

Address by General Jean-René Bachelet

General Jean-René Bachelet (2nd Son) was General Inspector of the Armed Forces of the French Republic. In 1995 he commanded the Sarajevo sector in the former Yugoslavia for UNPROFOR, during the paroxysm of the siege until its lifting. Between 1999 and 2004 he led a study to draw up an ethical and behaviour framework for the army and initiated an ambitious reform of the initial training of officers at Saint Cyr, the foremost French military academy. He gave the following opening address at the Interregional Meeting on the Role of Sanctions in Ensuring Greater Respect for International Humanitarian Law, held in Geneva on 15–17 November 2007.

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When I was invited to introduce this subject, my initial fear was that you were taking a risk in giving the floor to someone who has spent 42 years in uniform and in the infantry at that. This is a meeting of experts and I am obviously no expert on international law, let alone on the sanctions which are intended to reinforce it. However, my impression that, in asking me to speak, you had picked the wrong person was dispelled when, having read your documentation, I realized that the backdrop for the subject was in fact wartime behaviour, a topic with which I am not exactly unfamiliar.

The least I can do is to start by setting the scene. It is important and even crucial to appreciate the atmosphere surrounding wartime events if one wishes to understand what prompts people's behaviour. That is why it is useful for your examination of humanitarian law in wartime to start by painting a picture of wartime confrontations, exceptional situations which sometimes involve unbridled violence and in which standard references go by the board. In different ways, it will help us to capture the atmosphere.

I would like to make it clear that I will be presenting the point of view of a former member of an institutional army, the French army, rather than that of a "bearer of weapons", a term used that I find strange. Those who exercise what I will call the "profession of arms" are obviously subject to law – national law – which is hopefully not unrelated to international law.

The need for the adoption of a moral code

However, as soon as reference is made to behaviour – and hence action – what kind of law would it be if the protagonists did not approve of the moral code on which it is inevitably based? It is very likely to be useless, just as within a nation, a state governed by the rule of law, it is easy to imagine that when its people cease to be guided by the awareness that their lives are based on common values, civilian peace is at risk. At a deeper level and probably more powerfully than by law – although it is not an alternative – behaviour is therefore guided by the moral code that has been internalized.

After describing the highly charged setting of armed confrontations, and to provide a context for your subject, I would therefore like to focus on a number of basic principles inherent in a moral code for the profession of arms which is intended to guide behaviour in such situations. Let us start, then, by plunging into the heart of the inferno. In doing so, I am not going to refer to historical events from a distant past, but to a relatively recent event which is, in any case, set in the context of present-day conflicts.

The context of conflicts

We are in Sarajevo in May 1995. As you will know, for three long years the international community has been looking on, powerless, as the former Yugoslavia imploded. After Croatia, it was the turn of Bosnia; those who were familiar with the country and its history knew that the fighting was going to be merciless, which it was.

The military-political environment

I do not recall exactly how many UN resolutions were flouted as soon as they were passed. Blue helmet troops were sent in – more and more of them, without any apparent effect. At that time, for the Sarajevo sector alone, there was an Egyptian battalion, a Russian battalion, a Ukrainian battalion, three French battalions and a French air force detachment at the airport, all under the command of a French general who was in charge of the sector and had a multinational contingent.

Historians will probably find it interesting, and perhaps perplexing, to study those three long years during which it hardly seems credible, in our so intelligent world, for so many errors to have been committed, particularly with regard to the confusion over rules of diplomacy and rules which apply when it has been decided to use force. The fact remains that since diplomatic negotiations had led to our troops being placed in the position of potential hostages, the moment had come for real hostages to be taken. After the bombing of the outskirts of the Bosnian Serb capital of Pale by NATO aircraft – with no advance warning having been given to the commander of the Sarajevo sector – the Bosnian Serbs responded by taking dozens of blue helmets hostage.

The blue helmets belonged to groups which had been stationed throughout the entire Serbian area since the previous winter, when, following the Markale market massacre, the Serbs had found themselves obliged to regroup their guns at various points. The presence of so many UNPROFOR detachments at each of the sites was intended to discourage use of that heavy artillery. In disregard of elementary tactical rules, those detachments were thus placed in a totally vulnerable position, a matter which was decried by all military leaders in the field without obtaining the slightest response until that day in May when the Serbian reaction to the bombing of Pale was to trigger a major crisis.

The atmosphere of military action

That is the setting for the action that I would like to describe in order to convey the atmosphere of military action at its most brutal. The scene of the action is one of the checkpoints around the periphery of Sarajevo. It is located between the heart of the town in the north and the Serbian suburb of Grbavica in the south, the two areas being separated by the Miljaka river, which is spanned at that point by the Verbanja bridge, after which the checkpoint was named.

Although it started out as a checkpoint, it had become a veritable bunker, because the soldiers manning it had to shield themselves against the shooting from both sides. However, although the bunker provided a minimum of protection, in terms of defence tactics it defied every rule in the book. Entrenched in the Serbian area on the far side of the Miljaka river, it was overlooked by Serbian buildings on the one side and by Bosnian buildings on the other. To reach it, one had to cross the bridge and then negotiate a glacia around 50 metres long which led to the slopes of the mountain opposite; it was surrounded by barbed wire, and inside were a dozen men belonging to a French UNPROFOR battalion on a weekly roster. At that specific point in time, the mission, which was originally to monitor one of the rare crossing points occasionally open between the two areas, had been suspended and it was a matter of sitting tight and waiting.

One night in May 1995, in the middle of the “hostage crisis”, the commander of the company which is responsible for that checkpoint and others is unable to establish radio contact. He gets into his jeep and rushes to the checkpoint. On arrival he crosses the barbed wire but immediately realizes that something is amiss, despite the figure of a blue helmet at the door. Realizing that it is not one of his men, he and the men accompanying him manage to get clear. He understands that the Serbs had taken the checkpoint by surprise.

It is still dark. The decision is immediately taken to storm the checkpoint and recapture it. That decision marks a spectacular – and salutary – change of attitude compared with everything that has been done previously. Therefore the only attack of the war – in the brutal and bloody meaning conferred on it by military vocabulary – by the forces of the “international community” was to be launched by blue helmets, whereas a few months later the reputedly robust NATO forces were only doing “peacekeeping” – but that is another story. For the moment, I would like to invite you to experience that attack.

You need to picture the scene in the early hours of the morning. The captain's company moves down the slopes towards the checkpoint. To do that, they have to cross the lines of the Bosnians, who watch in disbelief. Armoured vehicles have been positioned discreetly between the Bosnian buildings so that they can use their guns to provide cover for the advancing men at the appropriate moment. So far, all is quiet.

The men are all set to go, facing the glaxis and, beyond it, some 50 metres away, the barbed wire enclosure. They are between 18 and 22 years old. Their commanding officer is a lieutenant who is scarcely older than they are. The captain is also there; he is no more than 30 years old. It is his responsibility to give the order to attack.

The "marines" (the name given to the marine infantry in the French army which comprised that company) leap forward. One of them is killed at the line of departure. The assault group get as far as the barbed wire. One of the attackers is hit and falls onto the barbed wire. His comrades use his body as a "bridge" over the wire. They reach the entrance to the checkpoint. Not one of them is without injury. Every one of them is wounded. The lieutenant is covered in blood from a head wound.

But let us recapitulate. The extreme tension of the departure, a knot of fear in the stomach and then a fierce rush of adrenalin – it all happens against a background of crackling gunfire, exploding grenades, the roar of cannon fire, the smell of gunpowder and then of blood.

The young men enter the checkpoint in a state of intoxication. The captain is there, hard on the heels of the first wave. He has a thousand worries. First, about his men who had been in charge of the checkpoint, not knowing what has become of them; they might still be inside as prisoners. He has to manoeuvre his back-up forces, that is, to redirect the tank fire. He follows his men into the checkpoint.

The Serbs have pulled back to the other part of the checkpoint, which is long and narrow and divided into two sections by a narrow corridor. They have left behind two of their wounded, who see their attackers bearing down on them in the physical and psychological state that I have already described.

The important role of the commander

We need to understand that, at that moment, the life of those wounded men hangs by a thread. Descending on them are young men of 20 covered in blood, in the murderous frame of mind which takes hold of men in such situations, and everything happens very quickly. Is law going to protect the two wounded Serbs? I leave you to answer that question.

The captain, who has since risen to the rank of colonel, then comes on to the scene. He immediately takes the situation in hand. He picks out the most severely wounded of the attackers – his men – and puts them on guard over the Serbian prisoners with the explicit instruction to watch over them. Then he relaunches the action in the direction of the second part of the checkpoint.

I am going to stop there. I merely wanted to depict the type of situation in which there is an exceptionally narrow dividing line between soldierly behaviour, as dictated by our cultural heritage and international law, and barbaric behaviour. In those circumstances, what is the deciding factor? Do you think that the behaviour will be decided by existing international law? National law? A sanction which, moreover, might be imposed in a situation like that? Of course not. What is going to decide matters is instinctive reaction. Now, in situations like that, the natural instinct is barbaric. That is where the commander plays an essential, determinative role: provided that he has the support of his men, that he is acknowledged, that he is more than the leader, the big brother who holds sway by his strength of character, his authority and his skills, but also his inner qualities, he is the only person capable of controlling combat hysteria, which otherwise leads to barbaric behaviour. That is the weight of his responsibility.

So much for the setting. Taking those real-life situations as the basis, I would like to recall the fundamental aspects of military action and go on from there to derive the principles which may be able to inspire a moral code for the profession of arms.

Principles of a moral code

After each of the major conflicts in the twentieth century, the intense longing for peace which has influenced humankind since time immemorial has repeatedly led to a misunderstanding regarding the nature of armies and military action. By virtue of their existence, armies are held responsible for war – hence leading to the pacifist wave which swept through the West during the entire cold war. Following the fall of the Berlin wall, however, when certain noble minds thought that they would see the emergence of an era of perpetual peace, the opposite has been observed: once the lid imposed by the bipolar world had been lifted, free rein was given to long-suppressed violence.

We thus rediscovered what we had already known in the 1930s: man's capacity, as an individual and collectively, to commit the worst injustices against his fellow men in circumstances in which, to put an end to them, there is no other solution than to respond with force since all other courses of action, especially diplomatic or economic ones, turn out to be pointless if not counterproductive.

The prevalence of force over unrestricted violence

What do we mean by force? A capacity for coercion which enables ascendancy to be gained over violence. Yes, but is that all? In fact, avoiding all euphemisms, it is a capacity to inflict destruction and death if there is no other way of dealing with unbridled violence.

That is therefore the capacity that needs to be retained. In terms of the values of our civilization, it is doubtless excessive but it is nonetheless absolutely vital – the alternative being the law of the survival of the fittest, or rather of the

most violent, and hence the automatic betrayal of the values which we are called upon to defend: human universality, the value of life, integrity and human dignity.

Does that mean that we will respond to unbridled violence with violence? That would be to betray those very values – this time by overdoing it. Thus force should be able to prevail over violence, but it will nonetheless not allow itself to resort to every available method. That implies a strong moral requirement, to which we will return.

In practical terms, armies are institutions which are duty-bound, if necessary, to use force defined in this way. They derive their legitimacy from the nations whose agents, in a sense, they are. Those are the basic premises, in the West, of the “profession of arms”.

Now let us return to situations in the field, to the picture that I have painted. In those exceptional circumstances, first, why do we go? In other words, what exceptionally powerful motivation causes a young man in his twenties to rush forward in response to an order with total disregard for suffering and death? Only those who know nothing of military matters or hardened anti-militarists may think that soldiers are turned into robots, that we are dealing with some kind of fierce discipline which instils greater fear of the commander than of the bullets.

The primary role of solidarity or brotherhoods of arms

It does not work like that. So, do we go in response to the call of the flag, in response to values, in the name of freedom, and so on? No. A historical constant comes into play. “We go” because a network of extremely strong solidarities has taken shape within a well-functioning troop. On the one hand, the solidarity is “horizontal”. It is the spirit of comradeship, a specific feature of military units. Soldiers have absolute trust in the comrades to their left, to their right and behind them. A genuine brotherhood has built up over days and nights, on good and bad days, through the joys and trials that they have shared. Historically, all testimonies are in agreement about that.

That “horizontal” solidarity goes hand in hand with a “vertical” solidarity. To exercise authority is not, as I have said, to impose fierce discipline. A subtle alchemy takes place in the relationship of absolute trust which exists between the commander and his subordinates. It is based, of course, on the leader’s skills and authority, but also on the caring attention that he shows for each of his men and has a very strong emotional component. It is what we call – in what may possibly seem exaggerated terms – the “brotherhood of arms”. That is why we “go”. It is because of trust in our fellow soldiers, in our leader and at the same time in ourselves because we cannot let people down. That is the soldier’s real operational motivation in the moment of truth.

One might object that all that is terribly ambivalent. It is for better or for worse. One might think that the Waffen SS also cultivated the brotherhood of arms. That is why a common, essentially ethical, source of inspiration is also needed, one that is derived from our civilization values, to which I have referred.

It is the extent to which that inspiration drives the esprit de corps and the brotherhood of arms that determines the degree of internalization of the moral code. Indeed, that code must be internalized before it can have any influence on behaviour in situations of extreme violence such as the one which I have described as an example.

Efficiency and humanity

Our soldiers therefore have to obey two – partly contradictory – principles. First, a principle of efficiency: ascendancy must be gained over the enemy, the upper hand must be gained over the forces of violence, the soldiers need to be the strongest. In the name of our civilization values, however, that is not done anyhow or at any price; the principle of humanity is no less essential. Force could thus not be unbridled violence; it is inevitably under control.

I would like to remind those who are tempted to see that as a modern concept – some of them in order to take pride in it as evidence of progress being made by moral conscience, others to be ironical about what is “politically correct” at the time – that this is the legacy of many centuries of civilization. It started in the fifth century AD, in the decaying Roman empire. In the wake of the Vandal invasion of north Africa, with its trail of devastation and atrocities and the collapse of the politico-administrative structures, the nascent church was more or less the only source of a solution. In the city of Hippo, which was called Bône at the time when Algeria belonged to France and is Annaba today, the bishop was a certain Augustine. His flock turned to him and asked, “Are we to allow our wives and children to be killed?” And Augustine answered, “No.”

Jus ad bellum and jus in bello

That gave birth to the concept – a concept that was doubtless ambivalent, but isn't that always the case in human matters? – of “just war”, the vast aim, often compromised, but never denied, of implementing, if necessary, a force which is not equated with violence. That was translated into legal terms in the Middle Ages, as you will know – I am not going to explain to jurists what *jus in bello* and *jus ad bellum* are. Isn't the “law of armed conflict” today the contemporary translation of *jus in bello*?

Similarly, when the former French Minister of Foreign Affairs, Dominique de Villepin, gave a vehement speech at the United Nations in 2003, his aim being to dissuade the United States from embarking on the disastrous war in Iraq, it can be seen that his line of argument follows the articles of medieval *jus ad bellum* practically point by point. The speaker probably did not do so consciously. But it goes to show that those principles are firmly anchored in our culture. Far from the outworking of a fashion, the concept of controlled force is therefore intrinsically linked to our civilizational values – and has been for centuries.

Internalisation and instinctive behaviour

Yet, as we have seen, the principles need to be internalized. That is where training comes in, particularly the training of leaders. When I was still in active service, one day I had to speak on that kind of subject at our officers' training schools at Saint Cyr-Coëtquidan. In particular, I called on a witness – a commander – whom I knew had been a lieutenant in Sarajevo during the hostage crisis to which I referred earlier and who had demonstrated exemplary behaviour in a particularly difficult situation. One of the students in the audience asked, “Why did you react like that?” His spontaneous reply was, “I didn't think.” That was the best response that he could have given, because it was tantamount to saying that in paroxysmal situations of violence and absolute urgency, the reaction is virtually instinctive. Orders received, “conduct to be observed”, “rules of engagement”, *a fortiori* the law, are pointless; the only thing that counts is the person's “basic capital”. If that “basic capital” has absorbed the principles to which we are referring here, we will have the only defence against barbaric behaviour worth having.

War without hatred

Before concluding, I would like to refer back to the profoundly cultural character of the concepts and principles mentioned and particularly to the matter of respect for the enemy. It is provided for in the third article of the “Code of the French Soldier”: “Mastering his own strength, he [the soldier] respects his opponent and is careful to spare civilians.” In the Foreign Legion, the “Legionary Code”, which predates the Code of the French Soldier, states, “You will not hate your enemy.” This is well and truly in keeping with the many centuries of the legacy of the medieval *jus in bello*.

However, we are aware that there are military cultures – by no means minor ones – which make hatred of the enemy an aspect of the behaviour to be instilled during military training. It seems clear that at the same time as needing to deal with improving international law, it is doubtless appropriate to call into question military cultures which make hatred of the enemy one of the basic tenets of military training.

I do not wish to embark here on an exercise – although it would not be without interest – which would entail showing you that, faced with the humanistic aim of many centuries which I have described, most deteriorations may be interpreted as the outcome of demonizing the enemy. However, history has shown us that regarding the aims of war as sacred and its corollary, demonizing the enemy – in the name of God, the nation, race, or for any other reason – opens the door to barbarism.

Today, let us ask whether a sanctification of human rights might not help to produce the opposite effect to the one that we are trying to achieve. The same thing can be said of the idea of obviously demonizing “terrorism”. Demonizing the enemy is to invite regression and to condemn oneself to barbarism. In this case, it is also to nurture the very terrorism that we are trying to suppress.

No one can deny, of course, that random attacks on people of all ages and conditions are absolutely reprehensible. However, there is a terrorist rationale. That rationale is evident at the level of the protagonists. It is an indirect strategy involving a deviation from the weak to the strong. The enemy is so strong that people think that they have no other solution than to divert their strength to hit out where it hurts. And where does it hurt in Western societies? Among people and opinions. That is the protagonists' rationale. It makes use of men or women who have clearly been "fanaticized" but whose real motivations are obviously humiliation and despair.

The more crushing the force, the more it therefore encourages "deviations" and hence the terrorism that it is trying to suppress. The more entire populations are driven to despair, with humiliation being an added feature, the more this creates a breeding ground for terrorism.

When I hear people say that war has been declared on terrorism, I do not know if I should laugh or cry. Terrorism is a weapon. It is rather as if the Renaissance sovereigns in Europe had declared war on the harquebus. It does not make sense.

To conclude

That is why the "new forms" of contemporary conflicts in no way invalidate the high humanistic aim of our civilization's legacy. As much as, if not more than, anyone else, a soldier carries that legacy forward, although the tragedy of the situations which he faces condemns him, at best, to the lesser evil. To conclude is both to sum up and to open up new avenues of thought. To do that, I would like to give two short quotations. The first is from the moralist Vauvenargues, who wrote with rare concision: "Vice foment war, while virtue does the fighting". Yes, violence is vice and force is virtue.

However, that quotation could lead to some unfortunate interpretations if it were not complemented by a statement made a number of centuries before by the great Augustine to whom I have already referred: "Worse than vice is pride in virtue." Obviously, Augustine should be recommended reading on training courses for today's political and military leaders.

Sanctions as a means of obtaining greater respect for humanitarian law: a review of their effectiveness

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Abstract

There are several aspects to reviewing the role of punishment in ensuring greater respect for international humanitarian law. First, there is the question of improving compliance with the law, second, the focus on the punishment itself and, third, the characteristics of the perpetrators. The situation of armed groups is dealt with separately. The article also examines transitional justice as an accompanying measure and the problem of how to take care of the victims. Finally, suggestions are presented which could help the parties concerned in the establishment of a system of sanctions capable of having a lasting influence on the conduct of weapon bearers so as to obtain greater respect for international humanitarian law.

* The author is in charge of the sanctions project being conducted by the ICRC's Advisory Service. Since 2006 the project has benefited from the ongoing support and advice of the Director of the Centre for International Law at the Université d'Aix Marseille III, Professor Xavier Philippe, and a group of experts from various backgrounds, namely Emmanuel Castano, New School for Social Research, New York; Amedeo Cottino, Università di Torino; Emmanuel Decaux, Université de Paris II; Pierre Hazan, journalist, adviser on transitional justice; Christian Nils-Robert, Faculty of Law, University of Geneva; Eric Sottas, OMCT, Geneva; Eric Steinmyller, Ministry of Defence, France; and Yves Sandoz, member of the International Committee of the Red Cross. The article largely reflects the results of this process of consultation undertaken since 2006, including an Interregional Meeting on the Role of Sanctions in Ensuring Greater Respect for International Humanitarian Law, held in Geneva from 15 to 17 November 2007.

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In 2004 the ICRC published a study on the origins of wartime conduct, the aim of which was to identify the factors which were crucial in conditioning the behaviour of bearers of weapons in armed conflicts (referred to hereafter as the Influence Study).¹ One of the main conclusions of the Influence Study is that the rigorous training of combatants, strict orders concerning proper conduct and effective sanctions in the event of failure to obey those orders are prerequisites for obtaining greater respect for humanitarian law from weapon bearers.

It has been the ICRC's wish since 2006 to examine those conclusions in greater depth by concentrating, in particular, on the role played by sanctions as a means of obtaining greater respect for humanitarian law. The choice of focus is also justified by the fact that where serious violations of international humanitarian law are concerned, sanctions are inevitable. In general, the international texts stipulate in very similar terms that, when violations affecting fundamental values have been committed, the parties must take the legislative measures necessary to assure the application of those sanctions and, in particular, to provide for penal sanctions which are appropriate, effective and strictly applied or sanctions which are sufficiently dissuasive.

In the ICRC's efforts to follow up states and parties to conflicts which have primary responsibility for the implementation and application of international humanitarian law, it becomes vital to try to find means which make it easier to implement sanctions. In other words, the focus needs to be on the conditions which would make it possible to increase the deterrent effect of a sanction and to make its message easier to read when it is applied to violations of international humanitarian law.

A more thorough analysis of the role played by sanctions in obtaining greater respect for humanitarian law also makes it possible to reaffirm the importance of the rule of law and the fundamental universal values which it upholds. This review should help to strengthen the rule itself and, at the same time, to prevent its being called into question. It should also help to determine what is negotiable and what is not.

To bring the exercise to a successful conclusion and to find the correct mix of theoretical principles and pragmatism, a number of challenges need to be overcome. First, the decision not to start by defining the concept of sanctions may come as a surprise.² While penal sanctions and their effectiveness remain at the heart of the discussion, we consider that the value of the different sanctions needs to be analysed as part of a legal process which covers a lengthy period of time and a broad geographical area and takes a number of complementary forms. Taken in isolation, a sanction is very often insufficient or ineffective. It may, however,

1 Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004.

2 On the definition of sanctions in international law, reference should be made to the article by Emmanuel Decaux, "The definition of traditional sanctions: their scope and characteristics", *International Review of the Red Cross*, in this issue.

become fully relevant if it is part of that holistic process. Moreover, that makes it possible to fulfil sometimes contradictory requirements such as those of carefully considered judicial decisions and of expeditiousness. A more detailed study of the role played by sanctions in obtaining greater respect for humanitarian law therefore makes it necessary to consider the nature and the characteristics of sanctions themselves as well as matters such as the forms of justice the persons to which they apply or the environment in which they are utilized.

Second, for a review of the role of sanctions to be credible and sufficiently detailed, the discussion needs to be broadened and questions need to be submitted to the crossfire of different specialist fields in the hope of achieving cross-fertilization and with the risk of remaining within the realm of generalities. Finally, one also needs to be aware of the fact that there will always be a mismatch between the number of sanctions and the number of crimes which have been committed during armed conflicts, given that the crimes are often mass crimes or systematic in nature. It would seem difficult to obtain strict respect for the principle of equality under those circumstances.

Having said that, it is nonetheless appropriate to go into more detail on some points. The review is restricted to bearers of weapons, including non-state armed groups, even if, in the case of the latter, the information is often incomplete and fragmentary. The backdrop is therefore behaviour in wartime and the focus is on the violations of the law applicable during armed conflicts. Within that framework, account needs to be taken of the social reality of a situation of war in which crimes – including serious crimes – are frequently committed as a result of circumstances and by people who would not normally have become involved in criminal activities. The review is restricted to measures which target individuals and not states following an internationally wrongful act, even if it is sometimes impossible to keep individuals and the state totally apart, particularly when it comes to judging leaders and when the violations of humanitarian law are the outcome of a policy that they themselves had drawn up. Due consideration should be given to the important role which may be played by the international judiciary bodies in officially recognizing violations of international humanitarian law affecting victims and in granting them reparations when states have not fulfilled their international obligations. Moreover, case law may have a real influence on the behaviour of the states concerned, which must be taken into account.³

3 In that respect, interesting developments have been observed in the case law of the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights. Reference should be made, in particular, to the various ECHR cases on the subject of missing persons in Chechnya. In these cases the ECHR considers that, in order to prevent inhuman treatment of the families of disappeared, states have to put into place effective mechanisms providing families with information and answers. See also Xavier Philippe's article which deals in particular with the distribution of competences among judiciary bodies: Xavier Philippe, "Sanctions for violations of international humanitarian law: the problem of the division of competences between national authorities and between national and international authorities", in this issue.

The review of the role of sanctions in obtaining greater respect for international humanitarian law covers seven aspects which have been identified in the studies undertaken by the ICRC since 2006:

- the first raises the question of adherence to the norm and explores the extent to which the parties concerned are familiar with international humanitarian law;
- the second relates to the sanction itself;
- the third aspect concerns the characteristics of the perpetrator;
- the situation of armed groups is dealt with separately as the fourth aspect;
- the fifth looks specifically at group-related problems;
- transitional justice as an accompanying measure is dealt with as the sixth aspect; and,
- problems relating to the victims are dealt with in greater depth as the seventh and final aspect.

For each of those aspects, elements and modalities which might be used to develop an operational instrument will be proposed. It should help the parties concerned to set up a system of sanctions capable of having a lasting influence on the behaviour of bearers of weapons so as to obtain greater respect for international humanitarian law. The elements and modalities are summarized in the conclusions. The different sections also pinpoint the issues which were identified during the research and for which the need for a more detailed analysis and further research has become apparent.

Observing the rules

To apply sanctions is also to acknowledge that there is an inadequate degree of compliance with the rule for which a lack of respect needs to be signalled. However, for individuals to comply with a particular rule, they first need to know it and it needs to be part of their framework of reference. It is not enough for a state simply to be party to an international treaty; appropriate measures need to be taken by the relevant authorities to translate the rules of that treaty into national law.

Although international humanitarian law stipulates the obligation to repress all serious violations of its provisions, it must regrettably be noted that legislation in a fair number of countries falls short of that requirement. Some acts which need to be repressed – and hence the sanctions applicable to them – have quite simply not been included in any form whatever in the reference legislation of a number of states. That situation can be explained by different factors such as the age of the texts in question, the lack of priority or interest on the part of the authorities with regard to issues of humanitarian law or, ultimately, a lack of political will.

Where measures have been taken, it must also be noted that they are very often incomplete and lead to problems both of substance and of form. For example, the list of crimes included in national legislation is often incomplete. In

some cases, there are also no provisions relative to the general principles of international criminal law. Consequently, the generally applicable provisions in national criminal laws remain applicable to international crimes and make it possible to place, without due cause, certain obstacles, such as the issue of statutes of limitation or the defence of superior orders, in the way of penal action. Moreover, the necessary amendments and adjustments are not always made to all relevant texts, in particular those which apply to bearers of weapons, and make differentiated treatment possible for the same deeds both as crimes under criminal legislation and as military offences. Those crimes are generally judged by separate courts and lead to sentences which are sometimes very different. Finally, the systems frequently suffer from a lack of clarity, the provisions relative to the repression of the most serious violations of international humanitarian law being scattered throughout several legal application texts (criminal code, code of criminal procedure, code of military justice, military criminal code, code of military discipline, special law, etc.). Those provisions are rarely grouped together in a single text. The crimes are sometimes included in general criminal law texts or in texts which are military in nature, or both. In some cases ordinary criminal courts have sole competence to judge those crimes, whereas in others military tribunals are used. Other systems retain concurrent competence. Those discrepancies are the cause of misunderstandings about the rules and their application and lead to a double inconsistency – first, with regard to the range of courts responsible for judging the same matters and, second, with regard to the risks of the cases being treated differently – in terms of procedure and substance – by the different orders or types of courts. Rationalization is needed if sanctions are to be made more effective. While it would seem desirable to unify the system by placing it under the competence of a single court, it appears unrealistic given the attachment of states to their own judicial systems. By contrast, the notion of similar guarantees, or even procedures, in the courts whose responsibility it is to deal with serious violations of international humanitarian law should be better received by the states.

It must also be admitted that certain rules of international humanitarian law ought to be clarified to ensure greater coherence of the various penal systems. Indeed, given the limited number of cases with which they have to deal, national judges are often faced not merely with a lack of rules but with their lack of practical application. That situation may well produce a degree of hesitancy with regard to international crimes when they have to deal with them and lead either to a refusal to recognize their own competence with regard to the reprehensible deeds or to an erroneous or incomplete understanding of the existing rule. The clarification of those rules might allow that risk to be kept to a minimum.

Characteristics of sanctions

A review of the effectiveness of sanctions with regard to violations of international humanitarian law must make extensive reference to numerous studies carried out

at the national level in this subject area, especially in the fields of criminology and penology. However, the review must take account of specific features. First, it must not be forgotten that the violations in question are committed in an unusual situation of extreme violence. It must also be acknowledged that it is difficult to conceive of all crimes being repressed and, last, the profiles of most of the persons having committed atrocities and to whom those sanctions should be applied are not those of common-law criminals. Those considerations must therefore be borne in mind when identifying the characteristics of sanctions.

The effectiveness of sanctions

Effective sanctions are those which produce the anticipated effect. Viewed from that perspective and taking account of the range of different crimes and perpetrators or victims, it may be difficult to assess the effectiveness of a sanction when humanitarian law has been violated. Sanctions may actually have a number of different aims, which become superimposed on each other, vary across time and from one geographical location to another, and depend on the individuals concerned. For example, the measures which ought to target the leaders who plan, organize or order the execution of crimes cannot be placed on a par with those aimed at people who commit the crimes, some of whom are sometimes, unfortunately, children. Nor can sanctions and the impact that they have on victims be excluded from the evaluation.

The definition of offences and sanctions generally suffers from a lack of foreseeability or readability for persons who are likely to be involved in armed conflicts as bearers of weapons. Adopting an exclusively penal approach to unlawful behaviour and sanctions also makes it fairly illusory to expect sanctions to have a dissuasive impact. The dynamics of the exercise consist of determining the possible factors and conditions which are conducive to preventing the crime from taking place or being repeated. The idea which must therefore be constantly borne in mind is a system of constraints (regardless of whether those take the form of punishment for violations or not) at each stage of the process prior to the commission of the crime. That ability to respond exists on paper, but insufficient use has been made of it in practice.

Having said that, certain characteristics remain constant, regardless of the circumstances, the individuals targeted or the court which imposes the sanction. First and foremost, it seems that sanctions may only play their role fully to the extent that, in every case, they make it possible to underline the reprehensible nature either during the action or just after the offence has been committed. The distinguishing features of sanctions must hence be the certainty that they will be imposed and their immediacy, that is, that there will be an immediate response. It obviously has to be recognized that certain sanctions, particularly those that are criminal, do not always permit that speed, which is why it is worth exploring the possibility of combining measures which would be the most apt to produce the desired effects among perpetrators, victims or any other persons concerned. Sanctions must also be applied to all perpetrators of violations without

discrimination, irrespective of the groups to which they belong, in order to uphold the principle of equality and to avoid the creation of a feeling of “victor’s justice”.

Second, the publicity surrounding sanctions is also important. The dissemination obligation is essential to the effectiveness of sanctions, because it is the means of informing and educating people about what a serious violation is and the consequences which it entails. That publicity raises complex issues, in particular with regard to how to provide it in both peacetime and wartime. In every case it must cover the rationale behind the sanction, that is, the reasons why it has been chosen. It must also deal with the entire procedure leading up to the imposition of the sanction (with account being taken of the need to protect personal data), which, in all circumstances, immediately rules out clandestine courts and secret places.

Third, sanctions should be characterized by their proximity in terms of both form and substance. As far as possible, they should be implemented close to the places where the violations were committed and to the people on whom they are to have an impact. To the extent possible, an abstract, disembodied procedure without a specific territorial context should be avoided. Delocalization should not be envisaged unless *in situ* justice proves to be impossible for reasons connected, in particular, with the inability or unwillingness of the parties which are responsible for carrying out that justice, and should be accompanied systematically by a complementary local sensitization procedure. In every case, account must be taken of the local (national) context and that factor must be given a weighting based on the universal criteria referred to above. “Context” is taken to mean all the mediate or immediate elements which enable the sanction to have a greater impact on the framework and the individual to which or to whom they apply, with account being taken, in particular, of the cultural factor. The field of sanctions seems to lend itself to an examination of the procedures which go beyond the accusatory system and are based on systems of logic which might achieve a better impact in certain circumstances, such as procedures based on public stigmatization (“shaming”) or rehabilitation.⁴ In other words, states should explore further the various ways of applying the law “in their way”, without ruling out recourse to adapted forms of more traditional justice, in order to make the law more effective.

Fourth, there is nothing to justify departing from the well-established principles of individualization and proportionality of the sentence. However, it must be recognized that the principle of proportionality seems difficult to implement in the case of mass or systematic violations of international humanitarian law.⁵ However, when examined more closely, the principle of proportionality is one of the false clear concepts of legal science to which everyone

4 In that respect see, in particular, the article by Amedeo Cottino, which explores the treatment of crimes by the Navajo and indigenous Hawaiian communities: Amedeo Cottino, “Crime prevention and control: Western beliefs vs. traditional legal practices”, in this issue.

5 Decaux, above note 2, observes in that respect that it is precisely because the crime committed is without comparison that the moral dimension consists of circumventing the logic of vengeance and settlement of accounts, without nonetheless being content with a “symbolic trial”.

refers without ever really defining its limits. Proportionality is a nomadic concept pertaining to different sciences and constitutes an unavoidable principle because of the logical function which it has in implementing the rule of law. Its great value – but also its complexity – is based on the evaluation of a connection between several dimensions or variables which oblige first the perpetrator and then the judge to take account of the “relations of proportion” as an artist would do when painting a landscape. Quite obviously, apart from the initial relation of the seriousness of the crime to the sanction, there are several “relations of proportion”, which explains that people talk more – or they ought to talk more – about the “principle of a lack of disproportion” than of the principle of proportionality. Under criminal law the principle of proportionality obliges the judge to pursue a synthetic approach, that is, for the purpose of deciding on the sentence, to take into consideration not only the deeds of which the perpetrator is accused but also the entire environment which led to their being committed. That way of interpreting the principle of proportionality makes it possible to move away from the strict “an eye for an eye” logic responsible for producing cycles of vengeance which certainly hinder greater respect for international humanitarian law.⁶

A typology of sanctions

Seen from that perspective, sanctions may be of various kinds; they may be criminal, disciplinary, jurisdictional or not and may be imposed by an authority governed by ordinary law or military law, which may be international or national. International humanitarian law should apparently not immediately rule out resorting to solutions other than criminal sanctions. Those solutions might be able to give greater consideration to contextual features and be better suited to take account of the mass or systematic nature of the violations. However, there should be no compromise on the obligation to maintain criminal sanctions for serious violations of international humanitarian law or on the fact that imprisonment remains essential in such cases. Imprisonment is the only sanction which may conceivably be imposed to punish major criminals long after they have committed their offences (sometimes several decades later), this course of action being credible provided that those crimes are not subject to any statute of limitation and given that efforts to combat impunity have revived in recent years. But imprisonment should also be seen as a means of pressuring the perpetrator to accept his responsibility – including responsibility towards the victims – rather than a way only of removing him from society and rendering him harmless. A programme that aims at his rehabilitation should also take into account this purpose. Nor does the context undermine the rules that are internationally recognized in the field of juvenile justice, which also apply to children who have

6 See the article by Damien Scalia for more details on applying the principles of legality, necessity, proportionality and non-retroactivity to the sentence: Damien Scalia, “A few thoughts on guarantees inherent to the rule of law as applied to sanctions and the prosecution and punishment of war crimes”, in this issue.

been involved in the perpetration of violations of international humanitarian law; such rules are based first and foremost on the primary interest of the child and are aimed at rehabilitation and reintegration.⁷

That integrated approach to sanctions, driven by the desire to obtain the maximum from them, leads to different types of sanctions being combined. For bearers of weapons, for example, priority should be given to using disciplinary sanctions which are applied without delay and linked to penal procedures when serious violations are involved.⁸ Disciplinary sanctions which constitute the immediate response of the hierarchy are capable of having an immediate impact on group dynamics and of immediately underlining the prohibition, thus avoiding any subsequent systematic deviation. Criminal sanctions, which naturally take effect later, act as a reminder of the standards and rules of humanitarian law for the perpetrator of the offence and society.

Accepting that the effectiveness of sanctions depends on combining their various forms also implies that different judicial systems can be used. No matter what systems of justice are involved, too much emphasis cannot be placed on the importance of clear national and international rules which establish the criteria to be respected in terms of impartiality, independence, publicity and compliance with the rules that guarantee fair legal proceedings, including the pronouncement of the sentence. Moreover, the individuals called to take the decisions should be properly qualified before assuming their tasks, which includes having an understanding of the cultural context in which they are called to operate. Once that essential basis has been put in place, the next step is to determine the system which is best suited to the circumstances. A clear preference has become apparent for, whenever possible, a national rather than an international system and ordinary criminal courts rather than military courts, but naturally with a certain number of nuances. There are, of course, situations in which the international complement is indispensable – or even inevitable – and areas in which military justice can complement ordinary justice harmoniously, particularly when it allows rapid deployment in the geographical area.⁹ In every case, these tribunals must provide all the judicial guarantees of human rights and international humanitarian law.

7 See, in particular, the Convention on the Rights of the Child (2 September 1990), Articles 37, 39 and 40; International Covenant on Civilian and Political Rights (23 March 1976), Article 14(4) and the international texts which deal specifically with the issue, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), UN Doc. AGNU/RES/40/33 (29 November 1983); United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), UN Doc. CES/RES/1989/66 (24 May 1989); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc. AGNU/RES/45/113 (14 December 1990); and United Nations Guidelines for Action on Children in the Criminal Justice System, UN Doc. CES/RES/1997/30 (21 July 1997).

8 On the issue of disciplinary sanctions applicable in the context of the armed forces, see the article by Céline Renaut, “The impact of military disciplinary sanctions on compliance with international humanitarian law”, in this issue.

9 In the context of armed conflicts it should be pointed out that the reference texts stipulate that prisoners of war must generally be tried by military tribunals, thus equating prisoners of war with the armed forces of the detaining power. By contrast, civilians in enemy hands have to be tried by the courts which normally preside in their territory (see, in particular, the Third Geneva Convention, Articles 82–88 and 102; the Fourth Geneva Convention, Articles 3, 64–66 and 71).

The complementary role which traditional justice may also play in the process deserves to be analysed carefully, the major challenge being to reconcile the concern for effectiveness with the preservation of essential principles, particularly those that are linked to guarantees relative to fair legal proceedings, in situations in which mass violations have been committed.¹⁰ While recognizing the importance of the specific cultural context, which makes it possible to avoid adopting an ethnocentric view, that cannot be used as a pretext to sell such principles short, and the risk of instrumentalizing traditional justice must not be underestimated.

In the case of parties which are not able to respond to the violations themselves and where the international complement is needed, a field of investigation opens up which should be fed by very recent experience of a wide range of different systems. The consensus is, however, that the international contribution should be temporary and aim at reinstating the national systems in the long term, especially by reinforcing their capacities. It is time to evaluate the merits of those ad hoc systems, such as that of Bosnia and Herzegovina, in which international judges have been integrated into the national system, that of Sierra Leone, where a mixed court has been established, or that of the international tribunals which are independent of national systems, such as those for the former Yugoslavia and Rwanda, while naturally bearing in mind the existence of the International Criminal Court. All those systems have obvious limitations, particularly with regard to their capacity of absorption, which may be a source of frustration. The aim is therefore to endeavour to draw up elements to identify, in particular, the best conditions for providing the national structures with international expertise, for evoking an appropriate national response and for encouraging an enriching dialogue between the different legal systems concerned. Given the concurrent existence of different systems, care must be taken to avoid imbalances which may be created by the systems themselves and by their implementation in determining and applying the sanctions.

Universal jurisdiction and complementarity of sanctions

Finally, this study of the complementarity of the roles of the sanction systems cannot ignore the principle of universal jurisdiction, as it authorizes the tribunals of all states to take cognizance of certain international crimes, regardless of where the offence has been committed and regardless of the nationality of the perpetrator or the victim. The objective of that jurisdiction is to ensure consistent repression of certain particularly serious offences. It demonstrates solidarity between the states in endeavours to combat international crime and should, at least in theory, make it possible to find a competent criminal authority in every case. Recent examples have also shown that universal jurisdiction, that is, beginning legal proceedings in another country, may have an influence on the courts in the state

¹⁰ See Cottino, above note 4.

on whose territory the crimes were committed or the state of which the perpetrator is a national by triggering their action.

Universal jurisdiction also affects the way in which sanctions are perceived within the national setting. The general tendency of the judicial authorities with regard to serious violations of international humanitarian law consists of thinking that the relatively limited risk of having to deal with such matters makes it pointless to deepen their knowledge of those areas. However, if the mechanisms of universal jurisdiction develop, even the most peaceful places on the planet may find themselves faced with the duty to try war criminals. The situation is anything but a scholarly hypothesis: the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, has passed some of the files on accused persons on to the states for them to be handled within the framework of their national judicial systems, and the International Criminal Tribunal for Rwanda (ICTR) is preparing to do likewise.¹¹ It is thus necessary for judges to be familiar with the rules relating to international crimes, and the natural extension of universal jurisdiction is reaffirmed. The need for judges to know those rules is all the more essential because the effectiveness of sanctions is a matter of common concern.

Universal jurisdiction appears essential because it is linked to the effectiveness of sanctions and to the notion that no war criminal may escape repression. In practice, however, it is often difficult to implement and comes up against obstacles which may be technical (conditions vary from one country to another) or political (selectivity of cases), which result in its being used today in a sporadic and anarchical manner. It would hence seem appropriate to identify elements on exercising universal jurisdiction which could take advantage of the framework of complementarity advocated by the Statute of the International Criminal Court. Those elements, which will take account of the relevant studies already carried out,¹² could establish the minimum links required to exist between the perpetrator of the offence and the place of the trial, by requiring him, for example, to be present in the territory concerned. They could also insist on the co-operation modalities between the states concerned and stress the importance for the states in which the offences were committed to fulfil their repression obligation or, if not, to allow other states or the competent international bodies to do so.

Characteristics of perpetrators

All the studies point to the need to set up mechanisms necessary to punish both the perpetrator of the violation and the relevant line of command responsible for

11 According to the procedure determined in Rule 11 *bis* of the Rules of Procedure and Evidence of both ad hoc international criminal tribunals.

12 See for instance the study on universal jurisdiction carried out by Princeton University in 2001, which identified certain principles, available at www1.umn.edu/humanrts/instree/princeton.html (last visited 14 July 2008). See also the resolution on universal jurisdiction in the field of criminal law with respect to the crime of genocide, crimes against humanity and war crimes, available of the Institute of International Law, adopted at the session in Krakow in 2005, available at www.idi-iil.org/idiF/resolutionsF/2005_kra_03_fr.pdf (last visited 14 July 2008).

it. As for the actual perpetrator of the violation, there are still some questions about the extent of his responsibility when crimes are committed following an order which is (manifestly) illegal. It needs to be recalled in that respect that military discipline requires unquestioning compliance with orders on penalty of sanctions which may be very severe, particularly when disobedience occurs within the framework of field operations. Non-compliance with an order may occur in at least two sets of circumstances which it is appropriate to single out. The first refers to cases in which the order given is a priori legal but to carry it out is not, because it was not clear enough to enable subordinates to understand what it meant or to comprehend the measures which it authorized. In that case, the full significance of training becomes clear. The scope for interpretation which subordinates are allowed willingly or not should be measured against the yardstick of the applicable rules of humanitarian law which they have taken on board and, if the procedure has been correctly applied, what they do should remain within the bounds of legality.

The second set of circumstances relates to a manifestly illegal order. In that case, the law is clear: obeying such an order is subject to sanctions and may in no way be an exonerating factor, although under certain strict conditions it may at most be taken into consideration as attenuating circumstances. The subordinate must therefore refuse to carry out the order. An order which is manifestly illegal is a command whose illegality is obvious. Viewed from that perspective, it is difficult to contest the illegal nature of serious violation, included in the Geneva Conventions and Additional Protocol I, of genocide or of crimes against humanity. That is, moreover, the approach taken by the Rome Statute, at least for these last crimes.¹³ In those cases concrete expression is given to the principle of humanity, as those crimes can affect the most fundamental areas of human life and they are indisputably reprehensible. The situation of the subordinate who has to assess the manifestly illegal nature of an order is a difficult one in the case of certain war crimes which take account of a degree of proportionality¹⁴ or which require a distinction to be made between those taking part in the hostilities and others. In cases in which subordinates are required to act responsibly, sanctions should most certainly take account of the difficult situation in which those subordinates find themselves (including the pressure exerted on them, or the threats to which they are subjected). When the order is one that the soldier considers to be clearly illegal, the operational framework should provide for a mechanism to clarify the order to which the subordinate may refer.

The commanding officers, in turn, may find their responsibility involved in different respects, in particular for having participated in the violation in one way or another; for having ordered a violation to be committed; for having failed

¹³ Rome Statute, Article 33(2).

¹⁴ Reference is made here to the principle of proportionality in international humanitarian law which prohibits 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 (as stated in Additional Protocol I, Article 51(5)(b)).

to prevent a violation from being carried out and, hence, failed in their duty to be vigilant; for having failed to punish those who have committed violations, or, worse, for having covered up for them. With this also comes the obligation to train their subordinates.

The importance of the responsibility of civilian and military superiors even if they have not participated directly in the offence is generally recognized, and recent developments in jurisprudence in that field at both the national and international levels, particularly with regard to the conditions which must exist for the responsibility of civilian or military superiors to be involved, are to be commended.¹⁵ However, it is agreed that there are a number of areas which are worth clarifying to enable that type of responsibility to be fully integrated into the scenes of operation with regard to both violations of humanitarian law which are serious and those that are not.

First, the concept of a superior needs to be clarified. On that issue, the commentary on Protocol I refers to a “superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control”.¹⁶ It is, however, not very forthcoming on the matter of problems linked to the line of command or to the degree of responsibility depending on the different scenarios, which range from the order to commit an offence to training deficiencies and include complicity, instigation, encouragement and tolerance. That issue could doubtless be dealt with in greater depth and usefully linked to that of the manifestly illegal order referred to above.

Second, the measures which need to be taken by superior officers should be more clearly defined in terms of their hierarchy and positions in the line of command to allow them the better to determine what is reasonably expected of them. Finally, it would be wrong to ignore the links which exist between military control and the power of the concerned civilian authority. The spectre of sanctions must be capable of influencing all those whose responsibility may be involved, especially leaders.

Third, it needs to be recognized that this approach based on the distinction between superiors and subordinates conceals the importance of intermediate officers both in the implementation of criminal acts and in the reconstruction of a society which is emerging from a conflict. An examination of the sentences pronounced by the ICTY shows that the most severe sentences were reserved for the leaders who were tried and for the subordinates who had committed particularly contemptible acts. In the light of initial analyses, it seems that those of the accused who had occupied intermediate positions in the hierarchy were generally punished less severely, which might also reflect their detachment from the criminal policies being pursued or their willingness

15 For more information on this issue, see the article by Jamie Allan Williamson, “Some considerations on command responsibility and criminal liability”, in this issue.

16 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, especially para. 3544.

to alleviate the damage or sufferings which resulted from those policies. It needs to be borne in mind that it was the specific context of the armed conflict that caused several of them to become involved in criminal activities. It is those same individuals who will be relied upon for the social reconstruction efforts in the period following the conflict. In that context the full weight of the educational and instructive nature of the sanctions becomes clear. They must correctly establish the connection between the crime of which the person is accused and the person concerned, so that the latter has no choice other than to admit his involvement. Sanctions which do not sufficiently explain why the specific individual's participation is blameworthy or which might suggest that his responsibility is only involved because of a remote connection with the crime¹⁷ unfortunately risk leading to the rejection of the entire process and are likely to stir up feelings of resentment which are inevitably passed on to future generations, thus engendering exactly what the sanctions set out to prevent.¹⁸

That binary approach based on the superior–subordinate relationship also fails to take sufficient account of the role of the instigators in preparing the environment which is conducive to violation of international humanitarian law. In that respect, it is encouraging to note that the Statute of the ICTR incorporated the provisions already included in the 1948 Genocide Convention, which make direct public incitement to commit genocide a punishable offence, and that the tribunal did not hesitate to apply them. There is, moreover, no reason why that form of criminal participation should not be extended to other international crimes, given the place occupied by the instigators, who, by pounding out their message, contribute to the demonization of the enemy and to justifying crimes committed against that enemy, as discussed below.

Finally, it is also important for a good system of justice to cover all those who may commit violations of humanitarian law. The particular case of the forces of the United Nations or of regional organizations must continue to be investigated even if a large number of studies are carried out on that subject. The recent resolution of the UN General Assembly on the accountability of UN officials and experts on mission, which recommends including in national legislation special criminal provisions for contingents from the countries which contribute to constituting the UN forces is worth being emphasized and taken into account by all those who participate in and assist the process of implementing international obligations at the national level.¹⁹ Besides, the United Nations and the competent regional organizations should also apply the strictest criteria in this area to themselves and, in particular, consider setting up a common disciplinary

17 Particular attention has to be given to cases related to the “joint criminal enterprise” theory.

18 It must also be noted that, for it hopefully to produce the effects discussed, the procedure to which the accused is subjected must also cover the mechanisms which enable the sentence to be adapted to the individual and the situation which that person will have to face once he has completed his sentence.

19 See in particular the Ad Hoc Committee on the criminal accountability of UN officials and experts on mission, UN Doc. AGNU A/RES/62/63 (8 January 2008), especially paras. 2 and 3 of the resolution's operative part.

system which would be able to respond to the need for speed and immediacy required by sanctions.²⁰ Those organizations should also take care to ensure that their officers are given appropriate training and that the knowledge is passed on to all levels. The question of accountability for private security companies and their staff also merits attention.

Armed groups²¹

Given that sanctions should have the same effects on persons placed in similar circumstances, to what extent can they affect the armed groups? Sanctions which could be imposed by the authorities on the members of armed factions simply because they participated in the hostilities even though this participation did not imply violations of humanitarian law are not covered here.²² Attention is rather drawn to the extent to which the message of sanctions can be built into the thinking of armed groups and help to ensure greater respect for humanitarian law.

The dissemination of the rules with regard to armed groups is a key element not only of their sensitization to sanctions but also of their compliance with the process. The greater difficulty in accessing those groups as well as their often unclear structures may render the implementation of international humanitarian law uncertain. The message about sanctions must be clearly spread: the members of armed groups – like those of other groups participating in the conflict and members of government forces or groups attached to them – will have to answer for atrocities committed. That is, moreover, the approach pursued by the International Criminal Court, which deals with crimes involving any individuals, including non-state actors. Moreover, that message should have a double connotation. On the one hand, it should make it possible to warn the perpetrators of potential atrocities that they run the risk of measures being taken against them and that the conflict will not be an excuse. On the other hand, it also makes it possible to emphasize that everyone will be treated in the same way, thus reaffirming the principle of equality. With regard to armed groups, the experts furthermore observed that the ICRC can play a particular role in this area. To the extent that it has access to those groups, it is responsible for ensuring that it

20 On this matter Decaux, above note 2, justifiably adds that a system of this kind must be based on the principles of subsidiarity and *non bis in idem*.

21 The ICRC is particularly interested in the question of respect for international humanitarian law by armed groups and has identified a series of tools which are useful in that respect: see in particular Annex 3 of the report entitled “International humanitarian law and the challenges of contemporary armed conflicts” presented at the 30th International Conference of the Red Cross and Red Crescent (30IC/07/8.4). The document is available at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/\\$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf) (last visited 14 July 2008). See also the article by Anne-Marie La Rosa and Carolin Wuerzner, “Armed groups, sanctions and the implementation of international humanitarian law”, in this issue.

22 See Additional Protocol II, Article 6(5), which states that “at the end of hostilities, the authorities in power endeavour to grant the broadest possible amnesty to persons who have participated in the conflict ...”.

conveys a clear message about sanctions and the importance of punishing all serious violations of international humanitarian law. Disseminating the rule is not enough; the message also has to deal with the modalities of respect as well as the mechanisms which are to be implemented in case of violation and which must in every case uphold the principles of fair justice.

Different factors have an influence on the role played by sanctions with regard to the behaviour of armed groups. The size of the group, the intensity and the length of time during which control is exercised over a territory are factors which are crucial to the establishment of institutions similar to those that the states are obliged to set up. The existence of a clear line of command also remains essential as a vehicle for the rules which are in line with humanitarian law, to train the troops in this area and in order to put a stop to behaviour which is not in keeping with humanitarian law and to sanction it. Finally, the objectives pursued by an armed group may also have a bearing on the place reserved for sanctions within the rationale of the group. For example, the importance of the armed group's being recognized by the international community may have a decisive positive influence as it might prompt the group to show its respect for the law and its ability to emphasize and repress what is prohibited, which, by the same token, could help to improve their image. By contrast, it is easy to imagine that sanctions will have a negligible impact on an armed group whose primary objective is to destabilize and hence disrupt any aspect of normalization. If the group is fighting a racist or oppressive regime, it will adopt certain values more easily than if its primary objective is to call those values into question and to reject the system on which they are based. The importance attached by a group in the first category to its image within the international community may have a positive impact on its willingness to demonstrate its concern to uphold those values and its ability to repress contraventions of them.

It is nonetheless evident that, in that area, more far-reaching investigations still need to be carried out on how justice could be carried out by armed groups and on the possible need to adapt the principles of fair justice in those situations, which are by nature unstable and intended to be transitory. International humanitarian law does not appear to rule out, a priori, the initiation of criminal proceedings by armed groups. Rather, it stresses the importance of the regular constitution of those courts, their independence and lack of bias, and the fact that they must give all recognized judicial guarantees.²³ In that respect, it seems important and necessary to carry out work to shed more light on the procedural guarantees which are indispensable to fair criminal justice and to assure their concretization and respect in this context. If no measure is taken by the parties concerned against the members of armed groups who have committed violations of humanitarian law, that asymmetry in the application of sanctions will merely evoke a sense of injustice and impunity which will unfortunately cancel out any positive impact that the sanction might otherwise have. It is therefore

23 See, in particular, Article 3 common to the Geneva Conventions and Article 6(2) of Additional Protocol II.

important to seek the necessary mechanisms which will ensure, on a common basis, the repression of anyone who violates humanitarian law, regardless of their allegiances.

Groups and sanctions

The impact of the group on the behaviour of combatants has been dealt with amply in the Influence Study. For example, that study points out that a number of research studies carried out in the course of recent decades have shown that combatants are frequently influenced not by ideology, hatred or fear, but rather by group pressure and the fear of being rejected – or even punished – by the group. The Influence Study hence stresses the importance of understanding the dynamics of the groups to which reference is made.²⁴ In military terms, reference is made, in particular, to the spirit of comradeship within the military unit to which the people belong and which gives rise to vertical and horizontal solidarity. In that context, it becomes vital to obey the authority. At the interregional meeting held by the ICRC on the issue of the role of sanctions, an UNPROFOR commander, who was present at the siege of Sarajevo in 1995, observed that exercising authority is not the same as imposing fierce discipline. Rather, a subtle alchemy is created in the absolute trust which exists between the commander and his subordinates and which is based on the powers conferred on the commander and, of course, his authority, but also on the caring concern that he shows for each of his men, with a very strong emotional component.²⁵ The obvious ambivalence of his remarks should be noted, as well as the possibility that those dynamics are for better or for worse, hence the importance of reconciling the principles and rules which the authority promotes by virtue of international humanitarian law in such a way that the pressure exerted by the group and by the authority has a positive effect on the individual. Everything possible must be done to ensure that group pressure does not lead to serious violations being perpetrated. In a hypothesis of that kind, the danger is that a spiral of violence may be triggered, irreversibly increasing the initial divide between the reprehensible behaviour of the group members and respect for the rule.²⁶

For troops to show respect for the rules and principles of humanitarian law in situations of extreme violence such as armed conflicts, those rules and principles must be part of relevant training courses. The troops must undergo training which allows them to absorb fully the rules and principles of humanitarian law as well as other obligations connected with the service, so that

24 The Influence Study draws particular attention to the mechanisms of moral disengagement and dehumanization: see in particular ch. 11 of *Behaviour in War: A Survey of the Literature*, which deals at length with those issues. See also Muñoz-Rojas and Frésard, above note 1.

