known as international humanitarian law. Under that title the Teheran Conference invited the UN Secretary-General to study the issues identified during the discussions and to make proposals. The initiative was confirmed by the UN General Assembly in its Resolution 2444(XXIII), of 19 December 1968, entitled Respects for Human Rights in Armed Conflict. That text reaffirmed a few fundamental principles which later on governed the development of international humanitarian law. At the request of the Teheran Conference, and confirmed by Resolution 2444, the Secretary-General produced substantive reports on issues and proposals relating to international humanitarian law.

It may surprise to realize that what should have been the task of the ICRC had actually been performed under the auspices of the United Nations: to take the initiative for the further development of international humanitarian law. The ICRC, however, did catch up and invited governments to send their experts to Geneva in 1971, for a first round of discussion. The stage was now set for a major codification exercise which led, on 8 June 1977, to the adoption of two *Protocols Additional to the Geneva Conventions* by a Diplomatic Conference convened by the Swiss Government, the depositary of the Geneva Conventions. While the designation chosen by the Teheran Conference – "human rights in armed conflict" – did not survive the discussions in Geneva, the idea behind the title certainly did. The links between each of the two Protocols and human rights law are not only evident but also numerous.

While the major part of *Additional Protocol I*, on international armed conflict, deals with matters such as the protection of the civilian population against military operations and with issues linked to methods and means of warfare, several provisions adapt human rights concerns to armed conflict situation. The clearest evidence for the "intrusion" of the law on human rights into humanitarian law is evidenced by Article 75, a monument among the various provisions of Protocol I touching on human rights issues. Under the title of *Fundamental guarantees* Article 75 codifies the essentials on the protection of human rights for persons affected by armed conflict. Moreover, Article 72 of Protocol I declares human rights law to be a subsidiary source of law to be respected in armed conflict.

Protocol II, on non-international armed conflict, covers a conflict situation which is considered to be an internal affair of the concerned State. Thus, human rights

3 See, among others, Karl Joseph Partsch, Human Rights and Humanitarian Law, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II , 1995, 910.

considerations must be in the forefront of the search for solutions which take into account the specific problems of warfare in a civil war. And Protocol II does just that. One of its preambular paragraphs sets the tone by recalling "that international instruments relating to human rights offer a basic protection of the human person". Part II, entitled "Humane Treatment" is pure human rights law, with its fundamental guarantees for the human person, its rules on detention and its provisions on penal prosecution.

International humanitarian law, with the Geneva Conventions' common Article 3 and Protocol II, applies to an internal conflict situation as soon as violence has reached certain intensity. Situations where tension and violence within the territory of a State do not reach that threshold remain under the control of the international human rights regime – which is not adequately prepared to control violence in these circumstances. Therefore, it is in "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (in the words of Protocol II, Article 1.2) where international humanitarian law and human rights law confront each other.[4]

The International Court of Justice twice emphasized in recent times that human rights law and international humanitarian law may apply simultaneously in a situation where the latter is applicable, i. e. in armed conflict. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* the Court stated that "the protection of the International Covenant of Civil and Political Rights does not cease in time of war" (para. 25). The ICJ Advisory Opinion of 9 July 2004, on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, confirms this view and adds that human rights law may well be, under certain circumstances, *lex specialis* to international humanitarian law (para. 106).

With these statements the ICJ confirms the close relationship between international humanitarian law and human rights law. The Court has not been contradicted on this point.

4th period: ... and international criminal law[5]

As mentioned in the comment on the 3rd period, the development of criminal justice on the international scene took a halt after the Nuremberg Tribunal had accomplished its mission. No doubt, the 1949 Geneva Conventions have all provisions on penal sanctions in case of violations of their substantive rules.[6] But the responsibility for prosecuting persons alleged to have committed violations of international humanitarian law, including grave breaches or war crimes, lies with the State which has jurisdiction over the person.

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4 See, e.g., Hans-Peter Gasser, International humanitarian law and human rights law in non-international armed conflict: Joint venture or mutual exclusion?, *German Yearbook of International Law*, vol. 45, 2002, 149.

5 See Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff Publishers, 2006, in particular Chapter 2: Criminalization of Violations of International Humanitarian Law.

6 1st Convention, 49/50, 2nd Convention, 50/51, 3rd Convention, 129/130, and 4th Convention 146/147.

Protocol I followed the same track. While its Article 85 added a considerable number of serious violations of international humanitarian law to the list of crimes which call for action by States, Protocol I continues to rely on prosecution before domestic courts. Protocol II has no provision on repression of breaches of its rules other than those on procedural aspects.

In short: The prosecution of persons accused of having committed a grave breach of the Geneva Conventions or their Additional Protocols fully remained in the hand of States, despite the unquestionably international character of the violation. Some States party involved in an armed conflict after 1945 did comply with that obligation and brought individuals to trial in a domestic court. But this remained the exception. The rift between international humanitarian law and international criminal law remained open.

The turning point came as an answer to a particularly heinous European war: the conflict which tore apart the Federal Republic of Yugoslavia. Acting under Chapter VII of the United Nations Charter the Security Council established with its Resolution 827 (1993) an *ad hoc* international criminal court: the *International Criminal Tribunal for the former Yugoslavia (ICTY)*, "for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia ...".

Only a few months later, in 1994, the Security Council created another *ad hoc* court and adopted the Statute of the *International Criminal Tribunal for Rwanda* (ICTR – Resolution 955 (1994)). The Rwanda Tribunal was established for prosecuting persons accused of genocide and other serious violations of international law during the tragic events in Rwanda.

While the two *ad hoc* courts pursued their mission with great energy the international community went a step further and, in 1998, the conference convened by the United Nations in Rome adopted the *Rome Statute of the International Criminal Court (ICC)*, thereby creating for the first time in history a permanent and international judicial institution with a jurisdiction over "the most serious crimes of concern to the international community as whole" (Rome Statute, Article 5). Pursuant to the Rome Statute, in particular its Article 8, the ICC has jurisdiction in respect of war crimes. Thus, the ICC assumes the role of making individual criminal responsibility for violation of international humanitarian law a credible concept. (It should be recalled, of course, that the ICC's role is of a subsidiary nature. The main task of prosecuting violations of international humanitarian law remains with the States.)

While the ICC is still in the initial phase of establishing jurisdiction over a first case, the practice of the two *ad hoc* Tribunals has already had a very important influence on substantive provisions of international humanitarian law. This holds true in particular for the Yugoslav Tribunal whose decision of 1995 in the *Tadić* Case actually developed the law in a decisive way. With that decision the ICTY concluded that international law also establishes individual criminal responsibility for crimes committed in non-international armed conflict. The Rome Statute followed up and made serious violations of international humanitarian law in such internal events to war crimes which fall under the jurisdiction of the ICC.[7]

7 Rome Statute of the International Criminal Court, 17. July, 1998, Article 8.2 c) and e).

5th period: synthesis

International criminal law, human rights law and international humanitarian law have different origins. They have developed each in their own way – up to a certain point. Today, the three domains meet together. Their principal legal instruments must be read in conjunction with each other. Opting out of one of them (as the United States did with its refusal to accept the International Criminal Court) throws doubt over the commitment to respect the other domains. "Promoting and encouraging respect for human rights and for fundamental freedom for all" (in the words of the UN Charter, Article 1.3) requires a comprehensive approach to international commitments. It embraces all the three legal domains.

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