25 See, in this regard, the Address by Jean-René Bachelet in this issue.

26 See Cottino, above note 6, who deals in particular with the question of the responsibility of the collective unit. This report has not examined that issue in greater depth but its importance must not be underestimated.

they become a natural reaction. Bearers of weapons must not have to weigh up the pros and cons in the heat of the action and their instinctive reactions must be in keeping with the law.²⁷

Sanctions must also be part of that process and must, first and foremost, be consistent with the rules which already exist within the society or group in question, since if it allows for a legitimization of crimes, those sanctions will be pointless. The idea of the necessary respect for the law and consequently for sanctions must also be part of the training, so that if bearers of weapons do not comply with the rule, they know that they will be punished. In that respect, it seems appropriate for the armed forces to develop codes of conduct that include simple rules which integrate in a practical manner the behaviour which is promoted by respect for the principles of humanitarian law, including matters relating to the consequences of non-compliance, with those principles. Enough disapproval cannot be voiced for military (or other) cultures which make hatred of the enemy one of the basic aspects of military training.²⁸ Such attitudes are essentially contrary to the entire philosophy of international humanitarian law and attack its very foundations. Regression with regard to respect for the principles of humanity is often the result of demonizing or dehumanizing the enemy or policies which aim at ostracizing the “other”.

On the last point, the force of the group must not be underestimated in the attitude to the enemy. Before the start of a conflict, the group may be called upon to play a decisive role in the awareness that it conveys to its members of belonging to a whole while stigmatizing the non-adherence – to varying degrees – of others, who are thus perceived as “abnormal”. In that structure, “normativity” is equated with “normality”, which is translated by the construction of new social rules that set apart those who are “abnormal” – that is, those who belong to another group set up for the set of circumstances in question. When an armed conflict begins, it then becomes very easy to target groups of “others” on the basis of their particular status (of a created minority) and their lack of normality in the new meaning given to that term. That outlawing has the advantage of providing justification for the discriminatory treatment meted out to the groups created and, in particular, allows the members of the dominant group to justify their action by treating it as normal and in line with the new rules that have been established. A policy justifying the breaches of the law is thus created and allows violations to be accepted without even raising the question of whether or not they are in line with the rules of international humanitarian law.

A kind of transfer of the framework and reference values is thus observed; it causes the perpetrators of violations not only to accept acts which they would have condemned unreservedly some years previously but also to consider those acts “normal”. That transfer of normality explains why the threat of sanctions is

27 See the article by Emanuele Castano, Bernhard Leidner and Patrycja Slawuta: “Social identification processes, group dynamics and the behaviour of combatants”, in this issue.

28 On this matter see in particular Michel Yakovleff, “The foundations of morale and ethics in the armed forces: some revealing variations among close allies”, *Inflexions*, No. 6 (2007).

not only improbable within the group thinking but, moreover, why they feel protected by the new rules which its members have taken on board.

It will also be seen that this type of attitude may vary in accordance with the spheres of influence. That means that normality is not necessarily the same within a society and among the bearers of weapons, who may accept certain violations of international humanitarian law more readily as they consider that the perception of their environment is not necessarily the same as that of an ordinary citizen and that the defence of their cause justifies violations of that kind. That defence may even vary within the same armed group in accordance with the activities and responsibilities of the different members of the group. The perception of normality may vary from one sphere of influence and decision to another.²⁹

It is therefore necessary to break these group dynamics which lead to violations being stripped of their seriousness by stressing the fact that sanctions are not negotiable and by recalling that they are not a possibility but a certainty and that accountability is required.

Transitional justice

To place the sanctions provided for with regard to humanitarian law back in the context of a review of transitional justice is to acknowledge that, taken in isolation, they are frequently insufficient and even ineffective. It is also to accept simultaneously that humanitarian law does not rule out having recourse to complementary solutions which are better able to take account of the mass or systematic nature of the violations that have been committed in the context of armed conflicts or of special contextual aspects and the expectations of the population or individuals concerned.

To position humanitarian law in that manner stimulates respect for it and its implementation by placing those issues back in the flow of justice which, when mass violations have been committed, covers several decades, takes varying forms ranging from the quest for truth via memory to reparations and requires mechanisms which are suited to those purposes. That pragmatically based integrated approach means that advantage can be taken of every opening in the hope of triggering a sort of set of healthy dynamics at the level of society and the individuals concerned; when the social fibre has been deeply damaged, the worse thing is for nothing to happen. Transitional justice is then accepted as complementing criminal justice and it is also acknowledged that it may help to reconstruct a society and individuals who form it as well as to write a coherent, authentic and honest history. However, there can be no compromise over the fact that criminal sanctions must be imposed in the case of serious violations to show

29 For a discussion of the existence of different dynamics which may exist in parallel, with emphasis on the local setting, see the article by Samuel Tanner: "The mass crimes in the former Yugoslavia: participation, punishment and prevention?", in this issue.

that the prohibitions are absolute and that no departure from them will be allowed, even if, in the actual context, that approach may clash with approaches which are aimed at promoting peace and are based on the mechanisms of forgetting and granting an amnesty.³⁰ One also needs to be aware of the risk of the measures of transitional justice being manipulated when they are used in the context of policies of disguised impunity.³¹

Transitional justice shifts attention from the crime and places the victim at the heart of the process. Its mechanisms are also complementary and may be defined in the light of the objectives pursued: “quest for truth”, “reparations”, “repression” and finally “sanctions” within the framework of the overriding general objective of reconciliation. Institutional reform is a prerequisite that is frequently necessary to ensure the actual effective implementation of the mechanisms of transitional justice. It integrates initiatives pertaining to restorative justice, according to which the crime is seen as having caused a wound which needs to be treated. Viewed from that perspective, the question of reparations must be given an appropriate place as, if sanctions are to have a preventive impact, necessary consideration must be given to reparations for the victims. Indeed, there can be no justice without social justice and there can be no social justice or a return to a peaceful coexistence when a large part of the population is left to suffer. That also allows a shift from the individual scale – face to face in the context of criminal proceedings – to a more collective scale, which allows better account to be taken of the principle of equal treatment. Those reparations integrate classic aspects of accountability, but go beyond them by including reparations which are outside traditional legal obligations and are based on individual responsibility. It thus seems that it is a serious error to link reparations closely with a criminal sentence, all the more so in a situation in which only a small minority of those who are guilty are ultimately sentenced.

Reparations may take various forms, may be financial or otherwise, or be imposed on a collective or individual basis. Reparations may also integrate public policies in favour of the victims or those eligible to access public services and equal opportunities. They also cover rehabilitation and reintegration measures as well as more symbolic measures – such as official apologies, guarantees of non-repetition, the construction of memorials or the holding of commemorative ceremonies – to which the victims are particularly attached.³²

30 The danger of adapting an act of justice to political imperatives has been underlined by Eric Sottas, “Transitional justice and sanctions”, in this issue.

31 Ibid. See also the article by Pierre Hazan, which analyses an example of truth and reconciliation in which the component of accountability and repression was ignored. Pierre Hazan, “The nature of sanctions: the case of Morocco’s Equity and Reconciliation Commission”, in this issue.

32 For a more detailed discussion on transitional justice and its components, see in particular Anne-Marie La Rosa and Xavier Philippe, “La justice transitionnelle”, in Vincent Chetail (ed.), *Peacebuilding and Post-conflict Reconstruction: A Practical and Bilingual Lexicon*, Cambridge University Press, Cambridge, 2008 (forthcoming).

Victims

No one would deny the importance of the role of the victim in the process of sanctions. The reviews deal mainly with the definition of victim and the way in which victims may participate in this process.³³

In fact, a large number of people may be affected directly or indirectly and in various ways by violations of humanitarian law. Time must therefore be taken to consider the types of violations to which they have been subjected. The role and place of the victims in the process of sanctions may be defined in different ways. They depend on the nature of the measure to which the victims give priority by virtue of the circumstances, being aware that measures may be neither criminal nor disciplinary but may be considered effective by the persons concerned. For example, “the right to know”, which is recognized by humanitarian law and which is not defined merely in terms of repression, grants victims who are members of a dead person’s family the right to obtain information about the fate of their relatives and hence goes on to give official recognition to the violations to which they were subjected.

The wide range of measures which may be envisaged does not detract from the importance of the criminal trial for the victims; through the pronouncement of the sentence, it highlights what is forbidden and grants them a kind of symbolic reparation. No one contests the fact that victims must be given access to the criminal trial – as witnesses who generally appear for the prosecution, or as *parties civiles* in the countries which have that institution. The question today is rather to determine at what stages (investigations, trial, sentence) and in what forms the criminal proceedings are open to them.³⁴ In every case, care must be taken to avoid creating unrealistic expectations by involving the victims. The quest for legal truth which is defined by virtue of the objectives of the trial does not always match the willingness of the victims to tell their stories, which would contribute to shaping a more comprehensive picture of the reality. Care must be taken to ensure that the entirely legitimate claim for a form of justice which serves the victims does not corrupt the way in which justice is carried out and is not harmful to the serenity of its proceedings, its integrity and impartiality. On the other hand, the prerogatives linked to the need to pronounce a judgment within a reasonable time frame must not be allowed to distort the legal investigation by giving priority to bargaining procedures regarding the charges, the guilt or the sentence (plea bargaining) which may obscure the truth. For consensual justice to have the desired effect, it must be carried out within a precise framework and the judges must be allowed to use their full discretion to reject agreements between the prosecution and the defence if they are not absolutely convinced that the facts as

33 See in this regard the article by Christian-Nils Robert, Mina Rauschenbach and Damien Scalia in this issue.

34 For a critical presentation of the mechanisms of participation by the victims at the International Criminal Court, see the article by Elisabeth Baumgartner, “Aspects of victim participation in the procedure of the ICC”, in this issue.

they are presented represent the true picture of events. Moreover, those procedures must inevitably be accompanied by minimum guarantees which ensure their truthfulness and the expression of sincere remorse and which offer an opportunity to apologize to the victims.

It is also imperative that greater account be taken in the criminal process of the problem of the victim who has to testify and the suffering and risk that that may represent for the victim by emphasizing the consistency which must be inherent in judicial proceedings with regard to different cases as well as between the different international and national courts. One can never emphasize enough how important it is for judges and lawyers, including national judges and lawyers, to be appropriately trained in conducting questioning and in particular cross-examination in such a way as to preserve the integrity of the persons questioned, many of whom have been the victims of the crimes for which the accused is on trial. In that connection, particular attention must be paid to victims of sexual violence.

Finally, there seems to be virtual unanimity about the fact that participation by victims in the criminal trial does not include the stage in which the sentence is decided, which should be left to the competent judiciary body.

Conclusion – Proposed elements of sanctions

The wide range of different factors influencing the definition and the implementation of sanctions explains just how difficult it is for sanctions imposed in isolation to change people's behaviour.

In pondering the specific reasons why sanctions may be ineffective and the factors explaining why they are called into question, the review has endeavoured to understand why sanctions are not used to their best value by those involved in conflicts and by external observers. The review has considered reinforcing the existing framework but has also examined supplementary reinforcement solutions aimed at placing sanctions in a position that they should have. The task was to attempt to identify the elements and modalities which could today bring about a concrete improvement in the effectiveness of sanctions in the efforts by all parties to ensure greater respect for international humanitarian law. They are summarized below and include elements governing the effectiveness of sanctions, including those that are inherent in sanctions imposed for violations of humanitarian law or those pertaining to the perpetrators.

Elements which determine the effectiveness of sanctions

1. Any message about the imposition of sanctions for violations of international humanitarian law must be accompanied by measures intended to improve adherence to the rules and respect for them.

- The necessary measures must be taken by all parties concerned to ensure that the applicable rules and sanctions are integrated into their system of reference, that they are known and properly applied.
 - At the national level, the judges must be trained in international humanitarian law and they must take part in the process of interpretation and clarification of that field of law, in particular by taking into account studies carried out in that area at the international level.
 - A rationalization effort must be undertaken to ensure that sanctions are more effective. It must deal with both the legal texts and the competent courts.
 - The states should be encouraged to ensure the similarity of guarantees and procedures used by courts responsible for dealing with violations of international humanitarian law.
2. To ensure that sanctions play an effective preventive role, the potential perpetrators of violations of international humanitarian law are to be given detailed information about the different types of sanctions and the modalities of their application
- At this level, education must enable individuals to identify clearly what is permissible and what is not.
 - This education must also be provided for all who are instrumental in the application of international humanitarian law, regardless of the group to which they belong, and including those acting under the mandate of the United Nations and competent regional organizations.
 - The principles and rules promoted by the authority must be in line with the requirements of international humanitarian law.
 - Any aspect which is based on hatred of the enemy must be excluded from training programmes.
3. Training and education in international humanitarian law need to be integrated as unavoidable mechanisms which imply genuine reflex reactions, particularly among bearers of weapons.
- Information about sanctions must convey the fundamentally wrongful nature of the behaviour which is being sanctioned.
 - The efficiency of sanctions and their dissuasive character depend on the degree to which the rule subject to the sanctions has been internalized by bearers of weapons.
 - The aim of this internalization must be to prompt genuine reflex reactions among the bearers of weapons, leading to respect for the rule.

Elements relative to violations of humanitarian law

4. The concept of sanctions must incorporate prevention of a repetition of the crime and be based on a pragmatic and realistic approach.

- The definition, procedure and implementation of sanctions must be designed in such a way that they make it possible to prevent the repetition of such crimes.
 - A pragmatic and realistic approach consists of searching for ways to prevent the crime from being committed or repeated, bearing in mind the resources available. It must respond to the dual challenge of conforming to the rules and principles of general international humanitarian law while adhering closely to the contingent requirements of the national framework.
 - Sanctions cannot be defined *in abstracto* but must rather be defined in relation to the concept of justice; in that context, the complementary nature of transitional justice must be recognized.
 - The above-mentioned pragmatic and realistic approach should also be able to provide guidelines for exercising universal jurisdiction. They should draw on the studies already carried out and be based, in particular, on the possible link which should exist between the perpetrator of the offence and the place of trial as well as on the modalities of co-operation between the states concerned.
5. Criminal sanctions remain the essential and unavoidable axis for the treatment of all serious violations of humanitarian law
- Sanctions must help to reinforce the rules of humanitarian law and the fundamental universal values which underpin them.
 - Imprisonment must remain the central element in sanctioning serious violations of international humanitarian law.
 - Criminal sanctions may not be viewed solely from the perspective of the prison sentence. In terms of effectiveness, they must be perceived with regard to the context, that is, all elements enabling sanctions to have a greater impact on the individual to which they apply and on the society to which he belongs, with account being taken, in particular, of the cultural factor.
6. Sanctions for violations of humanitarian law share some essential common characteristics irrespective of the circumstances.
- For the perpetrator of violations, sanctions must be certain in nature, that is, they must be automatic regardless of the perpetrator. The idea is that every perpetrator of violations knows that there is a price to pay.
 - To be effective, sanctions must be imposed as quickly as possible after the act has been committed (need for justice to be rendered without delay). An initial reaction must take place without delay, regardless of whether or not that is by combining disciplinary and judicial measures.
 - Sanctions should be implemented with respect for all aspects of the principle of equality. They must lead to all perpetrators being treated equally, irrespective of the group to which they belong.
 - Sanctions should be pronounced as close as possible to the places where the crime has been committed and people on which they are intended to have an effect. In that context, international justice must aim to reinforce national capacities and, whatever the case, only constitute a transitory or complementary process.

- Delocalization should only be envisaged as a very last resort and should inevitably be accompanied by a local sensitization mechanism.
7. Apart from the seriousness of the crime, other aspects need to be taken into account when selecting the sanction, in particular those linked to the context and the personal characteristics of the perpetrator (individualization).
- It is essential for the sanctions to be proportionate to the seriousness of the crime in order to avoid generating lack of comprehension and resentment among both the victims and the perpetrators. This proportionality is a guarantee for all parties.
 - The judge must adopt a synthetic approach which causes him to take account of the whole of the environment which led to the reprehensible act being committed.
 - The principle of proportionality thus implies an understanding of complex relations between several variables which judges have to take into account in order to avoid any disproportion.
 - Sanctions must take account of the personality of every perpetrator, which implies an individualized treatment of every violation.
8. In order for sanctions to play an effective preventive role in the society in question, they must be made public and be subject to appropriate dissemination measures.
- The effectiveness of a sanction is linked to its speed and the publicity given to it with regard to both the perpetrator and the group.
 - The dissemination obligation is fundamental because it is the means of informing and educating people about what a serious violation is and the consequences which it entails.
 - The clarity of the rule and of the message which accompanies it is indispensable for them to be effective. The message must cover the rationale which has led to the sanction and justifies the choice of that particular sanction. It must also cover the entire process leading to the imposition of the sanction.
9. The aim of the various mechanisms for imposing sanctions (criminal or otherwise) must be to reinforce each other in order to ensure that the overall process is as effective as possible.
- These mechanisms should be based on clear rules which define the criteria to be respected in terms of impartiality, independence, publicity and compliance with the standards guaranteeing fair procedures, including the passing of the sentence.
 - The large number of different sources of sanctions (jurisdictional, non-jurisdictional, disciplinary, traditional or other) must give rise to a clear distribution of powers among the bodies.
 - That is all the more important in systems which combine disciplinary and jurisdictional measures. The complementarity should give priority to effectiveness and the mechanisms should not be redundant.

- In that sense, the mechanisms of traditional justice should also be explored, while ensuring respect for the criteria referred to above.

Elements relative to perpetrators

10. Sanctions must lead the perpetrators to recognize their responsibility in the violation of humanitarian law and thus to help to enable the society as a whole to be aware of the impact of certain events which have affected it.

- The process set up must at least ensure that the perpetrator has no choice other than to accept his responsibility and that the sanction is in accordance with the extent of his responsibility for the violations committed.
- As far as it is possible and beyond what has been referred to above, that process must allow the perpetrator of the violations to show evidence of regret and give him the opportunity to ask for forgiveness.

11. Subordinates must be given the opportunity to understand the consequences of their acts and to assume responsibility for them.

- Codes of conduct need to be developed which include simple rules incorporating in a practical manner the types of behaviour which are bound to generate respect for the principles and rules of humanitarian law, including the consequences associated with lack of respect for those principles.
- Individuals must also be informed of their rights and obligations with regard to an order which is a priori or manifestly illegal and the ensuing consequences.
- Operational mechanisms need to be developed which allow subordinates to obtain clarification about orders that they are given, where they believed that the orders were not precise or manifestly illegal.
- Subordinates may not shelter behind the argument of superior order to avoid their responsibility.

12. Sanctions must first and foremost target the commanders responsible for mass crimes.

- Sanctions must not be linked solely to the direct nature of involvement in the conduct of a violation of the law but must also take account of the degree of responsibility in relation to the order given.
- The responsibility of military and civilian commanders and superior officers is not limited to the orders given but also covers lax control and deficiency in training.
- From an operational point of view, it is essential for the chain of command and the measures which may reasonably be expected at each level in that chain to be clearly established.

13. The role of the instigators must be evaluated precisely and give rise to an involvement which is in keeping with their responsibility.

- The responsibility of the instigators in preparing the environment which is conducive to violation of international humanitarian law by contributing, in

particular, to the demonization of the enemy and the justification of the crimes which are committed against that enemy, has to be clearly recognized.

14. In order to achieve its aim, the overall process of sanctions must ensure that the victims adhere to it and to that end take account of considerations in the field of social justice.

- Sanctions may be imposed on the perpetrator only after a previous quest for truth (no sentencing based on insufficient evidence or reasoned out by analogy) and after the victims have been given responses in terms of reparations.
- The participation of victims and society in general in the process of justice will allow it to be given credibility and will enable the system to be adapted to each context.
- Transitional justice with the victim as its focus makes it possible to expand the classic framework of sanctions by integrating other aspects which must, however, not be confused with its original hard core.
- Recognition must be given to the role of victims in criminal justice, but that role may not go so far as to allow their participation in determining the quantum of the sentence.

The definition of traditional sanctions: their scope and characteristics

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Abstract

For more than 30 years the codification of state responsibility has been the main task of the International Law Commission, which has placed greater emphasis on financial reparations than on criminal sanctions. Since the 1990s, however, the responsibility of individuals for gross violations of humanitarian law has been one of the main topics in international law. This new approach implies discrepancies between domestic practice and international case law in terms of the nature and scale of sanctions, the role of victims and also the accountability of non-state entities, including private companies and international organizations.

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By tradition, international public law gives short shrift to the concept of penal sanction. Indeed, the term figures last in the *Dictionnaire de droit public international*¹ entry for “sanction”, which is generally defined as designating “a broad range of reactions adopted unilaterally or collectively by the States against the perpetrator of an internationally unlawful act in order to ensure respect for and performance of a right or obligation”. The dictionary cites the doctrinal definition provided by an Italian author, L. Forlati Picchio: “A sanction would be any conduct that is contrary to the interests of the State at fault, that serves the purpose of reparation, punishment or perhaps prevention, and that is set out in or simply not prohibited by international law”.² Sanctions may be centralized, in an institutional framework,³ or decentralized, with the risk of a return to “private justice”.⁴ Much has been written on the relationship between calling into play the international responsibility of the state and having recourse to sanctions, and on

the relationship between the related concepts of “countermeasures” and “reprisals”, between primary and secondary law, and so on.⁵

Codifying state responsibility

Far from clarifying matters, the codification of responsibility in international law has only served to spark further debate. While the classic law of responsibility aimed to establish a link of causality between an “unlawful” act and the person to whom it was attributed, with a view to giving effect to the right to reparation, the deliberations of the International Law Commission (ILC) conducted under the influence of Special Rapporteur Roberto Ago underscored the distinction between crimes and offences, introducing a “qualitative” element into a purely quantitative relationship, the reparation being intended to expunge the unlawful act and enable a return to the *status quo ante*. Recognition of the unlawful act was deemed to be a form of moral redress, whereas material reparations, “of equivalent value” in the absence of *restitutio in integrum*, were an accounting operation.

The concept of “punitive” reparations, introduced by the arbitration of the *Rainbow Warrior* case between France and New Zealand, broke sharply with that tradition, whether by developing the concept or introducing an exception to it.⁶ The primary object of responsibility had been the cessation of the unlawful action and reparation, not the punishment of a “fault” and the stigmatization of the “guilty” state. The codification overseen by the most recent ILC Special Rapporteur, James Crawford, smoothed over the discrepancies, but the concept of “fault” has been introduced into the law on state responsibility, like a worm into an apple.⁷ Responsibility no longer concerns only the interplay of bilateral relations between two states, which are permeated by reciprocity – every state is both judge and defendant – it now calls into question multilateral obligations, *erga omnes*, based on mandatory law.⁸

1 Jean Salmon (ed.), *Dictionnaire de droit public international*, Bruylant/AUF, Brussels, 2001 (citation translated from the French).

2 Laura M. Forlati Picchio, *La sanzione nel diritto internazionale*, CEDAM, Padua, 1974 (translated from the French).

3 Jean Combacau, *Le pouvoir de sanction de l'ONU, étude théorique de la coercion non militaire*, Pedone, Paris, 1974. On the emerging issue of the “responsibility to protect”, see the forthcoming acts of the Nanterre colloquium organized by the Société française de droit international in June 2007.

4 See in particular the theses of Linos-Alexandre Sicilianos, *Les réactions décentralisées à l'illicite, des contre-mesures à la légitime défense*, LGDJ, Paris, 1980; and Denis Alland, *Justice privée et ordre juridique international, étude théorique des contre-mesures en droit international public*, Pedone, Paris, 1994.

5 For a brief presentation see Emmanuel Decaux, *Droit international public*, 5th edn, Dalloz, Paris, 2006.

6 Sentence of 30 April 1990, *Report of International Arbitral Awards (UNRIAA)*, Vol. XX. Significantly, the French arbitrator was a specialist in private, not international, law. See Gilbert Guillaume, *Les crises internationales et le droit*, Le Seuil, Paris, 1994. For a discussion of developments in the law on responsibility, see the colloquium organized in Le Mans by the Société française pour le droit international, *La responsabilité dans le système international*, Pedone, Paris, 1991.

7 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Texts and Commentaries*, Cambridge University Press, Cambridge, 2002.

8 Pierre-Marie Dupuy (ed.), *Obligations multilatérales, droit impératif et responsabilité internationale des Etats*, Pedone, Paris, 2003.

The International Court of Justice (ICJ), after much hesitation, itself expressly defined the concept of *jus cogens* in two recent decisions relating to the case of *Armed activities on the territory of the Congo*, that of 19 December 2005 (*Democratic Republic of the Congo v. Uganda*) and that of 3 February 2006 (*Democratic Republic of the Congo v. Rwanda*).⁹ As emphasized by the ad hoc judge Joe Verhoeven, however, its recognition of massive human rights violations was purely declaratory and spawned no debate on responsibility. The ICJ's capacity to provide redress in the case of large-scale crimes attributable to a state remained intact. In its decision of 26 February 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the ICJ was at pains not to qualify a state as such as guilty of genocide, with all the legal and political consequences such collective responsibility would have in historical terms. In fact, it is hard to see how, except in the event of *debellatio*, as in the case of Germany in 1945, a state could be held accountable for the crimes committed. It was by dissociating the German people from the Nazi regime responsible for Germany's defeat that the Allies enabled a democratic Germany to obtain rapid recognition. Is not convicting a state, by thus imposing on it either the abstract guilt of a "juridical person" that will one day disappear or change names, or the collective responsibility of a people instead of its leaders, tantamount to mortgaging the future not only of the people concerned but also of their neighbours?

Moreover, the action of a self-proclaimed entity like the Republika Srpska or of uncontrolled forces such as those in eastern Democratic Republic of the Congo tended to call into question the purely state concept of international responsibility. Here the concepts of complicity and of the obligation to prevent and repress were easier to grasp than the direct responsibility of a state. Thought should no doubt be given to the responsibility of non-state entities and liberation movements. Except for the rules of international humanitarian law, which govern their behaviour in certain circumstances, the Palestinian movements and their fratricidal clashes exist in a legal vacuum and this is a reality accepted by the entire international community, which is quick to denounce the abuses attributable to the state of Israel. The fact remains that behind every abstract entity there are men who commit crimes, as the International Criminal Tribunal for the former Yugoslavia recalled, referring to the Nuremberg judgement: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁰

9 Emmanuel Decaux, "La CIJ et les droits de l'homme", *Studi di Diritto Internazionale in onore di Gaetano Arangio-Ruiz*, editoriale scientifica, Turin, 2004.

10 Nazi Conspiracy and Aggression, Judgement of the Nuremberg International Military Tribunal, 1 October 1946, *Trial*, Vol. I.

Developments in international law on penal responsibility

The changes in the international law on state responsibility are all the more marked in that they go hand in glove with recent developments in the law on penal responsibility. The *Dictionnaire de droit public international*¹¹ cites Part VII of the Treaty of Versailles,¹² which, under the title “Penalties”, juxtaposed the personal responsibility of Kaiser Wilhelm II, arraigned before a special tribunal (Art. 227), and the prosecution of persons accused of having committed acts in violation of the laws and customs of war (Arts. 228 ff.). These two series of provisions remained largely a dead letter. Part VIII, which dealt with “Reparations”, was hardly more successful and poisoned relations between the Allies in the 1920s. It is interesting to note, however, that the Treaty of Versailles made a clear distinction between penal sanctions against persons, on the one hand, and financial reparations for the damages inflicted, on the other. Already at that time it proved very difficult to calculate “losses” and “damages” in terms of human lives and devastated properties and territories.

The concept of penal sanctions was definitively incorporated into international law after the Second World War, when the Nuremberg and Tokyo Tribunals were established. The inception of the International Criminal Court in 1998 marked the logical culmination of the process. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide stipulates that the

Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties [in French, *sanctions pénales effectives*] for persons guilty of genocide or any of the other acts enumerated in article III. (Art. 5)

A similar article in the 1949 Geneva Conventions stipulates that the

High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions [in French, *sanctions pénales adéquates*] for persons committing, or ordering to be committed, any of the grave breaches of the present Convention ... (Art. 129 of the Third Geneva Convention relative to the Treatment of Prisoners of War)

The double play of state responsibility and individual criminal responsibility poses a number of problems, if only in respect of the immunity of the state and its representatives, except when provided otherwise in treaties or by decision of the UN Security Council. The French Cour de Cassation recalled this in its ruling of 13 March 2001 in the case implicating Colonel Muammar al-Gaddafi, the Libyan leader, in the 1989 attack on the

¹¹ Above note 1.

¹² The Versailles Treaty, 28 June 1919, available at <http://www.yale.edu/lawweb/avalon/imt/menu.htm> (last visited 14 April 2008).

UTA DC-10.¹³ The associations of relatives of the victims tried to bring the case before the European Court of Human Rights, but their dubious financial conduct (they accepted an out-of-court settlement) led to their application being struck out as moot on 4 October 2006 by the Grand Chamber, which did not even examine the admissibility of the government's argument that the applicants had lost their status of victims.¹⁴ Even if the obstacle of state immunity is removed, the dual nature of state and individual responsibility remains intact.¹⁵ In practical terms, it was no easy task to distinguish between the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and that of the ICJ, there being a serious risk that they would end up with conflicting case laws, notwithstanding decisions by the other court. The ICJ based its decisions largely on the facts established by other independent bodies, but it did not seek to obtain the elements of "proof" of which only the ICTY had confidential knowledge; this led to a serious distortion, as pointed out by the ad hoc judge Ahmed Mahiou, in that the court found that there had been no genocidal intent without having really sought to prove that such an intent had existed. The result was the emergence of doctrinal criticism opposing the inadequacy of the court's "civil" procedure against the nature of the penal dispute.

The scale of sanctions

This dual development has served, I feel, to blur the classic concepts of sanctions and reparation. The international community has removed capital punishment from the scale of sanctions, another significant development since the Nuremberg and Tokyo trials. This step forward by the ad hoc tribunals established by the Security Council was enshrined in the Rome Statute, albeit not without difficulty as witness Article 80. The harshest sentence the International Criminal Court can hand down is a "term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person" (Art. 77). Since the jurisdiction of the national courts remains intact, a "double standard" may be applied. This was the case in Rwanda, where those sentenced by the local courts were publicly executed whereas the most senior officials brought before the International Criminal Tribunal for Rwanda were spared. The idea that the nature of the sanction must be in proportion to the scope of the crime must be overcome. Even a return to the law of retaliation would not be sufficient for mass crimes. It is precisely because the crime committed is "beyond compare" that it is morally

13 *Arrêt de la Cour de Cassation*, 13 March 2001, No.1414. For a discussion on the principle, see the colloquium organized by the Association SOS Attentats, *Terrorisme, victimes et responsabilité pénale internationale*, Calmann-Lévy, Paris, 2003. See also Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation", *European Journal of International Law*, Vol.12 (3) (2001), pp. 595–612.

14 *Association SOS Attentats and de Boëry v. France*, 4 October 2006.

15 See Rafaëlle Maison, "La responsabilité individuelle pour crime d'Etat en droit international. De la sanction pénale des individus par les juridictions internationales", dissertation, Paris II, 2000.

right to break the cycle of vengeance, of settlement of accounts – such as the expedited “trial” of the Ceauçescus – and public lynchings – such as Sadam Hussein’s execution to taunts of hatred – but without resorting to a “symbolic trial”. The imperatives of truth, justice and reparation, recalled in the guidelines adopted by the Human Rights Commission pursuant to the work of Louis Joinet, would not be met.¹⁶

The situation is even more complex when it comes to the sentences handed down by the various chambers of the ad hoc tribunals, which are far from coherent. There are variations over time – between those initially charged, who were simply following orders, and the principal “leaders” – and above all differences in appreciation between the examining and the appeal chambers. These developments and contradictions reflect the absence of a clear ranking of crimes. The “light” sentences recently handed down by the ICTY against those responsible for the Vukovar massacre sparked official protests from the Croatian authorities.¹⁷ Above and beyond what the “public” thinks, which varies depending on the camp, the “penal policy” of the ad hoc tribunals – torn between the prosecutor and the court – obviously lacks coherence and thus serves no pedagogical purpose. The same no doubt applies to our national courts, which are too humane, but the need to render exemplary justice “for humanity’s sake” sets international justice apart. Having been unable to prevent large-scale crimes, the international community should aim to dissuade by effectively combating impunity. It will probably not be possible to prosecute all the perpetrators of a genocide, just as not all the families of the victims will obtain compensation, but it must not be forgotten that mass crimes, although decided at the highest level by a handful of political or military leaders, are the sum of thousands of individual crimes whose perpetrators also bear full responsibility. By waiving the head of state’s immunity and rejecting the excuse of due obedience, penal law broke a vicious circle. Everyone is now fully accountable, to themselves and in law, and must answer for their acts.¹⁸

The concept of “victims’ rights”, so dear to French diplomacy, is new to penal law, especially with regard to mass crimes. The victims who attend the trial are there as witnesses, not as “civil parties”. This was already the case in Nuremberg, when Mrs Vaillant-Couturier testified.¹⁹ The Rome Statute endeavours to make a place for the victims, but in reaction to the practice of the ad hoc tribunals, selecting victims as mere witnesses subject to cross-examination who are bereft of respect for their suffering and on occasion of protection against subsequent reprisals. Article 79 provides for the establishment of a “Trust Fund”

16 Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

17 See *Mrksić et al.* (IT-95-13/1), see also James M Yoch Jr, “ICTY prosecutors appeal “lenient” sentences in Vukovar massacre trial”, *Jurist*, 30 October 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/10/icty-prosecutors-appeal-lenient.php> (last visited 14 April 2008).

18 Gen. Jean-René Bachelet, *Pour une éthique du métier des armes, vaincre la violence*, Vuibert, Paris, 2006.

19 For her testimony see *The Avalon Project at Yale Law School, Nuremberg Trial Proceedings Vol. 6, Forty-fourth day*, Monday, 28 January 1946, available at <http://www.yale.edu/lawweb/avalon/imt/proc/01-28-46.htm> (last visited 14 April 2008).

for the victims, but its scope is uncertain. If the Court collects no “fines or forfeiture” from convicted criminals who have organized their own insolvency – Charles Taylor, for example, received legal aid from the Special Tribunal for Sierra Leone²⁰ – international solidarity will have to provide the funds. It would also be unfair to all the anonymous victims who did not come forward for lack of proof or proper proceedings to draw too close a link between the fate of the accused and that of the victims. It would be particularly unhealthy if, depending on the whims of international politics or penal strategy, some victims were indemnified and others forgotten. Again, moving from the individual criminal trial – where the victim and the accused are brought face to face – to a collective trial for mass crimes poses problems of principle and practical difficulties of another kind entirely. In this field, the guidelines drawn up by Théo Van Boven and Chérif Bassiouni on the forms of collective reparations are useful.²¹ They propose not just symbolic measures, useful though these may be, but also rehabilitation, medical assistance and legal programmes.

It might be useful to come back to the notion of “effective penalties”. The first condition is that the penalty must exist. This implies combating impunity at all levels, from the head of state down to the foot soldier, and in all places, avoiding, as far as possible, double standards (the UN Secretary-General unfortunately spoke of a “rich man’s war” in the former Yugoslavia,²² yet all victims are entitled to the same vigilance, whether in Darfur or in Chechnya). But the International Criminal Court must not become a regional court either, mired in African crises. Even if justice has a cost, and choices have to be made in terms of what inquiries and prosecutions to undertake, beyond the limits inherent in the ICC’s jurisdiction any selectivity in international justice would spell long-term disaster for its legitimacy.

The effectiveness of the national framework

The best guarantee of universality remains the principle of complementarity, the idea being that national justice must be the first bulwark against violations of human rights and humanitarian law. Effective national prosecutions are also one of the positive obligations incumbent on all states. The states party to the Geneva Conventions must “respect and ensure respect” for humanitarian law. Under the

20 See David Charter, “Charles Taylor war crimes trial opens in The Hague amid funding crisis”, *The Times*, 7 January 2008, available at <http://business.timesonline.co.uk/tol/business/law/article3141681.ece> (last visited 14 April 2008).

21 Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, UN Doc. E/CN.4/Sub.2/1996/17; and regarding the Commission on Human Rights, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62.

22 UN Secretary-General Boutros Boutros-Ghali famously said this in July 1992, when accusing the Western powers of fighting “the rich man’s war” in Yugoslavia while ignoring the collapse of Somalia.

human rights system, whose guaranteed rights were characterized for far too long by an approach of “non-interference”, the states parties to international instruments must also respect, protect and implement their commitments. In a number of recent decisions (the Turkish cases in particular), the European Court of Human Rights has referred to the importance of the positive obligations arising from Articles 2 and 3 of the European Convention on Human Rights, emphasizing the obligation to investigate, prosecute and punish any violations committed. Justice must undoubtedly be as close to the ground as possible, international justice serving in the last resort to guarantee the sound administration of justice.

For the principles of subsidiarity and complementarity to be fully functional, national justice must live up to its name and comprise competent, independent and impartial judges. What is true of the regular courts is even truer of courts of exception, starting with military tribunals.²³ How can one speak of exemplary rulings if, in the name of *esprit de corps*, the decisions of the military courts are neither motivated nor published, as is still the case in France? Effective sanctions are closely related to a form of court “pedagogy” that must be based on clear markers and predictable sanctions. This should be an imperative at all levels, from the immediate disciplinary action taken by a hierarchical authority to the penal sanctions that are handed down within a “reasonable period” and take account as required of the situation or the attenuating circumstances. In this regard, time plays a role that is often overlooked. The Milošević trial, which got under way far too late – the ICTY was established in 1993 and had jurisdiction as of 1991, yet it was not until 1997 and the Kosovo crisis that the first indictments were delivered – and was held up by what can only be called unwarranted procedural manoeuvring before being cut short by events known to all, was tragic proof that the ICTY had reached an impasse. Trials concluded over ten years after the fact, no matter how successfully, undermine court effectiveness. Justice may be catching up with all the perpetrators of crimes in cases where there is no statute of limitations – one instance is the long-delayed trial of some of the elderly surviving members of the Khmer Rouge clique of leaders – but only immediate “effective sanctions” can play a truly dissuasive if not preventive role.

The responsibilities of the United Nations

The United Nations also has an essential role to play. Where local justice is non-existent, the Peacebuilding Commission recently created as a subsidiary body by the Security Council and the General Assembly should make “reconstruction” of the legal system and the restoration of legal certainty a priority.²⁴ The ongoing examination, notably at the initiative of Switzerland, of the concepts of justice and

23 See all the principles listed in Issue of the administration of justice through military tribunals: report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr. Emmanuel Decaux, UN Doc. E/CN.4/2006/58.

24 See <http://www.un.org/peace/peacebuilding/> (last visited 14 April 2008).

the rule of law should be taken further, in particular in countries emerging from crisis. How can sanctions be effective when there are no judges or prisons and the former warring parties share the spoils of political power? Just like the struggle against corruption, the requirement of justice should not be used by one side against the other to pursue the war by other means, to impose a victor's justice and gloss over the crimes that were the price of victory.

But the United Nations should also apply the most stringent criteria of justice to itself. This it has not yet done. Peacekeeping operations are not within the purview of the European Court of Human Rights, as recalled in the recent decisions on *Behrami v. France* and *Saramati v. France and Norway*, handed down on 2 May 2007 by the Grand Chamber in respect of the UN Interim Administrative Mission in Kosovo (UNMIK) and the Kosovo Force (KFOR). The Court referred to the ILC's recent work to transpose the codification of state responsibility to the draft article on the responsibility of international organizations and quoted the UN legal counsel as stating that "the acts of such subsidiary organs were in principle attributable to the organization and, if committed in violation of an international obligation, entailed the international responsibility of the organisation and its liability in compensation" (para. 33). The ILC has to clarify not just the responsibility of the organization as such, but also that of its staff, which should not, as in the case of sexual abuse committed by peacekeepers, hinge on more or less lax national systems. A shared disciplinary system would seem the best means of maintaining the highest standard within multinational contingents, on the basis of the principle of subsidiarity and respect for *non bis in idem*.

There remains one constraint that is hard to get around: speaking of justice and sanctions implies calling into question the states and international organizations, but leaves open the question of armed groups, not to mention terrorist movements. The dissuasive nature of sanctions goes hand in hand with the hierarchy and forms of discipline inherent in established structures, even under the terms of Additional Protocol II to the Geneva Conventions. This being so, the argument of reciprocity cannot be invoked in situations that are by their very nature asymmetrical. It is to be hoped that the argument of exemplary sanction will be all the more effective. Sanctions are not only negative; they may also have a positive import.

Social identification processes, group dynamics and the behaviour of combatants

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Abstract

In this contribution, respect for international humanitarian law among combatants is considered from a social psychological perspective. According to this perspective, the social identities derived by individuals from their membership of social groups provide norms and values used by the individual to interpret events, form opinions and decide upon a course of action. We argue that group identities are particularly salient in combat situations, and that they have a profound influence on combatants' decisions to respect or violate international humanitarian law.

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Violations of international humanitarian law (IHL) are carried out by individuals, but in order to understand such violations and hopefully prevent them from happening, we have to look at the determinants of such behaviour. We thus need to consider the group dimension, and more specifically the role played by social identities in framing the situation and guiding behaviour.

By social identities we mean “that part of an individual’s self-concept which derives from his knowledge of his membership of a group together with the

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value and emotional significance attached to the membership”.¹ Although we may regard our attitudes and behaviours as idiosyncratic, in reality much of what we think and do is profoundly shaped by our connection to social groups, varying from extremely large and abstract groups such as ethnic or religious communities to small working teams or the family. All these connections provide nested and cross-cutting social identities that direct and define our experiences and prescribe ways of thinking, being and acting. In other words, they make us who we are, so much so that we may think of the individual as the emergent property of such social categories.

The attitudes and behaviours of combatants are no exception. We shall in fact argue here that social identities held by combatants are even more important in shaping their behaviour than is typically the case. Respect or disregard for international humanitarian law is therefore largely a matter of group behaviour, not only because it is usually small-to-average-sized groups of individuals who commit violations or decide to respect the law, but also, and perhaps most importantly, because the combatant is acting not as a unique individual but rather as a soldier either of an army of a certain country or of a non-state army which defines itself in political, religious or ideological terms. As is well known, much of the training of combatants, aside from the technical aspects, is a process of de-individuation both of the combatant himself and of the enemy.² The reason for this is that it is difficult for an individual to mistreat, torture or kill another human being, but much simpler for a member of group A to enact such behaviours towards a member of group B.

The two sections following of this article both deal with understanding violations through the concept of social identity, but they focus on different aspects of this concept.

The first part examines the role of collective identities in providing the behavioural guidelines for the individual. We briefly review the accounts for atrocities that emerged in the social sciences after the Second World War, and argue that although many of the earlier insights are still relevant (notably those advocating that a view of the perpetrators as individuals with disturbed personalities should be abandoned), it is important to understand that the perpetrator is acting as a group member. In order to understand how individuals end up committing atrocities, we need to realize that they often view them differently, namely as necessary behaviour that is morally required of them as group members. The second part further expands on the motives for social identification and seeks to relate considerations about identities grounded in large social categories, such as one’s country or ethnic group, to the group dynamics that characterize combat units.

1 Henri Tajfel and John Turner, “An integrative theory of intergroup conflict”, in William Austin and Stephen Worchel (eds.), *The Social Psychology of Intergroup Relations*, Brooks-Cole, Monterey, Calif., 1979.

2 Jason Burke, *Al-Qaeda: The True Story of Radical Islam*, IB Tauris, London, 2004.

The role of group membership in prescribing behaviour

Although psychology is the study of mental processes and behaviour in general, the attention of psychologists is often devoted to problematic processes and behavioural patterns either at the level of individual psychopathology or at the societal, collective level: prejudice and discrimination, inter-group violence and conflict. To understand behaviour in war and, more broadly, respect for international humanitarian law, the theory and research findings emerging from social psychological research are most relevant, for they are primarily concerned with behaviour that is shaped by and directed towards social entities and institutions, and towards other individuals because of their membership of specific social groups. In other words, there is plenty of psychological theory that is relevant to understanding why one person commits atrocities against another person,³ but in most cases where international humanitarian law is concerned, what we are witnessing is behaviour that is unlawful (besides being unethical and morally repugnant) towards other persons by members of a group *because* of their group membership.

This may seem an obvious statement, but its implications are quite important, and they often go forgotten in the analyses put forward to explain violations – relying, as they do, on sadistic (or otherwise pathological) personality accounts. The attribution of this behaviour to specific character traits of the perpetrator is psychologically satisfying,⁴ particularly when the perpetrators are people of our own group,⁵ whose behaviour we need to consider atypical in order to maintain a moral and just view of ourselves – “the soldier who tortured the prisoner was a sadist, a monster”. While in some cases this explanation might hold some value, the proportion of variance explained by such factors is likely to be small: personality and personality disorders explain little of the atrocities that we witness.

In the social sciences this conclusion was drawn long ago and perhaps most eloquently by Hanna Arendt in her reporting of the Eichmann trial, when she noted that evil is, in fact, quite banal. Eichmann, according to Arendt, was no monster, no psychopathological case. He was terribly, normally, regularly human. His actions, resulting in the death of millions of people, were, according to Arendt, the consequence of his desire to do his job well. The fact that his job consisted of masterminding mass killings becomes secondary.

Arendt’s work was enormously influential and helpful in moving us away from an explanation of “evil” exclusively in terms of psychopathology, and her ideas are very consistent with the findings in classic social psychological

- 3 Russell Geen and Edward Donnerstein, *Aggression: Theoretical and Empirical Reviews*, Academic Press, New York, 1983.
- 4 Lee Ross, “The intuitive psychologist and his shortcomings: distortions in the attribution process”, in Leonard Berkowitz (ed.), *Advances in Experimental Social Psychology*, Vol. 10, Academic Press, New York, 1977, pp. 173–220.
- 5 Thomas Pettigrew, “The ultimate attribution error: extending Allport’s cognitive analysis of prejudice”, *Personality and Social Psychology Bulletin*, Vol. 5 (1979), pp. 461–76.

experiments such as Milgram's work on obedience⁶ and Zimbardo's prison study,⁷ which also testify to the fact that context can make most, if not all, individuals behave in unspeakable ways. What is lacking in these perspectives, however, is a clear definition of "context". Elsewhere we have argued that what is critical in understanding how people make sense of atrocities committed by their fellow countrymen is the level and type of identification with their in-group.⁸ In a series of studies we investigated whether in-group responsibility for atrocities (such as the killing of out-group members) moderates the use of moral disengagement strategies to deal with the psychologically challenging situation.⁹ In the most recent studies, we show that when it is the in-group, as opposed to another group, that commits the atrocities (such as the torturing and killing of prisoners), individuals dehumanize and devalue the victims more and show a lesser tendency to provide reparations to the (out-group) victims and to punish the (in-group) perpetrators. But this is usually more pronounced among individuals who hold a glorified image of the in-group. For instance, in another study we gave participants fictitious articles depicting torture carried out by soldiers of their own army (vs. another army) and subsequently asked them to summarize the events described in the article. We then analysed the language used in these descriptions, and found that when the perpetrators are in-group members (as opposed to out-group members), and when individuals have a high tendency to glorify (as measured by the in-group glorification scale),¹⁰ there is less attribution of responsibility, along with a tendency to minimize the events. In other words, high glorifiers construct a different reality when the in-group is the perpetrator, as compared with low glorifiers or with both of these groups of individuals when confronted with an out-group perpetrator.¹¹

These results were obtained not with combatants but with community samples in the United States (they replicate in other cultures).¹² However, they offer insights into the kind of contexts discussed in this article, namely respect for international humanitarian law. Indeed, we contend that the very link to the in-group is a key factor in understanding how misdeeds take place. Obedience to authority and "taking on the responsibilities of the job" are important factors and

6 Stanley Milgram, "Behavioural study of obedience", *Journal of Abnormal and Social Psychology*, Vol. 67 (1963), pp. 371–8.

7 Philip Zimbardo, Craig Haney, Curtis Banks and David Jaffe, "The psychology of imprisonment: privation, power and pathology", in Zick Rubin (ed.), *Doing unto Others: Explorations in Social Behaviour*, Prentice-Hall, Englewood Cliffs, N.J., 1974, pp. 61–73.

8 Emanuele Castano, "On the perils of glorifying the in-group: intergroup violence, in-group glorification, and moral disengagement", *Social and Personality Psychology Compass*, Vol. 2 (2008), pp. 154–70.

9 Emanuele Castano and Roger Giner-Sorolla, "Not quite human: dehumanization in response to responsibility for intergroup killing", *Journal of Personality and Social Psychology*, Vol. 90 (2006), pp. 804–18.

10 Sonia Roccas, Yechiel Klar and Ivo Liviatan, "The paradox of group-based guilt: modes of national identification, conflict vehemence, and reactions to the in-group's moral violations", *Journal of Personality and Social Psychology*, Vol. 91 (2006), pp. 698–711.

11 Patricia Slawuta, Bernhard Leidner and Emanuele Castano, ms. submitted for publication, 2008.

12 Sabina Cehajic, Rupert Brown and Roberto Gonzales, "Dehumanization of the Mapuches in Chile", unpublished ms., 2007.

can at times come into play independently of a person's group membership.¹³ Yet, by and large, misdeeds and – of specific concern here – violations of IHL occur because individuals see their behaviour as a moral duty at the group level, as opposed to “simply” non-reprehensible. The critical factor, as clearly elaborated by Reicher and his colleagues,¹⁴ is not only that the behaviour is “okay” but that it is morally required. In other words, it is not that it does not matter that some people are getting killed, and why that specific group is getting killed; on the contrary, it *does* matter. The perpetrators are likely to think that it is their moral duty to kill the others.¹⁵ We believe that those same in-group glorifiers who, as we have seen, devalue the victims more and go so far as to dehumanize them are also the ones most likely to engage in various acts of mistreatment, should the occasion arise.

In the preceding section we have presented what we consider to be a more accurate view of the determinants of atrocities at the inter-group level than the explanation (disturbed personalities) often put forward in popular culture and the media, as well as an account of dominant views in the social sciences, which are centred on the roles that individuals assume and on their desire to fulfil their superiors' expectations of them or those of their entourage. Specifically, we have discussed how a glorification of the in-group, and its dominant narrative, may be crucial factors in understanding violations of international humanitarian law. We shall return to this issue in the concluding remarks. Next, however, we would like to focus on another level of analysis and discuss how the contexts in which the combatants find themselves are particularly conducive to accentuating social identities and thus strongly affecting individual behaviour through group norms.

Social identification processes and group dynamics

Because human beings are social animals,¹⁶ it is obvious that most of their life is conducted in groups and that the social identities derived from such memberships are a constitutive part of who they are. Some evolutionary psychologists consider the group to be an important level at which selection occurs and that characteristics favouring the group are more likely to be passed on.¹⁷ Social

13 It should be noted, however, that even these two factors are intrinsically related to the social identity under consideration here. The preoccupation with doing a good job stems from the desire for advancement within a certain social environment or group and for the regard of other members in that group. Similarly, the authority to which obedience is offered does not come about in a social vacuum, but rather within a specific social entity or institution.

14 Stephen Reicher, Alexander Haslam and Rakshi Rath, “Making a virtue of evil: a five-step social identity model of the development of collective hate”, *Social and Personality Psychology Compass*, Vol. 2 (2008), pp. 1313–44.

15 Of course, the reference here is not to soldiers killing other soldiers in battle; that does not require much theorizing. What we are referring to is mistreatment and the use of violence, often lethal, against unarmed civilians or prisoners.

16 Elliot Aronson, *The Social Animal*, 4th edn, Worth/Freeman, New York, 1984.

17 Linnda Caporael, “The evolution of truly social cognition: the core configuration model”, *Personality and Social Psychology Review*, Vol. 1 (1997), pp. 276–98; Elliot Sober and David S. Wilson, *Unto Others: The Evolution and Psychology of Unselfish Behaviour*, Harvard University Press, Cambridge, Mass., 1998.

psychologists have, moreover, as seen above, long recognized the importance of social identities in shaping attitudes and behaviour. In recent years increasing attention has been devoted to understanding the motives for social identification. In other words, while belonging to social groups is considered a given, the reasons why individuals identify with specific social groups, sometimes very strongly, has become a matter of investigation.

In the early work of Henry Tajfel, the European social psychologist and originator of the social identity theory, we find the nucleus of a motivational account of the development of social identities, which holds that membership of a social group helps the individual to know and have a coherent image of himself.¹⁸ These ideas have recently been further developed in the uncertainty-identity theory,¹⁹ according to which a fundamental need to reduce uncertainty, particularly about the self, induces individuals to identify with social groups – especially highly entitative groups.²⁰ Another account of why individuals identify with social groups comes from the merging of social identity theory with terror management theory,²¹ a general theory of human behaviour grounded in psychoanalytic theory and existentialism. According to this view, the fundamental anxiety that humans have because of their awareness of the inevitability of their own death needs to be warded off, and one of the psychological mechanisms that serves as an anxiety buffer is social identification – that is, by seeing themselves as part of a large, long-lasting entity, individuals symbolically escape the finitude of their own individual existence.²² A series of experiments provide support for this conjecture, showing greater identification with and clinging to the in-group when individuals are primed for death (either supraliminally or subliminally).²³

In addition to possibly serving these two fundamental needs of individuals, identification with a social entity has been shown to be a buffer against more mundane anxiety. Early findings in social psychological research demonstrate that when participants in an experiment were left waiting for the next phase of the experiment to start, they chose more frequently to wait in the company of others, rather than alone, if they had been made anxious about the experiment itself.²⁴ In other words, individuals when anxious seek intimacy and close proximity with others. Anxiety and stress, although different, are related

18 Henri Tajfel, “Cognitive aspects of prejudice”, *Journal of Social Issues*, Vol. 25 (1969), pp. 79–97.

19 Michael Hogg, “Uncertainty-identity theory”, in Mark P. Zanna (ed.), *Advances in Experimental Social Psychology*, Vol. 39, Academic Press, San Diego, 2007, pp. 69–126.

20 Emanuele Castano, Vincent Yzerbyt, David Bourguignon and Eleonore Seron, “Who may enter? The impact of ingroup identification on ingroup–outgroup categorization”, *Journal of Experimental Social Psychology*, Vol. 38 (2002), pp. 315–22.

21 Sheldon Solomon, Jeff Greenberg and Tom Pyszczynski, “A terror management theory of social behaviour: the psychological functions of self-esteem and cultural worldviews”, in Mark P. Zanna (ed.), *Advances in Experimental Social Psychology*, Academic Press, San Diego, 1991, pp. 93–159.

22 Castano, E., Yzerbyt, V.Y., & Bourguignon, D. (2003). We are one and I like it. The impact of entitativity on social identification. *European Journal of Social Psychology*, 33, 735–754.

23 Emanuele Castano and Mark Dechesne, “On defeating death: group reification and social identification as strategies for transcendence”, *European Review of Social Psychology*, 16 (7) (2005), pp. 221–55; Zygmunt Bauman, *Mortality, Immortality, and Other Life Strategies*, Stanford University Press, Stanford, 1992.

24 Stanley Schachter, *The Psychology of Affiliation*, Stanford University Press, Stanford, 1959.

concepts, and it comes as no surprise that identification with social groups can potentially reduce stress too. Recent findings show that this is because social identification affects the degree to which a particular stressor is perceived as posing a threat to the self (primary appraisal), and the perceiver's assessment of his ability to cope with a threat (secondary appraisal). For instance, Haslam, O'Brien, Jetten, Vormedal and Penna²⁵ have demonstrated that among members of Royal Air Force bomb-disposal teams, work-related stress was determined by the level of identification with the team via its effect on the extent of social support they enjoyed from other team members. The stronger the identification with the team, the stronger the support felt and the lower the stress experienced.

Uncertainty, anxiety and stress: can we think of a situation that is more aptly characterized by the presence of these three conditions than combat? Combat breeds uncertainty and anxiety about our very existence: combatants literally do not know if they will live to see another day. Massive coping mechanisms are required to keep at bay not only the animalistic, instinctual fear of death, but also the existential anxiety discussed above. And as individuals in combat situations seek the social support needed to deal with the stress they experience, social identities pertinent to the conflict are likely to become very salient, with a concurrent polarization of beliefs.

The social identities of combatants are multiple and nested. In the case of a conflict between states these identities derive from national identity, the state army and ultimately the combatant's unit. At the beginning of the conflict we can, as shown above, expect views of the out-group to become more negative and out-group members to be demonized and dehumanized. This is particularly likely to occur among soldiers, who, we can assume, are more inclined to be in-group glorifiers than the average person. Soldiers are also more likely to see themselves as those whose duty it is to defend the morally superior in-group against the dehumanized out-group. From this it follows that international humanitarian law might come to be perceived as not entirely applicable – after all, the enemy is not quite human. The threat of sanctions therefore becomes even less relevant than it would normally be. Indeed, several scholars have spoken about dehumanization and similar strategies as moral exclusion or delegitimization.²⁶ The target is delegitimized and excluded from the moral community and therefore also from the scope of justice.²⁷

25 Alexander Haslam, Anne O'Brien, Jolanda Jetten, Karine Vormedal and Sally Penna, "Taking the strain: social identity, social support and the experience of stress", *British Journal of Social Psychology*, Vol. 44 (2005), pp. 355–70.

26 Daniel Bar-Tal, "Causes and consequences of delegitimization: models of conflict and ethnocentrism", *Journal of Social Issues*, Vol. 46 (1990), pp. 65–81; Susan Opatow, "Moral exclusion and injustice: an introduction", *Journal of Social Issues*, Vol. 46 (1990), pp. 1–20.

27 An institutionalized form of this psychological process can be seen at work in instances where individuals are categorized so as to exclude them from certain privileges or protection. The intense battle over the concept of enemy combatant in the United States is one such example.

Literature on the Holocaust provides some insights in this regard. When Hitler's police battalions were sent to the newly conquered eastern territories to carry out massacres of the Jewish population and other targets such as the Bolsheviks, the commanders first ordered their men to shoot women and children whom they referred to *inter alia* as conspirators against the German people, the kind of propaganda with which Germans had been bombarded for years before the beginning of the war. It is widely accepted that this, among other strategies, was successful in convincing ordinary men to begin shooting children.²⁸ As many commentators have noted and empirical findings now show, it becomes easier and easier to kill once you have started.²⁹

Depiction of the enemy as an evil, subhuman creature creates a climate within which previously unthinkable actions can be contemplated. Such dehumanization of the enemy can take place at various societal levels. It can be broadly propagated by high-ranking politicians and government officials, or relegated to the army, which has to do the dirty work of war. We may think that, at least in Western countries, the lessons of the Second World War prevent that perverted logic from taking hold. But of course the only thing that changes is who the enemy is and, depending on the respective viewpoint, who is good and who is evil. As an anonymous US soldier reported during the Vietnam War, "You are trained "gook, gook, gook"³⁰ and once the military has got the idea implanted in your mind that these people are not humans, they are subhuman, it makes it a little bit easier to kill 'em".

The process through which demonization and dehumanization of the enemy by the overall group may affect the behaviour of combatants, causing them to commit violations of international humanitarian law, is quite clear. If we consider the specific circumstances in which combat units operate, it becomes even clearer how things easily get out of hand. Findings from research studies on confessions will serve to illustrate this point. Research on confessions made during interrogations on crimes such as murder has shown that individuals can come to believe they have committed the crime when in fact they have not. This is most likely to occur when the suspect is being interrogated in circumstances that create high levels of fatigue and stress (prolonged interrogation, lack of sleep, in addition to the obvious stress inherent in the situation) and by interrogation techniques that make the suspect believe that the victim actually deserved his fate, or at least that it is understandable why the suspect would have killed him.³¹ Many such confessions turn out to be false. A number of factors are involved in situations like these, but one of relevance here is how a person's willingness to confess to a crime

28 Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, HarperCollins, New York, 1992.

29 Andi Martens, Spee Kosloff, Jeff Greenberg, Mark Landau and Toni Schmader, "Killing begets killing: evidence from a bug-killing paradigm that initial killing fuels subsequent killing", *Personality and Social Psychology Bulletin*, Vol. 33 (2007), pp. 1251–64.

30 Derogatory nickname for Vietnamese.

31 Saul Kassin, "On the psychology of confessions: does innocence put innocents at risk?", *American Psychologist*, Vol. 60 (2005), pp. 215–28.

he did not commit is affected by convincing him that the victims somehow deserved their fate (Interrogator: “I can see why you did it ... What man wouldn’t have done the same in your situation? She really asked for it”). What we think comes into play in these cases is the creation of a shared “reality” between the interrogator and the suspect, a “reality” in which the crime is presented as understandable and the perpetrator as not really guilty of much at all. Once the suspect signs the confession, of course, the true reality kicks in, and for the innocent suspect the consequences can be catastrophic.³²

A similar process may be at play in the context of combat. Unit members are continuously placed in highly stressful situations in which dehumanizing rhetoric about the out-group finds easy confirmation in everyday occurrences. The cohesiveness of the unit, already high for the reasons explained above, is likely to increase and lead to group dynamics through which the group ends up with behavioural decisions that are more polarized than those of each individual member.³³ It should be noted that polarization found in social psychological research does not suggest that group behaviour will always be more negative than individual behaviour.³⁴ In fact, the term polarization is used to convey the idea that the group will be likely to reach behavioural decisions (or to form attitudes) that are simply more extreme than those of individual members. If initial attitudes and behavioural intentions are positive, the group will probably be polarized towards more positive behaviour. In combat, members’ initial attitudes and behavioural intentions are biased towards the in-group and against the out-group; increased identification, cohesiveness and group dynamics are therefore likely to polarize towards allowing mistreatment or even killing of innocent civilians or of prisoners. Military training in state armies puts great emphasis on discipline and respect for rules (e.g. rules of engagement and international humanitarian law). However, given the importance of the group for the individual member, and particularly the small, cohesive unit that does so much for the individual member’s psychological equanimity, one wonders whether the reality matches the theory. The picture emerging from the only relevant data that has come to our knowledge is not very positive.

A recently released survey among US army forces serving in Iraq indicates that only half the soldiers or even fewer say that they would report a unit member for violations as grave as killing an innocent non-combatant.³⁵ These numbers are backed up by a junior non-commissioned officer, who states “we prefer to handle things within the unit; would only turn someone in if the violation put the safety of unit members in jeopardy”. Respondents to this survey (approximately 6,000

32 Saul Kassin, Christine Goldstein and Kenneth Savitsky, “Behavioural confirmation in the interrogation room: on the dangers of presuming guilt”, *Law and Human Behaviour*, Vol. 27 (2003), pp. 187–203.

33 Serge Moscovici and Marisa Zavalloni, “The group as a polarizer of attitudes”, *Journal of Personality and Social Psychology*, Vol. 12 (1969), pp. 125–35.

34 Stephen Reicher, “Crowds and social movements”, in Michael Hogg and Scott Tindale (eds.), *Blackwell Handbook of Social Psychology: Group Processes*, Blackwell, Oxford, 2002.

35 James Conway, *Mental Health Advisory Team (MHAT) IV Brief*, US Army Medical Department, Washington DC, 2007.

soldiers and Marines) were also asked about the treatment of non-combatants and their views on torture. Only 47 per cent of soldiers and 38 per cent of Marines say that all non-combatants should be treated with dignity and respect, while 17 per cent of both groups say that non-combatants should be treated as insurgents. Furthermore, 41 per cent of soldiers and 44 per cent of Marines say that torture should be allowed if it will save the life of a soldier or Marine and 36 per cent and 39 per cent respectively say that torture should be allowed in order to gather important information about insurgents.

These percentages are problematic in absolute terms, for as many as half the soldiers and Marines polled expressed attitudes and beliefs about how to conduct themselves while on duty that constitute violations of international humanitarian law. There are currently over 100,000 military personnel in Iraq. That means that some 40,000–50,000 soldiers or Marines are conceivably conducting operations in which, if they behave in line with their answers to this survey, they would be committing violations. In discussions with military personnel from different countries on various occasions we were informed that the US army is considered to be among the best-trained in the world with regard to rules of engagement and international humanitarian law. Yet half its personnel currently deployed in Iraq demonstrate beliefs, attitudes and behavioural intentions that bluntly contradict both those codes of conduct.

Furthermore, a comparison of answers by soldiers with those of Marines conveys an interesting message. Overall, Marines come across as less respectful of rules of engagement and of rules regarding how to treat non-combatants, and as more sympathetic to the use of torture. Such differences are not large, but they are systematic and should cause us to reflect upon another influence that social identification of subgroups within the same army may have. Because requests for the raw data on which the report is based have not been responded to, we have not been able to establish whether such differences are due, for instance, to greater exposure of Marines to combat and thus to its detrimental consequences on mental health.³⁶ However, data suggest that, if anything, Marines are less likely than soldiers to know someone seriously injured or killed, suffer casualties among members of their own unit, see dead or seriously injured Americans or be directly responsible for the death of an enemy combatant. Accordingly, they also report higher morale and are less likely to screen positive for mental health problems. This means that the overall more “violating” attitudes and beliefs of Marines, at least in the sample surveyed here, do not seem to be explainable in terms of higher stress or mental health problems. What remains is group norms: it would seem that Marines have norms for the treatment of non-combatants, torture and rules of engagement that differ from those of army soldiers. This observation suggests that different entities within the same military forces have a different understanding of what are expected to be universal principles and specific norms

³⁶ Screening positive for mental health problems means that one is twice as likely to commit violations such as destroying Iraqi private property or unnecessarily hitting a non-combatant. See Conway, above note 35.

regulating their actions as combatants. We would venture to say that Marines receive, if anything, more training than soldiers, and it would be interesting to investigate how this apparent disregard for what is supposed to be an important aspect of their training comes about.

In this second section we have reviewed social psychological theory and findings concerning the motives for social identification, and have concluded that combat is a context in which several of the factors likely to lead to close identification with, and increased cohesiveness of, one's unit are strongly at play. Furthermore, we have seen how this can lead to attitudes and beliefs that are inconsistent with international humanitarian law, primarily because the unit members are likely to see themselves as being at the forefront of the battle against evil in which the larger group (ethnic, religious, ideological) to which they belong is engaged. Finally, we have reviewed some of the statistics from a recent survey among US soldiers and Marines deployed in Iraq, which gave a bleak picture of respondents' beliefs concerning the treatment of non-combatants, the use of torture and the need to respect the rules of engagement.

Concluding remarks

In this article we have set out to show how group membership, and particularly the social identities that individuals derive from such memberships, are important aspects that must be considered for a thorough understanding of combatants' behaviour and specifically of their violations of international humanitarian law. Our contention is based on extensive social psychological theory and research findings which converge in suggesting that (i) individuals identify with social groups for a variety of motives, ranging from broad existential to epistemic ones; (ii) the context of application of international humanitarian law is inherently an inter-group context and thus respect for such laws, and violations thereof, are determined by norms developed at the level of social, not individual, identity; (iii) conflict in inter-group contexts is likely to be characterized by processes that lead to the glorification of the in-group and dehumanization of the "other", with a consequent view of the annihilation of the "other" as a moral duty; and (iv) in combat, social identities are very important and more strongly polarized inter-group behaviour is likely to occur, given the circumstances leading towards greater disregard for the "other" and the consequent relaxation of norms such as rules of engagement and international humanitarian law.

Building on our own work and on the conclusions reached by other colleagues,³⁷ we have argued that there is more to the atrocious behaviour routinely displayed by combatants (or, for that matter, non-combatants) towards prisoners, other soldiers or simply the civilian population than a distorted personality or the indifference and banality on which previous explanations have

37 Reicher, Haslam and Rath, above note 14.

focused. We contend that the very story a group tells itself when entering a conflict – the story about themselves, the group they are in conflict with, and their relationship (sometimes rooted in the distant past) – is of great importance.³⁸ The glorification of the in-group and the concomitant depiction of the other as the evil to be eradicated from this world converge to create a context in which the annihilation of the other is not only unproblematic, but also morally required. Against this psychological background, group dynamics at combat unit level lead to the enactment of behaviours that are both immoral and forbidden by the rules of engagement and by international humanitarian law.

Where does this leave us? If atrocities are not committed by psychopaths, screening our armies for psychopaths will do little to improve respect for international humanitarian law. If atrocities are not only the consequence of bureaucratization, the division of labour and the distancing of the perpetrator from the victim, monitoring these processes will not solve the problem. But if atrocities are habitually committed because an inter-group conflict is often, if not always, framed as a battle of good versus evil and combatants are likely to take this view to extremes and act upon it, then preventing violations will be an even more difficult and demanding task, particularly since such violations are not observed exclusively among guerrilla groups or untrained militias. While the problem may be more pronounced in those cases for want of the military professionalism that might mitigate the influence of such beliefs about the enemy, state armies are not a safe haven either, as shown by recent events ranging from the Srebrenica massacres of civilians by the Serbian army³⁹ to the torture of prisoners in Iraqi jails and at Guantánamo by US military personnel.⁴⁰ If even well-trained US army personnel display very limited battlefield ethics, as clearly shown by the data reported here, improving respect for international humanitarian law among combatants would appear to be very complex indeed. Our analysis suggests that demonization of the “other” at all levels might play an important role in influencing combatants’ behaviour and, in this regard, progress might have been made. When the United States launched the invasion of Iraq in 2003, President Bush made it clear that Saddam and his entourage (vaguely defined) were evil, not the Iraqi people. This is an important, welcome distinction, which may help to undermine some of the negative processes outlined above. But did it really make a difference? The reality on the battlefield is very different from that in which such distinctions can be easily maintained. When we fear for our life or seek revenge for our losses, the enemy “all look alike”⁴¹ and those distinctions are less likely to be maintained.

38 Branimir Anzulovic, *Heavenly Serbia: From Myth to Genocide*, New York University Press, New York and London, 1999.

39 Adam LeBor, *Complicity with Evil: The United Nations in the Age of Modern Genocide*, Yale University Press, New Haven, 2006.

40 The redefinition of torture by the US administration (or, for that matter, the American Psychological Society) changes nothing, in our view, with regard to the actions undertaken by its military and intelligence personnel.

41 Brian Mullen and Li-Tze Hu, “Perceptions of ingroup and outgroup variability: A meta-analytic integration”, *Basic and Applied Social Psychology*, Vol. 10 (1989), pp. 233–52.

Even if they are, what we have defined as evil is still ultimately another human being, and inhumane treatment therefore remains immoral, wrongful and in most cases illegal. Even more radically, we could ask ourselves what the meaning of this distinction is when our actions consist of bombing civilian-inhabited areas with the estimated loss – in the Iraq war, for instance – of hundreds of thousands of innocent lives?

The conclusion that follows from our analysis is not very optimistic. We suggest that violations of international humanitarian law might be caused or at least facilitated by an in-group narrative that becomes particularly destructive for the out-group in conditions of conflict. This narrative is a formative part of the group identity, and may thus be difficult to eradicate. Furthermore, a political discourse that would undermine such narratives is likely to encounter strong opposition and be labelled as unpatriotic. Yet we should not be entirely discouraged. The first step towards intervention to reduce the likelihood of violations of international humanitarian law is identification of the factors that contribute to its violation. It is our opinion that efforts to disseminate knowledge of international humanitarian law and incorporate it in training as much and as widely as possible should continue to be made, with an eye to making respect for certain norms central to the soldier's identity (as opposed to an afterthought) and ensuring that military units, particularly when engaged in violent conflict, do not become psychologically isolated from the larger entities of which they are part.

Insofar as violent conflict between humans continues to be a part of our existence, violations of international humanitarian law will continue to occur. Nonetheless, we hope that the insights we have gathered from psychological research on social identification processes will help guide the efforts of those attempting to reduce the occurrence and scope of such violations.

The mass crimes in the former Yugoslavia: participation, punishment and prevention?

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Abstract

This article discusses sanctions for and the prevention of mass violence. But rather than take a classic approach centred on statutory players such as soldiers, officers or political leaders, all of them acting within a legal chain of command, I focus on non-state perpetrators. My reflections are based on case studies of four former Serbian militiamen who took part in mass violence in the former Yugoslavia. I argue that it is of the utmost importance to consider the typical grass-roots relationship between these local players and their own community, so as to maximize the effect of sanctions and perhaps prevent further offences by potential future perpetrators.

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Mass crimes: legal and sociological approaches

What influence would international, national or local criminal sanctions have on the armed bands who took part in mass crimes in Croatia and in Bosnia and Herzegovina during the 1990s? I argue that to prevent and punish such acts, it is first necessary to assess and understand the perpetrators' experience of participation in mass violence. To begin with, two approaches to the study of "ethnic cleansing" or genocide, as in the former Yugoslavia or Rwanda, may be

envisaged: the legal and the sociological approach. For example, consider the concept of genocide. A legal approach defines genocide as a violation of the 1948 United Nations Convention for the Prevention and Repression of Genocide. It can, however, also be contemplated from a substantial, or sociological, perspective, which is the approach I shall take in this article. Viewed thus, genocide is no longer considered in terms of a violation of an international norm and rule, but rather as the result of social practices. It is not only a “nominal” crime that violates a rule of international law, but also a set of actions and social practices that need to be grasped and understood in order both to prevent and to sanction them. Consequently, mass crimes – seen from a legal perspective – concern the whole range of violations of international humanitarian and human rights law; they comprises, but are surely not limited to, the crime of genocide, crimes against humanity and war crimes. On the other hand, mass violence – to revert to a sociological perspective – includes the various aggressive social practices perpetrated by a group or entity against a civilian population. Such a body of perpetrators may comprise militias, armed thugs, an army, or even a whole state. The mass nature of these social practices depends on several criteria. First, they imply the existence of groups on both sides, be they perpetrators or victims. Second, they occur extensively: for example, the ethnic cleansing in Bosnia and Herzegovina was perpetrated by a complex network of soldiers, militiamen, armed bands and political protagonists. And third, social practices that typify mass violence occur over a long period of time: the ethnic cleansing of Bosnia and Herzegovina lasted three years. Massacres, rape, deportations, terrorization, imprisonment in concentration camps and extermination are the main characteristics of mass violence. In the following analysis, based on the foregoing typology and my socio-criminologist background, I shall focus mainly on a substantial, or sociological, appraisal of the experience of four former Serbian executioners who took part in the mass crimes committed in Croatia and in Bosnia and Herzegovina between 1991 and 1995. I shall then sum up the results of my ongoing research before outlining some propositions relating to the prevention and punishment of such specific perpetrators of mass violence.

Assessing the experience of four former Serbian perpetrators in the Yugoslav wars

The literature on how people “become evil”¹ or commit genocide or mass killing tends to focus on state agents. By definition, those individuals act within a specific hierarchical, bureaucratic structure which respects chains of command and reflects a high division of labour. Although such state institutions might not always be well

1 James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killings*, Oxford University Press, New York, 2002, p. 316.

co-ordinated,² they nonetheless convey the idea of “total institutions”. The soldier consequently evolves in an environment in which he is subordinate to, and dependent upon, the decisions and orders of his superiors. That social structure regulates all spheres of his personal life.³ The focus on state agents has produced a valuable core of knowledge which sheds crucial light on how such perpetrators become involved in violence against civilian populations, whether out of “obedience to authority”⁴ or because of the “banality of evil”,⁵ “doubling”,⁶ and so on. Yet recent events, such as the mass violence that occurred in the former Yugoslavia, show different and sometimes more volatile patterns than the Holocaust, on which the core literature is mostly grounded. In the Yugoslavian events, evidence shows that some perpetrators may have benefited from an “authorization space” – a certain latitude to act as they saw fit, and thus a criminal negligence on the part of state authorities; not all the perpetrators were affiliated to, or given orders by, the legal chain of command.⁷ Among these non-affiliated operatives, I focus on “armed bands”. They may be defined as perpetrators who are midway between two types of criminality. On the one hand, they are involved in “low- or middle-range criminality” such as theft, rioting, organized crime or trafficking.⁸ On the other hand, they take part in “long-range criminality” such as ethnic cleansing; the concept of range relates to the consequences, in terms of human lives, such criminality produces. Long-range criminality mostly concerns criminal political projects undertaken by central governments. Because of their dual involvement in both short- and long- range criminality, the participation by these armed bands in mass violence cannot be accounted for by explanations such as ethnic hatred⁹ or nationalist fervour.¹⁰ However, other explanations, such as greed, opportunism or pleasure,¹¹ are not accurate either, for they disregard the political objectives such armed bands nonetheless pursue.¹² I have therefore

- 2 For example, in his novel *Les Bienveillantes* (Gallimard, Paris, 2006), Jonathan Littell shows how competitive the SS and SA were in working towards the “Final Solution”, even though they were supposed to co-operate within the complex Nazi bureaucracy.
- 3 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, Anchor Books, Garden City, New York, 1961, p. 386.
- 4 Stanley Milgram, *Obedience to Authority: An Experimental View*, Harper & Row, New York, 1974, p. 224.
- 5 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, New York, 1964, p. 312.
- 6 Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide*, Basic Books, New York, 1986, p. 561.
- 7 Chérif Bassiouni, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, United Nations, New York, 1994, available at www.his.com/~twarrick/commxyu1.htm (last visited 13 March 2008).
- 8 Bill Buford, *Among the Thugs*, Norton, New York, 1992, p. 317; Vadim Volkov, *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism*, Cornell University Press, Ithaca, N.Y., 2002, p. 201.
- 9 Neil, J. Kressel, *Mass Hate: The Global Rise of Genocide and Terror*, Westview Press, Cambridge, Mass., 2002, p. 312.
- 10 Misha Glenny, *The Balkans: Nationalism, War and the Great Powers, 1804–1999*, Viking Press, New York, 2000, p. 726.
- 11 Paul Collier and Anke Hoefler, “Greed and grievance in civil war”, *Oxford Economic Papers*, 56 (4), 2004, p. 28; John Mueller, *The Remnants of War*, Cornell University Press, Ithaca, N.Y., 2004, p. 258.
- 12 Jeremy M. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, New York, 2007, p. 402.

proposed an alternative hypothesis, namely the emerging premeditation pattern,¹³ which I shall summarize in the following section.

The emerging premeditation pattern: approach and findings

In brief, the emerging premeditation pattern takes a sequential approach in considering participation by armed bands in mass violence. Hence, even though consent may be a reason for their members to get involved in mass violence, I argue that it is not the outcome of long-term advance planning to destroy a group, wholly or in part, because of its characteristics. Rather, such consent has to be split up into a series of decisions, which are the outcome of meaningful events produced by interactions between them within their group and with both their respective community and current war-related political and social events. The emerging premeditation pattern is based on material I collected during fieldwork undertaken with four former Serbian perpetrators-respondents, whom I shall name Radislav, Ivan, Nenan and Janko.¹⁴ Radislav, Nenan and Ivan operated in Croatia (Knin and Vukovar) in 1991–2. Janko, Nenan and Ivan took part in events that occurred in Bosnia and Herzegovina between 1992 and 1995 (Bratunac, Zvornik, Srebrenica and Sarajevo). These interviewees were divided into two groups: Radislav, Nenan and Ivan were part of a militia affiliated to the political opposition of the ultra-nationalist Serbian Renewal Movement (SPO) headed at the time by Vuk Drašković, a strong opponent of the clique supporting Slobodan Milošević, then president of Serbia. In contrast, Janko acted within an armed group affiliated to the central government. Apart from Nenan, whom Radislav and Ivan met during the violent events in Krajina, Croatia, they all came from the same town (that I shall refer to as Uzila) and had known each other for several decades. In my further analysis I identify four main characteristics of the relationship between the perpetrators, the collective structure in which they were embedded and the environment in which such atrocities took place. These four elements interacted, combined and fuelled the process inducing these perpetrators-respondents to participate in mass violence.

Politics and militarization in Serbia in 1990–1991

The political climate of contention in Serbia between pro-Milošević and monarchist factions back in 1990–1 stemmed from an underlying plot that ultimately led to the four perpetrators-respondents' participation in mass atrocities.¹⁵ The Serbian Renewal Movement saw that political climate as a

13 Samuel Tanner, "Political opportunities and local contingencies in mass crime participation: Personal experiences by former Serbian militiamen", *Global Crime*, Vol. 8 (2), 2007, p. 19.

14 For more details about the methodology and fieldwork, see *ibid.*

15 This contention revolved around the December 1990 multiparty elections held in Serbia and won by Milošević's party, the Socialist Party of Serbia. That victory was contested by the Serbian Renewal Movement, claiming that Milošević's party had stolen their political platform, namely the creation of a Greater Serbia.

window of opportunity to increase its own political legitimacy; to that effect the monarchist opposition, using the “defamation repertoire”, launched a harsh campaign centred on security issues to discredit Milošević and the federal Yugoslav People’s Army (JNA) by suggesting that the latter could no longer be trusted. Basically the opposition wanted to raise a genuine Serbian army of modern-day Chetniks (Slavic nationalist guerrillas) to defend Serbdom within and outside Serbia’s borders. According to some, that strategy worked on the population’s feeling of insecurity, regardless of their political affiliations.¹⁶ This political contention, interpreted by the four perpetrators-respondents as a crucial time to take action, triggered a “militarization” process that indisputably brought mass violence a step closer. Their mobilization was therefore both anti-government action and a will to protect Serbs abroad, which prompted them to leave for Croatia in 1991.

Local nationalistic cognitive scripts¹⁷

The contentious political climate outlined above definitely shook nationalistic attitudes and cognitive scripts that shape frames of meanings, which “do not simply affect the strategic calculations of individuals, ... but also their most basic preferences and very identity”.¹⁸ Alongside a political agenda pressing for the return of the monarchy and the Chetniks, three other cognitive scripts shaped the frame of meaning of the four perpetrators-respondents. A first refers to racial theories founded on evolutionism in which the Serb type ranks highest. Consequently Serbs, as perceived by these four individuals, should endorse the governance of the whole territory of Yugoslavia. On several occasions the interviews disclosed a largely reinvented history which disregards basic facts about Balkan demography.

A second set of cognitive scripts shaping the perpetrators-respondents’ frame of meaning revolves around mythology and religion. These contents are mostly activated by listening to popular songs that extol the prowess of former Chetnik warriors. In those songs, as well as in the said four respondents’ accounts, such warriors are often acting with the benediction of the Orthodox Church and are therefore considered as promoters and defenders of Christianity against Islam. Accordingly, executioners tend to be identified and referred to as heavenly warriors rather than as war criminals. Except for Janko, the respondents became

16 Dubravka Stojanovic, “The Traumatic Circle of the Serbian Opposition”, in Nebojsa Popov (ed.), *The Road to War in Serbia. Traumas and Catharsis*, Central European University Press, Budapest, 1996, p. 29.

17 “Cognitive scripts are one form of memory structure that evolve over multiple exposure to the same set of stimuli and/or repeated enactment of a particular behavior.” See A. Lakshmi-Ratan and Easwar Iyer, “Similarity analysis of cognitive scripts”, *Journal of the Academy of Marketing Science*, Vol. 16 (2) (1988), available at www.springerlink.com/content/hv0089x18652mqp3/ (last visited 12 April 2008).

18 Peter A. Hall and Rosemary C. R. Taylor, “Political science and the three new institutionalisms”, *Political Studies*, No. 44 (1996), p. 22.

true believers after their involvement in mass violence. But such cognitive scripts are also revealed through conversations about Serbian history, the Orthodox religion, novels and highly sensitive issues such as the continuing dispute between Croats and Serbs over the number of Serb victims of the Nazi-affiliated Ustashes during the Second World War.

And finally, a third set of cognitive scripts rests on specific beliefs shared both by the participants and by the community to which they belong. Revolving around local rural values, which differ from urban ones, they include mistrust of people living in urban centres such as Belgrade, a reversion to local preoccupations and values (pig and chicken farming, agriculture), and a simultaneous strong resistance to the ongoing modernization of Serbian politics and society (human rights activism, neo-liberal outlooks, political pluralism, anti-war protests). Even though the respondents promoted a nationalist agenda, it is important to stress that it differed on many points from the version promoted by Belgrade and the central government, a government which, moreover, was perceived in that area as illegitimate and not at all concerned with the interests of the rural population. Most of the Serbian communities that directly experienced the war and violence – as perpetrators or as witnesses of the Serb refugees coming from Croatia after Operation Storm there in 1995 – were from rural areas, rather than from the capital, Belgrade.¹⁹

The organizational background to the scenes of mass violence

The underlying social and organizational environment which set the scene for the mass violence also needs to be considered. I shall present a brief summary of the two contexts in which the four interviewees operated, namely Croatia and Bosnia and Herzegovina. The first concerns the participation of Radislav, Nenan and Ivan, between August 1991 and February 1992, in the events surrounding the formation of the self-proclaimed Autonomous Region of Krajina in eastern and western Croatia. As documented, the entire non-Serb population was ethnically cleansed from those areas.²⁰ Starting in July 1991 Krajina received more and more external human and material support, especially from Serbia. Interestingly, documents and interviews show that such support was not only officially (and unofficially) provided by the Serbian central government, but also de facto by volunteers like Vojislav Šešelj's Chetniks or executioners like Radislav, Nenan and Ivan affiliated to the Serbian Renewal Movement. Some evidence points to the fact that many perpetrators acted outside a single and united chain of command in the incarnation of the Yugoslav People's Army joint chiefs of staff.²¹ Moreover, the

19 This is not to say that the Belgrade population did not experience harsh years during the 1990s because of the international embargo imposed by the UN Security Council.

20 ICTY, *The Prosecutor v. Milan Martić*, Case No. IT-95-11, Judgement (Trial Chamber), 17 June 2007.

21 ICTY, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007; ICTY, *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Amended Indictment (Bosnia), 21 April 2001; Amended Indictment (Croatia), 22 July 2004.

situation appears to have been quite complex, as the perpetrators-respondents indicate major struggles between these multiple chains of command, many of which could not even be clearly identified. Consequently, besides creating an “authorizing space”, this network of perpetrators competing for control of the territories not only fuelled the violence but made it more indeterminate and unpredictable. Although nationalism is a key element, it is definitely not enough to sort out the myriad perpetrators who were involved in Croatia. The main protagonists included the Yugoslav People’s Army, the Croatian and Serb Territorial Defence Forces, Milan Martić’s police and several militias, among them Vojislav Šešelj’s Chetniks, plus “weekend killers” defined thus by Radislav, to name just a few. Radislav, Nenana and Ivan’s mobilization patterns each followed a different course. Rather than being appointed by a central government and a legal command – either to complement the Yugoslav People’s Army or militias loyal to the central government – they joined the war individually to see how they could “help”.²² After a few days in the field they finally linked up with units close to their ideology and hence deemed “prone to defend” Serbian interests in Croatia.

During the interviews the three aforesaid perpetrators-respondents strongly insisted that they could not trust the Yugoslav People’s Army, at that time perceived as being full of “fifth columnists”. The three men took part in the ultimate cycle of violence that occurred in Croatia in late 1991 and early 1992. Interestingly, Radislav acknowledges that the UN Security Council’s decision on 21 February 1992 to deploy the United Nations Protection Force²³ in Croatia precipitated their decision to leave the area. Radislav emphasized that he just did not want to get caught by the “Blue Helmets” and face the risk of being tried. Thus the elimination of the civilian population was not exclusively in the hands of a single party, namely the state, as has mostly been considered and up to now argued to be the case. The mass violence was the outcome of a polycentric structure comprising many stakeholders, whose motives and goals may have differed even though they all backed a nationalist political agenda. As pointed out by the respondents, the absence of a monopolistic authority exercising full control over the territory had devastating consequences for the non-Serb civilian population. The scope it provided for opportunistic intervention opened the door to competition between many types of perpetrators keen to implement their agendas – both political and criminal – and gave free rein to use of the most radical means in the repertoire available to the four perpetrators-respondents – that is, extreme violence. Brutalization – as the result of the struggling stakeholders’ attempts to seize control of the territory – accelerated the ongoing mass violence and plunged the perpetrators all the more deeply into mass crimes. For many this decentralized

22 Radislav told me that since he was a doctor, the first idea he had when he left for Croatia was to see how he could help the Serb victims in local hospitals.

23 UN Security Council Resolution 743 (1992) Establishing a United Nations Protection Force “UNPROFOR” on Croatian territory controlled by para-authorities, Un Doc. S/RES/743/1992.

mass violence,²⁴ at least in the early months of the war, presented numerous opportunities for acquiring political capital and legitimacy.

In addition, Ivan, Nenana and Janko operated in eastern Bosnia and Herzegovina during the first months of the war, in March and April 1992, mostly in such places as Bijeljina, Višegrad, Bratunac and Zvornik. Nenana, Ivan and Janko also operated in Srebrenica before and during the genocide.²⁵ The material collected provides a different but complementary insight into the organizational background for the scenes of mass violence. For example, Janko explained that although some of his orders came from his leader, a criminal mobster, he was also given many instructions, such as what to do and where to go, both by local civilians in Bosnia and Herzegovina and by local crisis staffs.²⁶ Janko also revealed a consenting environment that made mass violence unproblematic in the region where he operated. Compliant attitudes shown by both the officials and the local population gave him and his colleagues scope to act. He added that he usually operated at night, in a small unit of three or four individuals, saying that when they got to a place indicated, the local population would tell them exactly where to operate. It was no problem to find weapons, since they knew where to pick them up after the withdrawal, as demanded by the Security Council on 15 May 1992, of the Yugoslav People's Army from Bosnia and Herzegovina. Trafficking also helped to provide weapons. Finally, once they had "cleansed" an area, the Bosnian Serb Army (VRS) would dig mass graves and erase the traces.

Such findings contradict the widely documented portrayal of executioners as being persons who acted exclusively under the orders of a legal chain of command. Of course, I am not denying the importance of considering a "state paradigm" according to which political elites and state agents are responsible for the committing of such crimes. But such a "top-down" perspective obviously does not account for the manifold forms of mass violence. One only needs to consider grass-roots dynamics to realize that not all participation in mass crimes results from "obedience to authority". So concentrating on the role and responsibility of the regular army commanders and the political elite is not enough to address the issues of sanctioning and preventing mass crimes, and may even obscure crucial dynamics governing the elimination of civilians.

24 It occurred in parallel with Serbia's centralized criminal policy to eliminate the non-Serbs of Croatia.

25 It is qualified thus in the *Krstić* case: ICTY, *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Judgment (Chamber of Appeal), 19 April 2004.

26 These were local committees in charge of organizing and co-ordinating the elimination of the non-Serb population in Bosnia and Herzegovina. They were composed of members of the Bosnian Serb Army (VRS), police officers, secret services consisting of both Bosnian Serbs and Serbs from the Republic of Serbia, local mayors and politicians, and representatives from the local population. The crisis staffs were ideologically affiliated to the Serbian Democratic Party (SDS) led by Radovan Karadžić, and were also responsible for directing militias and executioners coming from outside Bosnia.

Grassroots organizational features: petty crime and patterns of community interaction

In the eyes of many Serbs, action on behalf of the Serbs in Croatia and Bosnia and Herzegovina transformed marginal players de facto into trustworthy protectors of both the Serbian nation and tradition. Yet many nationalists did not join militias or participate in mass violence. Within the prevailing environment of political conflict, nationalistic upheaval and the spread of collective violence, parallel incentives and facilitating resources were also in place to induce participation in mass crimes. I shall focus here on criminal activities and grass-roots organizational features.

Criminal activities

As mentioned above, Radislav, Ivan and Janko had known each other since their youth. They were bonded together by many experiences in common, not least low- or medium-range criminality. Radislav acknowledges that such activity was conducive to their participation in the crimes committed during the war, thus recognizing it as a form of continuation, yet of a different nature. Janko also admits that even though fighting the “Muslim threat” was definitely the initial incentive for him to go to – and stay in – Bosnia, he grew richer by looting property and stealing from his victims’ houses. The solidarity developed through former criminal activities helped to establish a network of mutual trust which facilitated criminal enterprise in time of war. Such a network not only generated connections but also compelled its members to protect the stakeholders and criminal activities.²⁷ Petty crime does not automatically lead to mass violence. However, nationalist scripts, as well as templates for interaction passed on via trust networks, helped to mobilize them for mass violence. Radislav’s comments about their opposition to the Milošević government and their intention to counter it are indicative. Their conviction of the central government’s inaction vis-à-vis the external Serb communities paved the way for those activists to take non-state quasi-institutional action, and criminal networks facilitated collective action.

Patterns of community action

Radislav holds a public position in the small town where I met him. He was, and still is, an important person in the area. A complex web of affiliations became evident during the time I spent following him in his multiple activities. His strategic position requires constant efforts to maintain his social capital. This includes offering drinks, settling disputes between members of the community and showing solidarity with members experiencing difficult or joyful events in their lives. Such small interactions may not have accounted in themselves for

27 Charles Tilly, *Trust and Rule*, Cambridge University Press, New York, 2005, p. 196.

participation in mass violence. But when coupled with other considerations (the political situation and growing militarization in Serbia in 1990–1, local nationalistic cognitive scripts and the organizational background to the scenes of mass violence), they chronicle the complexity of the four respondents' social network and provide crucial insight into their experience of mass violence. All these elements combined have a bearing on the local concept of *komsije*. It refers to a set of daily practices and considerations that sustain and strengthen solidarity between people who frequent the same neighbourhoods, bars and sports clubs. It translates into a series of small, repeated acts that create binding ties, whereas ideological and behavioural alternatives eventually stigmatize their authors and thus lead to disaffiliation. Informal mechanisms, such as shaming, compel people to abide by the rules mostly decreed by individuals like Radislav, Nenan, Ivan and Janko. People trust them and mobilize at their request. Consequently, Radislav, Ivan, Nenan and Janko are political and criminal entrepreneurs: they prescribe organizational solutions and actions enabling nationalist scripts and former criminal activities to be converted into social and symbolic capital on a quasi-permanent basis. Nationalist scripts and criminal activities – including the assets thus obtained – are means of turning formerly marginal mobsters and ideologists into key players in the local community. In the post-war context, their influence on the local population facilitates concealment of their wartime activities – and trust is unquestionably an essential part of that influence. So even though they operated on the sidelines of the whole structure and legal command responsible for the havoc in the former Yugoslavia, these four perpetrators are hugely instrumental in establishing idiosyncratic scenarios which not only minimize and blur their own responsibilities, but also distort the historical facts. These techniques produce altered scenarios of the past crimes, thus keeping the local population misinformed at best and impervious to ongoing national programmes related to “dealing with the past”.

The challenge of appropriate sanctions

I postulate that sanctioning and preventing participation by such individuals in mass crimes also require a domestic and grass-roots approach. It is of the utmost importance that issues such as sanctions and prevention be addressed via the characteristic relationship of perpetrators of that kind with the Serbian population in general and their local community in particular. First, I shall make some comments on the impact of sanctions applied hitherto by both international and national justice systems. Second, I shall pin down issues that might be relevant for building a preventive strategy for such specific non-state armed groups' participation in mass violence. Although my focus remains centred on the example of the four interviewed perpetrators and their community, I think the general tenor of my argument might resonate in other parts of the world that are now struggling with the participation in mass violence by non-state armed groups.

Sanctions for mass crimes: the domestic context

Despite their misdeeds, evidence shows that the four perpetrators-respondents were well aware of the most basic principles of international humanitarian law when they engaged in mass violence. It appears, however, that rules are interpretable and negotiable. Although they acknowledged being involved in grave breaches of international humanitarian law, they maintained that their victims were too. In their view, and with reference to “Operation Storm” in which hundreds of thousands of Serbs from Croatia were expelled by the Croatian forces, Croats and Muslims can be accused of the same sins. This sophism rests on the unjustified conclusion reached: the need to kill innocent civilians. Even though such attitudes may be false justifications and/or a way of coping with their own moral conscience, they nonetheless neutralized the very meaning of international humanitarian law – namely that civilians and persons not or no longer taking direct part in hostilities must be respected in all circumstances – and thus also the reason to respect and enforce that law. More disturbingly, and despite recognizing their misconduct, they considered their actions to be justified. Dissemination of knowledge of international humanitarian law may therefore be ineffective.

Sanctions by international justice

What influence would international sanctions have on such perpetrators? Three issues need to be underlined. First, for such local wrongdoers, the consequences and dissuasive effects of the international justice exercised by the International Criminal Tribunal for the former Yugoslavia are unclear and remote. Even though they keep themselves very well informed about the current trials and the sentences handed down by that tribunal, they do not feel really threatened by it. Many of the local executioners do not identify with indicted high-ranking army or government officials. On the contrary, as I have tried to show above, they were opposed to most of them during the armed conflicts.

Second, and interestingly, a parallel can be drawn between the victims and the perpetrators with regard to the impact of international justice at the local level. For both groups, that form of justice has little bearing and only a limited impact on their daily life and routine. But while the victims do feel, rightly or not, that international justice might not bring the kind of justice they request or expect, the situation for the perpetrators is different. In view of the type of persons indicted by international justice, namely high-ranking state officials, they feel safe in that they did not act under a legal chain of command.

And third, international justice can be seen to have little effect among the local communities, where it meets with a general lack of interest. I argue that this is due both to its remoteness from them and to the nature of its targets, former high-ranking officers and politicians. Except for a minority, people in Serbia today are mostly preoccupied with their daily routines and the country’s economic problems. The fate of their former leaders or obscure and barely known secret service members is consequently of minimal concern to them. I am not saying that

these officials should not be tried. But when it comes to ensuring that justice is done, legality, legitimacy and acceptability might not be seen by the multiple stakeholders, including the local population, as coinciding and straightforward. The results might be ineffective and counterproductive if such dynamics are discarded. For all these reasons, I argue that the impact on local communities of the application of international justice is limited, in both the short and the long term.

Sanctions by national/domestic justice

Sanctions by national courts, as in the current activity of the Serbian War Crimes Chamber, responsible for prosecuting crimes committed by Serbian citizens, have a much greater impact. First of all, they are not imposed by a remote international tribunal associated in local minds with those who dropped bombs on the region in 1999. In the process of healing and “dealing with the past” now under way in Serbia, sanctions imposed by a domestic court may be more effective than international justice. As someone I met in Belgrade put it,

Some of our citizens committed crimes abroad in our name. Now, judging them here [in Serbia] is important for our recovery because it means that we are not all guilty of these events, contrary to what international opinion expounds, and that we can identify the guilty ones and try them. It gives a strong signal to others that their turn might come.²⁸

This process may help a society to experience a fundamental distinction, already put forward by Hannah Arendt, between collective guilt and collective responsibility.²⁹ According to Arendt, if everyone is considered guilty, then paradoxically, no one really is, and to do so would amount to using the perpetrators’ own sophism and line of defence. Not everybody did actually kill or rape someone, yet a larger circle of individuals closed their eyes or did not try to prevent it. Precisely therein lies collective responsibility, according to this philosopher. If national judicial institutions declare some of the “common people” – in contrast to high-ranking dignitaries – guilty of war crimes in events presented at the time as protecting Serbdom, then it means that “something went wrong” and a rule has been violated. In some way it induces people to take a stand on that issue, whatever their opinion, and thus encourages them to examine their own conscience.

Sanctions have to be accompanied by an “awareness-raising” or outreach process in order to help remind people of the criminal nature of the acts performed in the name of the Serbian population. It would help to transform war heroes, or “heavenly warriors”, into war criminals in the eyes of the local

28 Interview conducted in Belgrade in March 2006 with a human rights activist from the Humanitarian Law Centre, Belgrade.

29 Hannah Arendt, *Responsibility and Judgment*, ed. and with an introduction by Jerome Kohn, Schocken Books, New York, 2003, p. 295.

communities. For example, the film shown of a group of local militiamen, known as the “Scorpions”, executing a group of young and harmless Muslim men definitely shocked public opinion in Serbia, as it did everywhere else. Those individuals were not high-ranking officials. On the contrary, they came from the same sphere as the general population, and that proximity has an impact on the Serbian population. That type of sanction may well help people to become aware of past events and thus change public opinion that has been misled by nationalist propaganda.³⁰

Besides the retributive aspect of sanctions, it is important to consider what effects we want them to have, and more specifically, on what target group. On the international community? That would be counterproductive, since the Serbs as a nation were already condemned by international public opinion even before the first convictions. On the former Yugoslav leaders? The sentences already passed on former leaders might give a strong signal to the one still at large. However, the cases of Karadžić and Mladić could also lead to the conclusion that a way out remains, despite the fact that those two indictees are the most wanted fugitives. In other words, attempts to raise the awareness of the local population might render justice more meaningful for them and impel them to look inside themselves and probe their conscience.

Preventing mass crimes

To conclude this article, I should like to formulate a few propositions relating to the prevention of such mass crimes. Once again, I shall stay focused on the experience of the four perpetrators-respondents and the grass-roots aspect, first addressing the issue at the international level, then the local initiatives that come to mind.

The international initiatives

The organization and action taken by the interviewed group of four militiamen are extremely volatile. There is no actual socialization or link to human values that I can think of, and which could be displayed through their “chain of command”. Yet one element that emerged during the field inquiry and might be of interest to prevent or stop such atrocities was revealed by Radislav himself. In response to my question about why they left Croatia at the beginning of 1992, he spoke of the deployment of the United Nations Protection Force (UNPROFOR). That force changed the whole balance of military and other power in the region and was an additional obstacle to their plans, so pursuing the political agenda and gaining full control of Krajina began to seem more and more problematic to them. That is

30 Eric Gordy, *The Culture of Power in Serbia: Nationalism and the Destruction of Alternatives*, Pennsylvania State University Press, University Park, 1999, p. 230.

when they decided to pull back. Hence international intervention might be a means of prevention to be envisaged.

Local initiatives

As mentioned above, not only must the retributive aspect of the sanction be taken into account, but also the effect it would have on the specific target group, namely the community in which the perpetrator is embedded. In many rural Serbian communities, international justice has so far turned war criminals into martyrs, and the *Šešelj* case is the most representative example of this, even though it might be considered as remote. There is therefore a huge effort to be made to deal with the image these communities have of their “heavenly warriors”. The prevention of mass atrocities involves not only the perpetrators themselves but also the whole grass-roots relationship between them and their community.

A first step would be to assess why such individuals are granted so much social capital and symbolic power by their community. One way of doing so is to consider the fears experienced by that community at the beginning of the war, in 1991. For example, numerous images of their “Serbian brothers” being threatened by the Croats were broadcast on Serbian TV. Many of these were propaganda and showed footage from the Second World War portraying violence by fascist Croatian Ustasas against the Serbs. These images had a strong impact on local communities “left alone” by the elite, which was more concerned with maintaining its own power than addressing the current social and economic crisis in rural areas. The result, following a mafia-like pattern, was that entrepreneurs like Radislav, Nenan, Ivan and Janko were seen by a scared population as a vital alternative, not only providing a quick way for the local community to resolve both its economic difficulties and genuine fears but also as someone to rely on, someone who would make a difference. These perpetrators then changed from economic entrepreneurs into moral and nationalist entrepreneurs promoting the “real” values of “Serbdom”, thus combining it with criminal agendas abroad. On the other hand, many of the crimes they committed were not witnessed by the local community, so their supporters have only a partial image on which they have built their trust. What can be done to reduce the symbolic capital accorded to these perpetrators? What would the alternative be for a population needing help with concrete issues, such as employment and security? The really crucial point is to cut the support the four respondents and others like them may get from their community from the very start, namely, to address the initial fears leading these communities to rely on such individuals. How can we show these communities there might be alternatives? Sanctions by local justice are probably a good way of weakening the social capital of such entrepreneurs and reliance upon them, but working on local cognitive scripts, representations and interests is definitely necessary too.

It is absolutely essential to address the link between the actual commission of mass violence and the surrounding social and political structure in which the perpetrator is embedded. The executioners described above indisputably had a

kind of tacit authorization resulting from the (voluntary?) lack of sanctions or other measures by the central government(s) to stop the criminal activities, even though they knew what was going on, but also from the local population's compliance and consent, despite being aware of the ultimate consequences their support would entail. Social control was virtually non-existent, so it was almost impossible for local judicial institutions to enforce international law during the conflict. Even though the group in which Radislav, Nenan and Ivan were operating was strongly opposed to the Milošević government, that government greatly benefited – paradoxically – from the involvement of opposing ultra-nationalist armed groups. They were working towards the same end: to eliminate the non-Serb population in Croatia and Bosnia and Herzegovina so as to gain new territories. In such situations, military intervention could be more effective than law enforcement.

Finally, although I have focused so far on penal sanctions, which are the first pillar of transitional justice, the second pillar, namely “truth-seeking mechanisms”, needs attention too. At some time during the field study, Radislav expressed regrets about what happened, even though he still is convinced that their actions were justified. Some of the executioners are literally haunted by what they did back in the 1990s and need to express it, but to whom, and how? If a truth and reconciliation commission were to take place on a regional, pan-Balkan, basis, Radislav would talk about his experiences and what occurred.³¹ On the other hand, and with the criminal investigations still going on to catch the perpetrators and bring them to trial, he admits that he would certainly not take any risks by making his deeds public. I am certainly no expert in transitional justice, but there does seem to be a wasted opportunity here. Would the disclosure of a former perpetrator's experience of involvement in mass crimes and the consequences he endures (having to live in hiding, traumas, nightmares, etc.) serve to deter potential future candidates from taking part?

31 However, while everyone agrees that the truth should be told about the events in the territory of the former Yugoslavia, very few dare speak about reconciliation or actually want it.

Crime prevention and control: Western beliefs vs. traditional legal practices

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Abstract

This paper raises two main questions. The first concerns the current idea that punishment – conceived as the loss of liberty – has an effect in preventing unlawful behaviour. It can in fact be shown that, in general, sanctions have a poor individual preventive effect. As to general prevention, punishment may be expected to have a deterrent effect when the unlawful behaviour is the result of a rational decision, that is, a decision based on a cost–benefit analysis. However, a wide variety of factors, from group support to situational and systemic factors, may very well counteract the threatening effect of the sanction. The second question concerns the feasibility of non-stigmatizing ways to cope with crime. The few examples borrowed from legal anthropology seem to indicate that viable alternatives exist. But the transfer of a non-Western, indigenous problem-solving process to culturally different contexts is problematic and should be carried out with extreme caution.

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This article is based on two general assumptions: first of all, the conviction that any discussion on dissuasion (in which deterrence represents a special case) should take into account the socio-cultural setting in which it is meant to operate; second, and moreover, the idea that no matter what the definition of crime may be, an adequate understanding of unlawful behaviour requires paying attention not only to the offender(s) but also to the victim(s) and the bystander(s).

Now that has been said, the article is organized in the following way. I shall start with some brief notes on the two main conceptions of punishment, one

of which is based on the notion of retribution (or just deserts), and the other on its utility. Since one of the key issues is the deterrent effect of punishment, in the second part I shall discuss in some detail whether and to what extent there is empirical evidence supporting this claim.

Anthropological studies of traditional societies have revealed a large variety of ways to cope with unlawful behaviour: unlike modern Western law, customary laws¹ often have quite different views as to who is the offender, what should be done about his transgression and how to restore social relations which have been threatened or broken. This is the subject of the third part.

Finally, there is another key issue: can we learn something from these non-Western experiences, or are they so bound to a specific culture that no cultural transfer is conceivable?

Needless to say, this paper has no ambition whatsoever to cover a field of inquiry that can be compared, metaphorically, to an almost endless landscape. Rather, I will illustrate less familiar ways of coping with wrongdoings, leaving aside far better known experiences such as those of the various truth and reconciliation commissions.

Punishment as retribution

Basically, when we discuss punishment we are confronted with two points of view.

The first argues that wrongdoings should be punished, regardless of what the lawbreaker's future conduct can be.² People who violate the law must be punished because punishment is what they deserve (thus the ideology of retribution is also known as the "just deserts" ideology). As has been said, "central to this retributivist argument is the notion that the purpose of punishment is to place blame on the offender for the offence committed".³ Fundamentally, it is the modern formulation of the ancient "eye for an eye" logic.

It is a view that has been heavily criticized – for one thing, because it is premised on the assumption that offence and sanction are homogeneous entities. But since we are unable to establish an equivalence between the punishment imposed and the crime which has been committed, how can the sanction that may be inflicted be considered retributive? I think hardly anyone can argue that the pain and suffering caused by theft or assault or murder are comparable to the pain and suffering produced by the loss of liberty through imprisonment. Days, months, years, a whole life spent in a cell mean miseries the degree of which can be

1 By customary laws I mean established patterns of behaviour within a particular social setting. They are also called traditional laws.

2 H. L. A. Hart, "Prolegomenon to the principles of punishment", in H. L. A. Hart, *Punishment and Responsibility*, Oxford University Press, Oxford, 1968; Norval Morris, *The Future of Imprisonment*, University of Chicago Press, Chicago, 1974.

3 George S. Yacoubian, "Sanctioning alternatives in international criminal law: Recommendations for the International Criminal Tribunals for Rwanda and former Yugoslavia", *World Affairs*, Vol. 161 (summer 1998), pp. 1–3.

measured by no one except the inmate himself (and his relatives). Nor can retributivists overcome this objection by substituting the concept of proportionality for the notion of equivalence.⁴ The statement according to which the most serious punishments should be reserved for the most serious crimes – in the sense that the severity of the former should be *proportionate* to the gravity of the latter – is untenable for the very same reasons as those given above.⁵ Moreover, there is plenty of evidence showing that both crime and punishment are socially and culturally constructed terms (remember, for instance, that not so long ago homosexuality was considered a crime) and therefore vary over time and space.

The deterrent effect of punishment

The utilitarian perspective

According to the other, and probably most influential, view on the criminal policy of the modern state, it is argued that a carefully calculated punishment can be designed for each crime so that the gain from the crime is offset by the punishment. Unlike the retributivist idea, this standpoint, which is historically linked to utilitarian thinkers such as Beccaria (1744) and Bentham (1781), justifies the pain and suffering inflicted on the perpetrator if, and only if, more pain and suffering (caused by more crime) are avoided. In reality, the infliction of pain is supposed to act not only on the perpetrator (*special* prevention), but on the “others” as well, the law-abiding citizens who might otherwise be tempted to violate the law (*general* prevention). A further question under discussion is whether the deterrent effect should be attributed to the *level of punishment* (the harsher the sanction, the higher the compliance) or to the *probability of sanction* (the risk of being arrested, tried and condemned), or to both.

Without going into the legal and philosophical debate elicited by the utilitarian position, let me just mention that even this perspective does not escape my foregoing critique of the retributivist idea, namely that punishment and crime are incommensurable entities. Equally incommensurable are the pain and suffering they cause.

Nevertheless, in spite of the theoretical and technical difficulties that it encounters, the notion that sanctions do – under certain given conditions mainly related to the efficiency of the sentencing system – have a preventive effect on crime is strongly held by common people, legal scholars and, last but not least, politicians. Indeed, the deterrent effect of punishment is usually taken for granted: “The notion of the general preventive effect of punishment is so deeply ingrained in the “common sense thinking” of society, that questions about its actual

4 Andrew von Hirsch, *Censure and Sanctions*, Oxford University Press, Oxford, 1976.

5 For a thorough review of theories centring on deserts and proportionality, see Michael Tonry, “Obsolescence and immanence in penal theory and policy”, *Columbia Law Review*, Vol. 105 (4) 2005, pp. 1233–75.

existence are frequently not raised and remain unasked ... In this sense, the notion of the general-preventive effect of punishment constitutes a prevailing *paradigm* in society.”⁶ In other words, the burden of proof lies with those who deny this notion.

It goes without saying that the whole issue is far from being a mere theoretical controversy, for accepting the idea that punishment “works”, in the sense that it helps to make perpetrators and others refrain from violating the law, implies that we are willing to harm some human beings through fines and/or imprisonment and, as an ultimate resort, to kill them. Without going too far into the death penalty debate, I must mention that I strongly reject on ethical grounds any form of capital punishment. And even in the light of the empirical evidence, defence of the death penalty is hardly tenable. The hitherto most comprehensive review of the new deterrent studies on the impact of the death penalty on murder points out a series of unacceptable methodological errors, such as drawing “causal inferences from a flawed and limited set of observational data and the failure to address important competing influences on murder”.⁷ Not to mention “the most important theoretical misspecification of omitting the incapacitative effects of imprisonment and life without parole (LWOP) sentences in particular”.⁸

Let us now turn to the less dramatic question of whether the various forms of curtailing individual freedom have a deterrent effect on behaviour.

On special prevention

The available data provided by a relatively large amount of research on this subject do not prove that punishment has a significant deterrent effect. On the contrary, recent findings⁹ indicate that sanctions may increase recidivism:

“[B]oth longer time served in prison and serving a prison sentence versus community-based sanction are associated with slightly higher recidivism rates. Similarly, shock probation, shock incarceration, and other such programs that introduce offenders to the severity of criminal justice in an attempt to deter from criminal activity do not decrease subsequent offending and, indeed, seem to exacerbate it.”¹⁰

6 Thomas Mathiesen, *Prison on Trial*, Sage, London, 1990.

7 Jeffrey Fagan, “Death and deterrence redux: science, law and causal reasoning on capital punishment”, *Ohio State Journal of Criminal Law*, Vol. 255 (4) (2006), p. 261.

8 Ibid., p. 269.

9 There is quite a large amount of empirical evidence showing that incarceration tends to create and or reinforce criminal careers. Mathiesen, above note 6; Amedeo Cottino, *Vie de Clan*, L’Harmattan, Paris, 2004.

10 M. Lipsey, N. N. Landenberger and G. L. Chapman, “Rehabilitation: an assessment of theory and research”, in C. Sumner (ed.), *The Blackwell Companion to Criminology*, Blackwell, London, 2004, p. 217.

On general prevention

As to *general* prevention, we have first to recall that deterrence theory posits a clear relationship between knowledge of enforcement actions and compliance. The law-abiding citizen is described as a subject who knows what happens to non-compliant others and therefore fears the consequences of non-compliance. But, as we all know, the reality of crime is many-sided, and there are several reasons why people comply or, on the contrary, disobey. For example, a law-abiding behaviour may be motivated much more by the fear of *informal* sanctions, “such as damage to a company’s reputation or to an environmental manager’s job or professional standing”,¹¹ than by the perception of the risk of being fined (or imprisoned). Furthermore, “compliance is much improved if mild law [law backed by non-deterrent sanctions in inducing compliance; editor’s note] is endogenously chosen, i.e., self-imposed”.¹²

Tyran and Feld have brilliantly illustrated the complexity of the situation by taking littering as an example.

“Clean streets are a classic public good ... fines for littering are usually quite low, i.e., given that the anti-littering ordinances are an example of mild law it is surprising from an economic perspective that not all people litter on streets. However, in real life of course, not all the people are the same. Some people would not litter even if there were no laws against littering. A second group of people would litter if there were no anti-littering ordinances, but may obey an anti-littering ordinance out of an internalized respect for the law. Enacting the anti-littering ordinance (a “deliberate reminder”) may activate respect in these people and therefore reducing littering. A third group of people make their behaviour dependent on how other people behave.¹³”

By and large, and going beyond the unresolved¹⁴ methodological problems, it appears difficult to substantiate the theory of deterrence, last but not least if we consider that the same conclusion, namely that there are no strong elements supporting that theory, has been reached by investigations dealing with very diverse topics such as “drunk driving”¹⁵ and “environmental crime”¹⁶ and studies centred around the deterrent effect of harsher punishments.¹⁷ In particular,

11 Jean-Robert Tyran and Lars P. Feld, “Achieving compliance when legal sanctions are non-deterrent”, *Scandinavian Journal of Economics*, Vol. 108 (1) (2006), p. 139.

12 *Ibid.*, p.135.

13 *Ibid.*, p.139.

14 See Gary Kleck, Brion Sever, Spencer Li and Marc Gertz, “The missing link in general deterrence research”, *Criminology*, Vol. 43 (3) (2005), pp. 623–59. They remark that there is a missing link between aggregate punishment levels and individual perception of punishment and therefore raise serious doubts about deterrence-based rationales for more punitive crime-control policies.

15 William N. Evans, Doreen Neville and John D. Graham, “General deterrence of drunken driving: evaluation of recent American policies”, *Risk Analysis*, Vol. 11 (2) (1991), pp. 279–89.

16 D. Thornton, N. Gunnigham and R. Kagan. “General deterrence and corporate environmental behaviour”, *Law & Policy*, Vol. 27 (2005), pp. 262–88.

17 Cheryl Marie Webster, Anthony N. Doob and Franklin E. Zimring. “Proposition 8 and crime rates in California: the case of the disappearing deterrent”, *Criminology & Public Policy*, Vol. 5 (3) (2006), pp. 417–48.

these authors show that there is no evidence that crime decreases after the imposition of harsh sentencing policies.

Probably one basic weakness of the deterrence theory is the underlying assumption, namely that human beings are rational actors – that is, people who choose a given course of action after having calculated and weighed up the pros and cons thereof. This *a priori* assumption – for which we are sadly indebted to much liberal economic thinking – envisions the person taking action as a *homo oeconomicus*. In so doing, it encompasses only one aspect of human behaviour and rests on a fragile foundation.

Are there any conditions under which punishment may have a deterrent effect? A general model

The limits of a viewpoint premised on the idea that potential deviants are rational, calculating individuals have led the American criminologist William Chambliss¹⁸ to develop a theoretical model which, to my knowledge, has never received the attention it deserves. What Chambliss does is to specify, in very abstract terms, some conditions under which a deterrent effect of punishment is plausible. To do so, he views the criminal scene in terms of two variables – the perpetrator's *behaviour* and his *commitment* to the criminal action.

For simplicity's sake, these variables are treated as if they were dichotomous.¹⁹ Thus the behaviour can be either instrumental or expressive, the commitment either low or high (Figure 1).

An instrumental behaviour is a goal-oriented comportment – that is, carried out by a rational actor on the basis of a cost–benefit analysis. What the rational actor does, before he makes the decision to carry out an unlawful act, is to evaluate alternative courses of action on the basis of the subsequent consequences. And among these consequences he includes the risk of being punished.

Unlike instrumental behaviour, expressive action represents an end in itself. It is, for instance, the case of the conscientious objector, the young person who refuses, on a moral basis, to bear weapons. He is neither interested in nor affected by the consequences of his action.

The commitment is low when the decision to break the law is due to occasional factors rather than to specific, stable motivations. Conversely, a highly committed person is one who has chosen to centre his life on a criminal activity. Individuals who have chosen a criminal career are, compared with law-abiding subjects, presumably less sensible to the threat of the sanction and/or will take the risk of being punished as a professional cost. In other words, the higher the

18 William J. Chambliss, *Crime and the Legal Process*, McGraw-Hill Book Company, New York, 1969.

19 It should be noted that general, abstract models – in particular taxonomies – display advantages but also disadvantages. On the one hand, we appreciate their simplicity: basic trends, correlations and the like are immediately shown. On the other hand – particularly when, as in our case, we work with dichotomies – the borderline between simplification and oversimplification can easily be blurred, and the risk of distorting the reality sought is high. Moreover, the concepts used may be manifold: clearly, the outcome will differ, depending on the meaning we attribute to them.

	Level of commitment to criminal action	
	Low	High
Instrumental	A	B
Type of behaviour		
Expressive	C	D

Figure 1. A typology of actions and motivations

commitment, the lower the probability that punishment will have a deterrent effect.

The fact that the level of commitment makes a difference in terms of deterrence was shown quite long ago in a study by Cameron²⁰ on shoplifting. She identified two types of shoplifters: the *booster* and the *snitch*. The former is the professional thief for whom stealing is a way of life. The latter, the *snitch*, is very much the middle-class housewife or the ordinary citizen who “contributes” to the family budget through more or less occasional stealing. The interesting point is that scrutiny of the supermarkets’ records revealed that the *snitch*, unlike the *booster*, rarely if ever appeared more than once in the registers. Apparently, he or she was not willing to take the risk of being caught again. Presumably, here, deterrence worked.

If this reasoning is plausible, we will expect in general a maximum of deterrence in (A), where low commitment is combined with instrumentality and, conversely, a minimum in (D), because expressiveness is combined with high commitment (this is the case of the “crime of passion”). In the other cases the preventive effect is probably very low, at least as far as (B) is concerned. Here the risk of punishment is, as it were, included in the “costs” of the criminal profession.

Chambliss has unquestionably developed a fruitful starting point for more specific analyses, but I believe that we cannot ignore group support, for we know²¹ that it makes quite a difference, in terms of commitment, whether the individual initiative to break the law can count or not on some sort of approval among other people – friends, relatives, comrades, affiliates and so forth (not to forget the bystanders). Good, though indirect, evidence of this is provided by the persistent strength of criminal organizations such as the Mafia, Camorra and the like, despite the extremely severe penal legislation enacted by the Italian government during the last thirty years.

So far we have been looking at commitment in terms of personal vs. collective involvement in deviant behaviour. But we could also look on the bright side, so to speak, by viewing commitment as a prerequisite for respect for the law.²² Needless to say, this topic goes far beyond the scope of the present article.

20 Mary Owen Cameron, *The Booster and The Snitch*, Free Press of Glencoe, Glencoe, Ill., 1964.

21 Edwin Sutherland, *White Collar Crime*, Yale University Press, New Haven, 1983. Amedeo Cottino, “*Disonesto ma non criminale*”. *La giustizia e i privilegi dei potenti*, Carocci, Rome, 2005.

22 I owe this suggestion to Anne-Marie La Rosa.

What can be said here, in a very sketchy and general way, is that law-abiding behaviour is usually considered to be the result of several convergent forces coming from within the individual (his conscience, his value system, etc.) and from his surroundings, and among the latter I would name two: control from above (the so-called formal control) and control from the peer group.

From a slightly different perspective, Zimbardo²³ stresses the poor explanatory power of the traditional model centred on the law-breaker and his disposition, convincingly arguing that it is context and structure that play a paramount role. True, the author deals with situations of extreme violence in combat zones, but “understanding how good people turn evil” is just another more suggestive and more dramatic way of asking why (ordinary) people become lawbreakers. According to this author, in contexts where the very basis of the military tends to be homophobia, misogyny and dominance over all enemies, the physical and psychological violence – even in its most horrendous forms – systematically inflicted upon civilians and prisoners (from the Rape of Nanking and the My Lai massacre to the Abu Ghraib abuses and torture) can be largely explained by situational and systemic factors. But if these factors do indeed have a much greater explanatory power than the individual perpetrators’ dispositions, then – argues Zimbardo – the legitimate punishment per se of individual perpetrators risks missing the point.

Actually, both the famous Stanford mock prison experiment²⁴ and the real Abu Ghraib prison have proved that situations matter. “Social situations can have more profound effects on the behaviour and mental functioning of the individuals, groups, and national leaders than we might believe possible.”²⁵ In particular, “situational power is more salient in novel settings, those in which people cannot call on previous guidelines for their new behavioural options. In such situations the usual reward structures are different and the expectations are violated.”²⁶ But systems matter as well, because they provide “the institutional support, authority, and resources that allow situations to operate as they do”.²⁷ Therefore, dehumanization – “a condition where others are thought not to possess the same feelings, thoughts, values, and purposes in life that we do”²⁸ – this basic, fearsome prerequisite for perpetrating any unimaginably cruel form of violence – is no longer a problem of “bad apples” but of “bad barrels”. To sum up, “bad systems create bad situations create bad apples create bad behaviors ...”²⁹

Finally, as for determining responsibility, I am in favour of a perspective that goes beyond the concrete responsibility of the individual perpetrator and puts the blame on the structure, on the organization. And in my view – for I purposely

23 Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil*, Random House, New York, 2007.

24 The 1974 Stanford experiment is described in detail in Zimbardo, above note 23.

25 *Ibid.*, p. 211.

26 *Ibid.*, p. 211.

27 *Ibid.*, p. 236.

28 *Ibid.*, p. 222.

29 *Ibid.*, p. 445.

ignore situations in which the violation of humanitarian rights seems to be an autonomous choice of a single mind – the burden of proof lies with those who deny this perspective. Findings in other fields of research, such as studies on economic crime,³⁰ do in fact show the feasibility of an approach viewing corporations that commit criminal actions as fully responsible. “A corporation does not, in a physical sense, have a brain with which to form intent or ability to act required for traditional criminal liability. However it does have a nerve centre composed of decision-making processes that govern corporate conduct and make legally binding decisions.”³¹

Let us now take a look at some other ways which human beings have invented to tackle the issue of deviant behaviour. A confrontation with other notions of offence, offender and punishment may be suggestive of new ideas and hypotheses.

Crime and customary law

There are societies or communities in which the dominant way to respond to crime is peaceful. It is peaceful in the sense that the main aim of the social response is first and foremost not to punish the offender but to help him. And this is made possible because sight is never lost of the victims or of the surrounding social context. As Rouland has aptly observed, “en matière délictuelle c’est moins la faute qui est sanctionnée que l’absence de réciprocité et d’équilibre des comportements entre les droits et les obligations” – it is less the offence that is punished than the absence of reciprocity and balance in terms of rights and obligations.³² Also, it is not infrequent that crime is viewed as a wound that must be healed, rather than as an offence in the Western penal sense of the word. This in turn greatly affects the judicial role in sentencing. Since the final result sought is a solution acceptable to all concerned, constant attention is paid to both restoration (a process that renews damaged personal relations and community ties) and reparation (the process of making things right for the victim).

Needless to say, the language used in these legal practices is everyday language. Similarly, important legal notions of Western law have no equivalent in traditional law, and traditional legal thinking likewise follows paths other than those we are used to taking in the West.

The Navajos: the criminal process as a peacemaking process

According to the Navajos, the response to crime is fundamentally inspired by the idea that the trial’s goal is to make peace. As Robert Yazzie, chief justice of the

30 Michael Gilbert and Steve Russell, “Globalization of criminal justice in the corporate context”, *Crime, Law and Social Change*, Vol. 38 (3) (2002), pp. 211–38.

31 Ibid. p. 220.

32 Norbert Rouland, *Anthropologie juridique*, Presses Universitaires de France, Paris, 2nd edn, 1990.

Navajo nation, puts it, “Our sentencing policy provides for peacemaking *before* a charge is filed, *after* one is filed, *before* sentencing and *after* sentencing”.³³ The centrality of peacemaking and the priority given to the restoration of social relations reflect a very specific way of looking at the offender. To the question “who is he?” the answer is: “he is someone who shows little regard for right relationships. That person has little respect for others. Navajos say of such a person, “*He acts as if he has no relatives*””.³⁴ But in the Navajo way of thinking, Chief Yazzie explains, when someone acts this way, “his relatives have a certain responsibility: It is shameful to have a relative who acts out against others. That hurts *your* relationship with others. So, you assume responsibility for your relative’s actions. The same holds true of victims. If my relative is hurt, I have a responsibility to step in and help”.³⁵ When this happens, the relatives are brought in and a peacemaker is appointed.

And here begins what is central to the whole procedure: the “talking things out”. This is a process in which not only the relatives on both sides participate, but also friends, neighbours and anyone else involved. After a prayer, usually conducted by an elder, the participants are invited to tell what happened and how they feel about it. When everybody has spoken, the peacemaker applies the lore (“forms of precedents which everyone respects”) to the problem. It is important to note that this is not a case of mediation: the peacemaker has a very clear opinion about what he has heard during the “talking things out”. Finally, when the prayer has been said and all feelings have been expressed, people usually reach a consensual decision about what to do, sign a document and plan what has to be done in practical terms.

Meanwhile, something very important occurs between the victim and the traditional “probation officer” (most often one of the victim’s relatives): the problem of restitution is addressed. The Navajo term for it is *nalyeeh*, which can be translated as “restitution” or “reparation”. The aim is not correction of the offender but correction of his action. In the negotiation that follows,³⁶ agreement is reached on an amount which can often be merely symbolic. In conclusion, to cite Yazzie’s words once again, “Peacemaking ... makes offenders look at themselves and at the consequences of their actions. Many victim assistance programs forget that victims have families, and they are one of the best resources to help. That’s the Navajo response to crime in a nutshell.”³⁷

33 Robert Yazzie, “The Navajo response to crime”, *Justice as Healing*, Vol. 3 (2) (1998), p. 3 (emphasis added).

34 Ibid., p.1 (emphasis added).

35 Ibid., p.2 (emphasis added).

36 Sometimes the negotiations can be interrupted by the intervention of a non-Indian court, as in the following example: “[F]amilies of three young men who raped a young Navajo woman were about to transfer twenty-one heads of cows to the victim’s family. A state court had jurisdiction, and it refused to enforce the agreement. The woman was shamed for not having a public symbol of her innocence delivered to her home and she got nothing” (ibid., p. 3).

37 Ibid., p.4.

Native Hawaiians “setting to right” (*ho’oponopono*)

The basic feature of Hawaiian culture is “the continuous preference by Hawaiians of employing a social interaction style that stresses interpersonal harmony and avoidance of overt conflict”.³⁸ *Ho’oponopono* is precisely a method to cope with any event that might threaten or undermine this harmony. It therefore has, in principle, a broad applicability, ranging from conflicts within a family via the domain of social problems and maladjustment to actual deviance and crime. The key phases of this practice are as follows: an *opening*, with assessment and preparation of the participants and formal statement of the problem; a *discussion*, leading to identification of the problem; a *resolution* through confession, forgiveness and, when necessary, restitution; and a *closing*. Of all these phases no single one is more important than another; rather, they follow each other in a logical sequence of built-in controls over the “degree to which the group holds the values of co-operation, trust, and interconnectedness, which are implicit in *ho’oponopono*”.³⁹ And to ensure this interconnectedness is one of the main tasks of the leader, traditionally a senior family member or a respected outsider.

What makes this method particularly interesting for our purposes is that it has been used both in a variety of settings where people are not part of the Hawaiian community and among socially unrelated subjects. How this has been successful is difficult to explain in detail. Certainly it has to do with cultural processes which help to transcend cultural boundaries. What can be said here is something quite obvious, namely that the transfer of an indigenous problem-solving process into another cultural context is doomed to failure unless one has some knowledge of “local knowledge”. This means starting with a reconstruction of the socio-economic and cultural scene in which the event we intend to cope with (whatever the problem may be) has occurred. Also, we need to map out the situation to ascertain, for example, whether other legal systems exist alongside the dominant one and what sort of justice is at work. Perhaps basic notions such as “offence”, “offenders” and “victim” do not have the meaning we Westerners usually attribute to them. Needless to say, this issue can become crucial when focusing on closed groups such as military units, crews, teams and so on, since these are groups which tend to elaborate their own normative codes, sometimes in opposition to the official legal system. The consequence thereof can be that criminal acts by group members are no longer treated as such. Principles of solidarity and loyalty may exert such strong pressure on a group of weapon-bearers that violations of humanitarian law by some of its members are no longer perceived as such, or become justified by upholding these values. Here we have a clash between certain military ethics⁴⁰ on the one hand and the law on the other.

38 Victoria Shook, *Ho’oponopono*, University of Hawai’i Press, Honolulu, 1985, p. 4.

39 *Ibid.*, p. 90.

40 See, e.g., Richard A. Gabriel, *To Serve with Honor: A Treatise on Military Ethics and the Way of the Soldier*, Praeger, New York, 1982.

To conclude this section I should like to point out that the idea of helping the offender to “make things right” is not totally alien either to Western criminological and legal thinking or to the practice of the courts. In the last twenty years, restorative and reintegrative programmes have been implemented which draw support from aetiological theories emphasizing the pivotal role played by community and family bonds. This is for example the case of the concept of reintegrative shame introduced by Braithwaite.⁴¹ In brief, the author’s argument goes as follows: crime rates vary, depending on the different processes of shaming wrongdoing. In Japan, where shaming exercises an extraordinary power on citizens, crime rates are low. In his opinion, this preventive power is due to the presence in that society of characteristics such as communitarianism and interdependency, which reduce exposure to white-collar crime as well as common crime. He holds that shaming, however, becomes counterproductive when it stigmatizes the deviant – that is, fails to include a reintegrative element.

It is difficult to say how effective this approach is. In a recent investigation carried out in Russia,⁴² the authors conclude that “the results are mixed. Disintegrative shaming is associated with future misconduct, but being reintegratively shamed is also positively predictive of projected crime/deviance”. These “mixed results” may be due, as these two scholars suggest, to a theory which needs further refinement – but perhaps also to the fact that shaming presumably has different connotations in Japan and in Russia.

Final considerations

Let me summarize in a few points what I have tried to say in this article. To begin with, it seems clear that neither theory nor empirical data support general statements about the deterrent effect of punishment (fines and/or imprisonment). Instead, they warn against an uncritical, generalized use of negative sanctions. That said, and following Chambliss’s line of thinking, it may be conceded that the (threat of) punishment may have an individual preventive effect in cases where subjects (individuals or groups) without particular commitment act rationally after calculating the pros and cons (category A). Whether and to what extent this ideal type of perpetrator can be identified with specific types of criminal behaviour – for example, human rights violations – is an open question which must be tested empirically. On a common-sense basis, however, I am willing to hypothesize that cases where weapon-bearers plan criminal actions, individually or in groups, directly or indirectly (a typical case of instrumental behaviour), their commitment does not have to be high. War narratives provide many examples of repeated violations of human rights committed by the same perpetrators, and I am inclined to believe that, in an unknown number of cases, the violations are experienced by

41 John Braithwaite, *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge, 1989.

42 Ekatarina V. Botchkovar and Charles C. Tittle, “Crime, shame and reintegration in Russia”, *Theoretical Criminology*, Vol. 9 (4) (2005), pp. 401–42.

the perpetrators as routine. We know that even torture may be turned into an ordinary job.⁴³

Second – and coming to the two anthropological examples of traditional law – it is evident that the Navajos' peacekeeping process, unlike what has happened in the Western judicial process since the creation of the modern state, is firmly centred on the victims and the social relations surrounding them. For the Navajos, all the conflicting parties are owners of the conflict. To use Christie's terms, the conflict is their property⁴⁴. Consequently, the potentially disruptive effects of a confrontation limited to only offender and victim are on the one hand strongly curtailed. On the other hand, the very fact that a conflict is "common property", in the sense that it belongs to all subjects engaged in the judicial process, tends to encourage a conflict resolution no longer restricted to the offender–victim relationship, but open and involving the broader fabric of society. If this can reasonably be considered as an overarching goal of any judicial system, then the Navajos have something to teach us.

What I have just said is true, too, of the Hawaiian *ho'oponopono* method, but it calls for a further comment. A striking result of this traditional way of coping with conflicts is that it seems to work even when the parties involved belong to different cultures and/or are not related to each other by kinship or other social ties. Without denying how problematic the transfer of a non-Western, indigenous problem-solving process to a culturally different context can be, this seems to me a case in which it may, with all due caution, be worth leaving the door open for further exploration and experimentation.

43 There is nowadays a considerable amount of evidence on what has been called the "banality of evil" – Hannah Arendt, *Eichmann in Jerusalem*, Praeger, New York, 1963 – or the "normality of evil" – Cottino, above notes 10 and 22.

44 Nils Christie, Conflicts as Property, *The British Journal of Criminology*, 17, pp. 1–15, 1977.

Some considerations on command responsibility and criminal liability

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Abstract

Under international humanitarian law commanders have been entrusted with the task of ensuring respect for that body of law by their subordinates. This responsibility includes not only the training in IHL of those under their command, but also the taking of necessary measures to prevent or punish subordinates committing violations of IHL. Failure by a commander to do so will give rise to criminal liability, often termed superior responsibility. The following article reviews some of the issues arising from the application and development of this form of responsibility, from both a practical and a legal perspective.

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For Princes are the glass, the school, the book
Where subjects' eyes do learn, do read, do look.¹

Under international humanitarian law (IHL) commanders have a duty to ensure that their troops respect that body of law during armed conflict and hostilities. Failure to do so may give rise to liability. A mere “breach of duty”, whereby the commander has not fulfilled the responsibilities expected of his rank, is usually dealt with through disciplinary action. However, where a commander fails to prevent or punish violations of IHL by subordinates, criminal proceedings are likely, and the punishment to be meted out will reflect the gravity and nature of the crime committed by the subordinate.² Indeed, because of their position of command over troops and subordinates and their influence and responsibilities as

* This article reflects the views of the author and not necessarily those of the ICRC.

superiors, military commanders and other superiors have an affirmative duty to act in preventing violations of IHL by their subordinates. In essence, the commander acquires liability by default or omission. Having evaded his responsibility as a superior to intervene in ensuring the respect of IHL, he will be seen as accountable for his subordinates and, in certain circumstances, as even more culpable than them. This does not mean that subordinates are absolved from all blame: they too as individuals are bound to respect IHL and will be held personally accountable for breaches.

The present paper will consider certain issues stemming from the application and development of this form of liability, termed “command responsibility” or “superior responsibility”, which entails criminal liability for the commander. After a summary review of the principle of command responsibility, a brief comment will be made on the *mens rea* standards applicable to military superiors and civilian officials, the “necessary and reasonable” measures that they are expected to take to prevent the commission of the crime, the scaling of applicable sentences and the connected issue of illegal orders.

Command responsibility

Whether a commander can be held criminally responsible for the breaches of IHL committed by his subordinates was a central issue in the *Yamashita* case, which was reviewed by the US Supreme Court in 1946.³ In this case, General Tomuyuki Yamashita, the commander of the Japanese forces in the Philippines in 1944–5, was charged with having failed to discharge his duty to control the operations of persons under his command who had violated the laws of war. The majority judgment, delivered by Chief Justice Stone, enounced the principle that the laws of war impose upon an army commander a duty to take such appropriate measures as are within his power to control the troops under his command and prevent them from committing violations of the laws of war. In the view of the court, the absence of such an affirmative duty for commanders to prevent violations of the laws of war would defeat the very purpose of those laws. To quote the Court,

1 William Shakespeare, *The Rape of Lucrece*.

2 See International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Judgement in *Čelebići Case*, Case No. IT-96-21-A, 20 February 2001, at 226: “Article 7(3) of the [ICTY] 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 for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”

3 *In Re Yamashita No. 61*, Misc. Supreme Court of the United States 327 US 1; 66 S. Ct. 340; 90 L. Ed. 499; 1946 U.S. LEXIS 3090. The relevant charge held against General Yamashita was that “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 acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery; and he may be charged with personal responsibility for his failure to take such measures when violations result.”

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

Commanders thus were deemed to have a clear responsibility to control subordinates and to ensure that they respected IHL. Failure to do so where violations of IHL were committed warranted penal action and punishment fitting the crimes.⁴ As aptly stated in the post-Second World War case of the *United States v. Wilhelm von Leeb et al. (High Command Case)*, “under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility.”⁵

From an IHL perspective, it took another thirty years or so to have these principles codified in a convention. The precedents set by the post-Second World War cases, including the above and those from the International Military Tribunal for the Far East (Tokyo Tribunal) and the US Military Tribunal at Nuremberg, to a certain degree influenced the drafting of the text of Article 86 (failure to act) of the 1977 Protocol I Additional to the 1949 Geneva Conventions (Additional Protocol I):

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. 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.

Command responsibility is now recognized in many national military manuals and has been the subject of further developments in particular by the various international criminal tribunals, both in their constitutive documents and

4 The US Supreme Court ultimately upheld the death sentence imposed by the Military Commission on General Yamashita.

5 *United States v. Wilhelm von Leeb et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI* (US Govt. Printing Office, Washington, 1950), at 1230, 1303.

in their jurisprudence.⁶ The Statute of the International Criminal Tribunal for Rwanda (ICTR) and that of the International Criminal Tribunal for the former Yugoslavia (ICTY) read,

The fact that any of the acts referred to in ... the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.

The main reason for the development of this form of responsibility, notably in the international criminal arena, lies in the recognition that crimes are often committed by low-level officials or military personnel because their superiors failed to prevent or repress them.⁷ As mentioned above, it is generally agreed that command responsibility is necessary to enable prosecutions beyond the direct perpetrators of the crimes. Without this form of responsibility, superiors could absolve themselves of any wrongdoing, for instance by arguing that the subordinates were not following orders when they committed crimes, or that they were at no time at the scene of the violations. Today the law is clear: one is duty-bound as a commander to intervene when acts of subordinates constituted or would constitute violations of IHL, and to prevent or repress these.

Conditions for establishing command responsibility

From the jurisprudence emanating from the international criminal tribunals, it is generally agreed that in order to establish command responsibility three key elements must be met. First, there has to be a superior/subordinate relationship. As explained in the ICRC Commentary on Article 86 of Additional Protocol I, “we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control.... The concept of the superior ... should be seen in terms of a hierarchy encompassing the concept of control.”⁸ This relationship can be *de jure* or *de facto*, with the exercise of effective command, control or authority being

6 For instance the United Kingdom’s *Manual of the Law of Armed Conflict* explains, “Military commanders are responsible for preventing violations of the law (including the law of armed conflict) and for taking the necessary disciplinary action. A commander will be criminally responsible if he participates in the commission of a war crime himself ... particularly if he orders its commission. However, he also becomes criminally responsible if he “knew, or owing to the circumstances at the time, should have known” that war crimes were being or were about to be committed and 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 authority for investigation and prosecution”. Ministry of Defence, *Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, para. 16.36.

7 See A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 205.

8 *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 (Commentary), ICRC/Martinus Nijhoff Publishers, Leiden, 1987, p. 1013.

determinative.⁹ Second, the superior knew or had reason to know that one or several subordinate(s) committed or were about to commit criminal acts. Third, the superior failed to take the necessary and reasonable measures to prevent or punish the commission of said acts. As discussed below, the latter two elements have been the subject of much jurisprudence.

The knowledge requirement: military commanders versus other superiors

Traditionally, the extent and nature of the “knowledge” required of a superior regarding the actions of subordinates was the same for both military commanders and other superiors (for instance ministers, mayors and directors of factories), irrespective of office held. This is reflected in Rule 153 of the ICRC’s customary law study: for both categories of superiors to attract liability, it had to be shown that the superior either *knew* or *had reason to know*.¹⁰

Whilst establishing that the superior *knew* has not been particularly contentious, the concept of *had reason to know*, a form of constructive knowledge, has been the subject of some jurisprudential debate. Article 86(2) of Additional Protocol I sheds some light on this concept, in that superiors will be deemed responsible if they had information which should have enabled them to conclude, in the circumstances at the time, that their subordinates were committing or were going to commit a breach. Due to a slight divergence between the English and French texts of Additional Protocol I, the ICRC Commentary on the Protocol explains that the information available to the superiors should be such as *to enable* them to conclude rather than *should have enabled them* to conclude.¹¹

In other words, there must be some information available to the superiors that puts them on notice of the commission of IHL violations by subordinates. This standard has been favoured by both the ICTR and ICTY Appeals Chambers:

[R]eason to know standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied

9 See ICTY Appeals Judgement in *Prosecutor v. Delalić et al. (Čelebići)*, Case No. IT-96-21-A, 20 February 2001, at 195: “The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.”

10 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Geneva and Cambridge, 2005, I, pp. 558–562.

11 Commentary, above note 8, p. 1013.

that the accused had “some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates”.¹²

Interestingly, the Rome Statute of the International Criminal Court (ICC), in its Article 28, advances two separate standards. For military commanders, the test remains that the person either knew or, owing to the circumstances at the time, should have known that the forces under his or her command were committing or about to commit such crimes. The *should have known* is not dissimilar to the traditional *had reason to know*.

By contrast, for other superiors – that is non-military commanders – to incur liability, it must be shown that the person either knew, or *consciously disregarded information that clearly indicated* that the subordinates were committing or about to commit such crimes. This approach was followed in the ICTR’s *Kayishema & Ruzindana* case. Here the trial chamber, having cited ICC Article 28 approvingly, stated with regard to the command responsibility of civilian superiors,

In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto, the Chamber finds that the Prosecution must prove that the accused in this case either knew, or *consciously disregarded information which clearly indicated or put him on notice* that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal’s Statute.¹³ (Emphasis is not in original).

The ICC Statute thus introduces additional elements that must be met to establish that a non-military superior had the requisite *mens rea* to be held liable through command responsibility. It must be shown not only that the superior had information in his possession regarding acts of his subordinates, but that the superior *consciously disregarded* such information, in other words, that he chose not to consider or act upon it. The information must also *clearly indicate* that the subordinates committed or were about to commit the crimes. To some extent this goes further than the majority standard elaborated by the ICTR or the ICTY by which the information need merely put the superior on notice of *possible* unlawful acts by his subordinates. An element of *certainty* rather than *possibility* vis-à-vis the commission of the crimes will therefore have to be met under the ICC Statute for non-military superiors.

Notwithstanding the merits of the ICC and *Kayishema & Ruzindana* standard, it does beg both legal as well as policy questions. As mentioned above, one of the principal aims of superior responsibility is to punish those individuals higher up the hierarchical ladder who, whilst not the direct weapon wielders, are

12 *Prosecutor v. Bagilishema*, Judgement (Reasons), Case No. ICTR-95-1A-A, 3 July 2002 (*Bagilishema* Judgement), para. 28.

13 *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Judgement, Case No. ICTR-95-1-T, 21 May 1999, at 228.

deemed nonetheless to be criminally responsible for failing to act appropriately in controlling and punishing subordinates. Superior responsibility has proved to be a particularly vital conduit for prosecutors at the international tribunals to bring to trial heads of government, ministers and other civilian superiors who, in their capacity as civilian superiors, clearly played a substantial role in overseeing and directing violations of IHL, crimes against humanity and genocide, without necessarily setting foot in the arena of combat or where the crimes were committed.

By requiring it to be shown that non-military commanders “consciously disregarded” information which “clearly indicated” that subordinates were taking certain unlawful actions, the burden of proof to establish superior responsibility for such commanders becomes that much more exigent. Consequently, it might become more difficult effectively to prosecute non-military commanders for violations of IHL through command responsibility. Some may argue that to so apply a different and stricter *mens rea* requirement for non-military superiors can only weaken the fight against impunity, as many of the accused before international criminal tribunals are civilian leaders.

Yet it could also be contended that this differentiation is justified to the extent that, in civilian contexts, superior–subordinate relationships are more often than not premised on *de facto* rather than *de jure* control. The existence of comparatively more formal and institutionalized relationships in military situations places a greater onus on military superiors to act on information, even where such information merely suggests rather than clearly indicates that IHL violations are committed by their subordinates.

“Necessary and reasonable” measures

Under Article 86(2) of Additional Protocol I, superiors are required to take all *feasible measures* within their power to prevent or repress a breach of IHL by their subordinates. In international criminal law, the standard that has been introduced is one of a failing by the superior to take the *necessary and reasonable* measures within his power to prevent or repress the commission of the crimes by his subordinates. Most domestic legal systems provide succinct definitions of “reasonable” and also, but to a lesser extent, of “necessary”. International criminal jurisprudence speaks of a “reasonableness in the circumstances” test, and tends to treat “reasonable” and “necessary” in unison.¹⁴ Yet the application of such a test in relation to serious violations of IHL, crimes against humanity and genocide could be problematic.

14 Although it should be noted that in some ICTY cases the prosecution has sought to define both: ““Necessary measures” are those required to discharge the obligation to prevent or punish, in the circumstances prevailing at the time. “Reasonable” measures are those which the commander was in a position to take in the circumstances prevailing at the time.” See *Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, Case No. IT-95-14, at 333.

Cases in which serious violations of IHL, crimes against humanity and genocide have been committed, when compared with most domestic criminal cases, present a complicated set of facts, often implicate several perpetrators and involve numerous victims. They usually occur in situations where the normal fabric of society and recognizable chains of command have been destroyed, with civilians and military, and victims and executioners, commingled. As Justice Murphy, in his dissent in *Yamashita*, reasoned,

Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished actor. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty.¹⁵

A perusal of factual findings from judgments of the ICTY, the ICTR and the Special Court of Sierra Leone (SCSL) confirms that, due to the complexity of events on the ground, attempting to transpose these facts to a court environment and seeking to define which measures were reasonable and necessary in the circumstances can be a fraught exercise. Such a determination cannot be made *in abstracto* and is dependent on the nature and extent of evidence presented in court. Yet despite myriad procedural and evidential safeguards it may still be questionable whether, in the light of the chaotic nature of the events during which most violations were committed, it is realistic to rely on the statements of “a reasonable man in the position/circumstances of the accused” in order to assess whether the accused took the necessary and reasonable measures. It could be argued that without the benefit of H. G. Wells’s time machine, there remains the risk that accused persons are in a “no-win situation”, with judges painstakingly evaluating and imputing the measure of an accused’s authority over his subordinates.¹⁶

By way of example, the ICTR trial chamber’s reasoning in *Musema* merits mention, with suggestions by the judges of measures which, in their view, the defendant could have taken against his subordinates in the circumstances:

The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their

15 Justice Murphy was concerned that desires for vengeance would permeate “victors’ justice” and lead to unfair trials.

16 See, e.g., the different conclusions reached in the *Bagilishema* Judgement, above note 12, on the one hand by Judge Asoka de Z. Gunawardana in his Separate Opinion and on the other by Judge Mehmet Guney in his Separate and Dissenting Opinion, with regard to the authority and responsibility of the accused during massacres in his commune.

positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.¹⁷

The judges have been sensitive to the rights of the accused and to the risk of expecting more than was within the capacity of a superior at the time of the violations. As the ICTY reasoned in *Čelebići*, it must “be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures within his powers ... [or] within his material possibility.”¹⁸ In *Blaškić*, the Appeals Chamber added that “necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates”.¹⁹

This approach is in line with Article 86 of Additional Protocol I, which, as indicated above, refers to the taking of “all feasible measures within their power”. The ICRC Commentary on this article explains that the language “reasonably restricts the obligation upon superiors to “feasible” measures, since it is not always possible to prevent a breach or punish the perpetrators. In addition, it is a matter of common sense that the measures concerned are described as those “within their power and only those”.²⁰ These last two words are restrictive, closing the door on possible speculation as to which actions may have been “reasonable”. Many national military manuals reflect the language of Article 86 rather than the combination of “reasonable and necessary” found in some international legal texts.

Case law will undoubtedly further elaborate on the understanding of reasonable and necessary measures. At this stage, though, it would seem that the applicable test is more means-based than results-oriented, and that the measures to be taken must be within the power of the accused. Yet even this pragmatic standard can be subject to varying interpretations. Some would argue that “reasonable and necessary” is synonymous with “practicable or practically possible”. Others, however, suggest that the prevalence of exceptional circumstances (such as genocidal massacres) requires the superior to take extraordinary measures to prevent and punish his subordinates.²¹ Whichever standpoint is

17 *Prosecutor v. Alfred Musema*, Judgement, 27 January 2000, Case No. ICTR-96-13-T, at 880.

18 *Prosecutor v. Delalić et al. (Čelebići)*, Judgement, Case No. IT-96-21-T, 16 November 1998, at 395.

19 *Prosecutor v. Tihomir Blaškić*, Appeals Judgment, 29 July 2004, Case No. IT-95-14-A 29 July 2004, at 72.

20 Commentary, above note 8, p. 1015.

21 See, e.g., above, notes 16 and 17, judgements and proceedings in the ICTR cases of *Bagilishema* and *Musema*.

favoured, any assessment as to effective control has to be cautious and empathetic, with due regard to the rights of the accused.

Heavier sentences for superiors

International humanitarian law and international criminal justice place upon superiors a greater responsibility than that of their subordinates in ensuring that the law is not violated. Superiors, by virtue of their elevated position in the hierarchy, have an affirmative duty to ensure that IHL is duly respected and that breaches are appropriately repressed. Their failure to do so can be interpreted as acquiescence in the unlawful acts of their subordinates, thereby encouraging further breaches and developing a culture of impunity. Courts have taken into account the “command position” of an accused in sentencing. Whilst recognizing that the length of a sentence is to be determined on the basis of the nature and gravity of the crime, case law of the international criminal tribunals seems to dictate that the status as a superior will in itself be considered an aggravating factor.

International criminal tribunals have delved extensively into the issue of appropriate sentencing for commanders. The reasoning in the case law is that a command position may justify a harsher sentence, in particular if the accused held a high position within the civilian or military command structure. The jurisprudence is clear, in that a position of authority, whether civilian or military, gives rise to both duty and trust which, if broken or abused, would tend to aggravate the sentence.²²

The tribunals have further explained that when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof, he should receive a heavier sentence than the subordinates who committed the crime. The justification in imposing a harsher sentence stems from the fact that where a commander fails to punish his subordinates for committing crimes or to prevent them from doing so, this creates an impression of tolerance, acquiescence or even approval vis-à-vis the actions of the subordinates. The tribunals have concluded that it would be inconsistent to punish a simple perpetrator with a sentence equal to or greater than that of the commander:

Therefore, when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence equal or greater to that of the commander.²³

22 See notably *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgement and Sentence, 4 September 1998; *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Sentence, 2 October 1998.

23 *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-T, 3 March 2000, at 789.

As such, the consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes. Because he is a leader, his conduct is that much more reprehensible:

This Chamber finds as an aggravating circumstance that Kayishema, as *Prefect*, held a position of authority. This Chamber finds that Kayishema was a leader in the genocide in Kibuye *Prefecture* and this abuse of power and betrayal of his office constitutes the most significant aggravating circumstance.²⁴

The case law points to a simple conclusion, namely that civilian and military commanders are deserving of harsher sentences than their subordinates. The mere fact of being in a position of responsibility will be seen as an aggravating factor:

Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances, independently of the issue of the form of participation in the crime.²⁵

It could be argued that in the above cited precedents too much weight is given to the accused's position as superior in determining the sentence, rather than to the severity of the crime itself. Indeed, taken literally, the case law suggests that a superior who failed to punish a subordinate for murder should face a greater punishment than the murderer, even if such superior did not possess the necessary specific intent to commit murder. However, the jurisprudence does reflect the fact that with rank come responsibility and the duty to intervene.

Manifestly illegal orders

In many contexts in which war crimes are committed by military personnel, subordinates will plead that they were merely following orders when carrying out certain unlawful actions. More often than not, the subordinate will not question the legality of an order, there being an inbuilt presumption that superiors are better placed to determine "wrong from right" in the conduct of hostilities. At other times, though, where the order seems to go beyond what is legally permissible, a subordinate will be faced with a choice: (i) disobey, and face possible reprimand and punishment by the superior or a court-martial; or (ii) obey, and risk criminal punishment by acting upon an order which has unlawful consequences. The lower the rank of the subordinate, the more difficult it may be to disobey an illegal order. This raises a dilemma, both moral and legal, for the subordinate.

24 *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Sentence, Case No. ICTR-95-1-T, 21 May 1999, at 15.

25 *Blaškić* Judgement, above note 23, at 789.

Whilst it is often argued that discipline and the unquestioning execution of orders are essential to succeed in battle, the law recognizes that there are limits to the “blind obedience” expected of subordinates. Subordinates will not be able to escape punishment by virtue of merely acting in pursuance of an order, where the order was manifestly illegal.

Traditionally it was felt that the subordinate, whilst committing the offensive deed, should not incur responsibility for following the illegal order. The rationale behind allowing an accused to raise a defence of superior orders was based on practical common sense. To disobey an order can lead to reprimand, demotion and even court martial. After all, a soldier’s first duty is to obey orders from a superior. Hence allowing a subordinate to raise a defence of superior orders recognizes that subordinates within the military have little or no discretion in questioning orders of superiors.²⁶

However, First World War case law suggested that the defence of superior orders would be unavailable unless the subordinate did not know that the order was in itself illegal and would result in the commission of a crime. The *raison d’être* of this approach is that knowledge of the illegality presupposes a moral choice to obey or not, which in certain circumstances may trump the little discretion subordinates had in not following orders.

Two First World War cases highlight this. In *Dover Castle*, a German submarine commander who torpedoed a British hospital ship successfully raised the defence of superior orders on the basis that German government and Admiralty memoranda had been communicated, indicating that hospital ships were being used for military purposes in violation of the laws of war. Thus the commander did not know that the order was unlawful, as the memoranda suggested that the ships were legitimate targets.²⁷

By contrast, in the *Llandoverly Castle* case two subordinates who followed their submarine commander’s order to open fire on the survivors of the torpedoed *Llandoverly Castle* hospital ship in their lifeboats had their defence of superior orders turned down. Here, the order was seen to be in violation of a universally known rule of international law. The subordinates could not as such claim their ignorance of the illegality.²⁸

After the Second World War the courts also denied access to the defence of superior orders, ruling it to be unavailable where a subordinate has a “moral choice” to obey or disobey the order. This approach assumes that there are clear situations where subordinates should question and not follow certain orders which, by their very nature, are outside the realm of that which is morally and legally permissible. The Nuremberg Principles echoed this standard:

26 See, e.g., L. Oppenheim, *International Law: A Treatise*, Vol. 2, 6th edn, 1940 ed. H. Lauterpacht (London: Longman, Green & Co.).

27 *Dover Castle*, 16 AJIL (1921), 704.

28 *Llandoverly Castle*, 16 AJIL (1921), 708.

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided that a moral choice was in fact possible to him.²⁹

In the recent *Finta* case, the Supreme Court of Canada opined that a defence of superior orders could be raised in certain circumstances, in particular where the subordinate has *no moral choice* as to obeying the order, even where the order was manifestly illegal:

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test: the defences are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.³⁰

The ad hoc international criminal jurisdictions have gone further, striking out altogether the possibility of raising a defence of superior orders. Instead, the Statutes of the ICTR and the ICTY allow only for mitigation of sentence:

[T]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.³¹

Article 33 of the ICC Statute does not allow a defence of superior orders if the order was *manifestly* illegal:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - b) The person did not know that the order was unlawful; and
 - c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

29 Principle IV of the Nuremberg Principles.

30 *R v. Finta* [1994] 1 SCR [701], Supreme Court of Canada.

31 ICTR Statute, Article 6(4); ICTY Statute, Article 7(4).

This reflects Rule 155 of the ICRC's customary law study, whereby criminal responsibility remains if the manifest illegality of the order was known:

Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful and should have known because of the manifestly unlawful nature of the act ordered.³²

It could be argued, given the ICC's position, that contemporary practice might allow the defence of superior orders if a subordinate can show that the order was not manifestly illegal or that he did not know and could not have known of the order's illegality. Rule 11 of Canada's 2001 military code of conduct explains:

Orders must be followed. Military effectiveness depends on the prompt obedience to orders. Virtually all orders you will receive from your superiors will be lawful, straightforward and require little clarification. What happens, however, if you receive an order that you believe to be questionable? Your first step of course must be to seek clarification. Then, if after doing so the order still appears to be questionable, in accordance with military custom you should still obey and execute the order – unless – the order is manifestly unlawful.

In other words, a subordinate must disobey an illegal order only when he knows that such order is manifestly illegal. A difficulty for the subordinate, though, could be in assessing whether an order is "manifestly unlawful/illegal".

Jurisprudence and academic treatises define a manifestly illegal order as one which offends the conscience of every reasonable, right-thinking person and which is patently and obviously wrong. Case law refers to the order being blatantly unlawful leaving no reasonable doubt as to its unlawfulness.

The identifying mark of a "manifestly unlawful" order must wave like a black flag above the order given, as a warning saying: "forbidden". It is ... not unlawfulness that is detectable only by legal experts ... but an overt and salient violation, a certain and obvious unlawfulness that stems from the order itself, ... an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt.³³

Interestingly, under Article 33 of the ICC Statute, orders to commit genocide and crimes against humanity are deemed to be manifestly unlawful, whereas the same is not expressly applicable to orders to commit war crimes. It could thus be inferred that the ICC does allow for a defence of superior orders in situations where war crimes have been committed. To so allow such a defence is arguably understandable, given the complexity of modern-day asymmetrical warfare, with myriad parties involved, the blurring of the distinction between combatants and civilians, and the conduct of hostilities and control of weapons

32 Henckaerts and Doswald-Beck, above note 10, pp. 565–8.

33 Israel, District Military Court for the Central Judicial District, *Ofer, Malinki and Others* case, Judgement, 13 October 1958.

from distant operation centres rather than in the field of combat. The realities of contemporary warfare may make the task of assessing and distinguishing right from wrong, permissible from manifestly illegal, that much more of an arduous task for subordinates in the midst of combat. Indeed, a number of the war crimes listed in Article 8 of the ICC Statute may not necessarily be that patently obvious without certain specific training or expertise.³⁴ This being so, it could be considered as unjust to punish lay subordinates who acted in good faith.³⁵

Conclusion

The principle that commanders and other superiors should be held criminally responsible for failing to prevent or punish subordinates committing IHL violations has been developed through international criminal jurisprudence, codified in Additional Protocol I and is now arguably considered to form part of international customary law. It is widely accepted that for a commander to turn a blind eye to crimes committed by subordinates can but encourage further violations of IHL. It is also acknowledged that it would be wrong for commanders to be able to escape any form of liability simply because they did not wield the weapon that dealt the fatal blow. Similarly, subordinates who violate IHL should not be able to escape punishment on the pretext that they were merely following orders, when the orders were stained with manifest illegality.

However, despite these advances in repressing perpetrators of IHL violations, irrespective of their hierarchical position, the evolving jurisprudence in this field has given rise to a number of questions, and has highlighted the difficulties in establishing the liability of commanders and assessing which action, if any, they could have taken in the prevailing circumstances to prevent the commission of IHL violations by subordinates. Some would argue that the standards expected of commanders in the midst of battle are untenable, and likewise that it is unrealistic to expect subordinates to question or disobey orders, however unlawful they may seem. It is with such issues considered that the theory of command responsibility has evolved, seeking to strike the right balance between the obligations placed upon superiors, and the individual actions of a subordinate in the midst of battle which escape their remit.

34 For instance, declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; 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; or intentionally directing attacks against buildings dedicated to, *inter alia*, science or charitable purposes.

35 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 (1999), pp. 785–94.

The impact of military disciplinary sanctions on compliance with international humanitarian law

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Abstract

The impact of disciplinary military sanctions on respect for international humanitarian law depends on the extent to which the principles governing that law have been integrated into the disciplinary rules of the armed forces and the range of responsibility of the commanding officer giving an order which breaches international humanitarian law or which does not ensure respect for it. Whereas the armed forces rely on a strong principle of obedience, respect for international humanitarian law depends essentially on the superior officer whose responsibility is subject to sanctions imposed by international criminal judges within a judicial system which aims to make sanctions an effective means of ensuring respect for international humanitarian law.

.....

Disciplinary law applies sanctions to those members of a specific body within a society, be it public or private, who have acted in a manner contrary to the collective interests of the body to which they belong. Disciplinary sanctions are therefore administrative in nature and differ from penal sanctions, which punish behaviour on the part of the individual that affects society in general. Just like doctors and judges, whose professional activity has important consequences for

* The opinions expressed are those of the author alone.

society, military personnel are subject to both disciplinary and criminal law. This is probably even more valid for military personnel, whose role is ultimately to use force or threaten to use force to protect the state's interests. Rigorous supervision of the armed forces and strict internal discipline are required to ensure that military personnel obey orders when in danger and do not abuse their power.

The main aim of disciplinary law is to give the hierarchical principle its effectiveness, by making it possible to punish behaviour that impedes the smooth running of the service. It is primarily a means of ensuring obedience to superiors and the execution of the task assigned by the political authorities. In order to assess the impact of military disciplinary sanctions on compliance with international humanitarian law, the content of disciplinary law must first be examined: the greater the extent to which the principles of international humanitarian law are incorporated in the disciplinary rules of the armed forces, the greater the impact of disciplinary sanctions. Their impact must then also be measured in terms of the accountability of an immediate superior who gives an order contrary to international humanitarian law or who does not ensure compliance with this body of law: the armed forces are founded on a strong principle of obedience to one's superior, meaning that responsibility for compliance with international humanitarian law lies essentially with him. The discussion that follows is divided into two parts and is intended to be both humble – an article can only lay the groundwork of a study that deserves to be carried out in far greater depth – and circumspect: an exhaustive study would be impossible, given the difficulties of gathering information on national military disciplinary systems, the author's linguistic shortcomings and the complexity of a comparative analysis of these systems.¹

Military disciplinary sanctions can be used to ensure compliance with international humanitarian law where there is an overlap between this body of law and disciplinary law

A comparison between a number of disciplinary systems² revealed rules common to these systems and to international humanitarian law, which enables us to try and determine the common ground between domestic and international rules. This is where disciplinary sanctions are likely to have an impact on compliance with international humanitarian law.

1 The military disciplinary systems and the criminal law of the following states were reviewed: Argentina, Australia, Bosnia and Herzegovina, Canada, Chile, France, Germany, Kenya, Philippines, Singapore, South Africa, Sri Lanka, Switzerland, Ukraine, United Kingdom, United States, Yugoslavia (before its break-up) and Zambia. The author would like to thank Stéphane Bourgon for providing documentation.

2 See note 1.

An attempt to establish the common ground between domestic disciplinary law and international humanitarian law

By studying a number of different military disciplinary systems we have been able to identify the categories of sanctions that are common to these two bodies of law. Given their widespread implementation, they appear to be the key sanctions used for maintaining discipline. Our consideration of the impact of disciplinary sanctions on compliance with international humanitarian law therefore focuses on these categories. It is clear that sanctions must be based on rules that are themselves inspired by international humanitarian law if they are to contribute to compliance with it.

The first category of common sanction identified concerns dereliction of duty and responsibilities by military personnel in combat.³

This category, which reinforces a soldier's principal duty, that of obedience, generally leads to compliance with international humanitarian law provided that military orders and assignments themselves comply with this body of law. The second category of sanction, which punishes orders to carry out a manifestly unlawful act and tolerance of such an act on the part of the superior,⁴ therefore complements the duty to "respect and ensure respect for" international humanitarian law contained in Article 1 common to the Geneva Conventions of 1949.⁵

We note that a soldier's duty to obey is sometimes constrained by a duty to disobey manifestly illegal orders⁶ – whether expressly, if disciplinary law prohibits compliance with such an order, or implicitly, if the refusal to obey is subject to disciplinary measures and concerns a legal order.⁷

This kind of disciplinary provision, whilst being difficult to implement,⁸ tends to favour compliance with international humanitarian law on the part of

3 For example: Germany, Law on the Legal Status of Soldiers (Soldiers' Law), Article 11; Australia, Defence Force Discipline Act 1982, Articles 15F and 27; Bosnia and Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 7(1); Ceylon, Army Act, 1956, Article 98; Kenya, The Armed Forces (Summary Jurisdiction) Regulations, Articles 19, 28 and 30; Singapore, Singapore Armed Forces Act, Articles 17 and 21.

4 For example: Bosnia and Herzegovina, Decree Law on Service in the Army of the Republic of Bosnia and Herzegovina, Official Gazette of BiH, 1 August 1992, Article 41; France, Instruction (directive) No. 200690/DEF/SGA/DFP/FM/1, 30 May 2006.

5 Article 1 common to the four Geneva Conventions reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

6 For example: Germany, Law on the Legal Status of Soldiers (Soldiers' Law), Article 11; Bosnia-Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 41; France, Instruction No. 201710/DEF/SGA/DFP/FM d'application du décret relatif à la discipline générale militaire (directive No. 201710/DEF/SGA/DFP/FM on the application of the decree on general military discipline), 4 November 2005, Article 7, and Statut général des militaires (general statute for soldiers), Articles 8 and 122-4.

7 For example: Australia, Defence Force Discipline Act 1982, Article 27; Kenya, The Armed Forces (Summary Jurisdiction) Regulations, Article 28; Singapore, Singapore Armed Forces Act, Article 17.

8 Regarding this issue see Jacques Verhaegen, "Refusal to obey orders of an obviously criminal nature: providing for a procedure available to subordinates", *International Review of the Red Cross*, No. 845 (March 2002), pp. 35–50.

military personnel because the soldier giving the order and the soldier carrying it out are both responsible for implementing this body of law.

The third category of common sanction identified covers ill-treatment of a person under supervision or outrages upon the dignity of such a person.⁹ This kind of sanction strengthens the rules of international humanitarian law prohibiting torture, cruel, inhuman or degrading treatment, sexual violence and outrages upon personal dignity.¹⁰ It in fact constitutes the essence of the protection offered to those who are not or are no longer participating in hostilities.

The final category of common sanction examined concerns harm to the reputation of the army.¹¹ We may legitimately consider that military personnel who violate fundamental rules of international humanitarian law bring discredit on the army to which they belong, as it is clearly utterly indefensible to use force in such a way as to violate the “cardinal principles” of international humanitarian law.¹² This generic category is therefore an interesting means of encouraging compliance with international humanitarian law, or at least its fundamental rules.

The question is therefore whether military disciplinary law plays a role in ensuring compliance with other rules of international humanitarian law, in cases where the violation is not considered to be a serious breach. According to Article 86(1) of Protocol I additional to the Geneva Conventions of 1949 (Additional Protocol I),

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

Disciplinary sanctions can therefore be used to suppress or even repress violations that do not constitute grave breaches of international humanitarian law.¹³ The categories of common disciplinary sanction described above confirm beyond doubt that disciplinary sanctions can be used in these cases, provided that the orders given comply with international humanitarian law.

Disciplinary law can therefore cover all obligations under international humanitarian law, although its actual scope depends on the willingness of each state party to the Geneva Conventions of 1949 and their additional protocols.

9 For example: Bosnia-Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Articles 7(6) and 7(9); Ceylon, Army Act, 1956, Article 126; Singapore, Singapore Armed Forces Act, Article 28.

10 See in particular Article 3 common to the Geneva Conventions of 1949. These disciplinary sanctions reinforce the repression of such violations contained in the statutes of the ICTY, the ICTR and the International Criminal Court.

11 For Bosnia and Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 8(5); for Ceylon, Army Act, 1956, Article 107.

12 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, paras. 78–79.

13 According to the commentary on Article 86(1) of Protocol I additional to the Geneva Conventions, states are obliged to take the “measures necessary” to suppress any violations that do not constitute grave breaches under the Conventions or the Protocol. Disciplinary sanctions are merely one option; a state can equally choose to prosecute these violations under its domestic law.

Given the impact of military disciplinary sanctions on weapon bearers, we would argue for the greatest possible complementarity between military disciplinary law and international humanitarian law.

The effects of military disciplinary sanctions

Sanctions have a dual aim – education and dissuasion. The educative side consists of encouraging the soldier to discharge his responsibilities better and to respect the rules inherent in being a member of the armed forces. This being so, the sanction must be limited to what is necessary to ensure that the soldier understands that he has done something wrong and that he modifies his behaviour.¹⁴

The sanction is also a call to order for the soldier concerned. Although it concerns one particular soldier, it can serve as a warning to all personnel under the orders of the authority imposing it. To achieve this aim, the punishment must be just, but sufficiently severe. The disciplinary procedure must also be implemented quickly.

Military disciplinary sanctions make a clear contribution to compliance with international humanitarian law through education and dissuasion. They are likely to have a greater impact if the rights of the person being punished are respected when disciplinary sanctions are imposed. In other words, if the soldier concerned has access to his file, if he has the right to give an explanation regarding the facts cited against him, if his punishment has a legal and factual basis and if he has the right to appeal against the punishment promulgated, then disciplinary law is being applied in an educational and just manner, which can only strengthen the rules of international humanitarian law that underpin it.¹⁵ Setting up a disciplinary procedure that meets the standards for a fair trial appears to be even more imperative since, in the case of multinational military operations led by the United Nations for the purposes of peacekeeping and international security, sanctions are a matter for the states providing contingents.¹⁶

Depending on the scope of military disciplinary law in each state, the impact on compliance with international humanitarian law may be considerable.

14 In some bodies of disciplinary law the detaining authority is directed to ensure that the punishment fits the circumstances and will have the desired effect on the individual being punished. In French law, for example, the *Guide à l'usage des autorités investies du pouvoir disciplinaire* specifies that the more serious the soldier's efforts to mend his ways, the more lenient his punishment should be. It adds that warnings and suspended sentences should be used and that, conversely, any further misconduct or breach of duty should restrict the use of suspended sentences (*Guide à l'usage des autorités investies du pouvoir disciplinaire*, annex to Instruction (directive) No. 200690/DEF/SGA/DFP/FM/1, 30 May 2006). Likewise, for Bosnia-Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 38.

15 The requirement for a fair trial is even more relevant, since it coincides with the recommendations of the UN Sub-Commission on the Promotion and Protection of Human Rights contained in UN Doc. E/CN.4/2006/58 of 13 January 2006. For a comprehensive discussion of the diversity of national military jurisdictions, with significant consideration of the implementation of disciplinary sanctions, see Elisabeth Lambert Abdelgawad (ed.), *Juridictions militaires et Tribunaux militaires d'exception en mutation: Perspectives comparées et internationales*, Editions des archives contemporaines, Paris, 2008.

16 UN Department of Peacekeeping Operations, Directives for Disciplinary Matters Involving Military Members of National Contingents, DPKO/MD/03/00993.

However, this depends first and foremost on the immediate superior, who is responsible for its implementation.

The duty of commanders to impose sanctions for violations as a precondition for compliance with international humanitarian law

Commanders must exercise disciplinary authority in order to maintain discipline and to enable the prosecution of serious breaches of international humanitarian law committed during hostilities. Moreover, international criminal judges consider that a commander has a duty to exercise this authority; if he does not, he is accountable for any breaches that occur.

The need to exercise disciplinary authority to ensure compliance with international humanitarian law

Disciplinary sanctions lose their educational and dissuasive effect if the sanctioning authority does not take action in the event of violations. Disciplinary sanctions are necessary for maintaining military discipline and for maintaining the commander's authority.¹⁷ It is precisely the hierarchical and disciplined structure of a military body that makes compliance with international humanitarian law possible for its members.¹⁸ Disciplinary sanctions are therefore a significant factor influencing compliance with international humanitarian law.

Disciplinary sanctions are also crucial to the prosecution of grave breaches of international humanitarian law committed during hostilities: as the judge is rarely at the scene of the hostilities, disciplinary sanctions play an important role in bringing to light the fact that a violation of international humanitarian law has taken place. Such violations might never have come to the judge's attention had they not been condemned as violations.

Disciplinary sanctions are therefore a decisive stage in the criminal punishment of grave breaches, which explains why international judges tend to consider that disciplinary sanctions are the minimum duty of an immediate superior when faced with this kind of violation. The International Criminal Tribunal for Rwanda considered that "in the case of failure to punish, a superior's responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law".¹⁹ Here again, disciplinary sanctions are an essential tool in ensuring compliance with international humanitarian law. It is therefore logical that a

17 Moreover, the majority of domestic disciplinary systems provide that a commander has not only the right but also the duty to impose sanctions for offences or breaches committed by his subordinates. In French law, for example, we find Article 2 of Decree No. 2005-794 of 15 July 2005 regarding disciplinary sanctions and suspension as they apply to military personnel.

18 The relationship between organization and compliance with international humanitarian law is emphasized in Protocol II additional to the Geneva Conventions of 1949, Article 1.

19 *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement, 7 June 2001, para. 50.

commander be held responsible if he does not punish breaches of international humanitarian law committed by his subordinates.

Accountability in international jurisprudence of a commander who does not use his authority to impose disciplinary sanctions

Article 87 of Additional Protocol I requires states to impose certain duties on commanders, such as that contained in paragraph 3, to “initiate disciplinary or penal action” against subordinates or other persons under their control who have breached the Geneva Conventions or the Protocol.²⁰ This duty is confirmed by case law from the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR).²¹

A commander who fails to impose disciplinary sanctions may be held responsible. Article 86 of Additional Protocol I provides that the immediate superior is to be held responsible should he not have taken all feasible measures to prevent or repress breaches committed by his subordinates.²² The international criminal tribunals make use of this accountability²³ and this has led to prosecutions.²⁴ Among them, it is worth highlighting the judgment in the *Hadžihasanović* case, in which the ICTY prosecuted a commander who had merely imposed a disciplinary measure when they believed that the seriousness of the conduct in question justified treatment by the competent legal authorities.²⁵ The implication here is that the immediate superior, as the person authorized to impose disciplinary sanctions, has a responsibility to encourage compliance with international humanitarian law.

This section of the judgment, regarding cruel treatment, was not contested by the parties. Nevertheless, the Appeals Chamber dismissed the prosecution’s argument that the trial chamber erred in law by concluding that the

20 Article 87(3) states that “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.”

21 See *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgement, 15 March 2006, para. 176; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001, para. 441; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 377 and *Prosecutor v. Blaskić*, IT-95-14-A, 29 July 2004, para. 83, based on Article 87(3) of Additional Protocol I and Article 7(3) of the Statute of the ICTY.

22 Article 86(2) of Additional Protocol I: “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.”

23 *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement, 07 June 2001, para. 50; *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgement, 15.03.2006, para. 171; and *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 374.

24 *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 463; *Prosecutor v. Hadžihasanović*, Judgement, 15 March 2006, para. 1777; and *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 03 March 2000, para. 734.

25 *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgement, 15 March 2006, para. 1777.

use of disciplinary sanctions is sufficient to discharge a superior of his duty to punish the crimes of pillage committed by his subordinates.²⁶ Indeed, it affirmed that

the assessment of whether a superior fulfilled his duty to prevent or punish under article 7(3) of the Statute has to be made on a case-by-case basis, so as to take into account the “circumstances surrounding each particular situation”.... It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under article 7(3) of the Statute. In other words, whether measures taken were solely of a disciplinary nature, criminal or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish under article 7(3) of the Statute.²⁷

As a result, it can be said that, when his subordinates committed violations of international humanitarian law of a certain gravity,²⁸ a commander cannot merely impose disciplinary sanctions but must also refer the matter to the competent court under domestic law.

This jurisprudence considerably strengthens the link between criminal and disciplinary sanctions. It is hence a powerful incentive for states to extend the duties and accountability that their respective legal systems impose on persons with disciplinary authority. It also confirms that disciplinary sanctions have an impact on compliance with international humanitarian law by actively employing the authority of sanctions in the service of this body of law.

26 *Prosecutor v. Hadžihasanović*, IT-01-47-A, Appeal Judgement, 22 April 2008, para. 33.

27 *Ibid.* (footnotes omitted).

28 In the case in point, the commander of the 3rd corps of the army of Bosnia and Herzegovina was found guilty in the trial chamber, in his capacity as a commander, of failing to take the necessary and reasonable measures to prevent a murder, punish another murder and prevent and/or punish cruel treatment.

Armed groups, sanctions and the implementation of international humanitarian law

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Abstract

While it is widely accepted that punishing the perpetrators of violations of international humanitarian law is an important instrument in improving compliance with the law, little research has been done into the obligations on armed groups to impose sanctions and their possibilities for doing so. This article discusses characteristics of armed groups that influence their willingness and ability to comply with international humanitarian law and to punish those of their members who commit violations. It takes a holistic approach to these sanctions, and analyses the different methods of punishing members of armed groups, including disciplinary sanctions, penal sanctions imposed by the state and penal sanctions imposed by the group itself.

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Introduction

Each party to a conflict is required to comply with the provisions of international humanitarian law and to ensure that the members of its armed forces and other

* The content of this article reflects the views of the authors and not necessarily those of the organisations to which they are or were associated.

persons or groups acting under its instructions and orders or under its control also comply.¹ In this respect international humanitarian law makes no distinction between the obligations of states and those of the armed groups concerned. Moreover, Article 3 common to the Geneva Conventions, which reflects the minimum rules applicable to all armed conflicts, stipulates specifically that the *parties to the conflict*, without distinction, must comply with certain rules set forth in that Article.²

In order to reflect on how sanctions can affect the behaviour of armed groups, we must examine the extent to which the underlying principles of international humanitarian law – which are rooted in international armed conflicts – are suited to them. Those principles call for appropriate action whenever the law is violated, including administrative, disciplinary or punitive measures, in order to put an end to the violation and prevent its repetition. In the case of several of these measures, the initiative and responsibility lie with the armed bodies themselves. Others fall within the purview of entities that are authorized and competent to take such action, such as judicial bodies, although it must be borne in mind that they may be powerless when faced with armed groups which claim control of their own affairs, hence the need to explore to what extent these armed groups are in a position to meet the relevant obligations imposed by international humanitarian law, including the measures to be taken in the event of violations.

In order to apprehend this issue fully we must first identify in the constellation of armed groups those that have the characteristics that are necessary if the implementation and sanctions of international humanitarian law are to have the desired effect of preventing violations from being committed or repeated. We shall confine ourselves to examining the situation of armed groups in the conventional sense of the term and shall not include those that have been described as transnational groups, even though some of the considerations set forth below could apply to them.³ Once these groups have been identified, we shall discuss how they could spread knowledge of international humanitarian law and

1 Article 1 common to the four Geneva Conventions of 1949. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep., para. 220; Rule 139 of the ICRC Customary Law Study confirms the applicability of this provision for international and non-international armed conflicts – see Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Geneva and Cambridge, 2005, Vol. I, pp. 495–8.

2 See for example *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep., para. 218. It states that “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (*Corfu Channel*, Merits, ICJ Reports 1949, p. 22, paragraph 215 above).”

3 See in particular, on the issue of transnational groups, Marco Sassòli, “Transnational armed groups and international humanitarian law”, *Program on Humanitarian Policy and Conflict Research*, Occasional Paper Series, Winter 2006, No. 6, Harvard University, available at www.hpcr.org/pdfs/OccasionalPaper6.pdf (last visited 14 July 2008).

train their members in this subject. We shall then turn to the sanctions which could be applied in the event of non-compliance by focusing our attention on the question of criminal punishment.

The essential characteristics of armed groups in relation to implementing international humanitarian law

There are various constraints involved in identifying armed groups that can be influenced by the discourse of compliance with the law. For instance, for international humanitarian law to be applicable, the armed groups must at the very least be operating in a context of non-international armed conflict – that is, in a situation of violence between a state and an armed group or between armed groups. To qualify as an armed group a minimum degree of organization – that is, a certain level of organizational coherence and hierarchy, such as a command structure and the capacity to sustain military operations – is necessary. This element will be discussed below.⁴

The level of organization

An armed group must have a minimum degree of organization to be able to comply with all the rules of international humanitarian law applicable to non-international armed conflicts.

This level of organization is particularly relevant to our purposes, for a group that does not attain it may well be unable to familiarize its members with international humanitarian law and establish mechanisms to ensure compliance. This situation can result in an increase in violence that is difficult to control and leads to a spiral of anarchy and bloodshed – precisely what humanitarian law aims to avoid by seeking a balance between the principle of humanity and the considerations of military necessity.

In practical terms, internal organization presupposes that there is a command structure. Only when such a structure exists can the leaders train the members of the group, give clear orders and instructions, be informed of the actions of subordinates and react promptly to them. A chain of command and a reporting system are thus necessary if the leadership is to be informed about violations, trace the role played by individuals in committing a crime and take appropriate measures. The reporting procedures require reliability and predictability and can only exist in structures with a certain level of internal organization.⁵

4 See Dietrich Schindler, “The different types of armed conflicts according to the Geneva Conventions and Protocols”, *Recueil des Cours de l’Académie de droit international de Liège*, Vol. 163 II, 1979, p. 147. For a detailed analysis of these criteria, see International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Fatmir Limaj*, Case no. IT-03-66-T, Judgement, 30 November 2005, para. 94–134.

5 On the different organizational structures of armed groups see Pablo Policzer, “Human rights and armed groups: toward a new policy architecture”, *Armed Groups Project*, Working Paper No. 1, July 2002, available at www.armedgroups.org/sites/armedgroups.org/files/_1_Policzer.pdf (last visited 14 July 2008).

Furthermore, there must be a body or an authority, such as a command superior, with responsibility for imposing rules and punishing violations. Under any system of self-regulation, offences committed by members of armed groups would be liable to go unpunished. Besides, it is this minimum degree of organization within the hierarchy of an armed group which makes it possible to hold superiors responsible for their omissions, owing to their effective control over their subordinates and their ability to command respect, to put an end to violations and to punish them. Seen from this angle, one understands how important it is for commanders and other superiors to take timely action to ensure that their subordinates are aware of their obligations with regard to international humanitarian law and to take the most appropriate measures in the event of violations.

It is not to be believed, however, that mere organization could be enough for an armed group, in actual practice, to be fully in a position to implement the law and to sanction violations and, above all, to be motivated to do so. From a purely practical point of view, other factors – not affecting the legal nature of a conflict – such as a group's level of control over the territory and its willingness to comply with the law may also play a role.

The level of territorial control

A certain level of territorial control is a condition for the implementation of Protocol II additional to the Geneva Conventions.⁶ Such control by armed groups is advantageous when it comes to imposing penal sanctions, since it can enable the group to set up institutions which are similar to those which states are obliged to establish, and which are often necessary for ensuring compliance with the law.

When armed groups have a high level of control over part of a territory, the state has little or no control in that region and probably cannot ensure that the law is implemented and observed or carry out law enforcement duties. In the event of violations it may therefore be extremely difficult for the state to impose sanctions on members of armed groups. On the other hand, it may be possible for armed groups to take the necessary measures to ensure that the law is known and complied with and to react in the event of contraventions with measures such as criminal sanctions, since these groups have a long-standing and more stable presence and can thus take over state-like functions. When armed groups have such a high level of territorial control, they usually also have the necessary financial and military means to maintain control over long periods. This makes their actions sustainable, which is a prerequisite for prosecuting and punishing serious violations of international humanitarian law while honouring all essential judicial guarantees to the full (see below).

⁶ Article 1(1) of Protocol II (1977) additional to the Geneva Conventions of 1949 stipulates that it applies to “organized armed groups which, under responsible command, exercise such control over a part of [a] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

In today's conflicts, however, it may be very difficult to look at the hostilities in terms of control over territory. They tend to be characterized by "isolated acts, often countered by covert operations coupled with repressive measures, [which] replace continual hostilities. The scene of actions shifts constantly, for an attack can take place at any time and in any country. There is no geographically circumscribed battlefield".⁷

The willingness of armed groups to respect international humanitarian law

The willingness of an armed group to abide by the law and to show that it can appropriately address situations of non-compliance is often linked with the aim it pursues.⁸ For example, an armed group whose aim constitutes per se a flagrant violation of international humanitarian law, such as a group that pursues a policy of ethnic cleansing, is unlikely to be much concerned about sanctions. The same can be said of groups that inculcate a culture of demonization and dehumanization of the enemy as a basis for training their members.⁹ On the other hand, groups that would welcome recognition and support from the international community clearly have a stake in preventing violations. They also have an incentive to show that they can and do mete out appropriate sanctions in the event that violations nevertheless do occur.

Unilateral declarations and special agreements

Allowing armed groups that are party to non-international armed conflict the opportunity to make a unilateral declaration stating their commitment to comply with international humanitarian law can be a useful tool for ensuring compliance in actual practice.¹⁰ It should be borne in mind, however, that such statements could be issued for purely political purposes.

The ICRC and the Depositary of the Geneva Conventions and their Protocols have on many occasions received declarations of this kind from armed groups.¹¹

7 Toni Pfanner, "Asymmetrical warfare from the perspective of humanitarian law and humanitarian action", *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, p. 155.

8 Note that the aim of the groups is irrelevant to definitions of such groups or of armed conflict under international humanitarian law. An exception to this are the armed groups fighting for national liberation, as provided for in Article 1(4) of Protocol II (1977) additional to the Geneva Conventions of 1949.

9 On demonization and dehumanization see in the English literature Lt. Col. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Little, Brown, New York, 1995. See in the French literature Harald Welzer, *Les exécuteurs. Des hommes normaux aux meurtriers de masse*, trans. Bernard Lortholary, Gallimard, Paris, 2007. See also the article by Emanuele Castano, Bernhard Leidner and Patrycja Slawuta, "Social identification processes, group dynamics and the behaviour of combatants", in this issue.

10 This possibility is mentioned expressly in Article 96(3) of Protocol I (1977) additional to the Geneva Conventions of 1949 for groups that fall within the scope of application set out in Article 1(4) of the Protocol.

11 They can be delivered in writing or orally. Although oral commitments do not have the same formal weight as written ones, they are useful for follow-up action and dissemination.

Many were published by the ICRC, some in this journal, without discussion of their validity or content.¹² These declarations provide the answer to a paradox of humanitarian law. For although armed groups, as we know, cannot be party to treaties of humanitarian law, it is nevertheless their responsibility to respect and to ensure respect for that body of law in all circumstances, even if in practice they are reluctant to be bound by the international obligations of the party they are fighting or by any laws which that party may have adopted. Although most of the declarations are limited to general statements of respect for international humanitarian law and do not include any concrete provisions regarding implementation mechanisms such as sanctions, they are a way for these groups to demonstrate and confirm that they are prepared to be bound by international humanitarian law and to ensure that it is implemented. This was in fact noted at the 27th International Conference of the Red Cross and Red Crescent convened in 1999,¹³ and it was on this basis that the Geneva Call organization invited armed groups to sign a declaration of adherence to the rules enshrined in the Ottawa Convention on anti-personnel mines. To date, thirty-five armed groups have reportedly agreed to ban anti-personnel mines through this mechanism, and the results in the field have been conclusive.¹⁴ These declarations send out a clear message from the hierarchy confirming its responsibility in the implementation of humanitarian law and can be an appreciable entry point for opening a dialogue with those groups on any particular aspect of implementing the law. Ideally, the declarations should include a pledge not only to comply with international humanitarian law, but also to include it in the internal disciplinary code of the group and to enforce compliance.

In addition to such declarations, there are special agreements (provided for in Article 3 common to the Geneva Conventions) between the parties to the conflict. These can provide an incentive to comply with international humanitarian law on the basis of the mutual consent of the parties. An example is the agreement between the various parties to the conflict in Bosnia and Herzegovina. It even included specific commitments as to its implementation and a commitment to undertake enquiries into allegations of violations of international humanitarian law and to take the steps needed to put an end to them and punish those responsible. The examples of such agreements are, however, rare,¹⁵ either because the states are concerned about indirectly granting armed groups legitimacy, or because the parties do not want to commit themselves

12 Examples are the unilateral declarations by the Palestine Liberation Organization (*International Review of the Red Cross*, No. 274, January–February 1990, pp. 64–5), the National Union for the Total Independence of Angola (UNITA) (*International Review of the Red Cross*, No. 219, November–December 1980, p. 320) and the African National Congress of South Africa (*International Review of the Red Cross*, No. 220, January–February 1981, p. 20).

13 See 27th International Conference of the Red Cross and Red Crescent, *Plan of Action for the Years 2000–2003*, Final goal 1.1(3), available at www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ8K (last visited 14 July 2008).

14 The declaration can be consulted at www.genevacall.org/about/testi-mission/gc-04oct01-deed.htm (last visited 14 July 2008).

15 Attempts to conclude final agreements have failed for example in Colombia, Tajikistan and Jammu/Kashmir.

to more than the minimum for fear of their own members being prosecuted, or because the intention of one or both parties to respect international humanitarian law is not sincere.

The dissemination of international humanitarian law and training for members of armed groups

If the state or states on whose territory armed groups are operating fulfil their obligation to spread knowledge of international humanitarian law among the civilian population – in particular by making the instruments available in the national language or languages – it can be presumed that, as a result, the armed groups too will be informed, at least in general terms. This does not absolve those groups from all responsibility, however. On the contrary, they themselves must, as part of their responsibility to ensure respect, see to it that all their members, in both their political and their military branches, are familiar with the rules of humanitarian law and understand them. Those rules can only be appropriated if certain measures which the leadership is largely responsible for carrying out are in fact taken.

First, appropriate training must be provided and should be tailored to suit the level in the hierarchy and the degree of responsibility of the target groups. It should address both the practicalities of compliance and the mechanisms to be implemented in the event of violation. People who bear weapons must internalize not only the message about obeying the rules but also the message about sanctions that will be incurred for failing to do so. They must be made aware that everyone who takes part in a conflict, irrespective of allegiance, will be held to account for any criminal acts they have committed. Organizations such as the ICRC bear considerable responsibility in this regard, since, wherever they have access to armed groups, it is up to them to be absolutely clear about the sanctions involved and the consequences of any act constituting a serious violation of humanitarian law.

Second, the content of humanitarian law must be made accessible; it should be summarized in simple rules, which could be included in codes of conduct. Some armed groups have in fact stated that they follow this practice.¹⁶ Most of these codes contain provisions regarding sanctions for violations. Finally, in order to ensure continuity of knowledge, armed groups should also attend to the training of skilled staff and, where possible, ensure the presence of legal advisers capable of providing commanders with information on applying and

16 Examples of armed groups that have developed internal codes of conduct are the United Self Defence Forces of Colombia (AUC), the National Liberation Army (ELN) and the Revolutionary Armed Forces of Colombia (FARC) in Colombia, the African National Congress (ANC) in South Africa, the Farabundo Martí National Liberation Front (FMLN) in El Salvador, the Patriotic Movement (MPCI) in Côte d'Ivoire, the Liberia United for Reconciliation and Democracy (LURD) in Liberia, the Maoists in Nepal, the Revolutionary United Front (RUF) in Sierra Leone, and the Sudan Armed Forces (SAF) and the Sudan People's Liberation Movement (SPLM) in Sudan.

adhering to humanitarian law in military operations. This practice is becoming increasingly common in the regular armed forces, and there is no reason why it should be any less important for armed groups also to have such staff at their disposal.

Identifying the most appropriate sanction

In the following paragraphs we shall extend our discussion of the sanctions issue beyond the criminal sanctions that must be imposed in the event of serious violations of humanitarian law. This is because, without wishing to detract from the importance of such sanctions in any way, it is our view that the deterrent effect of a sanction will always be uncertain if it relies only upon this single component. Efforts must therefore be made to introduce mechanisms and processes that lay a basis for censure to be transformed into practical effect whenever an offence is committed. One consequence of this approach is that disciplinary sanctions must be explored in depth.

Disciplinary sanctions

Although disciplinary measures are not sufficient to remedy serious violations of international humanitarian law, they are necessary and useful inasmuch as they enable the leaders of a group to react in a timely way to violations. These measures can take various forms, such as a note to file, a warning, demotion or dismissal. They can also involve the assignment of extra duty or the withdrawal of the soldier's weapons or uniform. In practice, they sometimes also include imprisonment and corporal punishment, including capital punishment. All these measures should naturally be taken in conformity with human rights standards.¹⁷ Disciplinary measures focus on the status of the person concerned within the group hierarchy and can thus have a significant deterrent effect. They are the concrete expression of the reaction by the group's hierarchy and signal to other group members that prohibited conduct will not be tolerated, thus quite possibly preventing further violations from being committed in the future. Disciplinary measures are also very often the only means of sanctioning violations while a conflict is under way, since criminal prosecution requires more time and more resources. If such disciplinary action is to be effective and is to prevent further violations it must be severe enough and must be made public – two conditions that are sometimes difficult to fulfil and to reconcile in actual practice.¹⁸ Simple rules laid down in writing and stating from the outset the penalty to be paid in the event of violation help to make the hierarchy's response predictable, with a view to

17 See Jelena Pejić, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375–91.

18 *Ibid.*

avoiding disparity and disproportion. The usefulness of such rules is not to be underestimated.

Criminal sanctions

As mentioned above, criminal prosecution is necessary where serious violations of international humanitarian law have been committed. The crucial question is who can impose such sanctions when armed groups have committed war crimes.

The state

The primary responsibility of sanctioning violations lies with the state. In practice, a sanction should be imposed as close as possible to the place and persons involved in the crime in order for its deterrent effect to be optimized.

The imposition of sanctions by the state party which has been directly involved in the conflict is subject to a number of significant constraints and must overcome many challenges. First, the state must be capable of duly conducting proceedings and willing to do so – which is far from being a matter of course at the end of a conflict. Second, the state must establish procedures in which all of the parties can have confidence. To do so, it must guarantee equal and individualized treatment for all, irrespective of what group they belong to. It is only when these sine qua nons are fulfilled and when the standards applied are the same for all that armed groups can be reassured and their natural reluctance to hand over their members to the government can be to some extent overcome.

The fact that the state concerned applies the broadest possible amnesty to persons who have participated in the armed conflict, for acts that were not war crimes, ideally while the conflict is still under way, can play a decisive role in the parties' perception of that state's genuine intention to conduct impartial procedures.¹⁹ If no amnesty is granted for the mere participation in hostilities, a state can at least grant a reduction in punishment in these cases, in the hope that this will have some positive impact on compliance with humanitarian law.²⁰ On the other hand, a situation where the state prosecutes the members of the armed group on the basis of its ordinary criminal law simply for having taken part in hostilities – thus refusing to recognize their “combatant immunity” – results in a lack of any incentive for them to comply with the rules of international humanitarian law, since they are likely to face domestic prosecution even if they

19 See Article 6(5) of Protocol II (1977) additional to the Geneva Conventions of 1949, and Rule 159 in Henckaerts and Doswald-Beck, above note 1, p. 611.

20 See “Improving compliance with international humanitarian law”, ICRC, background paper prepared for informal high-level expert meeting on current challenges to international humanitarian law, Cambridge, 25–27 June 2004.

do comply. Of course, blanket amnesties that cover serious crimes committed in a conflict are unacceptable.²¹

Criminal justice proceedings can rarely be instituted during a conflict; it is generally necessary to wait until hostilities have come to an end and the state has regained control of its territory before justice can be served in accordance with procedures which provide the necessary guarantees of a fair trial. Furthermore, criminal procedures are generally complex and lengthy, particularly when they concern serious violations of international humanitarian law committed on a large scale or systematically, and can require expert opinions that are not available at national level, hence the importance of combining such proceedings with other immediate reactions.

Another way of overcoming the above-mentioned difficulties would be to involve a third state on the basis of universal jurisdiction – that is, the principle whereby states can bring to trial the perpetrators of international crimes irrespective of where the crime was committed or the nationality of either the perpetrator or the victim(s). There are few examples in contemporary state practice of recourse to (semi-)universal jurisdiction in order to try members of armed groups.²²

The facts that recourse to universal jurisdiction is unpredictable and that, by its very nature, that jurisdiction is delocalized can detract from the deterrent message of the sanction. It must be recognized, however, that universal jurisdiction can be used to threaten those who have committed international crimes, even if they enjoy the inertia or connivance of the competent authorities.

Last, it should also be possible to benefit from the transitional justice mechanisms often set up after a conflict, including those that use traditional indigenous justice systems.²³ These mechanisms must, however, take due account of the interests, rights and obligations of all of the parties concerned. They must not give the impression that they are taking sides by failing to deal with all persons responsible for violations, regardless of which group they belong to. In addition,

21 The UN Security Council, Commission on Human Rights and Secretary-General have confirmed on various occasions that amnesties must not apply to war crimes. See for example Security Council Resolutions 1120 (1997) and 1315 (2000), Commission on Human Rights Resolution 2002/79 and the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (S/2000/915). See also Simon M. Meisenberg, “Legality of amnesties in international humanitarian law: the Lomé Amnesty Decision of the Special Court for Sierra Leone”, *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, pp. 837–51.

22 One example of the use of universal jurisdiction against members of non-state groups (albeit with close links to a foreign government) is the case of *Jorgic*. According to findings of the Oberlandesgericht Düsseldorf, Germany, Bosnian Serb Nikola Jorgic was the leader of a paramilitary group that took part in acts of terror against the Muslim population in Bosnia. The crimes were carried out with the backing of the Serb rulers and were designed to contribute to their policy of “ethnic cleansing”. He was found guilty of genocide and sentenced to life imprisonment. The judgment was found to be in compliance with the European Convention on Human Rights on 12 July 2007.

23 See for example the native Hawaiians’ “setting to right” (*ho’oponopono*) and the Navajo’s peacemaking processes, as described in Amedeo Cottino, “Crime prevention and control: Western beliefs vs. traditional legal practices”, in this issue. See also the traditional justice mechanisms in Burundi (*Bashingantaha*) and in Rwanda (*gacaca*).

while these mechanisms may have the advantage of being swift, they must still uphold all fair-trial guarantees.

At all events, where the fairness of the sanctioning process is doubtful or where the conditions discussed above are not met – when states are unable or unwilling to meet their responsibility to impose sanctions for violations of international humanitarian law, for example – international or mixed tribunals could prove to be the better option for effectively sanctioning violations committed in internal armed conflicts.

International or mixed tribunals

International or mixed tribunals can provide a satisfactory solution to several problems which may arise when the parties dispense justice themselves. In principle, these tribunals provide a guarantee of independent and impartial justice, which is sometimes lacking – or appears to be lacking – at national level. In addition, they should be in a position to deal equitably with all those who have committed acts of violence, so that the reality in the court – however imperfect it may be – is brought as close as possible to the reality on the ground. This would seem to be essential if a radicalization of positions is to be avoided and sanctions are to contribute in some way to a return to peaceful existence. It is in fact the approach adopted by the International Criminal Court, where crimes committed not only by states but also by armed groups are prosecuted.²⁴ The office of the prosecutor bears a particular responsibility in this regard in determining the court's prosecution policy.

However, international courts have the disadvantage of being located at a considerable distance from the places and persons concerned, which can reduce the effect that sanctions are expected to have. Furthermore, it should be pointed out that there is a growing tendency for internationalized proceedings to be instituted as close as possible to the place where the crimes were committed. In the same line of thought, it would seem essential that these international initiatives provide for links with the national systems concerned, so that cases can be transferred directly, and for strengthened national capacities, so that the cases can be dealt with as soon as possible after the conflicts in accordance with fair-trial guarantees.

The armed groups

Where the state is unable to impose criminal sanctions on individuals who have seriously violated international humanitarian law, the question arises of whether

24 To date, nine members of armed groups in Uganda, the Democratic Republic of the Congo, Sudan and the Central African Republic face warrants of arrest issued by the International Criminal Court. Only one warrant of arrest concerns a former Minister of State for the Interior of the government of Sudan and, most recently, charges were brought against the sitting head of state of Sudan. Information available at www.icc-cpi.int/cases.html (last visited 14 July 2008).

an armed group could itself impose such sanctions, thereby performing one of the functions typically regarded as a prerogative of state sovereignty. International humanitarian law contains no explicit provision on this subject. However, the provision on the passing of sentences in Article 3(1)(d) common to the Geneva Conventions implies that armed groups may pass sentences, since the rule is applicable to “each Party to the conflict” and not only to states. Article 6 of Additional Protocol II and its Commentary do not rule out the prosecution and punishment of criminal offences by non-state entities either.²⁵

Recognizing the right not only of states but also of armed groups to bring people to trial would be consistent with the principle of “equality of belligerents”, which underlies the contemporary law of armed conflict.²⁶ There do exist examples of armed groups that have endeavoured to hold trials and punish their own members.²⁷ Where states are unable to enforce the law, the perpetrators of serious violations of international humanitarian law would in many cases remain unpunished, at least until the end of the conflict, if armed groups had no possibility of imposing criminal sanctions. Of course, this does not prevent them from imposing disciplinary sanctions, as discussed above. A functioning judicial system in territories controlled by armed groups could also have a strong deterrent effect and thus prevent violations of international humanitarian law. There are, however, a number of practical problems linked to the imposition of penal sanctions by armed groups.

First, the armed groups would need to be sufficiently well organized and have the stability, time, determination and resources required to build up such a judicial system and hold trials. Second, the trials would have to be held in

25 The commentary on Additional Protocol II, in C. Pilloud et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, states that “like common Article 3, Protocol II leaves intact the right of the *established authorities* to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict”, pp. 1396–7 (emphasis added).

26 See “International humanitarian law and the challenges of contemporary armed conflicts”, report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 2–6 December 2003, ICRC, Geneva, 2003, available at www.icrc.org/Web/eng/siteeng0.nsf/html/5XRDC (last visited 14 July 2008), in which it is stated that “The principle of equality of the belligerents underlies the law of armed conflict”, p. 19.

27 The Frente Farabundo Martí para la Liberación Nacional (FMLN) in El Salvador wanted to bring two of its own members to trial for executing two wounded American servicemen after their helicopter was shot down in January 1991. The Salvadoran government demanded that the FMLN members be handed over to the state judicial system, and the head of El Salvador’s supreme court warned that any foreigner or Salvadoran national participating in an FMLN trial would be subject to criminal proceedings under Salvadoran law. The trial apparently never took place as the FMLN decided instead to hand over the defendants to the national truth and reconciliation commission. See Human Rights Watch, *1992 Annual Report* (El Salvador chapter), posted at www.hrw.org/reports/1992/WR92/AMW-08.htm (last visited 18 September 2007). The Communist Party of Nepal-Maoist (CPN-M) “established ‘Peoples Courts’, which operated during hostilities and reportedly blossomed after the cessation of hostilities. Furthermore, the CPN-M ... created its own ‘wartime and transitional’ comprehensive public legal code from 2003/04, which covers civil provisions as well as penal provisions both related and unrelated to the conflict”. Jonathan Somer, “Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict”, *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 681.

compliance with the standards imposed by human rights law and international humanitarian law.

International humanitarian law prohibits the passing of sentences in circumstances that fail to provide all the essential judicial guarantees afforded by a regularly constituted court, a precondition which we shall examine in greater detail below.²⁸ Such guarantees aim to eliminate the possibility of judicial errors resulting from “summary justice”,²⁹ and in particular summary executions.

The precondition of judicial guarantees is set out in considerable detail in international humanitarian law, backed up to a large extent by human rights law, in particular the relevant provisions of the International Covenant on Civil and Political Rights. The guarantees that must be granted include the presumption of innocence, the right of defendants to be informed without delay of their alleged offences, the right to mount a full and fair defence and the necessary means for doing so, and the obligation to fully comply with the principles of *nullum crimen sine lege* and *nulla poena sine lege*.³⁰ These guarantees must be upheld in all armed conflicts, whatever their nature. Depriving a person of the right to a fair trial constitutes a war crime.³¹

Clearly, upholding these guarantees raises a number of challenges for armed groups, since doing so requires a relatively well-organized judiciary, defence lawyers, interpreters and support for the indigent. Only well-organized and stable groups with adequate means and in control of territory can set up such a judicial system. Furthermore, the requirement of compliance with the principle of legality raises the question of what body of law the armed groups would apply. Authors hold conflicting views on this issue.³² However, in the interests of the defendants and of good faith it is paramount that no one be convicted of any offence on

28 For non-international armed conflict, see Article 3 common to the Geneva Conventions and Article 6(2) of Additional Protocol II. See also Rules 100–102, Henckaerts and Doswald-Beck, above note 1, pp. 352–74.

29 See Jean S. Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Vol. IV of The Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, 1958, p. 39.

30 Article 6(2) of Additional Protocol II supplements Common Article 3 with an extended list of judicial guarantees. See also Rule 100 of Henckaerts and Doswald-Beck, above note 1, pp. 352–71.

31 See Article 8(2)(c)(iv) of the Rome Statute of the International Criminal Court, which codifies a decision handed down by the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case no. IT-94-1-AR72, Appeals Chamber, 2 October 1995, paras 87–136). According to this decision, breaches in internal armed conflicts of Article 3 common to the Geneva Conventions involve individual criminal responsibility. Rule 156 of the ICRC’s Customary Law Study, listing serious violations of IHL that constitute war crimes in both international and non-international armed conflicts, also includes the wilful deprivation of a POW or other protected person of the right to a fair and regular trial. See Henckaerts and Doswald-Beck, above note 1, p. 574.

32 For Zegveld, state law applies. See Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 187. Jonathan Somer summarizes the view of Bothe et al. as follows: “armed opposition groups would be able to meet the *nullum crimen sine lege* criterion by relying on international law with respect to international crimes, while relying on either existing state legislation or their own existing “legislation” to prosecute crimes related to the mere participation in hostilities.” Somer, above note 27, p. 676. See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague, 1982, p. 606.

account of any act or omission that did not constitute an offence under the law at the time it occurred.³³

The precondition of a regularly constituted court sets the bar particularly high for an armed group that might wish to establish its own judicial system. If “regularly constituted” is interpreted as “regularly constituted within the meaning of national legislation,” or “established by law,” it is hard to imagine that an armed group could set up such a court.³⁴ To avoid requesting the impossible, some argue that emphasis should instead be laid on the fairness of the system and on ensuring its independence and impartiality³⁵ in line with Additional Protocol II and the more recent Elements of Crimes of the International Criminal Court.³⁶

Maintaining an open debate on the ways in which armed groups should comply with the requirements of international humanitarian law concerning the holding of a fair trial, affording all judicial guarantees, by no means implies that these guarantees should be relaxed or downgraded. Processes, methods and means should be identified which armed groups could use to give concrete form to these essential guarantees and to honour them in actual practice.

Conclusions

The role sanctions can play in influencing the behaviour of armed groups is an issue that is far from easy to deal with. The fact that little is known of practices that may have been developed in the field by armed groups does not make things any easier. However, where organized armed groups are involved, it is difficult to depart from the paradigm applying to government armed forces, which provides a framework for discussing the factors and conditions which can make sanctions more effective. Those factors are based on a good knowledge of humanitarian law including the sanctions associated with non-compliance, and the assimilation of that knowledge. Hierarchical superiors play a crucial role in this context, for it is they who ensure, by giving clear instructions and orders, that subordinates comply with the law, and it is they who react promptly in the event of non-compliance. Moreover, a prompt reaction must be a factor which subordinates have to reckon with before engaging in deviant behaviour.

Once it has been recognized that sanctions play a role in ensuring better compliance with the law, it is essential to examine the nature of sanctions and the body best placed to impose them. It becomes clear that limiting sanctions to the

33 See the Commentary on Protocol II in Pilloud et al., above note 25, p. 4606.

34 International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, ICRC, Geneva, 1973, p. 142: “... the words “regularly constituted”, qualifying the word “court” in common Article 3, were removed, as some experts considered that it was not very likely that such a court could be regularly constituted within the meaning of the national legislation if it were set up by the insurgent party”.

35 See James Bond, “Application of the law of war to internal conflict”, *Georgia Journal of International and Comparative Law*, Vol. 3 (2) (1973), p. 372, and Somer, above note 27.

36 See Element 4 of Article 8(2)(c)(iv) of the Rome Statute of the International Criminal Court, Elements of Crimes.

penal component alone – although compulsory in cases of serious violation of international humanitarian law – makes the preventive capacity of such sanctions more “random”. It is necessary to go further and attempt to pinpoint all the factors that can result in the sanctions producing the anticipated effects to the full, hence the advantage of exploring any disciplinary measures that armed groups might take or the involvement of such groups in mechanisms of transitional and traditional justice.

The question of criminal sanctions remains at the core of international humanitarian law, however, whenever serious violations are committed. While requiring that the procedure that is established be compatible with fair justice, humanitarian law does not preclude the possibility that criminal sanctions may be imposed by bodies other than states, including the armed groups concerned. It would seem obvious, however, that studies carried out in greater depth are required in order to identify the conditions that could enable armed groups to exercise justice by establishing mechanisms which comply with the requirements of the law to the full and which can contribute to the active role played by sanctions in enhancing compliance with humanitarian law.

A few thoughts on guaranties inherent to the rule of law as applied to sanctions and the prosecution and punishment of war crimes

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Abstract

War crimes are among the most serious crimes; that is why international courts and tribunals have jurisdiction to prosecute and punish them. However, serious though they are, it is not legitimate to punish them in such a way as to exceed the bounds of respect for human rights. The author considers that, when the perpetrators of war crimes are prosecuted and punished, criteria inherent to the rule of law like those applied by the European Court of Human Rights (such as legality and proportionality) must be met.

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The process of establishing norms governing sanctions is not exempt from the need to satisfy guarantees that are fundamental to the rule of law. Whether these norms enter domestic legal systems by virtue of legislation or case law (as in common-law countries) or whether they remain confined to international law,

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they must comply with the fundamental principles inherent in the concept of legality; otherwise such norms could only be seen as arbitrary and meaningless.

In the context of the prosecution and punishment of war crimes, the rapid development of norms over the past fifteen years (since the establishment of the international criminal courts and tribunals) may give the impression that the fundamental principles of criminal law have been pushed aside. The humanist impetus that helped to bring those crimes, which previously went unpunished in many instances, into the courtroom, at times overlooked some of the guarantees inherent in the rule of law. In the limited space available to me here I shall attempt to review these guarantees, respect for which must be considered a priority.

My analysis will cover four principles: legality, necessity, proportionality and non-retroactivity.

Although it is not the only institution involved in this development, the European Court of Human Rights (ECtHR) in Strasbourg has played a major role in the modern expression of the principles set out above. I shall therefore analyse the various material criteria relating to each of those principles in the light of the relevant case law. The ECtHR also has the advantage of applying to, and covering, both Romano-Germanic and common-law systems. It therefore represents a framework very close to that of international criminal law. Furthermore, it has a very significant influence on the current jurisprudence of the International Criminal Court, as evinced from the latter's recent judgments.¹

The principle of legality

Article 11 of the Universal Declaration of Human Rights defines the principle of legality as follows:

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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

To comply with this principle, the law must precisely define a social act as a crime and prescribe the penalty it carries.² By so doing, it guards against arbitrariness and allows citizens to regulate their social conduct. Legal security is dependent on this condition.

The law defines in advance those acts which are to be prohibited by the criminal law. Its role is to isolate the crime as a social fact, a distinct entity, and to punish the person who commits it. In other words, application of the maxim

1 In this regard see Elizabeth Baumgartner's article in this issue of the *International Review of the Red Cross*.

2 ECtHR, *Achour v. France*, Application No. 67335/01, 29 March 2006, para. 41.

nullum crimen, nulla poena sine lege presupposes that (i) the person concerned is the perpetrator of an act or omission which is objectively defined (an omission may also be a crime); and (ii) that this act or omission is defined as a crime by the law.

When it comes to punishment, the law has the same role to play. It cannot simply state that particular acts are criminal and leave it up to the judges to punish them as they see fit. “These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries.”³ Otherwise the result would be the same as if there were no principle of legality relating to offences, and that would be absurd. So the law must specify the penalty.

Today, specifically material criteria predominate in the definition of the principle of legality. Accordingly, the author and form of the source carry less weight in the interpretation of that principle than was the case when it was first formulated.⁴ It is important to point out at the outset that the “law”, the cornerstone of the principle *nullum crimen, nulla poena sine lege*, today encompasses not only written sources of law but also a more general body of rules which includes case law, and more broadly the law of common-law countries.⁵

Three criteria will be examined: foreseeability, quality and accessibility as applied to the law.⁶ They are closely interconnected, the foreseeability of the law being contingent on its quality and accessibility. Indeed, foreseeability is one of the crucial elements inherent to the principle of legality as applied to offences and penalties. In pursuance of its aim of protecting society and above all individual freedom (and hence legal security), the principle of foreseeability requires that the citizen knows what facts will give rise to criminal proceedings and what penalties are associated with them. That being the case, foreseeability cannot be viewed in isolation from the quality of the law⁷ and its accessibility to the citizen. If the citizen is unable to understand the law or has no access to it, foreseeability must remain an unattained ideal.

In regard to penalties, as confirmed by European case law, these conditions must also be specifically met: “the concept of the legality of a penalty implies not only that the said penalty has a legal basis but that the law itself meets the conditions of accessibility and foreseeability”.⁸

The quality of the law will reside in the clarity and precision of the provision, while accessibility will be determined by more casuistic enquiry (using cases and analogies) and may be of a more limited nature.⁹ These criteria will give rise to foreseeability, which we shall examine subsequently.

3 ECtHR, *Kaŕkaris v. Cyprus*, Application No. 21906/04, 12 February 2008, para. 140.

4 Cesare Beccaria, *Des délits et des peines*, trans. M. Chevallier, preface by R. Badinter, Flammarion, Paris, 1991.

5 ECtHR, *Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, para. 47.

6 *Ibid.*, para. 49.

7 Léon Julliot de la Morandière, *De la règle nulla poena sine lege*, Sirey, Paris, 1910, pp. 60 ff.; Djoheur Zerouki, “La légalité criminelle: Enrichissement de la conception formelle par une conception matérielle”, doctoral thesis, Université Jean Moulin-Lyon 3, 2001, p. 264.

8 ECtHR, Commission Report, *Gragnic v. France*, 29 June 1994, para. 32 (published in French only, author’s translation).

9 Frédéric Sudre, “Le principe de la légalité et la jurisprudence de la Cour européenne des droits de l’homme”, *Revue pénitentiaire et de droit pénal*, No. 1 (April 2001), pp. 335–56, p. 349.

The quality of the law: clarity and precision

In laying down that any deprivation of liberty must be effected “in accordance with a procedure prescribed by law”, Article 5 para. 1 ... primarily requires any arrest or detention to have a legal basis in domestic law [in accordance with the] *quality of the law* ...

In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty ... it must be sufficiently ... *precise*, in order to avoid all risk of arbitrariness.¹⁰

The requirement that a criminal law be precise, as set out in the seminal judgment *Sunday Times v. United Kingdom*,¹¹ goes hand in hand with the requirement that an offence must be clearly defined. The ECtHR again expressed this view in the case of *Kokkinakis v. Greece*.¹²

But what constitutes a clear and precise law? The case law of the ECtHR court gives a partial reply to that question when it asserts that the clarity of the law can be evaluated only on condition that the party concerned benefits from “appropriate advice”.¹³ According to the *Cantoni* judgment, this advice must allow the party “to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37). This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails.”¹⁴

The axiom “ignorance of the law is no defence” is very extensively accepted on the international level and should be applied in the same way to the states or parties to the European Convention on Human Rights. To understand the law, therefore, it is necessary to benefit from appropriate advice.

The Court considers that the criterion of clarity must also be met when it comes to penalties, as it states that “offences and the relevant penalties must be clearly defined by law”.¹⁵

As for the precision of the law, this is only relative and may be limited. The Court has stated in a number of judgments that it has “already noted that the

10 ECtHR, *Amuur v. France*, Application No. 19776/92, 25 June 1996, para. 50 (emphasis added).

11 *Sunday Times v. United Kingdom*, above note 5, para. 49.

12 ECtHR, *Kokkinakis v. Greece*, Application No. 14307/88, 25 May 1993, para. 52.

13 *Sunday Times v. United Kingdom*, above note 5, para. 49.

14 ECtHR, *Cantoni v. France*, Application No. 17862/91, 15 November 1996, para. 35.

15 ECtHR, *Coëme and others v. Belgium*, Applications No. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, para. 145.

wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague”.¹⁶ It has also mentioned the “impossibility of attaining absolute precision in the framing of laws”,¹⁷ especially in spheres of conduct where the particulars are in constant evolution in line with the conceptions of society.¹⁸ Thus the Court acknowledges that a system of law may have recourse to “one of the standard techniques of regulation by rules [which] is to use general categorisations as opposed to exhaustive lists”.¹⁹

Finally, precision and clarity must be assessed in the overall context of the text in question. A provision which is in itself imprecise may become clear when read together with other articles of the same law.²⁰ In a case where the “law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution”, the ECtHR concluded that Article 7 of the Convention had been violated.²¹ Thus precision and clarity in a legal rule are achieved by the combination of a text and clear case law, which together support the criteria relating to foreseeability. The possibility that the law might not be clear and comprehensible to someone with no legal training cannot be ruled out, as the person concerned is expected to seek appropriate advice in order to foresee the consequences of the law. I therefore take a critical view of such an interpretation of the precision and clarity that a rule has to possess. It would seem evident that understanding of a law should not be dependent on explanation in the form of “appropriate advice”.

To these criteria must be added the necessary accessibility of criminal law, in particular, which will be interpreted in a more ambivalent or “limited” way.²²

Accessibility of the law

According to the case law of the ECtHR, the condition of accessibility is defined as follows: “the citizen must be able to have an indication that is adequate in the

16 *Kokkinakis v. Greece*, above note 12, para. 40; see also ECtHR, *Müller and others v. Switzerland*, Application No. 10737/84, 24 May 1988, para. 29; ECtHR, *Olsson v. Sweden*, Application No. 10737/84, 24 March 1988, para. 61; *Sunday Times v. United Kingdom*, above note 5, para. 49.

17 ECtHR, *Barthold v. Germany*, Application No. 8734/79, 25 March 1985, para. 47.

18 *Ibid.*

19 *Cantoni v. France*, above note 14, para. 31.

20 European Commission of Human Rights, *G. v. Liechtenstein*, 30 October 1984, cited in Zerouki, above note 7, p. 308.

21 *Kafkaris v. Cyprus*, above note 3, para. 150. In this judgment the Court unfortunately considered that the finding of such violation constituted in itself sufficient equitable satisfaction for any moral damage suffered by the applicant.

22 *Sudre*, above note 9, p. 349.

circumstances of the legal rules applicable to a given case”.²³ Penalties fall within the scope of these “legal rules”, as does the definition of an offence.

Accessibility is assessed in practical terms.²⁴ It appears that the condition is met as long as there is a published text relating to the matter at hand, whether in the form of a law or of case law.²⁵ Finally, as the ECtHR has pointed out, the law does not need to be accessible to everyone; to meet the criterion, it must be accessible to the persons concerned²⁶ and those persons must be able to gain access to it in practice, if need be by taking “appropriate advice”.²⁷ I refer to my earlier critical remarks in this connection.

Foreseeability

To meet the criterion of foreseeability, a law must first meet the criteria examined above. However, it is important to look specifically at the criterion of foreseeability in order to grasp its full implications.

Following the ECtHR, certain authors have qualified foreseeability, specifying that it should be *relative* or *reasonable*. Individuals have to be able to “assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.²⁸ This is a clear indication that foreseeability is not absolute; it must be assessed on a case-by-case basis. As demonstrated by Zerouki, the adjective “reasonable” must be interpreted *a contrario*: anything that is unreasonable, unexpected or surprising cannot fulfil the requirement of foreseeability.²⁹

It follows that, when an interpretation is made by analogy and to the detriment of the applicant, this is unreasonable.³⁰ A “sudden” jurisprudential about-turn which is unfavourable to the accused, and which the applicant could not have expected, is deemed to be a violation of the principle of legality. Such a decision appears logical and respectful of individual freedoms.

However, it would certainly have been too easy to leave it at that. There may be circumstances in which external facts should cause the applicant to be aware that a jurisprudential reversal could occur or that an act that is not a crime and which it might be difficult to conceive of as a crime might nevertheless be criminal in certain circumstances.

23 *Sunday Times v. United Kingdom*, above note 5, para. 49.

24 ECtHR, *K.-H.W. v. Germany*, Application No. 37201/97, 22 March 2001, para. 73; *a contrario* see *Kokkinakis v. Greece*, above note 12, para. 40.

25 *Kokkinakis v. Greece*, above note 12, para. 40.

26 ECtHR, *Groppera Radio AG and others v. Switzerland*, Application No. 10890/84, 28 March 1990, para. 68.

27 ECtHR, *Pessino v. France*, Application No. 40403/02, 10 October 2006, para. 36. *A contrario*, in this case the Court considered that it was impossible even for a professional, who could benefit from appropriate advice, to foresee the Appeal Court’s reversal of case law.

28 *Cantoni v. France*, above note 14, para. 35; *Sunday Times v. United Kingdom*, above note 5, para. 49.

29 Zerouki, above note 7, p. 311.

30 *Pessino v. France*, above note 27.

It seems that two factors may be relevant in this regard. First of all, the court has considered that a change in mores and social attitudes may lead to recognition of a right, even if the rules of criminal law would appear to indicate otherwise. The case of *S.W. v. United Kingdom* is revealing in this respect: “[T]he abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilized concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.”³¹ In a case such as this, changes in social attitudes, because they are in conformity with the objectives of the Convention (the protection of fundamental rights), lead to a degree of foreseeability, in accordance with Article 7.

Second, the ECtHR expresses the view that the more serious the offence in objective terms, the more the citizen should expect it to be a crime subject to punishment. The *Pessino v. France* judgment, referring to the case of *S.W. v. United Kingdom*, states, “The Court considers that the present case is clearly different from the *S.W. v. United Kingdom* and *C.R. v. United Kingdom* judgments ... which related to a rape and an attempted rape perpetrated by two men on their wives. The Court observed in those judgments [that] “the essentially debasing character of rape [was] so manifest” that the criminalization of such acts committed by men on their wives was foreseeable, could not be said to be “at variance with the object and purpose of Article 7 (art. 7) of the Convention ...”, and “was in conformity ... with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.”³²

Does this mean that a domestic court could prosecute and punish an offence considered to be serious as a crime without falling foul of the criterion of foreseeability as understood by the ECtHR, even where there was no such provision in the law, and that its perpetrator could therefore be arbitrarily punished? On the basis of these judgments we should be inclined to reply in the affirmative, subject to future case law, for the question of reasonable foreseeability before the ECtHR remains somewhat ambiguous and difficult to categorize. In the case of *S.W. v. United Kingdom*, “the Court appears to state that the applicant should have foreseen that his behaviour would give rise to prosecution and punishment, because he could not have been unaware that this conduct was, if not legally, then morally reprehensible.”³³ If this is so, is it not dangerous to link the law with morality? Indeed, some have associated that link with the legal systems prevailing in certain dictatorships.³⁴

Finally, it should be noted that the principle laid down by the ECtHR amounts to prohibition of an interpretation by analogy which is *in malam partem* – that is, to the detriment of the accused. That prohibition is directly connected

31 ECtHR, *S.W. v. United Kingdom*, Application No. 20166/92, 22 November 1995, para. 44.

32 *Pessino v. France*, above note 27, para. 36.

33 Sébastien Van Drooghenbroeck, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, in *Revue trimestrielle des droits de l'Homme*, 1996, p. 475 (author's translation).

34 Zerouki, above note 7, p. 434.

with respect for the principle of legality. However, as we have seen in the cases cited earlier,³⁵ the preponderant criterion to be applied is not the detrimental nature of the outcome for the convicted person but that of reasonable foreseeability, which consequently applies to the interpretation adopted by the judge. This leads to the conclusion that any new, foreseeable interpretation must meet the criteria of necessity and respect for the principle of legality, and hence the requirements of legal security. As Zerouki points out in this regard, “if the mere possibility of a new legal interpretation suffices to make it reasonably foreseeable, the goal of safety is a long way off”.³⁶ Indeed, in the light of the way in which this reasoning is applied by the Court, it would appear that it is permissible for the sentence of life imprisonment to be mentioned in a law as the penalty for any violation of that law, and that all sentences would thereby become foreseeable. That would be problematic in terms of respect for individual freedoms. However, other criteria besides legality apply, among them that of necessity.

The principle of necessity or consideration of the purpose of the penalty

The matter of necessity must be approached, obviously in response to the offence committed but first and foremost in response to the objectives pursued by the penal sanction. As far back as 1874, J. J. Haus wrote that “[t]he penalty protects Society by the effects it produces; but it cannot be justified by its usefulness alone; it must also be a necessary, indeed indispensable, means of protection; for if by means of less rigorous measures Society could achieve the same result, it would not be entitled to dispense repressive justice.”³⁷

Necessity is defined, both in everyday language and in the context that concerns us, as that which is imperative, which cannot be otherwise, which is an obligation. Yet how can an obligation be judged in relation to the *quantum* of a penalty? That is a delicate undertaking and can be only relatively “arbitrary”, especially if necessity is defined in absolute terms and allows for no comparison. We therefore turn to the aims of the sanction in order to clarify the concept of necessity.

The literature generally agrees that criminal sanctions have four main aims: resocialization, deterrence (or special prevention), neutralization and general prevention. The principle of necessity should not only be observed mainly through the prism of defence of society (general prevention), but also in relation to special prevention. As for neutralization, the relevant principle is that of proportionality, which I shall examine subsequently. In regard to general prevention, I would

35 *S.W. v. United Kingdom*, above note 31.

36 Zerouki, above note 7, p. 433 (author’s translation).

37 Jacques Joseph Haus, *Le fondement du droit de punir*, 1874; available at http://ledroitcriminel.free.fr/la_sciences_criminelle/les_sciences_juridiques/introduction/haus_fondement_punir.htm (last visited 29 May 2008, author’s translation).

simply point out that, *ex hypothesi* and as Professor Robert has argued, it is a principle that is “impossible to prove scientifically and ... impossible to deconstruct ideologically”.³⁸ As it would be impossible to examine the other aims of a penalty in such a brief overview, I shall leave that discussion to others with more expertise than I.³⁹ Although in this brief outline I shall not examine all the implications of resocialization, it would seem important to focus on the sentence of life imprisonment, which is the penalty laid down for war crimes in many domestic legal systems. That being the case, we must ask ourselves whether such a penalty is compatible with the aim of resocialization of the criminal.

Resocialization is indisputably one of the aims of penal sanctions, but it cannot be achieved by a life sentence for the simple reason that the criminal will never be released into society. Many authors nowadays see a life sentence as a form of torture, an inhuman and degrading punishment, and call for its abolition.⁴⁰ At all events, by its very nature it cannot serve to resocialize criminals. As pointed out by P. Poncela, “there is general agreement that after about 15 years in prison an individual begins to disintegrate, and can no longer take part in any reintegration project”.⁴¹ Moreover, a life sentence “kills the detainee by inches”;⁴² it is a penalty that the French Constituent Assembly succeeded in abolishing in 1791 as it was considered to be “worse than death”.⁴³ Life sentences therefore have no justification, especially in an international system that advocates humane values for all human beings, whether or not they are war criminals or perpetrators of genocide. Moreover, certain European states have already abolished the life sentence (Cyprus, Norway, Portugal and Spain). We might have hoped to see the ECtHR support these humanistic and apparently pioneering decisions. Although it has found that the imposition of a life sentence *per se* was not contrary to Article 3 of the Convention,⁴⁴ the Court has on several occasions expressed the view that imposing a life sentence without parole on an adult could raise an issue under Article 3.⁴⁵ Moreover, in its judgment in the case of *Selmouni v. France* of 28 June 1999, when interpreting Article 3, a fundamental provision in the Convention system, the Court gave an interpretation to the effect that “the increasingly high

38 Christian-Nils Robert, “Le rôle de la sanction (dans l’approche intégrée de la justice et de la réconciliation)”, in *Colloque à Sanremo: Justice et Réconciliation*, 7–9 September 2006 (unpublished, author’s translation).

39 Christian-Nils Robert, *L’impératif sacrificiel, Justice pénale au-delà de l’innocence et de la culpabilité*, ed. d’en bas, Lausanne, 1986; A. C. Berghuis, “La prévention générale: limites et possibilités”, in *Les objectifs de la sanction pénale, en hommage à Lucien Slachmuylder*, Bruylant, Brussels, 1989, pp. 23–68; Pierrette Poncela, *Droit de la Peine*, PUF, Paris, 1995.

40 For France: Pierrette Poncela and Pierre Lascoumes, *Réformer le Code pénal*, PUF, Paris, 1998, p. 178. In Germany, this features in the political programme of the Green party: *Fraktion Bündnis 90/Grüne, Lebendig begraben, lebenslange Freiheitsstrafe und Resozialisierung, ein Dauerwiderspruch*, Bonn, 1991.

41 Pierrette Poncela, “Perpétuité, sûreté perpétuelle: la peine de mort à petit feu, entretien accordé à Hommes et Libertés”, *Revue de la ligue des droits de l’homme*, No. 116 (2001) (author’s translation).

42 *Ibid.*

43 *Ibid.*

44 CEDH, *Sawoniuk v. Royaume-Uni*, Application No. 63716/00, Decision on admissibility, 29 May 2005.

45 CEDH, *Nivette v. France*, Application No. 44190/98, Decision on admissibility, 3 July 2001.

standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”.⁴⁶ We might therefore have expected a judgment finding that life imprisonment is contrary to Article 3 of the Convention. Unfortunately, only very recently, the ECtHR delivered a judgment that ran counter to such hopes: life imprisonment without parole (in the case in question, release would have been possible only by means of a presidential pardon) is not a violation of Article 3.⁴⁷ Let us nevertheless take note of the fact that the decision was adopted by a very narrow majority (ten votes to seven).

Necessity is also applied in connection with the principles of proportionality and non-retroactivity, or again that of retroactivity *in mitius*. In regard to proportionality, the link is obvious: to be necessary, a penalty must be proportionate. As for retroactivity, as soon as an accusation is quashed or a penalty reduced, there is certainly no longer any necessity for it – supposing that there ever was.

The principle of proportionality

The principle of proportionality is directly related to the principle of necessity, and forms what Poncela calls the “just moderation”⁴⁸ of the penalty. Proportionality must be examined principally in the relationship between the crime and the penal sanction.⁴⁹ Other factors that have to be taken into consideration are the harm “caused and feared”, the criminal record of the accused, if any, and any aggravating or mitigating circumstances.⁵⁰ Bentham expressed the opinion that “the value of the punishment must ... outweigh that of the profit of the offence”,⁵¹ but also that the greater the crime, the greater the justification for hazarding a severe penalty in the hope of preventing it.⁵² Subsequently this principle came to occupy an important place in penology, even though it is obviously difficult to apply clear arithmetic to the question of what punishment a crime should entail. According to this theory, the quantum is fixed on an arbitrary basis by the law, which may apply various criteria such as the gravity of the crime and the suffering of the victims, but also aggravating and mitigating circumstances relating to the perpetrator or to the crime itself.

Several criteria connected with proportionality are applied by the ECtHR. Proportionality is regularly expressed in terms of “appropriate and adequate”

46 *Kafkaris v. Cyprus*, above note 3, partially dissenting opinion of judges Tulkens, Cabral Barreto, Fura-Sandström and Spielmann, para. 101.

47 *Kafkaris v. Cyprus*, above note 3, para. 140.

48 Poncela, above note 39, p. 38.

49 Maurica Cusson, *Pourquoi punir?*, Dalloz, Paris, 1987, pp. 87–8.

50 *Ibid.*, pp. 157–69.

51 *Ibid.*, p. 170.

52 *Ibid.*, p. 171.

measures to be taken by national authorities.⁵³ Disproportion is found in the quantitatively immoderate, excessive, unjustified nature of a sanction as compared with the objective pursued. In some cases, the Court has considered as disproportionate measures which could have been replaced by less restrictive solutions.⁵⁴

Finally, in the context of legality as defined by the case law of the ECtHR (using the criteria of foreseeability, accessibility and clarity), proportionality is becoming a key concept. Indeed, as the “foreseeability of the law” is assuming rather “extra-ordinary” forms in terms of the foreseeability of its application in case law, it is becoming necessary for this rule, or should we say this law, to respect the principle of proportionality in the effects it generates. This appears all the more important when it comes to the jurisprudential mode of enforcing the law. In various decisions the Court has thus applied the principle of proportionality when assessing the foreseeable or “non-accomplished” enforcement of the law by domestic courts. Without again going into the details of this “foreseeability” of case law which we examined earlier, it should be borne in mind that the courts must not go beyond that which could reasonably be expected in the circumstances of the case,⁵⁵ the aim for the court being to “be satisfied that ... there exist adequate and effective guarantees against abuse”⁵⁶ or “arbitrary interference”.⁵⁷

Proportionality is already established in the very text of the Convention, but it has also given rise to abundant and wide-ranging case law. In the majority of cases, proportionality tends to emerge from cases relating to Articles 8 to 11 of the Convention, which guarantee the right to respect for private and family life and respect for home and correspondence, and the right to freedom of thought, conscience and religion, freedom of expression and freedom of association.

Apart from these various rights to which proportionality has become attached, the ECtHR has had occasion to lay down the principle of proportionality in criminal matters, in association with Article 3 of the Convention, which prohibits inhuman or degrading treatment or punishment. This context is of particular interest, as it is very closely connected with my research. The Court’s jurisprudence, however, has two facets which need to be clarified.

On the one hand there is older jurisprudence which holds that the Convention does not recognize as such any right to call into question the length of a sentence regularly imposed by a competent court,⁵⁸ and holding that the mere fact that an offence is dealt with more severely in one country than in another is insufficient to establish inhuman or degrading punishment.⁵⁹ The ECtHR has also found that the length of a sentence could raise an issue under Article 3 only in the

53 ECtHR, *New Verlags Gmbh & CoKG v. Austria*, Application No. 31457/96, 11 January 2000, para. 54.

54 ECtHR, *Informationsverein Lentia and others v. Austria*, applications No. 13914/88;15041/89;15717/89, 24 November 1993; para. 39.

55 *Barthold v. Germany*, above note 17, para. 48.

56 ECtHR, *Klass and others v. Germany*, Application No. 5029/71, 6 September 1978, para. 50.

57 ECtHR, *Kruslin v. France*, Application No. 11801/85, 24 April 1990, para. 30.

58 ECtHR, *X. v. United Kingdom* (inadmissible), Application No. 5871/71, 30 September 1974, p. 54.

59 ECtHR, unpublished, Application No. 11615/85, 10 December 1985.

most exceptional circumstances.⁶⁰ A certain dichotomy already seems to be emerging between these terms, sometimes within one and the same decision.⁶¹ In fact, although such circumstances mainly concern conditions of imprisonment, there is no reason to believe that they might not lead back to the offence or the surrounding circumstances and to the sentence pronounced.

On the other hand, in some more recent judgments the ECtHR seems to leave a measure of latitude to consider the appropriateness of the duration of a penal sanction, even if the statement of reasons is far from clear:

The Court notes first of all that a person may be humiliated by the mere fact of being criminally convicted. However, what is relevant for the purposes of Article 3 (art. 3) is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him. In fact, in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system.

However, as the Court pointed out in its judgment of 18 January 1978 in the case of *Ireland v. the United Kingdom* (Series A no. 25, p. 65, para. 163), the prohibition contained in Article 3 (art. 3) of the Convention is absolute: no provision is made for exceptions and, under Article 15 (2) (art. 15-2) there can be no derogation from Article 3 (art. 3). It would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is “degrading” within the meaning of Article 3 (art. 3). Some further criterion must be read into the text. Indeed, Article 3 (art. 3), by expressly prohibiting “inhuman” and “degrading” punishment, implies that there is a distinction between such punishment and punishment in general.

In the Court’s view, in order for a punishment to be “degrading” and in breach of Article 3 (art. 3), the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the *nature* and *context* of the punishment itself and the manner and method of its execution.⁶²

Furthermore, in the *Soering* judgment, in regard to the death penalty and the so-called “death row” syndrome, which the condemned person risked being exposed to in case of his extradition to the United States, the ECtHR court stated as follows:

That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3 (art. 3). The manner in which it is imposed or executed, the personal circumstances of the condemned person *and a disproportionality to the gravity of the crime committed*, as well as the

60 ECtHR, *X. v. FRG* (inadmissible), Application No. 7057/75, 13 May 1976, p. 127.

61 ECtHR, *V. v. FRG*, Application No. 11017/84, 13 March 1986, p. 178.

62 ECtHR, *Tyrer v. United Kingdom*, Application No. 5856/72, 25 April 1978, para. 30 (emphasis added).

conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3).⁶³

Finally, in reference to the application of Article 10 (freedom of expression), the ECtHR has also had occasion to apply the principle of proportionality, in some cases even condemning a state for imposing a sanction which, in the eyes of the Court, was out of proportion to the legitimate aim pursued. In the *Thorgeir Thorgeirsson* case the Strasbourg judges considered that “the reasons advanced by the Government do not suffice to show that the interference complained of [the penal sanctions] was proportionate to the legitimate aim pursued”.⁶⁴

The ECtHR places emphasis on proportionality, which must be respected by legislation and the way it is applied by the relevant jurisdictions. Life imprisonment, examined in connection with the principle of necessity, should therefore be viewed in the light of proportionality; and it does not appear to respect those principles, whatever the crime committed.

The principle of non-retroactivity *in mitius*

The principles of non-retroactivity and retroactivity *in mitius* are directly related to the criterion of foreseeability, since they are the direct causes of its application. Indeed, foreseeability demands that a law cannot be applied to acts committed before it came into force. The criterion of foreseeability, as defined above, has to be given concrete expression in legislative and jurisprudential practice. Now we must look at the explicit prohibition on retroactivity of a criminal law, and hence on the lawfulness or otherwise of retroactivity *in mitius*.

The ECtHR, applying the Convention and, in particular, its Article 7(1), expressly lays down the prohibition on retroactivity. A distinction should be drawn, however, between two forms of retroactivity: the “direct” form, which corresponds to the coming into force of a new law after the offence has been committed, and the “indirect” form, which corresponds to interpretation of the law.

As regards the former, as already mentioned, the ECtHR merely takes up in different terms the principle of non-retroactivity, saying that it is an inviolable principle of law.⁶⁵ Thus when a law is applied retroactively, the Court sees this as a violation of Article 7(1).⁶⁶ As for the latter, although a degree of retroactivity may appear through the interpretation of laws, the Court has underlined the criteria

63 ECtHR, *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989, para. 104 (emphasis added).

64 ECtHR, *Thorgeir Thorgeirsson v. Iceland*, Application No. 13778/88, 25 June 1992, para. 69.

65 ECtHR, *Kokkinakis v. Greece*, above note 12, para. 52; *K.-H.W. v. Germany*, above note 24, para. 45; ECtHR, *Streletz, Kessler and Krenz v. Germany*, applications No. 34044/96, 35532/97, 44801/98; and *K.-H.W. v. Germany*, Application No. 37201/97, 22 March 2001, para. 50.

66 ECtHR, *Jamil v. France*, Application No. 15917/89, 8 June 1995, para. 35.

that must be met if such interpretation is not to be synonymous with retroactivity pure and simple. However, there is no need to review here the various criteria that we examined earlier in connection with foreseeability.

Furthermore, the stated principle of non-retroactivity admits of one possible exception, namely retroactivity *in mitius*, whereby a law may apparently be applied retroactively as long as it is more lenient than the one applicable at the time of the offence.⁶⁷ In this connection, the ECtHR has declared inadmissible complaints from applicants who argued that the principle of non-retroactivity had been violated by the imposition of a life-sentence where only the death sentence was provided for in the legislative texts governing the offences for which they had been condemned. The Court considered that life imprisonment was more lenient than the death sentence.⁶⁸

Thus a more lenient law may be applied retroactively, as a departure from the strict principle of the non-retroactivity of a penal law. The principle of *lex mitior* is therefore recognized on the European level, as it is on the international level by virtue of Article 15(1) of the 1966 International Covenant on Civil and Political Rights.

Conclusion

This brief review of the criteria that must be met by the law demonstrates that those criteria constitute essential guarantees for the observance of fundamental freedoms.

If we follow the case law of the ECtHR, the principle of legality must be given effect by ensuring that the law is characterized by clarity, accessibility and foreseeability. The principles of necessity and proportionality are more limited and subject to casuistic enquiry, even though their observance is an obligation in criminal law. Finally, retroactivity is absolutely prohibited when it is to the detriment of the accused, but may and indeed must be applied in his or her favour.

The ECtHR has had the merit of addressing in detail the various criteria inherent in criminal law. However, it would appear from its case law that it has begun to attribute to some of those criteria an interpretation that could be seen as moving away from the protection of those very individual liberties it was set up to protect. Two examples illustrate this risk. The first is the need for the citizen to seek “appropriate advice”. Taken to its logical conclusion, this could be construed as meaning that the man in the street does not need to understand the law. It is therefore important that the criterion not be interpreted too expansively. The second example is the definition of foreseeability. There too, unless safeguards are put in place, any sentence may be construed as foreseeable either if it is contained

67 *Kokkinakis v. Greece*, above note 12, para. 52; *Convention, G. v. France*, Application No. 15312/89 (Lack of jurisdiction), judgment of 27 September 1995, para. 26.

68 ECtHR, *Karmo v. Bulgaria*, Application No. 76965/01, Decision on admissibility, 9 February 2006; *Ivanov v. Bulgaria*, Application No. 76942/01, Decision on admissibility, 5 January 2006.

in the law, in the broad sense of the word, or if it is in keeping with developments in society. This example serves to demonstrate that the criteria inherent in criminal law must be strictly defined if the prosecution and punishment of crimes, including war crimes, is to remain circumscribed by fundamental guarantees.

Sanctions for violations of international humanitarian law: the problem of the division of competences between national authorities and between national and international authorities

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Abstract

This article seeks to explore the reasons why sanctions for international humanitarian law (IHL) violations are so difficult to put into effect. Beyond the lack of willingness of states to do so for political reasons, some more technical aspects should be emphasized. The implementation of sanctions is too often seen solely through the prism of international law, without enough attention being paid to the complexity and diversity of municipal legal systems. The author puts forward the idea that efficiency starts with a clear sharing of competencies. Three main issues are discussed: first, the influence of the sharing of competencies within the state (between the judiciary, the executive and the legislature) on the implementation of sanctions; second, the broad interpretation of their powers by regional or international bodies in charge of monitoring and reviewing human rights protection; and, third, the creation of new or specific bodies in charge of dealing with and if necessary punishing gross violations of humanitarian law.

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The debate concerning the effectiveness of sanctions in international humanitarian law (IHL) naturally leads us to ask ourselves about the impact of the exercise of competences by the institutions entrusted with this task under the Geneva Conventions. The present contribution seeks to present and enumerate a number of the difficulties and problems that concern the effectiveness of sanctions for serious breaches of international humanitarian law associated with the exercise of competence by the bodies entrusted with this task.¹

The generally perceived ineffectiveness of sanctions for serious violations of international humanitarian law is due to a combination of various factors, one of which – and a major one – is the incapacity of the bodies responsible for the control of international humanitarian law to discharge their task. To put it plainly, the control jurisdictions or institutions cannot or do not wish to fulfil their mission and impose sanctions for such violations. Considering the number of violations that occur, sanctions are rarely pronounced and, when they are, they generally appear to be lenient towards the perpetrators. This gap between the mechanisms emphasized by the texts and the reality constitutes one of the critical points of international humanitarian law, because it results in a failure to penalize the violation of legal obligations. This impression of ineffectiveness (indeed more than just an impression!) affects the image of international humanitarian law and its capacity to govern the protection situations for which it is intended.

The Geneva Conventions and the Additional Protocols contain clear and precise obligations intended for the states parties. Furthermore, these obligations are reinforced not only by the general rules of public international law but also – and this is forgotten a little too often – by the rules of domestic public law, the effectiveness and implementation of which are often more convincing. The situation can be summarized as follows.

Violations of international humanitarian law fall within the sphere of competence of the state: it is up to the state to prosecute and punish such violations.² Third-party states can also (and generally should, even if only rarely) prosecute such violations if they constitute grave violations of international humanitarian law (whether it is a question of grave violations of the Geneva Conventions, of grave violations under other texts constituting war crimes or indeed of the grave violation of customary rules also constituting war crimes). This obligation is (or should be) a direct consequence of the obligation stemming from the principle of universal competence with regard to international crimes. In the absence of implementation, the international community has sporadically tried to establish sanctions mechanisms, a process culminating in the establishment of ad hoc international criminal courts or combined courts to make up for the

1 The ideas and proposals that follow are intended more as food for thought than tried and tested solutions. They are drawn from collective thinking and from personal ideas. These are the views of the author alone and not necessarily those of the ICRC.

2 As well as to redress them, though that is a different debate, unless we consider – which should at least be discussed – that redress can also be a form of sanction.

deficiencies of the traditional mechanisms. While the establishment of a permanent International Criminal Court evidences the emergence of new political will, it cannot on its own solve all the problems if the majority of prosecutions are not undertaken by the states parties.

The approach followed in the present contribution is based on a series of findings and questions.

The findings derive from the implementation of obligations under the Geneva Conventions of 1949, which require states to implement sanctions mechanisms in their national penal systems in the event of grave violations of international humanitarian law. While numerous states have incorporated clauses providing for such sanctions in their legislation, in particular in their penal codes, it is up to them to decide how and by whom such measures are to be taken. However, the situation is far from uniform and there are different strata of competence. A first stratum is represented by “administrative sanctions” which can be pronounced by the hierarchical superior. They are generally independent of other types of sanctions but may still have points in common. A second stratum is represented by the traditional penal sanctions entrusted either to a special judge (military courts) or to an ordinary judge (of the criminal courts); the way in which competences are apportioned may vary greatly from one state to another and may be based on the status of the perpetrator, the time the offence was committed or other criteria such as the capacity of the victim, the nature of the operation in question and so on.

Apart from this organization of the division of competences relating to the sanctions for violations of humanitarian law, the implementation and/or effectiveness of which may leave much to be desired, it will be noted that there is a recent trend for actors – whether natural persons or somewhat less than natural but pre-existing – to play a role that they had not intended to play originally or that they previously had to play in only a complementary or subsidiary fashion. These are national or supranational bodies whose main role is to condemn and indeed impose sanctions on behaviour that constitutes a violation of fundamental rights. The question of sanctions goes beyond simple penal sanctions³ and simple violations of international humanitarian law involving a plurality of actors who, during recent years, have “shown themselves” capable of punishing behaviours that also (and sometimes above all) constitute violations of humanitarian law. This situation has the effect of confusing the issue because solutions are not always to be found where they might be expected!

Finally, the debate has thrown up *sui generis* institutions and solutions which, though they first appeared iconoclastic and incompatible with the guiding principles and rules of international humanitarian law and international criminal law, are now seen as vital. This includes in particular non-penal sanctions and the creation of non-judicial or para-judicial entities established to “come up with”

3 We would point out here that national penal sanctions do not – far from it – consist solely of punishments involving the deprivation of liberty.

solutions for reconstructing society, satisfying the victims and ensuring that certain grave violations of international humanitarian law do not go unpunished.

Thus there are three points to be examined: the organized division of competences within the state responsible for punishing grave violations of international humanitarian law; the spontaneous appropriation of competences by the bodies responsible for overseeing respect for human rights; the creation of *sui generis* bodies to deal with and, where necessary, impose sanctions for grave violations of humanitarian law.

The organized division of competences within the state to deal with grave violations of international humanitarian law

Sanctions for grave violations of international humanitarian law are not – far from it – left aside by international humanitarian law⁴ or by criminal law (whether national or international). The obligations are fourfold in nature.

First, states must adopt penal measures to punish persons who have committed grave violations of international humanitarian law; this constitutes a positive measure or an obligation to act, non-respect of which is (theoretically) likely to engage the international responsibility of the state. Second, states must prosecute and try, or arrange for the trial of, persons who have committed grave violations of international humanitarian law. Third, they must take the necessary steps to put an end to the grave violations of international humanitarian law if they still persist; if a violation continues, states are obliged to take measures. Fourth, states must respect and ensure respect for the right to a defence and the guarantees of a fair trial.

The state is thus offered every opportunity to fulfil its obligations in this regard. International humanitarian law empowers a state to exercise its competences in domestic law, but as it interprets them. Each state must retain control of its own proceedings and its indictments, provided that it discharges the obligations to which it has consented. Not all the obligations relate to the division of competences. Some are connected with the substance of the offences and the nature of the sanctions. Others, however, concern the obligation to try or to arrange for the trial of the persons responsible. These are the obligations that are fundamental to the division of competences, but they also represent its main challenge.

A number of remarks may be made in light of this multiplicity of situations.

First, this question relates more to domestic law than to international law. The range of possibilities is so great that it gives each state a choice as to the methods and the means of the sanction. Therefore the question of the choice of court, its composition and its rules of procedure is left to the discretion of the

4 See Geneva Convention (GC) I, Article 49; GC II, Article 50; GC III, Article 129; and GC IV, Article 146.

state, provided that it complies with the rules laid down by international humanitarian law. The question of determining whether the court should be ordinary or extraordinary (which is not the same as special) is a decision that is open to all kinds of responses. This can be unsettling when attempting to understand the process, because analysis of the implementation of this obligation presupposes a good knowledge of each national legal system, which is not always possible.

Second, international humanitarian law texts concentrate their obligations on grave violations of international humanitarian law (or more precisely grave violations of the Geneva Conventions). This formulation does not exclude other violations (which most often relate to statutory law) but, it would seem, systematically incorporates their penal dimension. This is an aspect that perhaps merits discussion. While the many actors and experts in humanitarian law and post-conflict situations currently agree to acknowledge that sanctions do not need to be perceived solely from the penal aspect, international humanitarian law, in contrast, concentrates on the penal sanctions. This could present a distorted perception of sanctions in as much as certain bodies, including in particular disciplinary entities, can apply sanctions that do not even enter into consideration in the pure perspective of humanitarian law but can prove more effective and less hypothetical than penal sanctions.

Third, international humanitarian law contains provisions only with regard to the characteristics of the court and the general rules of procedure applicable. International humanitarian law does not require states to choose between civil courts and military courts. Nor indeed does it say how the two types of jurisdiction should be apportioned where both exist. The multiplicity of domestic situations precludes any exhaustive presentation of the possibilities of assigning competences in the national legal orders. However, it is possible to outline the main models of this division, while bearing in mind that this is essentially a pedagogical exercise. There are three main possibilities.

The first possibility – and the simplest – consists of entrusting the task of dealing with such violations to the ordinary courts of the judiciary. However, although simple, this system has a twofold disadvantage: on the one hand, the courts are not generally adapted to dealing with this type of violation on a massive scale and, on the other, the judges are not specifically trained to deal with the particularities of grave violations of international humanitarian law. What is more, ordinary courts may not be functioning during hostilities.

The second possibility is the creation of special courts for grave violations of international humanitarian law. This solution results in the coexistence of ordinary courts with special courts. In this case, while a whole range of solutions is available to the state, there can be profound differences. The main question is to determine what criteria apply for the competence of the court responsible for dealing with grave violations of international humanitarian law. Is it a court of a military type which defines its competence on the basis of the capacity of the perpetrator of the violation (in which case, civilians are excluded)? Is it a permanent court or a temporary one? Is it a court that defines its sphere of

competence in terms of territory and time and so can try anyone who has committed such crimes during the conflict and on all or part of the territory of the state? This gives us all the ranges and nuances of the solutions that can exist. With this possibility, there clearly arises the question of the division of competences between civilian and military courts. This is a matter left to the discretion of the state. However, we must be careful not to be misled by words where we do not know the context. The traditional mistrust or suspicion of military courts is not necessarily appropriate where due process is guaranteed. In the case of courts of special jurisdiction, it is necessary to draw up a list of the “minimum standards” that must be complied with for them to be considered a reliable “judicial order” and so to draw up an adequate representation of the division of competences. Although the courts of special or specialized jurisdiction are an attractive option for the state, they must not be transformed into “exceptional courts” which either pass judgment without discernment or which systematically acquit the perpetrators of grave violations of international humanitarian law.

The third possibility is that there already exists within the state a plurality of orders of jurisdiction (judicial, penal and administrative courts) which share between them the authority to punish grave violations of international humanitarian law. This is particularly the case where penal sanctions and disciplinary sanctions are separate from each other. In such an eventuality, there is the risk of problems from an overlap of competences or a difference in assessment of the violation and the sanction. Disciplinary sanctions are generally perceived as administrative decisions taken in the name of the exercise of hierarchical power (in certain cases, they are even considered to be internal measures that are not open to judicial review) and so can be independent of penal sanctions. This has an unquestionable influence on the competence of the two orders of jurisdiction and can have negative induced effects (for example, the disciplinary sanction may be heavier than the penal and vice versa). However, we must not make things seem worse than they are. Despite the existence of two orders of jurisdiction, certain states (mainly states applying a Roman-German legal system) establish bridges between them and take into consideration the sanction in its entirety, despite the existence of two judges (criminal and administrative).

The only common limit concerns the jurisdictional guarantees that must be respected in all cases. If it appears that there is a discrepancy between the two types of court, only those which conform to the requirements of international humanitarian law should be able to rule.

In the fourth possibility, international humanitarian law only calls on the external jurisdictions if they are in a better position to penalize grave violations of international humanitarian law. Thus the exclusive competence of the state is not taken as a given but gives it priority in the obligation to rule on the matter. Is it therefore important to discover the extent to which the state is better placed and whether its courts are able to punish such violations?

All these questions show that the division of competences is a subject on which international humanitarian law has relatively little to say, as it is approached through an analysis of the end result (respect for international humanitarian law

and sanctions in the event of its violation) that has little effect on the division of competences within the state as regards international humanitarian law sanctions. This freedom of organization is perhaps one cause of the difficulty of applying sanctions. This is scarcely surprising considering that a sanction's effectiveness is due to the process that takes place rather than simply being a "price to pay" for a serious violation of international humanitarian law.

Here, then, are a number of questions intended to stimulate debate on this point.

Is it not a fact that, by doing no more than laying down a series of minimal rules, international humanitarian law has left too large a margin of interpretation to the states, which take advantage of this vacuum to organize their own system of the division of competence in favour of a minimalist jurisdictional system or, conversely, by deliberately leaving the treatment of grave violations of international humanitarian law out of the general rules?

Is it not a fact that the choice of an ordinary jurisdictional system is bound to fail where the judges are not specifically trained to deal with the particularities of offences connected with international humanitarian law (lack of knowledge of the particularities of the offences, lack of practice with regard to satisfaction of the conditions to be fulfilled for there to be an offence and so on)?

Is it not paradoxical to organize the division of competences between courts without paying attention to the procedure and the particularities of violations of international humanitarian law?

How are we to take into consideration the other forms of sanctions (including in particular administrative or disciplinary sanctions), which international humanitarian law takes into account only indirectly?

These questions do not presume to offer a single definitive answer to the problem of the division of competences. Rather, they demonstrate that this is one reason for the lack of effectiveness of sanctions.

The spontaneous appropriation of competences by the bodies responsible for overseeing respect for human rights

Another phenomenon that has developed more recently concerns not the exercise *a priori* of the original competence but the substitution or more precisely the "taking over of competence" by a body that exists but that is not specifically dedicated to sanctions for violations of international humanitarian law. What has been observed in recent years and noted by various authors⁵ is the following: faced with the ineffectiveness of the conventional sanctions mechanisms, the victims (or more often individuals acting privately or within a group for the defence of

5 Hélène Tigroudja, "La cour européenne des droits de l'homme face au conflit en Tchétchénie", *Revue trimestrielle des droits de l'homme* (2006), p.128; and Hans-Joachim Heintze, "The European Court of Human Rights and the implementation of human rights standards during armed conflicts", *German Yearbook of International Law* (2002), p. 64.

interests) have sought new ways of obtaining “justice” before a court. Numerous states are members of international organizations for the defence of human rights and, as such, have incorporated into their legal order mechanisms of individual recourse, permitting their nationals to have recourse to a supranational judge if there is a dispute or if they do not obtain satisfaction. Thus the Inter-American Court of Human Rights and the European Court of Human Rights have, on various occasions, been called upon to punish violations of human rights which also constituted violations of international humanitarian law. However, the two courts have adopted a different approach with regard to international humanitarian law. Whereas the Inter-American Court has referred to humanitarian law to interpret the provisions of the Convention it is responsible for safeguarding,⁶ the European Court of Human Rights, while sanctioning behaviours constituting grave violations of international humanitarian law, has preferred to refer solely to the violation of the European Convention on Human Rights (ECHR).⁷ In our opinion, however, the question of the reference to the applicable law is secondary in the exercise of the search for the broadening of competences. The question of the choice of the reference norm (international humanitarian law or international human rights law) remains subject to a number of internal and external factors that are difficult to analyse here in their entirety. On the other hand, it must be noted that a real complementarity (or competition!) is beginning to take shape between the various bodies responsible for punishing violations of international humanitarian law. This competence, developed fortuitously, can also give rise to certain consequences in terms of the effectiveness of these same sanctions. It must immediately be pointed out that the jurisdictional bodies of international human rights law were not designed to respond to the challenges of violations of international humanitarian law. Although it has been possible to obtain certain considerable results, their significance must be measured over the long term. As with the preceding point, we shall take note of a certain number of issues that are important for the debate on sanctions before going on to raise a number of questions concerning the exercise of these new competences.

First, the exercise of the competence by the regional human rights jurisdictions is of an occasional nature and forms part of the wider dimension of the international protection of fundamental rights. In consequence, it is difficult to describe the situation as a real competition between jurisdictions. On the contrary, it is a “substitution mechanism”, showing, in most cases, the inability of the national systems to take efficient and effective measures.

Second, the reference to humanitarian law to analyse violations of fundamental rights may be different, depending on whether it is a question of interpreting the rules of the Geneva Conventions or a normative reference serving

6 See in particular the *La Tablada* case, and also in relation to disappearances, I/A Court H.R., *Serrano-Cruz Sisters v. El Salvador*, Series C No. 118, Judgment of 23 November 2004, paras. 111 ff.

7 See in particular the judgments of 24 February 2005 in the cases of *Khashiyev and Akayeva v. Russia* (Application No. 57942/00 and No. 57945/00), *Isayeva, Yusopova and Bazayeva v. Russia* (Application No. 57947/00, 57948/00 and 57949/00) and *Isayeva v. Russia* (Application No. 57950/00).

as the basis for the sanction. The position of the Inter-American Court in the *La Tablada Base* was much more comfortable than that of the European Court of Human Rights when it had to pronounce on the direct violation of Article 3 common to the Geneva Conventions. In these particular cases, the European Court of Human Rights referred directly to acts constituting grave violations of humanitarian law (methods and means to be used, the massive use of weapons which have indiscriminate effects). It did not qualify them as such but referred to the articles of the ECHR.⁸ Comparison and analysis of the reasoning of the courts is particularly difficult, bearing in mind that the issues at stake were different. However, we can underline here the fact that the question of the competence of these courts with regard to sanctions for violations of international humanitarian law cannot be framed in the same terms as those encountered before national or international courts. The courts responsible for establishing human rights violations are not criminal courts. They find against states, but not perpetrators. Substitution therefore has its limits.

Third, the competence of these courts *ratione materiae* does not often lead them to address questions of grave violations and their sanctions according to a perspective of repression or retribution, but more in terms of the conformity of behaviours with the international undertakings of the states (conventions protecting human rights or fundamental rights). The role of the judges is to determine whether the obligation under the Geneva Conventions was ignored in a very specific case and having regard to the evidence provided by the parties. In consequence, the “sanction” pronounced by these courts for the protection of human rights can only be the satisfaction of seeing the state denounced for its treatment of violations of international humanitarian law, possibly with an award of financial compensation, representing a so-called “equitable remedy”. Hence we may well ask whether the exercise of a competence with regard to international humanitarian law by these courts can influence the behaviour of weapon bearers in one way or another.

Fourth, these courts cannot make up for the general deficiency of the system. While they can support, encourage and initiate certain channels, they are intended for individual claims and so cannot absorb large numbers of violations of international humanitarian law where these have been committed. The regret expressed by certain observers and commentators concerning the absence of a direct reference to international humanitarian law is perfectly understandable. What court would take the risk of going beyond its “sphere of competence” on the grounds that it could have been inspired by and applied the rules of international humanitarian law? The problem may not lie there. The protection of the substance of the rule is more important for the court than the search for the broadest basis. Accordingly, there is not a transfer of competence but rather a marginal supplementary competence, the resources of which are limited. To count on a substitution of competence would be a mistake.

8 ECHR, Articles 2, 3, 5 and 13.

Fifth, it is impossible to ignore the political importance of such cases and the obligation of the court to which the matter has been referred to show itself beyond reproach in terms of legal reasoning. There can be no room for approximation in these cases, which are often heavily covered in the media and may take place in contexts where peace has not necessarily been established. This “political weight” of the legal reasoning undoubtedly influences the perception of the subject-matter competence by the court: the choice of reference norm cannot be made lightly or correspond to an exercise drawing together a compendium of all the texts existing and protecting the same rights.

Sixth, the question clearly arises as to the capacity of these courts for the protection of human rights to deal with grave violations of international humanitarian law and their sanctions. The issue here is an external physical limit to the capacity of these courts to accept a large number of applications. A massive influx of petitions would increase the risk of the system becoming congested and thus prevented from pronouncing judgment under the right conditions. In other words, if these courts are called on to deal with a restricted number of cases, they can cope. However, if it were a question of dealing with hundreds or even thousands of cases, the situation would be more complicated and the solution trickier. We must not lose sight of these questions of physical capacity when it comes to assessing the effectiveness of the “taking over of competences” and, above all, we must not give false hope to applicants who believe in a miracle solution and a direct sanction for grave violations of international humanitarian law. However, the effect of these courts’ reiterating the same message must not be underestimated. If, despite the limited number of cases, there is a certain consistency in their judgments concerning violations, the effect may prove to be positive in the medium term, particularly in terms of amending existing legislation. In fact, the intervention of these courts is often an admission that traditional mechanisms have failed.

Here again, as with the first problem, a number of questions can be raised with regard to the complementary or supplementary competence of these courts:

Does the handling of grave violations of international humanitarian law by the courts responsible for protecting international human rights law constitute progress or an advance in terms of sanctions or, on the contrary, does it represent a solution that is inevitably limited and can only play a marginal role?

In terms of sanctions for violations of international humanitarian law, what is the real impact of these new competences? Can we consider the condemnation of a violation to be a form of sanction? Can this have an influence on weapon bearers?

The creation of *sui generis* bodies to deal with and, where necessary, punish grave violations of humanitarian law

Despite the existence of grave violations of international humanitarian law, sanctions generally fail. National prosecutions for grave violations of international

humanitarian law remain marginal, the international criminal courts have difficulty in accelerating the trial process and punishing the main accused, and the states which have launched themselves into a proactive policy of applying the principle of universal competence have often had to draw back for diplomatic and political reasons. There remains one last avenue to explore, namely the possibility of establishing ad hoc institutions responsible for the management of violations. The idea is to create a competent body “to order”, depending on the possibilities available at the end of the conflict or even while it is in progress. A number of points may be raised here.

First, the difficulties of implementing the system of original competences (state and supra-state) oblige the states responsible for the implementation of international humanitarian law (as with any other international obligation they have contracted) to find solutions other than “inaction” or “amnesty”. While it is true that these two characteristics have long marked the end of conflicts, there remains a – rather recent – tendency on the part of states (under pressure from the victims, pressure groups, other states, the international community) to envisage a replacement solution when the initial solutions do not work. These actions can take the form either of the establishment of special courts (to avoid the use of the term “exceptional courts”) or of (paralegal) truth and reconciliation commissions.

Second, the search for original solutions must be combined with an imperative, namely the effectiveness and measurability of the results. It is not sufficient simply to establish an ad hoc body. Such a body must also have the means to fulfil its task and the capacity to pronounce “sanctions” in one form or another. Thus it is not impossible to combine the existing institutions (which will then have singularly reduced tasks in terms of caseload and must confine themselves to the most serious cases) with the traditional institutions (in so far as they operate at all). The new institutions have the advantage of being able to establish their own procedure and so define their competences on the basis of the needs encountered in the local context.

Third, the diversity of the expectations and a certain realism often lead to a rethink and the requirements in terms of sanctions being revised “downwards”. While no one disputes the need for an adequate and proportionate sanction, an analysis of the aims and objectives of the sanction inevitably leads to the situation being examined in concrete terms with regard to the three aspects “truth–reparation–reconstruction”. As a result, the sanction is no longer confined by exclusively penal constraints. On the contrary, it can incorporate elements to help the state in the process of reconstruction: pacification, reconciliation (acceptance of the other), restoration of the place of each within society, restoration of the rule of law and confidence in the legal system. This also means that the competences of the ad hoc bodies must lead to a multidimensional approach to the sanction that is “compatible” with the requirements of international humanitarian law. This is certainly one of the most sensitive questions to deal with, giving rise to queries and controversy.

Fourth, the choice of ad hoc bodies cannot be made without taking into consideration the resources available and the prospects for the success of the

process on the ground. The establishment of such a body must not be considered a panacea or a miracle cure. It is imperative to arrive at a precise and rigorous definition of the competences, procedures and powers of the ad hoc body and to specify its tasks on the basis of the factors particular to every post-conflict situation. This approach is likely to vary from the traditional standards for sanctions, as laid down in the original system of the Geneva Conventions.

This rethinking of the competence of the traditional bodies or the bodies established on an ad hoc basis leads us to raise a number of questions regarding the creation of a competence specific to such bodies.

Is it possible for these ad hoc bodies to be entrusted with tasks identical to those established by the legal texts when it comes to sanctions and the repression of grave violations of international humanitarian law? In particular, how are we to manage the potential conflicts between the characteristics of these institutions and the general principles of criminal law: non-retroactivity, proportionality of the sanction in relation to the charges and so on?

Can the definition of competence in favour of an ad hoc body be made in favour of an extended range of sanctions, including for example the pecuniary or moral responsibility of the perpetrators? Is it possible to include the absence of penal sanctions and to enshrine a certain form of immunity from prosecution?

How are we to apportion precisely the division of competences between the traditional jurisdictional bodies (criminal courts) and the transitional bodies (truth and reconciliation commissions)? Where do we draw the dividing line and who will decide this? What are the criteria for selecting the competent body?

Should traditional bodies (i.e. customary law structures) be incorporated into the sanctions and reconstruction system by granting them new competences? Under what conditions? Is it possible to assess the risks of such a formula (e.g. by looking at the *gacaca* courts in Rwanda and the resulting blunders)?

What is the status of these institutions with regard to general international law and international humanitarian law? Is their competence compatible with the requirements of the fight against impunity, and the prosecution of perpetrators of international crimes? If so, how? Don't these institutions create a no-man's-land in terms of the rationale for sanctions against grave violations of international humanitarian law? Don't they constitute a solution that is easy for the present but that mortgages the future, especially if they turn out to be a failure?

In spite of its fundamentally technical nature and its numerous variants, the division of competences can no longer be considered a subject of secondary importance when seeking to understand the difficulties associated with the effectiveness of sanctions in international humanitarian law. It is an important element of the process that leads to sanctions being pronounced. This subject is being neglected as no debate is taking place on the matter. It is absolutely essential to recognize its true significance if we wish to have a comprehensive debate on sanctions.

Transitional justice and sanctions

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Abstract

Transitional justice aims at once to restore victims' dignity, build confidence between warring groups and foster the institutional changes needed to bring about a new relationship within the population, in order to usher in the rule of law without endorsing practices that amount to total or partial impunity. In situations of post-conflict, however, governments are also faced with other pressing needs, such as disarming fighting forces, improving civilian security, compensating victims and relaunching the economy of a society in ruins. This article explores the relationship between these needs and transitional justice mechanisms, and critically evaluates their influence on the forms justice has taken in post-conflict situations.

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Transitional justice is a concept with wide currency nowadays. Regarded as a mechanism allowing a shift – transition – from an authoritarian system in which there is no rule of law to a democratic regime that respects human rights, it is nevertheless highly ambiguous as regards both the philosophy that subtends it and the methods it employs.

The avowed aims of transitional justice are at once to restore victims' dignity, build confidence between warring groups and foster the institutional changes needed to bring about a new relationship within the population, in order to usher in the rule of law without endorsing practices that amount to total or partial impunity. The various measures that make up transitional justice generally combine “healing” measures of restorative justice (truth and reconciliation commissions) with a parallel system of punitive justice (in particular with regard to those chiefly responsible for and the perpetrators of

the most serious crimes).¹ Moreover, transitional justice arrangements set out to reform institutions by restoring the primacy of law and making sure that the judicial bodies are operational for the future. At the same time, they work to ensure that the crimes committed during the previous era do not go unpunished.

Transitional justice therefore pursues manifold aims in a post-conflict situation in which those in government are faced with other pressing needs such as disarming fighting forces, improving civilian security, compensating victims and relaunching the economy of a society in ruins.

Obstacles to setting up transitional justice arrangements

Does the end of a conflict always present all the conditions necessary for transitional justice arrangements to be put in place?

Disarmament, demobilization and reintegration as top priorities viewed in the light of demands of transitional justice: the case of the Democratic Republic of the Congo

The Democratic Republic of the Congo (DRC) experienced one of the longest-lived dictatorships on the African continent. Colonel Mobutu, who seized power in 1965, was to cling on to it until the “war of liberation” in 1996–7 in which Uganda and Rwanda took part. The combined death toll of that war and the subsequent one, which broke out in 1998, was some three to four million, depending on the source, over and above the countless victims of the Mobutu regime.²

As of today, almost half the fighters have been processed through disarmament measures, but in terms of justice the transition has achieved virtually nothing. Plans for an international tribunal for the DRC have not come to fruition and the International Criminal Court has indicted and brought to trial only one accused. Moreover, the Truth and Reconciliation Committee provided for under

1 For a definition of transitional justice, see Alex Boraine, President of the International Centre for Transitional Justice, “La justice traditionnelle: un nouveau domaine”, Colloquium “Réparer les effets du passé. Réparations et transitions vers la démocratie”, Ottawa, 11 March 2004, available at www.idrc.ca/uploads/user-S/10899187131Discours_d'Alex_Boraine.doc (last visited 10 July 2008); Marc Freeman and Dorothee Marotine, “Qu’est-ce que la justice transitionnelle ?”, International Centre for Transitional Justice, 19 November 2007, available at www.ictj.org/images/content/7/5/752.pdf (last visited 10 July 2008); the observations of Juan Méndez in the *amicus curiae* brief submitted to the Colombian Constitutional Court on the Justice and Peace Act (Law 975) on 17 January 2007, analysing the requirements of transitional justice on the basis of various experiences, available at www.ictj.org/en/news/press/release/767.html (last visited 10 July 2008).

2 The PopulationData.net Centre lists two studies by the International Rescue Committee dated April 2003 and December 2004 on the number of war casualties in the DRC at the end of the 1990s. The first reports 3.3 million dead and the second 3.8 million. Available at www.populationdata.net/humanitaire/guerre_bilan_rdc2004.html (last visited 10 July 2008).

the Comprehensive and All-Inclusive Agreement has proved incapable of doing its job, even in the context of reparation measures for victims.

As demonstrated by the Second International Conference on Disarmament, Demobilization and Reintegration (DDR) and Stability in Africa, held in Kinshasa from 12 to 14 June 2007, the lack of progress made by transitional justice in the DRC can be explained in the terms of the priority given to the DDR process.³

In order to disarm, demobilize and reintegrate the 330,000 or so fighters involved in the conflicts, it proved necessary not only to give warlords guarantees of impunity but also to reintegrate (and even promote) them so that they would encourage their troops to disarm. Furthermore, the “mixing” that is going on has by no means broken down all the tribal loyalties of the reintegrated soldiers.⁴

Against such a background, DDR operations not only fail to serve transitional justice (because there is a deliberate policy of not passing on information obtained so as to allow the violations committed to be investigated), they constitute a twofold obstacle.

First, they do not allow justice – of any kind – to deal with cases arising from the past and, second, they create a deep sense of injustice among the victims, who see that the international community not only guarantees that the perpetrators go unpunished but devotes vast amounts of money to reintegrating the main human rights violators by allowing them to take up high-level positions within the public security forces, even as these are being reorganized; at the same time, they are forced to recognize that this same international community is not in a position to provide the victims with adequate compensation.

My purpose here is not to deny military necessities. DDR operations in the aftermath of wars such as those which ravaged the DRC in the 1990s are necessary and extremely complex. Without them, conflict would rage on for decades and would eventually jeopardize the state’s very existence and its ability to perform its most fundamental roles, which is what we are currently witnessing in Somalia. The question is rather whether transitional justice really offers an alternative in a context of this kind.

In the DRC, even the right to the truth seems unthinkable for the time being, so great is the priority being given to the need for disarmament.

International geopolitics, selective justice and negationism

In the Great Lakes region ...

A still more gloomy picture can be painted in the case of Burundi. Despite several genocides (1966–1972 and 1993), as documented for instance in the report drawn

3 “DDR and Transitional Justice”, issue paper, Second International Conference on DDR and Stability in Africa, Kinshasa, Democratic Republic of the Congo, 12–14 June 2007, UN/ISAA and the Government of the Republic of the Congo.

4 Ibid.

up by B. Whitaker for the Sub-Commission on Human Rights (1984),⁵ those of the Special Rapporteur on Burundi⁶ and the documents of the UN Security Council,⁷ the transition towards a return to peace (if not to normality) has not been accompanied by any efforts to achieve justice, be it retributive or restorative, for these extremely grave violations.⁸

In neighbouring Rwanda, however, under pressure from public opinion, the 1994 genocide was not only recognized by the United Nations and the African system, but prompted the establishment of an ad hoc tribunal with the mandate to bring to trial those responsible for the massacres and other serious violations perpetrated in this context. Moreover, Rwandan justice also made use of local traditional courts to try those who had taken part in the genocide either at close range or at a distance. It is a pity that the United Nations did not decide to deal with the Burundi and Rwanda situations as a whole within the framework of the same proceedings. One outbreak of genocide can in no way justify another, and the Tutsi victims massacred by the Hutus in Rwanda must not be weighed against the Hutu victims massacred by the Tutsis. But when instances of genocide occur in two neighbouring countries, apparently with very similar if not identical causes, it is shocking to see one being given the attention it deserves whilst the other is simply ignored. This difference in treatment by the international community cannot be explained either by the scale of the massacres or their nature. It must be ascribed mainly to geopolitical considerations which led certain powers, in particular the United States, to advocate that the Rwandan genocide should be dealt with but that at the same time neither the genocide in Burundi nor the

5 Whitaker Report, Revised and updated report on the question of the prevention and punishment of the crime of genocide, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Thirty-eighth session, item 4 of the provisional agenda, UN Doc. E/CN.4/Sub.2/1985/6-2, July 1985.

6 Paulo Sergio Pinheiro, Special Rapporteur on Burundi, described the situation in Burundi in 1995 as genocide. UN Doc. E/CN.4/1996/16/Add.1, 27 February 1996.

7 The Security Council set up a Preparatory Fact-finding Mission (Report UN Doc. S/1995/157, 20 May 1994); a Mission (Report UN Doc. S/1995/163 of 9 March 1995) and an International Commission of Enquiry (Report UN Doc. S/1996/682). In its conclusions, the Commission of Enquiry considered that the evidence was sufficient to establish that acts of genocide against the Tutsi minority had taken place in Burundi. It also considered that the evidence showed that indiscriminate killing of Hutu men, women and children had been carried out by members of the Burundian army and gendarmerie, and by Tutsi civilians. It found that, although no evidence was obtained to indicate that the repression was centrally planned or ordered, it was an established fact that no effort was made by the military authorities at any level of command to prevent, stop, investigate or punish such acts. In its final report, the International Commission of Inquiry on Human Rights Violations in Burundi since 21 October, commissioned by a number of humanitarian organizations (Human Rights Watch/Africa Watch (New York, Washington), the Fédération Internationale des Droits de l'Homme (FIDH, Paris), La Ligue des Droits de la Personne dans la Région des Grands lacs (LDGL, Kigali), L'Organisation Mondiale contre la Torture (OMCT/SOS Torture, Geneva), Le Centre National pour la Coopération au Développement (Brussels) and NOVIB (Amsterdam)), drew markedly more serious conclusions as to the role of the Burundi army and gendarmerie, which were essentially made up of Tutsis.

8 In "The International Criminal Tribunal for Rwanda: justice betrayed", Montreal, October 1995, John Philpot, associate secretary-general of the American Association of Jurists, denounced the limitations that prevented the tribunal from delivering justice worthy of the name in the wider context of the conflict. See also Pinheiro, above note 6.

crimes committed by Kagame's army should be examined.⁹ This discriminatory treatment can only lead to fresh tension in the region. Despite all the imperfections of the Arusha tribunal and the *gacaca* courts, it might be considered that an initiative for justice has been made in Rwanda which should help the transition towards a society with greater respect for law. However, the neglect of the situation in Burundi can only reinforce the impression of the country's Hutu victims that the violations committed against them are not perceived by the international community as being as serious as those suffered by the Tutsis in Rwanda.

... and in Asia

In Cambodia the genocide,¹⁰ referred to by some as an "autogenocide",¹¹ carried out between 1975 and the end of 1978 by the Khmers Rouges ended only with the intervention of Vietnam in December 1978. The figures generally accepted put the number of dead in the massacres at a third of the population. The question of justice was "forgotten" for various reasons.

The United States, China and their allies allowed the Pol Pot regime to survive artificially for fourteen years on the pretext that a change of regime brought about by foreign intervention was unacceptable. This made any international action impossible. The international community paid no attention to the depredations documented within Democratic Kampuchea, because during all that time it was the Khmer Rouge ambassador who sat in the United Nations and condemned the violations committed by the "Vietnamese invader".¹² In 1979 the Human Rights Commission refused to get involved in the matter of massive violations perpetrated by the Khmers Rouges¹³ and for more than a decade international institutions systematically refused to bring to trial those responsible for the genocide.

Subsequently, peace negotiations opened in 1989 aimed to include the Khmers Rouges in the talks, which clearly would exclude any reference to crimes they had committed against humanity. Not until the Paris Agreement was concluded in 1991 was any reference made to the politics and practices of the past.

On the other hand, two attempts to bring cases for atrocities committed during the Pol Pot era have run into difficulties which have so far not been

9 Florence Hartmann, spokesperson for Carla del Ponte at the International Criminal Tribunal for the former Yugoslavia from 2000 to 2006, in *Paix et Châtiment, Les guerres secrètes de la politique et de la justice internationale*, Flammarion, Paris, 2007, unveils the role played by the United States in ousting the Prosecutor in August 2003.

10 As regards the definition of genocide, it is noted that, although the relevant articles of the Convention make it possible to establish fairly precisely what constitutes genocide and which situations do not fulfil the legal definition, in practice recognition of genocide more frequently depends on political factors.

11 In Gérard Chaliand and Jean Lacouture, *Voyage dans le demi-siècle: Entretiens croisés avec André Versaille*, Editions Complexe Bruxelles, Paris, 2001, Lacouture confirms that he was the first to use this concept but he stresses its inherent ambiguities. The term was borrowed by Elisabeth Beeker for the title of her work *Les larmes du Cambodge, l'histoire d'un autogénocide*, Presse de la Cité, Paris, 1988.

12 Raoul-Marc Jennar, "Cambodia: Khmer Rouge in court", *Le Monde diplomatique*, Archives, October 2006, available at <http://mondediplo.com/2006/10/11/cambodia> (last visited 10 July 2008).

13 See report of the UN Human Rights Commission's 35th Session.

overcome.¹⁴ The people's revolutionary tribunal which tried Pol Pot and Ieng Sary in 1979¹⁵ was not accepted or recognized by the people of Cambodia, who perceived it as a system of justice imposed by the Vietnamese liberator/invaser.

In 2003 the United Nations and the government of Cambodia decided to schedule a trial for 2007. The plan was to set up a tribunal consisting of seventeen Cambodians and eight international members.¹⁶ Their brief is to try breaches of Cambodian criminal law and violations of human rights and humanitarian law.¹⁷ There is a risk that the judgment will concern only the last survivors, since the chief culprits, including Pol Pot, are dead. Only five accused have been arrested. Although they bear enormous responsibility, they are only a handful out of the many responsible for the atrocities committed and will be answering for crimes committed over thirty years ago. The small number of persons accused and the fact that they will be tried for crimes committed against victims from the previous generation are two factors that run counter to the avowed aims of transitional justice, which sets out to deal with the legacies of the past in full and as promptly as possible.

These few cases would tend to indicate that transitional justice, like its "ordinary" counterpart, does not provide a suitable response to all post-conflict situations and also that it is paralysed by obstacles associated with the both the domestic situation and the international context. We may therefore question its suitability when it implies substantial derogations from certain principles of international law, particularly in connection with measures of punitive justice. The judgments delivered in a transitional justice system have the same force as those handed down by "classical" courts according to "classical" laws. The principle of *ne bis in idem* or the application of the most favourable criminal law could therefore be relied on by their beneficiaries.

Transitional justice or transitional policy?

According to Mark Freeman,

[T]ransitional justice focuses on the question of how societies in transition from authoritarian rule to democracy, or from war to peace, address a history of massive human rights abuse. It is concerned primarily with gross human rights violations understood as torture, summary executions, forced disappearances, slavery, and prolonged arbitrary detention, as well as certain

14 See Centre de droit international de l'Université de Bruxelles, "L'intervention du Vietnam au Kampuchéa en 1978–1979", for a compilation of the positions of states, available at www.ulb.ac.be/droit/cdi/Site/Vietnam%20Kampuchea%201978-1979.html (last visited 10 July 2008).

15 <http://droit.francophonie.org/df-web/publication.do?publicationId=4278> (last visited 10 July 2008).

16 34th Session of the UN General Assembly, UN Doc. A/34/491. See also Trial Watch Saloth Sar, available at www.trial-ch.org/de/trial-watch/profil/db/facts/saloth_sar_659.html (last visited 10 July 2008).

17 See "Law on the establishment of extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of democratic Kampuchea", available at www.derechos.org/human-rights/seasia/doc/krlaw.html (last visited 10 July 2008).

“international crimes”, including genocide, crimes against humanity and serious violations of the laws and customs applicable in armed conflicts, whether of a national or international character.¹⁸

The author lists a number of characteristics which distinguish traditional justice as a “*distinct field*” (emphasis added):

1. Transitional justice focuses on legacies of past human rights crimes. While the main approaches to transitional justice have important forward-looking aims such as building trust between and among victims, citizens and institutions, these mechanisms are primarily concerned with accountability for human rights crimes committed in the past.
2. Transitional justice does not call for retroactive justice at any cost. There is an understanding that in transitional societies the demand for transitional justice must be balanced with the need for peace, democracy, equitable development and the rule of law.
3. The different measures of transitional justice are not meant to be implemented in isolation but to complement each other.
4. Transitional justice prioritizes a victim-based approach. Mark Freeman states, “The legitimacy of transitional justice mechanisms is measured by the extent to which victims oppose or support them, and the degree to which they are able to participate in and benefit from them.”¹⁹

First, it would appear that among the four characteristics distinguishing transitional justice as a distinct field, only the second and fourth introduce any specific new elements.

The first characteristic – the fact that transitional justice focuses on violations of human rights committed at a time when the mechanisms which would dispense justice under the rule of law were either paralysed or non-existent – is in fact a piece of information with no specific content.

At least since Nuremberg, justice that cannot be dispensed at a given moment is deferred until things return to normal or until it is possible to give a ruling on the basis of the law which was already in existence, in particular international customary law.

The third characteristic poses the principle of holistic justice, which is not in itself an original idea, since justice cannot be content merely to punish, with no attempt to redress the situation, return to the *status quo ante* or compensate the victims and restore institutions.

Points 2 and 4, on the other hand, introduce variables which might fall within the order of justice or might be considered as arising from purely political imperatives.

18 Mark Freeman, “What is transitional justice?”, International Center for Transitional Justice, 2003, not published – quoted in DDR and Transitional Justice, issue paper, Second International Conference on DDR and Stability in Africa, Kinshasa, Democratic Republic of the Congo, 12–14 June 2007, UN/ISAA, p.5.

19 Ibid.

The contention that transitional justice does not argue for retroactive justice is on the face of it a source of confusion. It is not a question of the retroactive implementation of a law enacted after the crime was committed – which would be incompatible with the principle of legality of sanctions – but rather of the implementation, when it becomes possible, of the law that was in existence before the crime was committed.

Violations of the most fundamental rights

The scope of transitional justice is limited to “gross” violations of human rights and certain international crimes such as genocide, crimes against humanity and grave breaches of the laws and customs of war. It therefore focuses essentially on a category of crimes which, according to the International Law Commission, “assailed sacred principles of civilization and, as it were, fell under *jus cogens*”.²⁰ This rules out the possibility of any rule, national or international, under which the impugned practice would be defined as non-criminal.

Moreover, since the adoption of the Rome Statute setting up the International Criminal Court, the crimes concerned all fall under the jurisdiction of that court (Article 5). The definition of these crimes is to be found in Articles 6, 7 and 8, and the penalties incurred are set out in Articles 77 and 78.

The establishment of the International Criminal Court was rightly perceived as a major step forward in terms of international justice and as a new weapon in the fight to end impunity in order to protect the rule of law.

However, in his second point, Mark Freeman suggests that the demand for transitional justice “must be balanced with the need for peace, democracy, equitable development and the rule of law”.

This idea of balance seems to me particularly dangerous to the extent that it makes an act of justice conditional on political imperatives. It will doubtless be pointed out that, in practice, impunity is rife in those very places where societies and those who compose them are incapable of achieving peace and democracy. Is it not logical, then, to foster the establishment of conditions that will allow a return to the rule of law, at the risk of failing to punish the crimes of the past, putting off their punishment till a later date or limiting the penalties inflicted on the perpetrators?

In political terms, the reasoning is perfectly acceptable, but can it be considered an element of justice, whatever name we use to describe it?

The fourth criterion seems to take care of this objection by affirming that the legitimacy of transitional justice mechanisms is to be measured in terms of their acceptance by the victims, the more so since this criterion is to be combined with the third, which refers to complementary measures as part of a holistic approach.

20 Extract from the *Yearbook of the International Law Commission*, 1983, Vol. I, Summary record of the 1755th meeting A/CN.4/SR.1755.

We can therefore imagine that measures combining punitive and restorative justice while ensuring that those aims are balanced against the need for peace and democracy would be legitimate provided that they enjoyed a degree of acceptance on the part of the victims. Is reconciliation between tormentors and victims, which may be desirable but is rarely attained in reality, a matter of justice in the strict sense? How far can we go in balancing the two forms of justice and can we countenance amnesty measures in some circumstances where the victims are in agreement?

Conditional amnesty – on what conditions?

So far, South Africa is the country where the victims have been most willing to accept the need to limit punitive justice and to accept amnesties. The pre-1994 apartheid regime was based on a system of institutionalized racism which, although it was far from unique in history, had started to become intolerable, not only for the country's black community but also for a growing portion of South Africa's white minority and the international community. In November 1973 the international community adopted an international convention outlawing apartheid and providing for its punishment.²¹ Article II of this Convention defines the crime of apartheid and Article I states that it is a crime against humanity.

Following years during which they refused to countenance reform and perpetrated acts of repression entailing the worst violations of human rights, the extremist white minority, under pressure on both the national and international fronts, finally made a U-turn and invited the leaders of the black majority to take part in a transition towards a system based on equality among citizens.²² That process led to the election of a president from among the black majority.

In that case the term "transition" referred not to a slow and gradual process of change, but rather to the manner in which powers were transferred and to the way in which the new authorities assumed those powers to keep the country unified.

In fact, once the white majority agreed to share power with the black minority, the cause of the conflict disappeared. A new social order in which all were recognized as equal was set up immediately. The question in that case was how to dispense justice, that is, how to punish serious human rights violations of the past whilst conserving the major institutional *acquis* represented by an end to apartheid and without causing widespread conflict.

The South African authorities favoured a system of restorative justice placing the emphasis on finding the truth and granting total or partial amnesties to offenders who co-operated with that quest for truth. However, these amnesties,

21 International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, entry into force 18 July 1976, in accordance with Article XV, available at www.unhcr.ch/html/menu3/b/9.htm (last visited 10 July 2008).

22 On the end of apartheid see Elise Colette, "Fin de l'apartheid", *Jeune Afrique*, 26 June 2005.

the aim of which was to avoid a bloody confrontation, were the result of a bargaining process. The victims generally had no way of finding out what had become of their family members other than through the confessions and cooperation of those responsible for their fate. Faced with the choice of never knowing or accepting that the perpetrator would go unpunished, many placed a higher value on truth than on punishment. This “choice” is an experience shared by many relatives of people who have disappeared: anything is preferable to the torment of uncertainty. In such cases the decision not to prosecute the perpetrator(s) is not so much a result of balancing the needs of justice against those involved in bringing about a reconciled society as a choice between Scylla and Charybdis.²³ Moreover, the remission of penalties and above all amnesties by no means won the approval of all the victims’ families, and some, such as that of Steve Biko,²⁴ held out in vain against arrangements of that kind.

From a legal point of view, there are two remarks to be made. First of all, these amnesties run counter to the principle of international law that there should be no amnesty for the most serious human rights violations, and in particular crimes against humanity, of which apartheid is one.

As in other countries, the concept of forgiveness has sometimes been put forward to justify the dropping of proceedings against a perpetrator on the grounds that the consent of the victim makes a solution of this kind acceptable. Forgiveness and reconciliation are powerful forces for reconstructing a society riven by conflict; they need to be facilitated within the framework of ad hoc commissions. But these commissions and their work cannot be a substitute for justice. As recalled by the Inter-American Commission on Human Rights²⁵ and as pointed out by Louis Joinet in his Principles,²⁶ even forgiveness by a victim cannot exonerate the perpetrator. The damage done to the victims and society through violation of the rules that protect fundamental rights gives rise to an obligation on the part of the state to prosecute and punish the perpetrator.

23 In Homer’s *Odyssey*, when passing through the straits of Messina Odysseus is forced to choose which monster to confront while passing through the strait: Scylla, who was a creature who dwelt in a rock, had six heads and ate people, or Charybdis, who had a single gaping mouth that sucked in huge quantities of water and belched them out, thus creating whirlpools. The phrase “between Scylla and Charybdis” has come to mean being in a state where one is between two dangers and moving away from one will cause you to be in danger from the other.

24 Leader of the anti-apartheid movement who died under torture on 12 September 1977.

25 See Angelika Rettberg, *Entre el Perdón y el Paredón: Preguntas y Dilemas de la Justicia Transicional*, Universidad de los Andes, Bogotá, 2005, available at www.idrc.ca/openbooks/190-6/ (last visited 10 July 2008). See also Pronunciamentos OACNUDH-UNHCHR Ponencia del Director 2004-02-10, “Derechos a la verdad, a la justicia y a la reparación integral en caso de graves violaciones a los derechos humanos”, available at www.hchr.org.co/publico/pronunciamentos/ponencias/po0435.pdf (last visited 10 July 2008). In Amicus Curiae Expediente No. D-6032, Washington, 2 December 2005, submitted to the Colombian Constitutional Court, the Center for Justice and International Law (CEJIL) analyses in detail the state’s obligation to punish in the light of Inter-American and international case law. Available at www.cejil.org/documentos/AMICUS%20FINAL.doc (last visited 10 July 2008).

26 In two annexes to his final report “L’administration de la justice et les droits de l’homme des détenus: Question de l’immunité des auteurs des violations des droits de l’homme (civils et politiques)”, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, Louis Joinet defines forty-two principles, known as “Joinet’s Principles”.

Transitional justice theorists do concede that these two parallel sets of measures belong to different spheres, but when they claim that they balance two imperatives as part of a justice system with a new dimension, they weaken the very fundamentals of justice even though they do facilitate the transition process. We should therefore speak rather of transitional “policies” and make it clear that, through these measures, we are attempting to guarantee a minimum level of justice in dealing with past violations.

What sorts of punishment are appropriate during the transition process?

Several solutions have been put forward.

1. A sequential solution.
2. A system that restricts itself to vouchsafing the truth and compensating victims.
3. A conviction on lesser charges under a special law.
4. Conviction followed by remission measures.

Justice “deferred”

In Argentina, the dictatorship (1976–82) imposed an extreme nationalist and fascist system after eliminating representatives of the forces of the left and democratic organizations by means of assassination and forced disappearance. Also subject to international pressure, but above all faced with economic difficulties which it could not resolve, the junta tried to mobilize public opinion in a “great” national cause – the recovery of the Falkland (Malvinas) Islands, which were under British rule. Severely defeated, those responsible for the policy which led to the conflict lost all credibility. Dissent broke out even among the armed forces, who found themselves constrained to hand over power to a civilian government.²⁷

Successive democratic governments have tried to limit the role of the armed forces in order to provide a better foundation for democratic structures whilst avoiding a head-on confrontation. In 1985, following the military defeat, the junta was put on trial and the chief members were sentenced,²⁸ but over the

27 Nicolas Zeisler, “La guerre des Malouines dans la société argentine depuis 1983 jusqu’à nos jours”, EPIcentre – études politiques internationales, available at <http://etudespolitiquesinternationales.blogspot.com/2006/11/la-mmoire-des-malouines.html> (last visited 10 July 2008).

28 Once democracy was restored in 1983, indictments were brought against the main junta leaders for the crimes committed between 1976 and 1983. The Cámara Federal en lo Criminal y Correccional handed down verdicts in 1985 which were subsequently confirmed by the Supreme Court, for example against Videla in 1986. Following the presidential pardons bestowed by Carlos Menem, other charges were brought against some of these former leaders. For Videla see Causa Nro 33714, “Videla Jorge R. s/ procesamiento”, “Sentencia confirmando el procesamiento del General Jorge Rafael Videla en la causa Plan Cóndor”, Buenos Aires, 23 May 2002, available at www.derechos.org/nizkor/arg/doc/videla2.html (last visited 10 July 2008). For Galtieri see “Leopoldo Galtieri”, Enciclopedia aRiKaH, www.arikah.net/enciclopedia-espanola/Leopoldo_Galtieri (last visited 10 July 2008). For Massera see “Decisión de la Cámara en lo Criminal y Correccional Federal de la Argentina, en el proceso contra Massera y Otros”, Expdte. 30514, “Massera, s. Excepciones”, J. 7/S. 13, Buenos Aires, 9 September 1999, available at www.derechos.org/nizkor/arg/ley/massera.html (last visited 10 July 2008).

next two years the Full Stop Law in 1986 and the Due Obedience Law in 1987 guaranteed impunity to those who committed the acts and those with intermediate responsibility.²⁹

As in South Africa, but operating in a different manner, the new Argentine authorities tried to consolidate the new regime, although the army, albeit weakened, still posed a serious threat. But, whereas South Africa favoured truth and restoration, Argentina placed the emphasis on sentencing and punishment but confined its attentions to the main perpetrators.

By adopting a system that guaranteed impunity for thousands of middle-ranking officials by means of laws that could be revoked, Argentina appeared to be protecting the future. In August 2003 its parliament repealed the Full Stop and Due Obedience laws and in June 2005 the Supreme Court ruled that the amnesty laws, which had guaranteed impunity to a thousand or so military personnel guilty of serious human rights violations during the period of the dictatorship, were unconstitutional.³⁰

However, courts hearing cases brought by victims who want to see the perpetrators convicted and obtain redress for the injustices they themselves have suffered were confronted by a fresh, albeit somewhat less intractable obstacle in the form of reactions by the defendants. A real “law of silence” was imposed on prisoners implicated in cases of mass violations by their fellow perpetrators, and witnesses and plaintiffs found themselves under serious threat. It is worth noting in this context that in September 2006 a former detainee from one of the junta camps, Jorge Julio López, disappeared the day after he gave evidence before the La Plata Court, and there is no news of him to this day.³¹ Everything indicates that he was murdered by the people he had denounced. Actions brought by hundreds of victims come up against threats from former perpetrators, showing that even more than twenty-five years after the events it is still problematical for them to reveal the whole truth and seek to have the guilty punished in the Argentina of 2007.

Despite these grave difficulties, the public in Argentina has been able to learn the truth, the victims have been – at least partially – compensated and the main perpetrators of violations have been tried and punished. Nevertheless, over the past twenty-five years successive democratic governments have been unable to reduce the influence of the middle-ranking officials from the time of the dictatorship, some of whom have managed to reinforce their positions within the state structure, thanks to laws which protected them until recently. The fact that

29 On the content of laws no. 23492 (Full Stop) and 23521 (Due Obedience), see José Balla “Leyes de Punto final y Obediencia Debida”, available at www.monografias.com/trabajos/puntofinal/puntofinal.shtml (last visited 10 July 2008).

30 See “Les droits de l’homme”, published by the Embassy of the Argentine Republic in France following the commemoration of the 30th anniversary of the Coup d’état, 24 March 2006, available at www.ambassadeargentine.net/derechoshumanos.htm (last visited 10 July 2008).

31 See OMCT urgent appeal ARG 260906 and press release of 3 October 2006 at www.omct.org/index.php?id=APP&lang=eng&articleSet=Press&articleId=6308&PHPSESSID=b784778ae05123cb37-c20844114f2de9 (last visited 10 July 2008).

many victims are now taking legal action against these perpetrators reveals a dissatisfaction with impunity and the limits of a sequential system.

The right to truth on violations perpetrated by persons unknown

Morocco is an interesting example. Regarded as one of the most repressive regimes during the “years of lead”, the country is now held up as a “champion” of human rights in the region.³²

Towards the end of his reign, King Hassan II realized that the repressive, authoritarian monarchical regime he had instituted during the 1960s could not survive for long. He therefore decided to open up the political arena by appointing as prime minister a man sentenced to death in his absence by that regime, and making provision for victims to obtain compensation.

A new policy, continued and enhanced under King Mohamed VI, led to the freeing of political prisoners and mediation by the Equity and Reconciliation Commission in the most serious cases.³³

That Commission made it possible to bring to light the situation of political prisoners and the suffering endured during the harshest years of King Hassan II’s repressive regime. Thus it performed one of the essential functions of restorative justice, which is to allow the community to see what has happened and the victims to give evidence about the reasons for their struggle and the repression suffered (right to truth). It also opened up the possibility of compensating victims for the violations perpetrated on them.

On the other hand, there was no real questioning of the perpetrators’ role and, above all, those mainly responsible have still not been punished, contrary to the principle that those who have committed serious crimes should pay for their actions.

Morocco now faces a twofold challenge. First, as regards the transition itself, it was not the intention of the monarchy to introduce a democratic system in the Western sense of the term, but to strengthen a modernized and enlightened monarchy. In that system, the king not only remains the main source of power but is regarded as holy (Commander of the Believers) and, as the courts brutally reminded us in summer 2007, any criticism of the king’s statements in the press

32 The appointment of Abderrahmane Youssoufi, whose human rights record is uncontested, as prime minister of Morocco in 1998; the appointment of Driss Benzekri, a victim of the Years of Lead and a leader in the struggle for human rights, as chair of the advisory council on human rights; and the prominent role played by the Moroccan representatives, both in the UN Commission on Human Rights and in the UN General Assembly in the adoption of the 1998 Declaration on Human Rights Defenders, were perceived by the international community as signs of a major change. See statement by Rosalyn Higgins, President of the International Court of Justice, on 20 September 2007, available at www.magharebia.com/cocoon/awi/xhtml1/en_GB/news/awi/newsbriefs/general/2007/09/21/newsbrief-03 (last visited 10 July 2008). See also Christine Daure-Serfaty, “Le Maroc vers les droits de l’homme à petits pas”, 9 December 2004, available at www.yabiladi.com/article-politique-196.html (last visited on 10 July 2008).

33 See first report of the Moroccan advisory council on human rights (CCDH) under the UPR (Universal Periodic Review) procedure, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/MA/CCDH_MAR_UPR_S1_2008_ConseilConsultatifdesDroitsdeHomme_urpsubmission.pdf (last visited 10 July 2008).

may result in long prison sentences for the journalists concerned.³⁴ In other words, the aim of the transition is to grant human rights to the population whilst maintaining the royal prerogatives which are still the cornerstone of the system. In the context of Morocco, the fact that the transition was of the top-down variety and that it was aimed at modernizing a monarchical system whilst preserving the basic elements of the previous regime largely explains the limited extent to which justice has been brought to bear on the legacy of the past.³⁵

Similar observations may be made about Bahrain, another monarchy in which a transition has provided an opportunity to modernize the state by introducing “from the top down” a whole range of legislative innovations supposed to guarantee human rights, but where political parties remain outlawed and those responsible for depredations go unpunished.

In Chile, the dictatorship of General Pinochet set up following the 1973 coup d'état was obliged to undergo a gradual transformation under pressure from international quarters and national public opinion. Greater independence was given to the courts and more open elections were able to take place.

The dictatorship took great care – as did the Franco dictatorship in Spain in its time – to guarantee impunity for the main leaders as far as possible and to keep the opposition in check.

In 1978 an auto-amnesty law guaranteed protection from prosecution to those who carried out the coup d'état and those responsible for subsequent outrages.³⁶ In 1985 an agreement on greater democracy was concluded between the junta led by General Pinochet and some of the parties now tolerated.³⁷ The 1980 constitution allowed a limited degree of democracy and electoral freedom, and above all ensured that General Pinochet and the other members of his junta retained control of the process. The 1988 plebiscite that brought Pinochet's presidential mandate to an end took place against that background.³⁸

34 Two journalists on the weekly *Nichane* were in January 2007 sentenced to three years in prison for insulting Islam. See www.algerie-dz.com/article7825.html (last visited 10 July 2008). One journalist from *Al Watal Al An* was sentenced to eight months in prison and another to a six-month suspended sentence in August 2007. See http://tempsreel.nouvelobs.com/actualites/medias/20070815.OBS0676/prison_ferme_pour_un_journaliste_marocain.html (last visited 10 July 2008).

35 See Pierre Hazan, “The nature of sanctions: the case of Morocco's Equity and Reconciliation Commission”, in this issue.

36 For the text of the Amnesty Law, see www.derechos.org/nizkor/chile/doc/amnistia.html (last visited 10 July 2008). For its effects see Amnesty International on the case of Carmelo Soria Espinoza at www.derechos.org/nizkor/chile/soria2.html (last visited 10 July 2008). For the case of Luis Alfredo Almonacid, see “Corte Interamericana condena vigencia de Ley de Amnistía en Chile”, www.memor-iando.com/noticias/101-200/158.html (last visited 10 July 2008). See also Communication No 746/1997 against Chile of 4 August 1999 to the UN Human Rights Committee, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.66.D.746.1997.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.66.D.746.1997.En) (last visited 10 July 2008).

37 See text of August 1985 “Acuerdo Nacional para la transición a la plena democracia”, available at http://es.wikisource.org/wiki/Acuerdo_Nacional_para_la_transici%C3%B3n_a_la_plena_democracia (last visited 10 July 2008).

38 See “Constitución Política de la República de Chile”, Instituto de derecho público comparado Universidad Carlos II de Madrid. This document contains a brief introduction to the constitutional development of Chile, the text of the 2001 Constitution and the different laws that amended the Constitution between 1991 and May 2001, available at <http://turan.uc3m.es/uc3m/inst/MGP/conschi.htm> (last visited 10 July 2008).

In 1991 a truth and reconciliation commission set up to investigate the fate of victims over the period from 1973 to 1990 was able to begin its work.³⁹ It established 3,197 cases, a figure clearly much lower than the real scale of repression.

In 1994 the Reparations and Reconciliation Commission decided that compensation should be paid to 2,115 families. However, the recognition of violations suffered by victims and the award of compensation did not entail prosecution of the perpetrators.⁴⁰ The UN Human Rights Committee at its March 2007 meeting welcomed the process of institutional restoration begun in Chile. It nevertheless expressed concern that a decree-law that continued to provide total amnesty for those who committed violations between 11 September 1973 and 10 March 1978 had been kept in place, contrary to the provisions of the International Covenant on Civil and Political Rights.⁴¹

In 1998, with a view to his retirement, General Pinochet had himself appointed senator-for-life, thereby guaranteeing himself total immunity from prosecution until his death. The plan proved less than foolproof, however – not because of any reaction by the opposition but thanks to interventions at international level, including that of Spain's Judge Baltasar Garzón.

It was not until 2005, thirty-two years after the coup that overthrew President Salvador Allende, that a constitutional reform approved by the parliament swept away the remaining authoritarian elements inherited from the Pinochet dictatorship, marking the final act of the transition to democracy. The transition lasted two decades, from 1985 to 2005, and ended with the emergence of a democratic regime that showed greater respect for human rights. However, in terms of truth, compensation for victims and, most of all, punishment for perpetrators of violations, the process remained highly constrained by the limits put in place by the general's regime.

Negotiated penalties or guarantees of impunity

The process unfolding today in Colombia under the "Justice and Peace Act" is intended to bring about an end to hostilities between the government and organized groups operating outside the law. The rebels are invited to lay down their arms and help to restore the rule of law. The law provides for reduced penalties for crimes linked to political ends. This raises a great many questions.⁴²

39 "Comisión nacional de Verdad y Reconciliación" established by President Patricio Aylwin on 24 April 1990 by 'Decreto Supremo No. 355'. Report available at www.usip.org/library/truth.html#Chile (last visited 10 July 2008).

40 See "Linea Cronológica del Programa: De la Comisión Nacional de Verdad y Reconciliación al Programa de Derechos Humanos", Ministerio de Interior Chile, available at www.ddhh.gov.cl/historia_programa.html (last visited 10 July 2008). See also Report of the National Truth and Reconciliation Commission referred to in the above document.

41 Concluding observations of the Human Rights Committee: Chile 18/05/2007, Eighty-ninth session 12-30 March 2007, CCPR/C/CHL/CO/5.

42 See Report "Consideraciones sobre la Ley de Justicia y Paz", Office of the United Nations High Commissioner for Human Rights, Bogotá, 27 June 2005, available at www.hchr.org.co/ (last visited 10 July 2008). Up-to-date documentation on the impugned legal instruments is also to be found on the site of the Colombian Commission of Jurists "Documentos acerca del marco jurídico sobre desmovilización e impunidad en Colombia", available at www.coljuristas.org/justicia.htm (last visited 10 July 2008).

Under this law, in contrast to its South African counterpart, the members of organized groups operating beyond the law are not threatened with losing the advantages they obtain under its provisions even if they do not co-operate fully and honestly by confessing all the crimes they have committed and passing on information in their possession. On the contrary, the law stipulates that if a perpetrator “forgets” a crime – even one as serious as a massacre – the maximum increase in the sentence initially imposed will be 20 per cent.

Moreover, as pointed out by Jaime Araújo Rentería, a judge of the Supreme Court of Colombia, the alternative penalty reserved for armed groups under the Justice and Peace Act for crimes such as genocide, genocide by multiple homicide, justifying genocide, homicide and aggravated homicide is between five and eight years, whereas for these same crimes, depending on how they are categorized, the penal code provides for sentences of between eight and fifty years. As common crimes committed for political ends are covered by the law, a drug trafficker who could be sentenced to fifty years’ imprisonment for torture, murder and massacres has every interest in declaring himself to be a “narco-paramilitary”, as “Don Berna” did in Medellín, in order to take advantage of the maximum sentence of eight years stipulated for the same type of crimes under the “Justice and Peace Act”.⁴³

That would explain some statistical curiosities. First of all, when the paramilitaries were demobilized, the official figures indicated that 35,000 paramilitaries, over 10,000 of them bearing arms, had asked to benefit from the Act. However, it should be pointed out that the paramilitaries continue to operate on practically all the territory they occupied prior to its enactment.

On the face of it, it is a little difficult to explain such continued control of the territory, since according to the figures published by the armed forces prior to demobilization of the paramilitaries, the number was some 15,000 men. It was established that some of those “demobilized” had never in fact been “mobilized” but had “enlisted” in order to be able to take advantage of the law.⁴⁴ Furthermore, many of those demobilized were either reincorporated into other groups or are continuing to lead their troops covertly. The Act has therefore had little effect on the military operations of the outlaw groups.

The Act has also had another unwanted side-effect. Over the past two decades, thousands of farmers have been massacred and, according to the figures of farmers’ organizations, some three million of them have been forced to leave their lands.⁴⁵ According to the same sources, over half of the displaced were small

43 Jaime Araújo Rentería, “Loi ‘Justice et Paix’ et droit des victimes: l’expérience colombienne”, *Mouvement* 2008/1, No. 53, pp. 88–94.

44 On the demobilization of paramilitaries, see the report by Human Rights Watch “Las apariencias engañan: La demobilización de grupos paramilitares en Colombia”, August 2005, Vol. 17 (3) (B) and compare with the statements by the Colombian armed forces to the *Diario Occidente* of 11 March 2006, “Fuerza Aérea Colombiana: concluye proceso de desmovilización de 26,000 paramilitares”, available at www.fac.mil.co/index.php?idcategoria=8374&facmil_2007=689fbbe5ae2017760f8ef647ed40aaba (last visited 10 July 2008).

45 See “Solidaridad mundial con las víctimas de los crímenes de Estado y del paramilitarismo en Colombia”, Medellín, 6 March 2008, available at <http://colombia.indymedia.org/news/2008/03/82561.php> (last visited 10 July 2008).

landholders. Jaime Araújo Rentería estimates the amount of land stolen from people forced to flee at some four million hectares.⁴⁶

Most of the victims will never be able to recover their property. Those who have appropriated that land by purchasing it through straw men or by taking advantage of laws on possession or laws intended to stamp out illegal crops are making enormous profits. In practice, a real agrarian reform in reverse is under way, favouring the growing of palm trees for the multinationals as opposed to the traditional food-producing agriculture. The Act, which provides for a very meagre compensation fund that will not allow dispossessed families to recover their former way of life, is helping to propel the sector into poverty. Colombia illustrates how difficult it is to address criminal violations of civil and political rights in isolation from the economic and social crimes with which they are closely bound up.

Conviction and/or punishment

Louis Joinet formulated one way in which transitional justice could combine the demands of the fight against impunity with reconciliation and the consolidation of a process aimed at ensuring full respect for rights. At a colloquium held in Santiago de Chile in 1996, he presented a report entitled “Set of principles for the protection and promotion of human rights through action to combat impunity”, in which he suggested that a distinction be made between the amnesties pronounced before any trial and sentencing could take place and those granted at the end of a process that has led to the conviction of a perpetrator.⁴⁷

Amnesties that prevent persons suspected of violating fundamental human rights from being brought to trial are unlawful from the viewpoint of international law. However, according to Louis Joinet, an amnesty granted after someone has been convicted, either to reduce the sentence or even to enable the convicted person to avoid serving it altogether, could be not only acceptable but also favourable to the transition process. In some cases, the conviction itself stigmatizes the perpetrator and his or her acts sufficiently to satisfy the expectations of both society at large and the victims themselves. The most important thing is that the law be spoken and a values-based order restored by means of a clear statement to the effect that the tormentor is a criminal and the one tormented is a victim. A judicial sentence satisfies the related demands for truth and rehabilitation. It is therefore possible to imagine post-conviction amnesty mechanisms.

46 Araújo Rentería, above note 43.

47 When presenting his report (see above note 26), Louis Joinet raised the question of the compatibility of any form of amnesty with international law. According to his analysis, reported by Benjamín Cuellar in his address “Amnesia or amnesty” in San Salvador in autumn 1995, amnesties organize a conspiracy of silence and prevent the victims from obtaining any form of reparation. A conviction followed by an amnesty has fewer unwanted effects. The address by Benjamín Cuellar is available at <http://pauillac.inria.fr/~maranget/volcans/06.96/amnesie.html> (last visited 10 July 2008).

In terms of principles, it is plain that a solution of this kind deserves credit for satisfying the twofold demands of transitional justice. However, some questions arise when it comes to putting it into practice. As we have seen in South Africa, the aim of amnesty measures is to get the perpetrator to co-operate as fully as possible so as to establish the truth about all violations, both those committed by that perpetrator and any others of which that person may have knowledge.

An amnesty declared after the perpetrator has been sentenced would not necessarily help to achieve those objectives in the same way. If the perpetrator has been tried for crimes, some of which he could not be convicted for because of insufficient evidence, he will have no incentive to help to establish a truth that could cost him further indictments. The principle *ne bis in idem* would not cover crimes that had remained hidden, even if they were part of a series. There remains a possibility that a convicted criminal might denounce accomplices or other acts he or she may have become aware of, for example in an official capacity. There too, we may wonder whether someone in that position might not be more inclined to keep quiet to avoid any reprisals by those incriminated in the form of further accusations.

To avoid such problems, the convicted person would probably demand assurances that any new information he or she provided or any information provided by others incriminating him or her would not lead to a heavier sentence or any further indictments. This would give rise to precisely the kind of situation that the measures were intended to avoid, namely an amnesty that protects a perpetrator from being tried and convicted in accordance with his or her deserts as the “price” of co-operation.

Practice in South Africa has shown that, even when they agree to co-operate, perpetrators of violations tend to disclose their own violations or those they are aware of gradually and often out of fear that one of their accomplices may speak first and provide fuller information on crimes they themselves wished to hide or minimize. Those who want to take advantage of an amnesty law are encouraged to be transparent, all the more so since they are assured of an amnesty or a pre-negotiated reduction in sentence in return. After conviction, however, it seems to me that the conditions are not the same and that, unless they are protected from the consequences should they confess crimes as yet undiscovered, people already convicted are likely to be more circumspect.

Dealing with violations selectively

Transitional justice theorists tend to postulate a radical caesura between a “before” rife with the worst evils and an “after” free of the slightest defect.

Far be it from me to defend dictatorships or become an apologist for conflicts, but it should be pointed out that, even though they may constitute remarkable improvements over situations of lawlessness, transitions rarely meet the needs of peace, democracy, fair development and the rule of law to which traditional justice avowedly aspires.

Justice that restricts itself to violations of civil and political rights

Thus understood, transitional justice tolerates limitations on the ideal application of justice, and particularly punitive justice, inasmuch as it countenances derogations justified by the need to speed up the transition process. The philosophy implicit in this approach is based on the idea that democracy and peace – which allow society to be rebuilt and the community to be reunified – will guarantee a peaceful and more just way of life and that it is therefore legitimate to sacrifice the absolute application of certain principles in view of the anticipated gains.

This process is greatly tinged with ideology in that it envisions a model of democracy defined mainly from the point of view of freedom of expression for the citizens and respect for internationally recognized civil and political rights. This liberal approach overlooks the fact that any conflict – whether it is an internal conflict or a conflict arising out of a dictatorship – sets in and smoulders on in a context marked by deteriorations in the social structure of the state that affect not only civil and political rights but economic, social and cultural ones as well.⁴⁸

Transitional justice claims to address the most serious crimes that form part of the legacy of the past situation, for example torture, summary executions, forced disappearances, slavery, arbitrary detention. Its approach considers the “core” of human rights, which it sees as restricted to civil and political rights. If we attempt to deal with the past in an exhaustive way, can we overlook massive violations of economic, social and cultural rights such as denial of shelter, food or land? This is all the more paradoxical since transitional justice aspires not only to restore the *status quo ante* but to create the conditions necessary to the emergence of a peaceful society under the rule of law.

This being so, would it not be appropriate to take into account violations of economic, social and cultural rights perpetrated or aggravated during the conflict period, such as we have witnessed in South Africa or Colombia? There would seem to be all the more justification for doing so since the violations of civil and political rights listed by Mark Freeman⁴⁹ are often combined with very serious violations of economic, social and cultural rights and, in some cases, failure to respect the latter creates fertile ground for violation of the former.

Admittedly, it is more difficult to criminalize and punish violations of these rights, but precisely these violations often sow the seeds of conflict. If the aim is to bring about a real transition, surely it is necessary to address all serious human rights violations of the past. It will then become apparent that the roots of torture and forced disappearance are to be found in the social tensions generated by an unequal and unjust system and an inequitable sharing out of the fruits of production and by abusive appropriations and despoilment of entire

48 See Thomas E. McCarthy (ed.), *Attacking the Root Causes of Torture: Poverty, Inequality and Violence*, preface by Louise Arbour, OMCT, Geneva, 2005, available in book or electronic format (www.omct.org).

49 Freeman, above note 18.

communities. Can we punish the one without punishing the other? Is it because violations of economic, social and cultural rights are considered less serious that they are not included in the scope of transitional justice? How solid can a reconciliation be when violations of social and economic rights are glossed over and the future is organized on a basis that perpetuates or even aggravates those violations?

It may be objected, as mentioned earlier, that judicial mechanisms that could punish violations of economic, social and cultural rights are still at the embryonic stage and that it would therefore be appropriate to develop further the implementation mechanisms for civil and political rights for which there already are more precise and effective instruments. Although I would not deny the validity of this objection, I would point out that, while it purports to define a new domain, transitional justice seeks to operate within the framework of a combination of measures aimed at protecting civil and political rights while totally ignoring social, economic and cultural rights, violations of which are not even referred to within that framework. Post-conflict and post-dictatorship situations often lead to deep-seated frustrations as the citizens, while they may be relieved to be free of arbitrary rule, remain dissatisfied with the social model that emerges from the transition. In this connection, the situation in the countries of the former socialist bloc in Europe present characteristics which it would be interesting to study in depth.

By the same token, while the South African transition in practice made it possible to apply the principle of “one man/one vote”, it had practically no impact on the country’s social structure, which was a legacy of colonialism. That social structure keeps the essential natural wealth of the country in white hands while the vast majority of black people continue to live in frequently unbearable conditions of poverty. Violence in South African society (the country has one of the highest urban crime rates in the world) is not regarded as a result of political discrimination, but it is certainly linked to social discrimination which was not dealt with in the context of the transition.

As a result, over and above the relative impunity granted to the perpetrators of crimes against civil and political rights, these societies have to face post-transition situations in which the system of social injustices that led to the conflict in the first place is left intact.

There are two possible approaches. Given that it is impossible to punish all violations of fundamental rights for want of an appropriate system for punishing violations of economic, social and cultural rights, the first approach accepts the inevitability of applying the rules with a degree of flexibility that, logically enough, can call into question the very principles of criminal law in matters of civil and political rights too. The second approach, premised on the view that impunity must be fought in all areas of fundamental rights if the law is not to lose its role as a common regulator of social conduct, sets out to define avenues for bringing violations of economic, social and cultural rights to justice and effective mechanisms for punishing as crimes violations of those rights.

Democratic transition?

Although it is not possible to isolate violations of civil and political rights from offences against social, economic and cultural rights, it is important to question the political purpose of a transition, which will depend on the parameters of the conflict.

Whether in Spain, Chile or Argentina, the clashes that brought dictators to power were the result of confrontations between political forces seeking to establish diametrically opposite political regimes. In these three countries at least, the aim of the transition that followed the period of dictatorship was not so much to restore the political *status quo ante* as to consolidate a process that had been embarked on against the will of the majority of the population.

It is admittedly not possible to undo historical processes that are the result of a complex and largely irreversible dynamic. Nevertheless, in transitions that follow dictatorships, when we envisage potential reparations and punishments, we should consider not only individual victims and their aggressors, but also the social and trade-union movements and other institutions involved. This collective aspect is often not addressed because the protagonists are in fact the same people; the results of crime become institutionalized and the crimes themselves legitimized. The purpose of any dictatorship is after all to prevent or check a democratic process in order to give the country's future a slant different from the one favoured by the majority of the population.

Like the uprising against the Republican regime in Spain in 1936, the coup d'état against President Allende in Chile in 1973 was a crime against democracy. This type of crime is not restricted to the elimination of legitimately elected authorities, but continues over time through the destruction or far-reaching corruption of social and political movements entrusted by a popular majority with running the country's affairs.

At the end of a dictatorship, groups across the political spectrum are fundamentally and nearly always irremediably changed. Parties subjected to bloody purges are left with lasting damage to their identities and sometimes even cease to exist.

At the moment, we are impotently witnessing a phenomenon of this kind in Colombia. In less than two decades, the Patriotic Union has been decapitated. Over 3,000 of its members, including a good number of its leaders who had seats in the highest bodies of the state, have been assassinated or "disappeared". These crimes are the result not of clashes between opposing armed forces, regular or irregular, but of the implementation of the aims set out in extermination plans thought up by one part of the army and bearing code names such as "The Red Ball" or "Operation Coup de Grace".⁵⁰ Like the thousands of targeted murders of

50 When he visited my office in June 1994, Senator Manuel Cepeda Vargas informed me that he expected to be assassinated on his return as part of an operation nicknamed "Golpe de Gracia", aimed at eliminating the members of the Patriotic Union. He was indeed assassinated on 9 August that same year. A documentary film, *El Baile Rojo: Memoria de los Silenciados*, by Yesid Campos, was broadcast on the Colombian television channel Caracol on 18 August 2008. See www.reiniciar.org/drupal/?q=node/145 (last visited 10 June 2008).

trade-union leaders, these plans are part of a strategy aimed at eliminating the forces of the left and trade-union opposition in order to build a state based on consensus democracy and ultra-liberal principles.

The transition must therefore take into account the situation that prevailed before the conflict and the one that will result from the transitional process. Will that really make it possible, not to return to the *status quo ante*, which is impossible in view of the foregoing, but at least to guarantee the various components of society the right to express and organize themselves, not just freely but in a society that has punished the forces that created the current conditions?

Unlike the international Convention on the Prevention and Punishment of the Crime of Genocide, Colombian criminal law, like that of most of the countries of Latin America, has incorporated a definition of genocide in line with the initial draft of the authors of the Convention, that is, including elimination of political groups as a constituent element in genocide.⁵¹ However, as we have seen in the case of the democratic transition in Chile, although General Pinochet was at least ruffled by the attempts to prosecute him for the crime of genocide, it was thanks to the actions of a foreign judge and not in the context of the Chilean transition.

Inasmuch as the transitional phase is aimed at restoring or establishing democracy and the rule of law, it should logically not only pursue the individual perpetrators responsible for extermination policies but also the organizations that planned and organized them. That is all the more vital in countries that legally characterize such crimes as genocides. By the same token, the various movements affected by a dictator's policies of repression or elimination should be able to obtain reparation and compensation so as to be able, as far as possible, to recover a status similar to the one they enjoyed before the crime.

However, although the needs of national reconstruction allow these types of measures to be adopted in relation to individuals, it is extremely rare for organizations, parties or trade unions to receive reparations for the damage they have suffered, although they do sometimes benefit from some form of symbolic rehabilitation. Admittedly, it is hard to see how a party or a political movement or an association that has disappeared as a result of repression could be adequately compensated.

Punishing the authorities that conducted this policy should be viewed as all the more fundamental since this would be the most effective means of opening the way for a genuine democratic reconstruction. But there, too, the practical problems are often insurmountable. Authoritarian or dictatorial movements that have successfully wrested power from the legitimate forces and then broken those

51 When Judge Garzón indicted General Pinochet, one of the heads was genocide. In an interesting study entitled "Exclusión de los Grupos Políticos en la Tipificación Internacional del Genocidio", Rigoberto Paredes Ayllon analyses the difference in approach between the concept as proposed by Rafael Lemkin in 1944 and the wording of Article 2 of the Convention (see above note 21). He also points out the differences between the Latin American criminal codes and international law. See www.rigobertoparedes.com/web_english/ver_publicacion.php?Cual=11, www.rigobertoparedes.com/web_english/_files/Exclusion_de_los_Grupos_Políticos-Genocidio.doc (last visited 10 July 2008).

forces are no longer the same at the end of a process that often extends over several decades. After an extremely violent phase in order to gain legitimacy and ensure their staying power, these regimes generally replace the officials of the apparatus of state under their control with technocrats considered as politically neutral. As a result, a more acceptable face gradually emerges within the initial dictatorial movement, allowing a transition towards a democracy geared to the perpetuation of a system conceived by the putschists. That is how democracy gained ground in Chile within the framework of the ultra-liberal system the military junta wanted to impose in complete contradiction to the programme the people voted for in the early 1970s.

Paradoxically, the question of punishment for political groups or movements of a political nature can only be addressed where there is a total break with the past rather than a transition. The Nuremberg tribunal was able to judge not only individuals but the Nazi party per se only because there was no transition. Conversely, the political forces put in place by Franco and Pinochet had time to adapt so that they were not challenged when the transitional period came to an end.

To the extent that the democratic process can again function untrammelled, it is to be hoped that new movements, new trade unions or new parties more in line with the interests of the democratic forces in society will come into being and help to create a fresh debate. However, there is still a danger that, if keen tensions should again make themselves felt, extremist movements could be tempted to interrupt the process. They will feel even more confident in doing so if similar attempts in the past have a history of success.

Punishment, one element of justice among others ...

This rapid survey, which is not remotely exhaustive (either geographically or thematically), leads us to draw some conclusions.

The first, it seems to me, is that the various transitions have responded to circumstances and political imperatives rather than providing a genuine model that could guide us in our approach to punishment and its corollary, an end to impunity.

The emphasis placed in Chile on restorative justice favouring elucidation of violations by means of a truth and reconciliation commission and subsequently a reparation and reconstruction commission and then, in a second phase, compensation for victims, was the best that could be achieved under the 1978 amnesty laws. True, General Pinochet and the junta that brought him to power in 1973 were subjected to strong pressure both from international public opinion and from the people, who aspired to greater freedom, but the regime kept a firm hold on the liberalizing process on which it was forced to embark. These parameters therefore shaped the struggle of the families of the disappeared and those killed by the armed forces or the police and those who themselves were victims of torture and arbitrary acts. Both the force of the pressure exerted and the regime's proclivity to reject any attempt to impugn the perpetrators (particularly those

principally responsible for the coup d'état and for managing repression during the dictatorship) explain the stages, contours and limits of the transitional process.

Conversely, in Argentina, the circumstances of the Generals' defeat made it possible for the highest military authorities to be put on trial and convicted, both for the coup d'état and for the depredations committed while they held virtually all the powers of the state. The regime's inability to handle the country's economic difficulties had prompted it to embark – in order to restore its prestige – on the disastrous invasion of the Falklands. Once defeated, the Generals were obliged to move over and lost any semblance of credibility as to their ability to manage the country. The way was thus opened to a transition.

But very quickly the new authorities found themselves forced to restrict their measures to the members of the regime who bore the heaviest responsibility. A total purge of the forces involved in depredations during the dictatorship appeared too risky, as there was a danger of it destabilizing the regime (danger of a fresh coup) and undermining internal security (a long period of challenge to the authority of the security forces could have weakened the state's ability to maintain order).

In contrast to Chile, the new regime had the benefit of circumstances that made it possible to punish the principal perpetrators, but only if their subordinates were considered not to bear any responsibility. The Due Obedience Law legalized a defence resorted to in vain by the accused in the Nuremberg trials, namely the defence that they had a duty to obey the orders of their superiors and could not be held responsible for doing so.

This amnesty for middle-ranking officials will not only help to reinforce the hierarchical position of perpetrators of serious violations, especially in the provinces, as pointed out above, but will also constitute a major obstacle to the establishment of the truth. In the absence of any criminal proceedings against those who stole their grandchildren after killing their sons or daughters, the grandmothers of the Plaza de Mayo will in very many cases never find any trace of the babies they are seeking. In most cases it will prove impossible to establish the chain of complicities between the murderers, the officials who forged the necessary documents and the couples who took the children as their own.

In that respect, at least, South Africa obtained more convincing results. But there, too, the special features of the transition can be explained in terms of the particular circumstances of the country. In view of the massive legacy of injustices, the tensions between different African tribes and the fact that the white minority still controlled the economy, there was a danger that the collapse of apartheid would unleash a situation which would engulf the country in violence.

The personality and, in particular, the personal history of Nelson Mandela were crucial in gaining acceptance – sometimes tempered with much reluctance and bitterness – for the system of conditional amnesties as the price to be paid for truth and as a basis for compensation and reconstruction. The man who led the transition to democracy and who asked the victims and his community to sacrifice their right to justice was himself a victim, having spent over a quarter of a century in arbitrary detention in particularly unpleasant conditions.

This appeal was therefore not perceived as motivated by cold political calculation, but as the project of a man who had suffered in his own flesh and who was entitled to demand justice, but who was prepared to forgo that entitlement in clearly defined conditions in the interests of a higher goal, namely to avoid the risk of a bloodbath. A situation like that remains an exception, as it is rare for one man to be able to personify all the victims and the cause of democracy and, moreover, to possess the stature and abilities of a statesman with the influence to make his mark on the two communities and manage a peaceful transition to everyone's satisfaction.

... or the guarantee of a return to the rule of law

The three examples referred to above would tend to indicate that the solutions found so far have never been wholly satisfactory and appear rather to be *sui generis* responses that do not necessarily provide the basis of an abstract system that could be generally applicable.

Moreover, as pointed out at the beginning of this article, transition measures sometimes presuppose the paralysis of all forms of justice, be they restorative or punitive. The needs of disarmament, demobilization and reintegration operations in the DRC translated not only into guarantees of impunity but also into the non-transmittal of all information obtained in the course of the operations, thereby making it impossible to establish the truth. Worse still, the mixing of troops, indispensable for the breaking of tribal ties, meant that violators of fundamental rights, in terms of both humanitarian and human rights law, were given new commands. And yet these operations are supposed to be necessary to stop massacres, rape and pillage.

It is generally agreed that the aftermath of any conflict calls for a transition phase in which the state apparatus necessary to the rule of law is still under construction and is still too fragile to exercise its competences in terms of justice in a satisfactory manner, particularly with regard to past violations. But can we therefore consider that in this context punishment must be somehow "adapted" to the circumstances and that it should focus more on the perpetrator's contribution towards reparation than on punishing him in the classic sense of the word?

In practical terms, that is exactly what happens, hence the temptation to place this process within a normative framework, a justice system that facilitates transition but cannot be considered as neglecting the rights of victims and the duties of the states. But, faced with the resulting dilemma, it has to be admitted that greater emphasis is placed on restorative justice measures, which are often considered sufficient to meet the conditions of retributive justice.

Furthermore, the application of punitive justice raises sometimes insurmountable obstacles. Over and above the fact that for practical reasons the judicial system is often unable to deliver justice fairly, the serious nature of the crimes committed makes it difficult to apply proportionate punishments. How is it possible to apply commensurate punishments to someone who massacres a

family in cold blood and someone who organizes a genocide. If the perpetrator of genocide receives life imprisonment, what does someone convicted of a “mere” massacre deserve?

These questions and many others are perfectly legitimate. Nevertheless, it must be borne in mind that the end of any conflict marks a return to the rule of law – that is, the application of abstract rules, valid for all, and not political arrangements hammered out on the basis of the relative clout of the people involved.

The question of punishment for crimes involving violations of human rights and, to a certain extent, violations of humanitarian law is not posed in the same terms as that of punishment for infringements of the positive law of a state.

Generally speaking, the person who infringes a rule of criminal law is not invested with any authority and does not have the obligation to enforce the law, still less to interpret it. The offender is acting in an individual capacity when, for personal reasons, he or she infringes an established rule that is supposed to protect all citizens or society as a whole against wrongful attacks on fundamental interests, including the right to life.

Violations of human rights, in contrast, are perpetrated by agents of the state or by individuals invested with authority recognized by the state or acting with the implicit acquiescence of the state. There is therefore a twofold responsibility in such cases, namely that of the state qua state for non-compliance with its international obligations or of customary law, and that of the individual holder of authority who commits an unlawful act.

As a general rule, and in contrast to the situation in classic criminal law, the perpetrator not only violates a rule but he also purports to relativize or reject the rule he violates in the name of a higher rule or a higher interest of state.

For the dictatorships of the Cono Sur (Brazil, Paraguay, Uruguay, Argentina and Chile) the doctrine of national security served as a normative reference superordinate to positive law. In his reply to Guy Aurenche, the former president of ACAT (Action by Christians against Torture), Brazil’s Captain Fleury did not deny using torture, enforced disappearances and summary executions, but he justified them as difficult but necessary acts that courageous men agreed to perform to protect a threatened society whose members were not aware of the danger that threatened them and did not have the courage to employ the necessary means to eliminate that danger.⁵²

In that type of context, punishment has a propaedeutic and prophylactic role. It serves to send a clear message to society as a whole on the values that subtend it and on the sacrosanct nature of the law that underpins and protects those values. At the same time, it serves to ensure that perpetrators of violations or

52 Captain Fleury was a known Brazilian torturer to whom the then president of ACAT sent a letter urging him to change his ways in the name of the Christian values on which he purported to found Brazilian society. In his reply, the captain justified the need to resort to torture (see exchange of letters in the ACAT publication: *Echange de lettres dans le Courrier de l’ACAT N°12: Non à la Torture en Europe*, Paris, 1979).

those who countenance them and justify them by refusing to accept the primacy of the rule of law are kept out of positions of authority in the country's institutions.

In the words of a mother of a militant who died under torture, the hardest thing to bear was the reaction of their neighbours who, without going so far as to justify the atrocities committed against her child, claimed to be “bringing up” their own so that they would not “commit” the type of actions that had led to her son's arrest. Children were being brought up in a culture of fear and taught to show respect for a system based on the negation of the rule of law and a form of arbitrary “law” that shaped society around anti-democratic and inhumane values, in order to avoid wrongful punishment.

In systems of that kind, punishment ends up legitimizing the unacceptable references that the *de facto* authorities purport to impose. In a climate where citizens denounce their fellows, one often hears the remark “They must have done something to be treated that way”. A victim of a human rights violation is presumed guilty because he or she is punished by the authorities and it is dangerous to speculate that the punishment was not in a good cause.

In a context like that, the “shaming” mechanism of restorative justice is most unlikely to work. In extreme cases, as with Fleury, the regime pays tribute to the violator to justify its policies. The Americans observed the same phenomenon in the Nuremberg trial when Goering was interrogated.⁵³

The aim of a transition is to restore a scale of values that will serve as a basis for unchallengeable rules and also protect those rules. Attempts to contravene them or, worse still, challenge their legitimacy, on the part of those who violated them in the past and continue to do so, must be effectively resisted. For the victims, for society and even for the perpetrators, punishment is often the only yardstick against which the law is judged.

Since the Middle Ages, a state's full sovereignty has been measured by the its ability to deliver justice at all levels. There has happily been some progress in concepts, but a system that negotiates punishment reveals its weakness. Justice should be at once restorative and punitive.

This requirement is all the stronger since we are living in an age marked by very serious relativism at the international level and in which human rights treaties are not only frequently violated, as has often been the case in history, alas, but also one in which their very content is undermined by abusive interpretations, and their authority challenged, for instance by the enactment of domestic legislation or regional treaties that are in contradiction with the states parties' obligations. This trend is particularly noticeable in relation to the prohibition on torture.

To violate a rule – particularly one of *jus cogens*, is a serious matter, but to actively challenge the rule itself, its scope and its consequences, is even worse. A

53 During his trial, Goering cut a strong figure. He was aggressive towards his accuser and posed as the immortal hero of the German nation, a leader imbued with his own superiority and acting for the sake of a grand design. Far from repenting, he used the court as a tribune from which to defend his achievements.

debate on the nature of punishment in the context of a transition is likely to aggravate the danger of relativism in respect of the rule itself, particularly when the debate addresses the need to lighten the prescribed punishment to favour the transition. A particularly perverse strategy is to reaffirm forcefully the principles and the unchallengeable nature of the rules while at the same time voiding them of their substance.

Current attempts to call into question the absolute prohibition on torture – and inhuman and degrading treatment – are a case in point. While proclaiming their unfailing support for the ban on torture, some leaders and jurists claim, in the teeth of all the *acquis* of international law, that cruel, inhuman or degrading treatment or punishment falls into a category in respect of which the prohibition can be challenged depending on circumstances. Moreover, as the criteria they use to define torture circumscribe the violation abusively, acts belonging to the category of torture are “downgraded” to cruel, inhuman or degrading treatment or punishment as characterized, no less abusively, as lawful when necessitated by threats to the security of the state or particularly serious circumstances.

By the same token, there is a likelihood that the punishment of very serious crimes may be questioned – or at least considerably attenuated – for noble reasons such as the restoration of democracy. That such measures may sometimes be inevitable for inescapable political reasons, may be accepted, even by the victims, but if they were at the same time to be presented as emerging from a justice system, with all the consequences that implies (*res judicata*, *ne bis in idem*, etc.), that would constitute a considerable risk in my view.

Whatever form it may take, a punitive sanction for a serious crime is the only possible response to a violation. The perpetrator’s remorse, his efforts to restore the *status quo ante* or at least to compensate the victims or help to establish the truth are elements that can influence the punishment inflicted. However, they are no substitute for it and do not justify reducing it to a level below the minima prescribed by law before the act was committed.

No doubt many victims will never see justice done during their lifetimes. However, as it strengthens its institutions after a conflict or a dictatorship, a state must try to dispense justice and not give in to the temptation to negotiate the application of the law “à la carte”.

The nature of sanctions: the case of Morocco's Equity and Reconciliation Commission

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Abstract

Using the case of Morocco's Equity and Reconciliation Commission as an example, this article analyses how transitional justice is by definition the place where ethics and reasons of state, the will to see justice done and the balance of power meet. Therein lie both the strength and the ambiguity of transitional justice. The sanction-free approach adopted in the specific case of Morocco limited the Commission's effectiveness by not establishing the truth about past human rights violations or creating an environment conducive to greater democratic reform.

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The question of sanctions is one of the most complex issues facing transitional justice. Ultimately, sanctions aim to restore peace by punishing the perpetrators of massive human rights violations. The real difficulty, however, is to reconstruct society and recast national unity while at the same time stigmatizing a part of the population and the leaders who helped to commit crimes. How best simultaneously to punish and reconcile in divided, fragile and often battered societies?

Our consideration of this question starts with the heated debate on the nature of sanctions that divided the human rights community and public opinion between 1995 and 2000. The debate had the merit of clearly spelling out the positions and their respective strengths and weaknesses.

We then analyse a recent truth commission, Morocco’s Equity and Reconciliation Commission (Instance Équité et Réconciliation, IER),¹ which was the first in the Arab-Islamic world and functioned from 2004 to 2006. For the purpose of our analysis, the Commission is interesting in that King Mohammed VI decided on a sanction-free approach. Given that the Commission had no means of constraint or capacity to mete out even non-penal punishment, what was its impact? In some cases, truth commissions have worked in tandem with the courts, as in Sierra Leone; in others, those who refuse to co-operate have been threatened with prosecution. The Peruvian Truth and Reconciliation Commission, for example, transferred about fifty of its political crime cases to the courts for prosecution.² In South Africa, amnesty for the direct or indirect perpetrators of crimes was conditional on their full and complete co-operation with the Truth and Reconciliation Commission, and the debate currently rages in South Africa whether or not to start penal proceedings against those who refused to co-operate, either in part or totally.³ Morocco – and therein lies its interest – is a crystal-clear case in which there was no threat of sanction against those who refused to co-operate.⁴

The debate on sanctions within the human rights community

The debate on the nature of sanctions that took place in the late 1990s between the partisans of international criminal tribunals and those who favoured truth commissions focused on two emblematic experiences of transitional justice, that of the International Criminal Tribunal for the former Yugoslavia (ICTY) and South Africa’s Truth and Reconciliation Commission.⁵ Basically, the partisans of the tribunals felt that the perpetrators of mass crimes had to be punished by penal sanctions. They held that without such sanctions it would be impossible to establish the rule of law, foster a human rights culture and, above all, promote reconciliation. Slaking the thirst for revenge and breaking the cycle of violence

1 IER report: the full report in Arabic, and a summary in French, are available on the website of the CCDH (www.ier.ma); see www.ccdh.org.ma/spip.php?article552&var_recherche=IER (last visited 10 May 2008).

2 See www.cverdad.org.pe/ingles/ifinal/conclusiones.php (last visited 9 April 2008).

3 See www.doj.gov.za/trc/ (last visited 9 April 2008). See also Dorothy Shea, *The South African Truth Commission. The Politics of Reconciliation*, USIP Press Books, Washington, D.C., 2000; Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, USIP Press Books, Washington, D.C., 1995; Desmond Tutu, *No Future without Forgiveness*, Doubleday, New York, 1999.

4 See www.ier.ma/?lang=en (last visited 9 April 2008). See also *Morocco’s Truth & Reconciliation (IER) Commission*, Moroccan American Center for Policy (MACP), available at www.moroccanamericanpolicy.com/upload/documents/IER_factsheet_102507.pdf (last visited 9 April 2008).

5 Robert Rotberg and Denis Thompson (eds.), *Truth versus Justice, the Morality of Truth Commissions*, Princeton University Press, Princeton, 2000; Reed Brody, *Justice: The First Casualty of Truth*, Human Rights Watch, 30 April 2001; Antonio Cassese, “A big step forward for international justice”, *Crimes of War Project: The Magazine*, December 2003, available at www.crimesofwar.org/icc_magazine/icc-cassese.html (last visited 10 April 2008).

implied punishment, even if that punishment paled in comparison to the crimes committed.⁶ It was for this reason that when the UN Security Council adopted Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda (ICTR) it expressly defined “reconciliation” as one of the new institution’s objectives.⁷

The partisans of the truth commissions, on the other hand, in particular the key people behind South Africa’s Truth and Reconciliation Commission, asserted that holding out the promise of amnesty for those who confessed to their crimes produced a clearer picture of the truth and had a more effective social impact than the tribunals. From their point of view, it was the fact of seeing the criminals themselves publicly confess to their crimes that served to heal the scars of the past.⁸ This policy of both ethical and strategic forgiveness is neatly expressed in the Commission’s slogan, “Revealing is healing”. Punishment in the form of public stigmatization (naming and shaming) was part of the process of nation building that allowed South Africa to be symbolically reborn and to move from the apartheid regime to the rainbow nation. A commission, they said, was more effective in reconstructing society and promoting social reconciliation than endless and costly trials of a handful of deposed leaders.⁹

Gradually, however, the debate petered out. To use an economic image, there was an excess supply of perpetrators that the tribunals could not absorb. The extreme example of the ICTR is striking: although it has a budget of several hundred million dollars, the Tribunal has handed down only a few dozen sentences in over twelve years of existence,¹⁰ and yet hundreds of people played a major role in the planned killing of 800,000 Tutsis and thousands of Hutu opposition members. In Rwanda itself, some 120,000 people have been imprisoned on genocide-related charges.¹¹ Experience has shown that judicial systems that want to abide by the principles of fair trial are ill-equipped to try thousands of cases. It is hard to restore the rule of law and build a democratic state when the men who were the chief architects of mass crimes benefit from impunity. This dual difficulty resulted in the development of a comprehensive approach to sanctions involving both judicial and extrajudicial processes.

From the normative point of view, the 1998 Rome Statute of the International Criminal Court thus ratified a process by which amnesty for the (chief) perpetrators of international crimes was more narrowly defined. At a lower level of responsibility, the promoters of transitional justice came up with a mixed approach to sanctions that calls into play a variety of penal and non-penal

6 *Report of the International Criminal Court*, UN Doc. A/60/177, 1 August 2005, available at www.icc-cpi.int/library/organs/presidency/ICC_Report_to_UN.pdf (last visited 10 April 2008).

7 UN Doc. S/RES/955 (1994), 8 November 1994: “*Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace”.

8 See Rotberg and Thompson, above note 5.

9 *Ibid.*

10 For a list of cases see <http://69.94.11.53/> (last visited 9 April 2008).

11 See www.preventgenocide.org/punish/domestic/index.htm#rwanda (last visited 9 April 2008).

sanctions, such as stigmatization of the guilty if they are named by the commission (about thirty have been set up to date, mostly in Latin America and Africa), the enactment of screening and lustration legislation, and the opening of archives (in particular in the former communist countries), that are all part of the process of naming and shaming.¹²

There is nevertheless a point beyond which the principles of law and the recommendations for their application in a system of transitional justice can be compressed no further. By definition, transitional justice is the place where ethics and reasons of state, the will to see justice done and the balance of power meet. Transitional justice is wrapped up in political considerations, which largely determine the nature of the sanctions to be inflicted. Therein lie both its strength and its ambiguity.

Morocco's Equity and Reconciliation Commission

It is in the general context of post-cold war globalization of public policies of reconciliation that we have elected to consider the case of Morocco. As we said earlier, the functioning of the Equity and Reconciliation Commission seems particularly pertinent when considering the question of sanctions. The Commission is an extreme case, because neither the torturers nor their leaders were made to appear in public or behind closed doors or obliged to justify their acts in any way. The main question, therefore, is to determine what impact the commission had in the absence of penal or extrajudicial sanctions. Was it the successful means of democratizing Moroccan society that its promoters in the human rights community envisaged? Or was the absence of sanctions not an indication, as its detractors affirmed, that the Commission was essentially a political marketing tool aimed at lending credibility to the new king, at seducing Western governments with its human rights discourse and at co-opting a part of the Moroccan left-wing opposition and civil society, at the price of stifling political life?¹³

Before taking the analysis any further, let us go back over the context and very special process by which the Commission was established, and its stated objectives.

Context

After forty-four years as a French protectorate, Morocco gained independence in 1956 during the reign of King Mohammed V. His son, King Hassan II, took power in 1961 and ran the country with an iron fist until his death in 1999. His reign can

12 Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York, Routledge, 2001.

13 For an evaluation of the Commission's work see also "Morocco's Truth Commission: honoring past victims during an uncertain present", *Human Rights Watch*, Vol. 17 (11(E)) (November 2005), www.hrw.org/reports/2005/morocco1105/morocco1105.pdf (last visited 10 May 2008).

be divided into two distinct periods. During the *années de plomb* (years of lead), the country suffered a climate of repression marked by the torture of real or suspected opponents. The Equity and Reconciliation Commission would later speak of 10,000 people tortured and several hundred killed.¹⁴ The second period started when the cold war came to an end in 1989, and was marked by a slow process of liberalization reflected in particular in the founding of the Consultative Council on Human Rights (CCDH), the ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and successive amnesties for political prisoners.

The Commission's origins and objectives

The Commission originated in a specific set of circumstances that gave it the equivocal character it would have until its dissolution. It was established on 10 April 2004 by royal decree, without the intervention of parliament, the outcome of a deal between King Mohammed VI, who had succeeded his father in 1999, and civil society members, in particular former left-wing opponents of Hassan II's regime who had in most cases spent many long years in prison before joining human rights organizations.¹⁵

The Commission's ambiguity resided in the fact that Morocco is constitutionally an executive monarchy. All real power – political power, spiritual authority and military power – lies with the king, and much of the country's economic power is controlled by the royal family. The process of change in Morocco is therefore at the very least ambivalent, although there is no disputing that the regime has become more liberal since Mohammed VI's accession to the throne. The ambivalence is even more marked when it comes to the Equity and Reconciliation Commission, which, unlike its South African forebear, provided absolutely no incentive for the leaders and henchmen of the apparatus of repression to come forward or even to co-operate with it. Indeed, no agents of repression ever testified at any of the seven public hearings the Commission organized and before the public hearings took place the victims had to sign a pledge that they would not name those who had arrested and tortured them.

The royal decree founding the Commission gave it a three-pronged mandate: (i) to shed light on all cases of forced disappearance and "arbitrary detention"; (ii) to "compensate" and "ensure reparations are made for all the harm suffered by the victims"; and (iii) to prepare a report "analysing human rights violations ... and making proposals and recommendations that serve to preserve the record, to make a definite break with the practices of the past and

14 Equity and Reconciliation Commission, *Résumé du rapport final*, Rabat, IER, 2005, available at www.ier.ma/_fr_article.php?id_article=1496 (last visited 10 April 2008).

15 Veerle Opgenhaffen and Mark Freeman, "Transitional justice in Morocco: a progress report", International Center for Transitional Justice, New York, November 2005, available at www.ictj.org/images/content/1/9/197.pdf (last visited 9 April 2008). See also "Morocco's Truth Commission", above note 13.

resolve the consequences of the suffering caused to the victims, and to restore and bolster confidence in the rule of law and respect for human rights”.¹⁶

The Commission’s mandate covered a period longer than that of any other truth commission: the forty-three years between independence in 1956 and the death of King Hassan II in 1999, the same year that the Indemnity Commission was established to compensate the victims of “disappearances” and torture.

The Moroccan debate on the absence of sanctions

The absence of sanctions deeply divided the Moroccan human rights community.

The militants who played an active part in the Commission accepted the absence of sanctions as a pragmatic solution that dovetailed with their strategic interest. They based their arguments on the potential to transform and democratize society inherent, in their view, in the deliberations of a truth and reconciliation commission.

Salah El-Ouadie, himself a former political prisoner and a member of the Commission, explained his position thus:

We put the following historic deal before the Monarchy: it is up to the State to recognize its wrongs, to engage in an in-depth process of reform comprising constitutional guarantees so as to avoid the risk of reoccurrence, to promote a genuine culture of human rights by founding a democracy worthy of the name. In exchange, we forgo judicial proceedings. This is a strategic pardon. I do not believe in the law of retaliation, for, as Desmond Tutu says, with an eye for an eye and a tooth for a tooth, everyone ends up blind and toothless.¹⁷

The Commission’s supporters took account of three points:

1. They considered that the Moroccan judicial system’s lack of independence precluded the holding of fair trials in the short term.
2. They bet that a process of transitional justice would shed light on the crimes of the past and further the process of democratization. From their point of view, the Commission had to help leverage the democratic transformation of Moroccan society.
3. They believed that a process of transitional justice would result in time in the mobilization of civil society, a new balance between the country’s political forces and the introduction of sweeping institutional reform conferring true independence on the judiciary and paving the way for penal prosecutions. They wagered that a truth commission would stir civil society to act and reconfigure the political environment, suddenly making

¹⁶ Decree No. 1.04.42 of 10 April 2004, approving the Commission’s statutes, available in French at www.ier.ma/article.php?id_article=221&var_recherche=Journal+Officiel+N%B0+5203 (last visited 9 April 2008).

¹⁷ In Pierre Hazan, *Juger la guerre, juger l’Histoire*, PUF, Paris, 2007, p. 146 (translated from the French).

previously unimaginable activities possible. Their arguments were based in particular on the Argentine precedent, where the laws of amnesty (of Punto Final) had been recently abrogated and judicial proceedings undertaken. What counted most for them was not punishment of the guilty, but the transition from an authoritarian regime to a constitutional monarchy.¹⁸

The Commission's opponents, on the other hand, raised the following points:

1. They deemed it unacceptable that transitional justice should serve as a pretext, with the blessing of some of the former victims, if not to exonerate, at least to spare from all punishment those who had run the apparatus of repression. They saw the Commission as a veiled attempt to rehabilitate, to confer impunity on the repression's leaders and their underlings.
2. They denounced the operation as a political whitewash by the palace at a time when those responsible for years of repression still held key positions in the army and police forces.
3. They also denounced the fact that human rights continued to be violated, in particular within the context of the "anti-terrorist struggle" that was launched after the Casablanca attacks in 2003 and that led to the arrest of 3,000 Islamists under a law adopted in the heat of the moment.¹⁹

Amnesty versus pardon

The clash between the Commission's partisans and opponents within the Moroccan human rights community on the issue of punishment was coupled with diverging views between the king and pro-Commission human rights militants. The dispute was semantic: the king referred to the absence of punishment as "pardon", whereas the pro-Commission militants spoke of "amnesty".²⁰ The lexical difference was not neutral. The pro-Commission human rights militants had clear political goals: the democratization of society – that is, greater power for parliament and government, an independent judiciary and less power for the monarchy. They acted as a pressure group on the political authorities. They agreed to the principle of an amnesty for pragmatic reasons, knowing that it could one day be revoked.

The king's situation was different. He had his own concept of the Commission's role in modernizing Morocco, but he also had to cope with countervailing pressure from, on the one hand, human rights activists and, on the other, the armed forces, the police and the security services that helped him keep his grip on power. What is more, he had a policy of more or less distancing himself from his father's reign while positioning himself as part of its continuation. In that

18 Ibid.

19 Ibid.

20 Ibid.

respect, it is symptomatic that the Commission was mandated to examine human rights violations up until 1999, the year in which Hassan II died.

The fact that King Mohammed VI used the discourse of pardon resulted from this complex set of givens. On the strength of the spiritual authority he embodies as the Commander of the Faithful, he invoked God to justify the absence of sanctions. In the speech he delivered when the Commission’s mandate came to an end he told an audience of victims, “I am sure that the sincere work of reconciliation we have accomplished ... is, in fact, a response to the divine injunction “Forgive with a gracious forgiveness”. It is a gracious gesture of collective pardon.”²¹

The second argument put forward by the king was the restoration of national unity. He advocated forgiveness as the means of “reconciling Moroccans with their past” while they built a modern society. In order to release energies, there had to be an end to the political and legal wrangling over “mistakes” of the past:

The goal is to reconcile Morocco with its past ... Some say this initiative is not enough, because the witnesses cannot reveal the names of their torturers. Obviously, again, I do not agree. This is not an initiative, as some would have it, that will divide Morocco in two. There are no judges and no defendants. We are not in court. We must examine this page of our history without complex or shame. This is the start of the path to better conditions.

The Commission’s results in the light of the absence of sanctions

The absence of sanctions had many effects.

- The co-operation of the security services, the armed forces and the police proved to be difficult. Because there were no sanctions for refusal to co-operate, the bodies that had been the active agents of repression largely forbore to work with the Commission. As a result of their hostility, no light was shed on a number of disappearances and killings, and yet in some cases the witnesses were still alive and documentary evidence was available. The most emblematic case is that of the former Moroccan opposition leader, a powerful Third World voice, Mehdi Ben Barka, who was kidnapped in Paris in 1965 and most likely killed by Moroccan agents in circumstances the Commission was unable to clarify, even though most of the facts were already in the public domain. The IER report clearly states the responsibility of the state to clarify the case of Ben Barka and others, which has not happened so far.
- The absence of sanctions also made the Commission exercise prudence in its final report. Repression during Hassan II’s reign was not the work of

21 Translated from the French; available in French at www.ier.ma/article.php3?id_article=1531 (last visited 9 April 2008).

individuals or isolated services. It was a structured system that went right up to the sovereign. The Commission's report was nevertheless careful not to go up the chain of command or to cast doubt on the very nature of the regime or the father of the current king. It would have been foolhardy to do so. Article 23 of the Moroccan Constitution states that the person of the king is sacred and inviolable. The Commission's work nevertheless allowed people to speak in public for the first time about the massive human rights violations perpetrated during the "years of lead". The witnesses' public testimony was undoubtedly a watershed in the political history of modern-day Morocco.

- As we have seen, the absence of sanctions divided the Moroccan human rights community. This unexpectedly prompted the Commission's detractors to organize alternative public hearings in which the torturers were named. In other words, the Commission opened a space for speech which the Moroccan Human Rights Association (AMDH) quickly filled, using "alternative" public hearings publicly to stigmatize those responsible for the "years of lead".

Ultimately, the absence of threats of punishment for refusing to cooperate limited the Commission's effectiveness in shedding light on cases of disappearance. It also reflected the ambivalence of the Commission's objectives and the diverging points of view of its promoters, whose often incompatible objectives ranged from the rehabilitation of the former regime to the introduction of a constitutional monarchy. The absence of sanctions also hampered Moroccan society's interpretation of the Commission's work and the limits to its scope.

In its final report the Commission advocated measures of substantial political and institutional reform.²² Whether or not the political authorities are willing to implement them will show whether the pro-Commission human rights militants have won their wager that a commission, even one with no power of constraint or punishment, can further the process of democratization. If such proves to be the case, they will have been right to go against the stream of traditional truth commissions, which come in the wake of, rather than preceding, major institutional change.

22 See www.ier.ma/rubrique.php?id_rubrique=307 (last visited 9 April 2008).

Aspects of victim participation in the proceedings of the International Criminal Court

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Abstract

The participation of victims in criminal proceedings is generally a rather new phenomenon. While there is a certain tradition of victim participation as “partie civile” in the criminal proceedings of some national jurisdictions, it is a novelty in international criminal trials. The drafters of the International Criminal Court (ICC) Statute chose to design a rather broad victim participation scheme. Although it is hailed as an important and effective instrument for giving victims of gross violations of human rights and international humanitarian law a voice, the procedural and substantive details are far from being settled. Some of the most significant issues are discussed in this article, including the question whether and how victim participation may influence sentencing and punishment.

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The participation of victims in criminal proceedings is generally a rather new phenomenon – and is still far from being fully accepted.¹ Victims have played and continue to play a marginal role in the precedents of the International Criminal Court (ICC);² they are seen as nothing more than witnesses, and in those precedents neither participation nor compensation schemes exists.³ Influenced by a strong tendency in national and international law to acknowledge victims’ views

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in criminal proceedings, which was supported by a number of non-governmental organizations (NGOs) and states, a relatively broad victim participation scheme was finally drafted for the Rome Statute of the International Criminal Court (the Statute).⁴ It is today widely considered as an instrument to give victims of gross violations of human rights and international humanitarian law a voice and to promote reconciliation.⁵ Yet, serious concerns exist as to whether victims should be allowed to participate in such an extensive manner, and whether such participation is in the interests of justice, a fair and efficient trial and finally the victims themselves. However, this article will not explore the purpose of victim participation in criminal proceedings as such. Nor will it cover the broad issue of its impact on the individual or the society as a whole, for instance whether victim participation as it now stands in the ICC procedure is generally of any legal, economic and psychological benefit for the victims, although such considerations are obviously the motivation and underlying reason for it. These issues are largely covered in the article by Mina Rauschenbach and Damien Scalia.⁶ The aim here is instead to analyse the procedural aspects of the ICC's victim participation scheme, its implementation by the organs of the Court and its possible influence on the concept of punishment and sentencing in international criminal law, and to point out certain difficulties in the interpretation of the relevant provisions.

- 1 *Handbook on Justice for Victims: On the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, Office for Drug Control and Crime Prevention, New York, 1999, pp. 1 ff.; Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors affecting this Status*, Institute for Human Rights, Åbo Akademi University, Turku, 2004, pp. 15 ff.; Gioia Greco, "Victims' rights overview under the ICC legal framework: a jurisprudential analysis", *International Criminal Law Review*, Vol. 7 (2007), pp. 531 ff.; Rafaëlle Maison, "La place de la victime", in Hervé Ascensio et al. (eds.), *Droit international pénal*, Pedone, Paris, 2000; Jan Philipp Reemtsma, *Das Recht des Opfers auf die Bestrafung des Täters – als Problem*, Beck'sche Verlagsbuchhandlung, Munich, 1999, p. 13.
- 2 Sam Garkawe, "Victims and the International Criminal Court: three major issues", *International Criminal Law Review*, Vol. 4 (2003), pp. 345 ff., pp. 346f.
- 3 E.g. Susanne Malmström, "Restitution of property and compensation to victims", in Richard May et al. (eds.) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, The Hague, 2001, p. 373; Beat Dold and Lisa Yarwood, "Victim participation at the ICC: valid potentiality or vanguard pandering?", *African Yearbook of International Law*, Vol. 13 (2006), pp. 159 ff., p. 161.
- 4 Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc A/CONF.183/9, as corrected, reprinted in 37 ILM (1998) 999. See David Donat-Cattin, "Comment to Articles 68 and 75", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Nomos Verlag, Baden-Baden, 1999, pp. 869 ff., 871 f.; David Donat-Cattin, "The role of victims in ICC proceedings", in Flavia Lattanzi et al. (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, Editrice Il Sirente, Ripa Fagnano Alto, 1999, pp. 251 ff., 253 f.
- 5 Claude Jorda and Jérôme de Hemptinne, "The status and role of the victim", in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, Oxford University Press, Oxford, 2002, pp. 1387 ff., 1397; Antoine Garapon, *Des crimes qu'on ne peut ni punir ni pardonner: Pour une justice internationale*, Éditions Odile Jacob, Paris, 2002, pp. 161 ff.
- 6 Mina Rauschenbach and Damien Scalia, "Victims and international criminal justice: a vexed question?", in this issue. See also Uwe Ewald, "Victimization in the context of war: some aspects of a macro-victimological research project", *European Journal of Crime, Criminal Law and Criminal Justice*, Vols. 2/3 (2002), pp. 90 ff., 95.

Outline of the ICC victim participation framework

The broad wording of the provisions on victim participation in the ICC's constitutive documents suggests that the drafters intended to leave wide discretion to the judges in actually shaping the Court's victim participation scheme.⁷ However, that broad and at times not entirely consistent drafting raises a multitude of complex legal issues, with both substantive and procedural implications. The first decisions rendered by the ICC Pre-Trial Chambers⁸ on victim issues give an initial idea of the subject's complexity. Article 68 of the Statute – the core provision on victim issues – lays down the basic rule on victim participation in the proceedings in its paragraph 3, which reads: “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 participation should, however, not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. The views and concerns of victims “may be presented by [their] legal representatives ... where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”. It is complemented by a whole set of provisions that shed light on what is meant by “shall permit their views and concerns to be presented and considered”. They are partly contained in the Statute itself, but mostly in the ICC Rules of Procedure and Evidence (the Rules),⁹ and relate to victim definition, participation, legal representation, notification and other central procedural issues. Some of the issues were decided by Pre-Trial, Trial Chamber and Appeals Chamber judges after the first important victim-related decision of 17 January 2006 (the 17 January 2006 decision).¹⁰ Almost exactly two years later, on 18 January 2008, Trial Chamber I rendered another “landmark decision” on the issue of victim participation¹¹ (the 18 January 2008 decision). Prior to the decision, Trial Chamber I invited all parties and participants to make submissions on the “role of victims in the proceedings leading up to, and during,

7 Emily Haslam, “Victim participation at the International Criminal Court: a triumph of hope over experience?” in Dominic McGoldrick et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, pp. 315 ff., 324.

8 The abbreviation PTC I is used below to refer to Pre-Trial Chamber I, and PTC II for Pre-Trial Chamber II.

9 ICC Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000), ICC-ASP/1/3, 09.

10 17.01.2006, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version – 22.03.2006), ICC-01/04-101-Corr. Pre-Trial Chamber I had admitted a group of applicants to participate as victims in the investigation proceedings when examining the situation of the Democratic Republic of Congo. The Prosecutor referred to this group of victims as “situation victims”, as opposed to “case victims”; e.g. in 25.06.2007 Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, ICC-01/04-346, pp. 11 f. For comments see Jérôme de Hemptinne and Francesco Rindi, “ICC Pre-Trial Chamber allows victims to participate in the investigation phase of proceedings”, *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 342 ff.

11 18.01.2008 Trial Chamber I Decision on Victims' Participation, ICC-01/04-01/06-1119. This decision formed part of the preparation of the trial proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter the *Lubanga* case).

the trial”.¹² Based on these submissions and prior pronouncements by the different chambers, the said decision was intended “to provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings”.¹³ Nonetheless, many questions concerning victim participation remain controversial and are still pending: one of the three judges dissented¹⁴ and both parties¹⁵ filed an application for leave to appeal, which was finally granted by Trial Chamber I.¹⁶ Undefined legal terms need to be clarified, such as “personal interests”, “presentation of views and concerns” and “appropriate” stages of the proceedings, as do the requirements for such presentations, the content of the participation right and issues of standard of proof. The issue of victim participation at the investigation stage and its implications for the balance of interests, as well as the general problems linked to prejudice and inconsistency with the rights of the accused and with principles of fair trial, still have to be resolved. Furthermore, practical issues such as identification of the applicants, the legal representation of victims, collective participation of large victim groups and the form and modalities of presentations need to be assessed. Since leave to appeal has been granted, some of those issues will be settled by the Appeals Chamber.¹⁷

Various participation regimes

The structure of the Statute and Rules, mainly outlined in Rule 92(1), suggests that the drafters created various victim participation schemes. At least two are easy to

12 On 5 September 2007, Trial Chamber I issued the “Order setting out schedule for submissions and hearings regarding the subjects that require early determination” (ICC-01/04-01/06-947). Subsequently, submissions were made by the Prosecution (Prosecution’s submissions of the role of victims in the proceedings leading up to, and during, the trial (re-filed publicly on 23 October 2007, ICC-01/04-01/06-996); the Defence (Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences, ICC-01/04-01/06-99); the legal representatives of the victims participating in the *Lubanga* case (Conclusions conjointes des Représentants légaux des victimes a/0001/06 à a/0003/06 et a/0105/06 relatives aux modalités de participation des victimes dans le cadre des procédures précédant le procès et lors du procès, ICC- 01/04-01/06-964); the Office of Public Counsel for Victims (OTPC)(Observations du Bureau du conseil public suite à l’invitation de la Chambre de première instance, ICC-01/04- 01/06-1020); the Registry and its Victims Participation and Reparations Section (Confidential Joint Report: Proposed mechanisms for exchange of information on individuals enjoying dual status, ICC-01/04-01/06-1117-Conf. 18); and the Victims and Witnesses Unit (Report on security issues relating to the dual status of witnesses and victims, ICC- 01/04-01/06-1026-Conf.).

13 18.01.2008 Trial Chamber I Decision, above note 11, para. 84.

14 “Separate and Dissenting Opinion of Judge René Blattmann”, in 18.01.2008 Trial Chamber I Decision, above note 11, pp. 49 ff.

15 28.01.2008 Defense Requête de la Défense sollicitant l’autorisation d’interjeter appel de la “Decision on Victims’ Participation” rendue le 18 janvier 2008, ICC-01/04-01/06-1135; and 28.01.2008 Prosecution Application for Leave to Appeal Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, ICC-1/04-01/06-1136.

16 26.02.2008 Trial Chamber I Public Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1191, with Judge Blattmann dissenting.

17 Ibid. At the time of going to press of this article, the Appeal Chamber decisions were not yet rendered.

identify: the submission of “representations” and “observations”, and participation *stricto sensu*.¹⁸

The first participation scheme, specifically provided for in Articles 15(3) (authorization of investigations initiated by the Prosecutor *ex proprio motu*) and 19(3) of the Statute (challenges to the jurisdiction of the Court or the admissibility of a case), takes effect at an early and crucial stage, when the initiation or continuation of the proceedings is at stake. In Article 15 of the Statute, victim participation appears as the logical consequence of the Prosecutor’s *proprio motu* investigation, for which victims constitute an important source of information.¹⁹ With regard to Article 19(3) of the Statute, observations submitted by victims are essential to assess challenges to jurisdiction or admissibility by states or by the defendant, as they provide for a more objective point of view that is linked neither to political nor to individual interests, since it is not directly linked to the reparation regime. No formal application procedure seems to be necessary for these forms of participation, which consist of “submitting observations” and “making representations”.²⁰ Nevertheless, the question remains as to how the victims will be chosen, how their credibility is assessed and how the information obtained is used and corroborated.

The more complex, second participation scheme, under Article 68(3) of the Statute and Rules 89 *et seq.*, entails an application procedure pursuant to the Rules of Procedure and Evidence and the Rules of the Court²¹ and provides for broader participation.

Finally, a specific victim participation scheme has been established with regard to the reparation procedure in Article 75 of the Statute. The inclusion of a possibility of obtaining reparation for victims, similar to “adhesive procedures”

18 Regulated generally by Article 68(3) of the Statute and Rule 89 of the Rules of Procedure and Evidence (RPE). See Carsten Stahn, Héctor Olásolo and Kate Gibson, “Participation of victims in pre-trial proceedings of the ICC”, *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 219 ff., 224 f. The authors suggest that there are three participation regimes, differentiating between the scheme under Article 53(3) and (61) of the Statute and the “seeking the views of victims” by a chamber pursuant to Rule 93 of the RPE. However, it is questionable whether the latter really constitutes an extra participation scheme, or instead indicates where the Court should seek the views of the victims admitted in accordance with Article 68(3) of the Statute and Rules 85 to 93 of the RPE. Similarly, Gilbert Bitti and Hakan Friman, “Participation of victims in the proceedings”, in Lee Roy et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, New York, 2001, pp. 456 ff., 459.

19 Morten Bergsmo and Jelena Pejić, “Article 15: Prosecutor”, in Triffterer, above note 4, p. 369, para. 24.

20 Birte Timm, “The legal position of victims in the Rules of Procedure and Evidence”, in Horst Fischer et al. (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Arno Spitz Verlag, Berlin, 2001, pp. 289 ff., 293 f. Participation might be reserved for victim organizations or groups of victims.

21 The application procedure will not be discussed in this article. Rule 89 of the RPE describes the application procedure by written application to the Registrar, who then provides a copy of the application to the prosecution and the defence. They are then entitled to reply within a time limit set by the chamber in charge. The chamber can either accept the application and specify the appropriate proceedings and manner of participation, or reject the application if it considers that the person is not a victim or that the criteria set forth in Article 68(3) of the Statute are not fulfilled in any other form. If an application has been rejected, there is no remedy against the decision, but he or she can file a new application later in the proceedings.

known in civil law systems,²² is considered as revolutionary in international criminal law.²³ Although integrated in the course of the regular procedure, it forms a kind of extra “civil action” procedure that is reflected in the separate procedural regime.²⁴

Victims of a situation and victims of a case

A controversy between the Pre-Trial Chambers and the Prosecutor developed around the question of whether victims should be allowed to participate as early as the investigation stage of a situation – as reflected in the position of Pre-Trial Chamber I in its 17 January 2006 decision (and subsequent rulings), or only at a later stage of the proceedings – as maintained by the Prosecutor.²⁵

The differentiation between “situation” and “case” level, although not explicitly mentioned in the ICC’s constitutive documents, emanates from the structure of the Statute.²⁶ Whereas a “situation” is broadly defined in terms of temporal and territorial parameters and may include a large number of incidents, supposed perpetrators and thus potential indictments, “case” refers to a concrete incident with one or more specific suspects occurring within a situation under investigation,²⁷ entailing proceedings following the issuance of a warrant of arrest or a summons to appear.²⁸

The Pre-Trial Chamber maintained that victim participation at the situation level was not excluded and would “not per se jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent

- 22 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2007, p. 361. E.g. Article 25 para. 3 of the new Swiss federal law on the assistance to victims of criminal offence reads as follows: “Si la victime ou ses proches ont fait valoir des prétentions civiles dans une procédure pénale avant l’échéance du délai prévu aux al. 1 et 2, ils peuvent introduire leur demande d’indemnisation ou de réparation morale dans le délai d’un an à compter du moment où la décision relative aux conclusions civiles ou le classement sont définitifs. See <http://www.bj.admin.ch/bj/fr/home/themen/gesellschaft/gesetzgebung/opferhilfegesetz.html>
- 23 Carla Ferstman, “The reparation regime of the International Criminal Court: practical considerations”, *Leiden Journal of International Law*, Vol. 3 (2002), pp. 667ff.; see also Garkawe, above note 2, p. 349. Reparations in the ICC system embrace restitution, compensation and rehabilitation.
- 24 Establishing a distinct “reparation procedure” to be discussed below, mainly stipulated in Sub-Section 4 of Section III of the RPE; also in Articles 76(2) and 82(4) of the Statute and, *inter alia*, in Rules 91(4), and 53 of the RPE.
- 25 30.11.2006 Prosecution’s Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06 ICC-01/04-315, pp. 6ff.; also Prosecution’s Reply under Rule 89(1) of 25.06.2007, above note 10, pp. 9 ff.
- 26 E.g. Article 13 of the Statute, defining the trigger mechanisms for the exercise of ICC jurisdiction, mentions referrals of a situation, in which one or more of the crimes defined in Article 5 appears to have been committed. The Statute’s Article 14 on the referral of a situation by a State Party mentions “a situation in which one or more crimes ... have been committed”. In Article 15 no mention of “situation” but only of “case” can be found, although the use of the term “case” in relation to the authorization of *proprio motu* investigations under Article 15 seems misleading; see Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, M. Nijhoff Publishers, Leiden, 2005, p. 67. Articles 17, 19 and 53 of the Statute refer to “case” too.
- 27 Héctor Olásolo, “The Prosecutor of the ICC before the initiation of investigations: a quasi-judicial or a political body?”, *International Criminal Law Review*, Vol. 3 (2003), pp. 87 ff., 100; Christopher Keith Hall, “On Article 19”, in Triffterer, above note 4, para. 3.
- 28 17.01.2006 PTC I Decision, above note 10, para. 65.

with basic considerations of efficiency and security”.²⁹ The Prosecutor on the other hand insisted that the elements defining a victim pursuant to Rule 85 must be read together with Article 68(3) of the Statute in order to qualify a person as victim. He claimed that permitting general victim participation at the situation level had no basis in the Statute.³⁰ To support this argument, the Prosecutor pursued a two-step test, starting with the general victim qualification of Rule 85, followed by an assessment of whether the personal interests of the victim were directly affected by the proceedings in which he or she wished to participate.³¹ Such personal interests must be judicially recognizable³² and directly related to a specific matter within the proceedings.³³

The 17 January 2006 decision does raise a number of questions and problems. First, early victim participation at the investigation stage might adversely affect the rights of the suspect/accused, the impartiality and independence of the investigation and, most importantly, the expeditiousness of the proceedings as a whole.³⁴ Second, the Pre-Trial Chamber did not precisely define the procedural rights provided to victims at such an early stage of the proceedings. Further, early involvement of victims under the Article 68 regime is most probably not even in the victims’ interest. It is submitted that the separate form of victim involvement in the early stage of the proceedings,³⁵ outside the general framework of Article 68(3) of the Statute, covers victims’ interests adequately. In connection with other trigger mechanisms such as state or Security Council referral, the control mechanism provided for in Article 53 of the Statute³⁶ incorporates victim participation through Rules 92(2)³⁷ and 89, and the Pre-Trial Chamber did not reveal why formal victim participation according to the Article 68 regime was necessary prior to these procedures. It is questionable whether the

29 Ibid., paras. 23ff.; specific citation: para. 57; Hemptinne and Rindi, above note 10, pp. 346 ff.

30 22.08.2006 Prosecution’s Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06 and a/0016/06 to a/0046/06 ICC-01/04-01/06-345, para. 10.

31 Ibid., paras. 7ff.

32 Haslam, above note 7, p. 326.

33 This is – according to the Prosecutor – generally not the case at the investigation stage of a situation. The Pre-Trial Chamber, however, considered that personal interests of victims *were* generally affected at the investigation stage, since their participation could serve to clarify the facts, to punish the perpetrators of crimes and finally to request reparations for the harm suffered. PTC I 17.01.2006 decision, above note 10, 16ff.

34 Hemptinne and Rindi, above note 10, 347.

35 If the Court’s jurisdiction is triggered by the Prosecutor *proprio motu*, victim participation thus takes place through Article 15(3) of the Statute, at the crucial moment of authorization of an investigation.

36 Contrary to Article 15, Article 53 applies to all trigger mechanisms, meaning that not only jurisdiction and admissibility of a case must be assessed, but also whether an investigation/prosecution would serve the interests of justice, including its impact on the interests of victims. The notion “interest of justice” remains vague; situations are conceivable in which an investigation would place victims and witnesses cooperating with investigators in extreme danger. However, this scenario is likely to occur in any investigation conducted by the ICC. The Office of the Prosecutor (OTP) was therefore obliged to carry out most of the investigations related to the situation in Darfur outside Sudan. See Prosecutor’s 27.02.2007 Application under Article 58 (7), ICC-02/05-56 27-02-2007 EO PT, p. 27; Matthew R. Brubacher, “Prosecutorial discretion within the International Criminal Court”, *Journal of International Criminal Justice*, Vol. 2 (2004), pp. 71 ff., 80 f.

37 Which reads as follows: “In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53.”

potential advantages, such as the counterbalancing of too broad prosecutorial discretion and enhancing the fairness of the investigation,³⁸ can become effective at all outside the Pre-Trial Chamber scrutiny provided for in Articles 15 and 53 of the Statute. On the contrary, as the Prosecutor contended correctly, premature victim participation entails an unnecessary waste of the Court's resources that could be better used for more meaningful victim participation once proceedings in a case begin.³⁹ Furthermore, the majority of the so-called "situation victims" will most probably not be accepted in a case before the ICC, because the specific incident in which they were victimized is either not investigated at all or will never be the subject of a specific case. Those individuals are then left with unfulfilled hopes and expectations, and might in addition be in serious danger themselves.⁴⁰ In addition, the impediment to the objectivity and independence of the investigation⁴¹ and the risk of an imbalance between the interests of the victims and the accused seem important, since prior to the existence of any case no purposeful defence is possible.

The Appeals Chamber⁴² unfortunately rejected the Prosecutor's application for extraordinary review of the Pre-Trial Chamber's decision to deny leave to appeal against the 17 January 2006 decision,⁴³ on the basis of procedural grounds. However, the Appeals Chamber will now have the possibility of rendering a comprehensive ruling regarding the more recent decision.⁴⁴

38 E.g. by putting pressure on the Prosecutor to proceed with or start a prosecution case. Hemptinne and Rindi, above note 10, 346.

39 The handling of applications proved to be very time- and resource-consuming, as shown clearly by a small calculation made with regard to PTC decisions rendered in the *Lubanga* case: out of a total of 45 decisions rendered by Pre-Trial Chamber I from the issuing of the warrant of arrest in February 2006 to the referral of the case to the Trial Chamber in September 2007, 20 decisions (13 per cent of all decisions) were directly related to victim participation (not counting decisions on victim protection issues).

40 Prosecution's Reply under Rule 89(1) of 25.06.2007, above note 10, paras. 21 ff. Ironically, this had happened to the group of victims admitted for participation by the 17 January 2006 decision: they did not qualify as victims for the *Lubanga* case: see 29.06.2006 PTC I Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172.

41 Especially because of the risk of instrumentalization of victims for political means and attempts to manipulate investigations. Hemptinne and Rindi, above note 10, 348.

42 13.07.2006 Appeals Chamber Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168.

43 25.04.2006 Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-141.

44 Trial Chamber I granted partial leave to appeal against its 18.01.2008 Decision: 26.02.2008 Trial Chamber I Decision on Leave to Appeal, above note 16, para. 54. The Trial Chamber limited the issues of the appeal to the following questions: (i) "Whether the notion of victim necessarily implies the existence of personal and direct harm"; (ii) "Whether the harm alleged by a victim and the concept of "personal interests" under Article 68 of the Statute must be linked with the charges against the accused"; and (iii) "Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence". Judge Blattmann, in his dissent, opposed this restriction of issues to be considered in the appeal. See Dissenting Opinion of Judge Blattmann, above note 16, para. 3. Unfortunately, no leave to appeal was granted for important questions, such as the modalities of identification of an individual applying to participate as a victim, the *prima facie* admissibility of applications, the question whether the notion of victim necessarily implies the existence of a personal and direct harm, and whether anonymous victims should be allowed to participate in the proceedings. See 26.02.2008 Trial Chamber I Decision on Leave to Appeal, above note 16, paras. 22, 25, 37 and 50.

Victim definition and qualification

The starting point for victim definition and subsequent admission for participation in the ICC proceedings is the question of who qualifies as “victim”.⁴⁵ In addition, applicants must show their “personal interest”.⁴⁶ The definition of victims in Rule 85 is largely based on existing victim definitions in international law, mainly those contained in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁴⁷ and in 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.⁴⁸ Although not legally binding, these texts are considered as core documents on victim issues at international level,⁴⁹ as they take into account the existing international norms with regard to victims’ rights.⁵⁰

Since no compromise was found for a definition of the term “victim” during the drafting and negotiation of the Rome Statute,⁵¹ it was placed in the Rules. Accordingly, “victims” are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”, and

Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art, or

45 RPE, Rule 89(2).

46 Statute, Article 68(3).

47 Adopted on 29 November 1985 (A/Res/40/34, Annex).

48 Adopted on 16 December 2005 (UNGA Res. A/60/147) (hereinafter “the Basic Principles”).

49 Jan Van Dijk and Jo Goodey, “Benchmarking legislation on crime victims: the UN Declaration of 1985”, in Bundesamt für Justiz (ed.), *Opferhilfe in der Schweiz: Erfahrungen und Perspektiven*, Haupt Verlag, Bern, 2004, pp. 311 ff.; Gael M. Kerrigan, “Historical development of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, in Cherif M. Bassiouni (ed.), *International Protection of Victims*, International Association of Penal Law, Erès, 1988, pp. 91 ff.

50 Principle 8 of the Basic Principles defines victims as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” And Principle 9 further clarifies 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”. A number of other existing victim definitions could also serve the ICC for interpretation purposes, mainly those elaborated in the European context: The Council of Europe (CoE) created a number of victim-related instruments and documents within the framework of its human rights policy, e.g. the 1985 Council of Europe Recommendation 85 (11) on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted by the Committee of Ministers on 28 June 1985, at the 387th meeting of the Ministers’ Deputies; CoE Recommendation No. R (87) 21 on Assistance to Victims and the Prevention of Victimisation, adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers’ Deputies; 1977 CoE Resolution (77) 27 on the Compensation of Victims of Crime, adopted by the Committee of Ministers on 28 September 1977, Document I 15 957; 1983 European Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, Strasbourg, 24.11.1983.

51 Silvia Fernández de Gurmendi and Hakan Friman, “The Rules of Procedure and Evidence of the International Criminal Court”, *Yearbook of International Humanitarian Law*, Vol. 3, (2000), pp. 157 ff, 181.

science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.⁵²

To qualify as a victim, the applicant must therefore be a natural or a legal person and prove that he, she or it suffered harm resulting from a crime that falls within the ICC’s jurisdiction, and that a causal link between the crime and the harm suffered exists.⁵³ Since the definition is drafted in a rather open way, further interpretation of its elements appears necessary,⁵⁴ although contrary to other elements such as the “personal interest” in and “appropriateness” of the stage of the proceedings, it may not vary much from one stage to another.⁵⁵

Natural person

So far, the Pre-Trial Chamber decisions do not contain much reflection on the definition of the term “natural person”. Both the Pre-Trial Chamber and Trial Chamber I focused strongly on the issue of victim identification, so the actual interpretation was basically limited to the rather banal conclusion that “A natural person is thus any person who is not a legal person”.⁵⁶ Some subsequent decisions assessed how the identity of the applicant could best be established.⁵⁷ Nevertheless, even with regard to this purely procedural requirement, no general approach was discernible in the various pre-trial findings⁵⁸ until the 18 January 2008 decision

52 Rule 85.

53 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, paras. 87–94; 17.01.2006 PTC I Decision, above note 10, para. 79; also PTC II 10.08.2007 Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 ICC-02/04-101 (the identical decision is filed twice: under the Uganda situation and in the case of *The Prosecutor v. Joseph Kony (et al.)*, the former under ICC-02/04-101, the latter under ICC-02-04-01-05-252, with a review of existing decisions on the issue in paras. 12f.).

54 Christoph Safferling, “Das Opfer völkerrechtlicher Verbrechen”, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 115 (2003), pp. 352 ff., 369.

55 The victim participation must be appropriate to the relevant stage of proceedings, pursuant to Article 68(3) of the Statute. See 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, paras. 93 f. See also 06.06.2006 Prosecution’s Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, CC-01/04-01/06-140, para. 8.

56 17.01.2006 PTC I Decision, above note 10, para. 80. Little more enlightenment was provided by the case-by-case examination with regard to the individual applicants, rendered in the Pre-Trial Chamber decisions on victim applications so far. These usually simply stated that an applicant was a natural person, without giving any further explanation, e.g. 31.07.2006 PTC I Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* at the investigation stage of the situation (para. 22) in the Democratic Republic of the Congo, ICC-01/04-177, p. 7. See also 20.10.2006 PTC I Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-601, p. 9.

57 10.08.2007 PTC II Decision on Victims’ Applications, above note 53, paras. 23, 33–34. A consideration, which is, however, of rather procedural and not substantive interest. See *ibid.*, paras. 26, 35, 55, etc.

58 E.g. 17.08.2007 PTC I Decision on the requests of the legal representatives of applicants on application process for victims participation and legal representation, ICC-01/04-374, compared to the 10.08.2007 PTC II Decision on Victims’ Applications, above note 53. In the Uganda situation, respectively in the *Kony et al.* case, the single PTC II judge mentioned the difficulties of duly establishing an applicant’s identity in a situation of on-going conflict, on the one hand, and the need for appropriate proof, “given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings”, PTC II 10.08.2007 Decision on Victims’ Applications, above note 53, paras.

that tried to unify the varying approaches taken by the Pre-Trial Chambers.⁵⁹ It seems that some more theoretical analysis of the notion would do no harm, even if it is by far not the most complex part of the victim definition. Questions related to legal (in)capacity in general, and especially the legal capacity of conducting proceedings in one's own name,⁶⁰ are particularly likely to occur in the future and will require more thorough consideration.⁶¹ Furthermore, the issue of representation of minors by their parents or other family members is of a certain importance, especially if the charges contain the war crime of recruiting and enlisting children under the age of fifteen and using them in hostilities, as in the *Lubanga* case.⁶² In addition, a problem may arise regarding victims who are simultaneously perpetrators, as the example of the *Lubanga* case shows.⁶³ Child soldiers are typically victims and perpetrators at the same time.⁶⁴

12 and 43. A voting card was considered as sufficient proof of identification, but not a "proof of identity" statement by an individual belonging to a local authority, simply declaring that a given applicant "is a victim". Ibid., paras. 17 and 18.

- 59 It defined the range of documents or other means by which an applicant may establish proof of his or her identity. 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, paras. 87f. Interestingly, no leave to appeal was granted on this issue, although it involves essential questions, as Judge Blattmann pointed out correctly. 26.02.2008 Trial Chamber I Decision on Leave to Appeal, above note 16, para. 22, and Judge Blattmann's Dissenting Opinion thereto, paras. 15ff.
- 60 Judge Blattmann in his dissent found that both, fairness and expeditiousness, are affected and that "a resolution from the Appeals Chamber on this issue will materially advance the proceedings, in that certainty will be provided and the important work of the court to identify victims will move forward in a progressive manner" (ibid., para. 17).
- 61 None of the decisions mentions this requirement, which also entails a person's capacity to appoint a legal representative or to act as the legal representative for another person. As the notion of "legal capacity to act" differs from one legal system to another, it might be necessary to develop an autonomous interpretation for international criminal proceedings. Some of the issues related to questions of representation of minor victims by other victims (e.g. parents, guardians) were discussed by the relevant Pre-Trial Chamber in connection with procedural aspects of the proceedings prior to the substantive assessment of the application. E.g. 17.01.2006 PTC I Decision, above note 10, para. 102: with regard to formal requirements for the applications, such as the kind of forms used, the identity of the applicants, the signatures and the authorization of an NGO to file documents on behalf of the victims.
- 62 The issue has not been discussed so far, except in the PTC II 10.08.2007 Decision on Victims' Applications, above note 53, para. 20, where the judge requested the Victims Participation and Reparations Section (VPRS) to submit a report indicating from what age the Ugandan legal system allows documents meeting the ICC conditions to be issued to individuals, and to provide information about the existence and obtainability of documents establishing the link between a child and a member of his or her family, such as birth certificates or other types of documents. Another delicate problem to assess is whether applicants sign applications knowingly and willingly, in particular with full knowledge of the consequences of such an application and the potential security risks involved. In order to monitor the kind of circumstances under which such applications are filed and whether the applicants were fully informed, the Court might envisage accepting only applications prepared or supported by accredited NGOs.
- 63 29.01.2007 PTC I Decision on the Confirmation of Charges, ICC-01/04-01/06-803, translation of the French original, available at www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf, accessed 16.09.07.
- 64 This is at least the perception of other victims and the civilian population in general. Bukeni T. Waruzi Beck, Director of the Congolese NGO AJEDI-Ka, had described this situation in his article "Child soldiers and the ICC: challenges and strategies, DRC case", in Victims' Rights Working Group Bulletin Access of July 2006, No. 6, p. 2.

Organizations or institutions as victims

The ICC system does not only allow organizations to represent natural persons; under specific circumstances they can qualify as victims themselves. 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 fall under Rule 85(b). This controversial broadening of the traditional understanding of “victim” is based on the idea that legal entities are often the target of certain war crimes.⁶⁵ Delegations opposed to the inclusion of legal persons feared a diversion of the Court’s resources, better used for individual victims, and potential misuse of the participation scheme by multinational companies.⁶⁶ The compromise as laid down in the provision should, however, exclude such applications. Yet, undefined notions such as “direct harm” and “dedication to religion, education, art or science or charitable purposes” or “places and objects for humanitarian purposes” call for interpretation.⁶⁷ Hitherto no application by an organization or institution has been filed and thus the Court has not yet addressed any of the above questions.⁶⁸

The notion of harm

The notion of harm, defined neither in the Statute nor in the Rules, has been interpreted by the Pre-Trial Chamber on a case-by-case basis in the light of existing international human rights standards,⁶⁹ such as the above-mentioned UN documents⁷⁰ and the case law of the Inter-American Court of

65 As defined in Article 8(2)(b)(ix) and (e)(iv) of the Statute.

66 Silvia A. Fernández de Gurmendi, “Definition of victims and general principle”, in Roy, above note 18, pp. 427 ff., 433. The concerns about compensation requests of powerful companies were not completely unfounded, in view of the experiences of the United Nations Compensation Commission (UNCC), established by the Security Council to process claims and pay compensation for losses resulting from Iraq’s invasion and occupation of Kuwait: 5,800 claims of corporations, other private legal entities and public sector enterprises (e.g. for construction or other contract losses, losses from non-payment for goods or services, etc.) were handed in, seeking a total of approximately US\$80 billion in compensation. See UNCC website http://www2.unog.ch/uncc/claims/e_claims.htm, accessed 8.10.07.

67 An important aspect to consider might be that charitable institutions might be used or misused by parties to a conflict for propaganda and military purposes, or that they play an important role on their own initiative in conflicts, as the example of the Rwandan churches shows. Helena Nygren Krug, “Genocide in Rwanda: lessons learned and future challenges to the UN human rights system”, *Nordic Journal of International Law*, Vol. 67 (1998), pp. 165, 171; Tharcisse Gatwa, *The Churches and Ethnic Ideology in the Rwandan Crises 1900–1994*, Regnum/Paternoster, 2006.

68 Trial Chamber I simply stated that the Court will “consider any document constituting it [the organization] in accordance with the law of the relevant country, and any credible document that establishes it has sustained’ direct harm as defined in Rule 85(b) of the Rules. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 89.

69 Statute, Article 21(3): “[t]he application and interpretation of law ... must be consistent with internationally recognized human rights”. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 35.

70 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, UNGA Res. A/60/147, adopted 21 March 2006; and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UNGA Resolution 40/34 of 29 November 1985 (A/Res/40/34, Annex). 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 35.

Human Rights⁷¹ and the European Court of Human Rights.⁷² Both the Pre-Trial Chambers and the Trial Chamber have concluded that not only physical injury but also economic loss and emotional suffering constitute harm within the meaning of Rule 85.⁷³ The judges considered that the following incidents were likely to cause harm: abduction and enslavement; carrying heavy loads for some 500 kilometres without eating or drinking; and torture and unlawful detention resulting in physical and mental suffering.⁷⁴ The loss of family members after being forced to see them tortured was deemed to cause serious emotional and mental suffering, and the looting and burning of houses and other property was characterized as economic loss.⁷⁵ Physical injuries and psychological trauma as a result of exposure to fire and random shooting, severe burns and witnessing events of an exceedingly violent and shocking nature, as well as the enlistment of children, was considered to cause physical and emotional harm.⁷⁶ According to Pre-Trial Chamber I, no definitive determination of the harm suffered by the victims could be rendered at this early stage, especially when referring to “situation victims”.⁷⁷ This consideration is relevant with regard to the principle of presumption of innocence, the application of which could be impeded if the determination of harm goes too far.

Crimes within the jurisdiction of the Court

Acts such as those described above must qualify as crimes falling under the ICC’s jurisdiction *ratione materiae, loci, personae* and *temporis*. Again, the assessment depends on the stage of the proceedings to which the application for participation refers, although Trial Chamber I opined that “Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework”.⁷⁸ Judge Blattmann correctly disagreed with this assertion,⁷⁹ which

71 Citing the case *Velásquez Rodríguez v. Honduras*, IACtHR Judgement, 29 July 1988, Series C No. 4, where prolonged detention in specific circumstances was considered as detrimental to physical and moral integrity, and hence constituting a form of harm; see paras. 156, 175 and 187.

72 Citing the judgement *Keenan v. the United Kingdom*, ECtHR Judgment, 3 April 2001, appl. no. 27229/95, para. 138.

73 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 92.

74 17.01.2006 PTC I Decision, above note 10, para. 172, referring to the ECtHR case *Selmouni v. France*, ECtHR Judgement 28 July 1999, appl. no. 25803/94, where the ECtHR considered that, “having regard to the extreme seriousness of the violations of the Convention of which Mr Selmouni was a victim, the Court considers that he suffered personal injury and non-pecuniary damage”, see para. 123.

75 *Ibid.*, para. 160, with regard to VPRS 4, para. 181, for the accounts of VPRS 6, para. 146.

76 PTC II 10.08.2007 Decision on Victims’ Applications, above note 53, paras. 31 and 40. On the enlisting of children by militia troops, see 20.10.2006 PTC I Decision on Applications for Participation in Proceedings, above note 56, pp. 9f.

77 17.01.2006 PTC I Decision, above note 10, paras. 81f.; 10.08.2007 PTC II Decision, above note 53, para. 13.

78 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 93.

79 “Separate and Dissenting Opinion of Judge René Blattmann”, *ibid.*, para. 7, where he states, “I completely disagree with the assertion of the Majority that the Statute does not limit the Chamber’s jurisdiction to the crimes attributed to the accused. In truth, the drafters of the Rome Statute have been careful to address issues of jurisdiction through the guise of the case brought before the Court. Furthermore, it is symptomatic that the Statute restricts the parties’ presentation of evidence to that which is relevant to the case before the Chamber” (footnotes omitted).

also diverges from earlier holdings of the Pre-Trial Chambers.⁸⁰ The scope of the referral therefore defines *prima facie* the situation (e.g. northern Uganda for the Ugandan referral, Darfur for the Security Council referral), although nothing in the Statute hinders the Prosecutor, subject to Pre-Trial Chamber authorization, from expanding the scope of the investigations *ex proprio motu*, at least in relation to state referrals.⁸¹ The scope of a situation emanating from investigations initiated by the Prosecutor⁸² would probably be defined by the Pre-Trial Chamber authorization.⁸³ Therefore applicants who were allegedly victims of crimes committed within such a situation defined *ratione temporis*⁸⁴ and *ratione loci*⁸⁵ and where the alleged acts fell within the Court's jurisdiction *ratione materiae*⁸⁶ would qualify as "situation victims". "Case victims" have to show that they have suffered harm directly linked to a crime set forth in a warrant of arrest, summons or charges. The Court automatically re-examines whether a person already admitted as a victim of a specific situation still qualifies as a victim of a case.⁸⁷

Nexus between the harm suffered and crimes under ICC jurisdiction

The causal link or nexus, reflected in Rule 85 in the words "as a result of", is established if the applicants credibly demonstrate that the harm they have suffered is a direct result of the commission of crimes falling within the ICC's jurisdiction. With regard to "situation victims", the Pre-Trial Chamber considered that it was not "necessary to determine in any great detail at this stage the precise nature of the causal link and the identity of the person(s) responsible for the crimes" and that "a determination of the specific nature of such a link goes beyond the purposes of a determination made under rule 89 of the Rules whether in the

80 For instance, was it considered as sufficient for "situation victims" to show that such acts had been committed in a situation referred to the Court either by the Security Council or by a state, e.g. the Democratic Republic of Congo situation, referred to the ICC by the government of the DRC in accordance with Articles 13(a) and 14 of the Statute?

81 Antonio Marchesi, "On Article 14", in Triffterer, above note 4, pp. 353 ff., 358, para. 12.

82 Pursuant to Article 15 of the Statute.

83 So far, no such *proprio motu* investigation has been initiated and none of the Pre-Trial Chambers has had to pronounce on this issue. Note that the use of the term "case" in Article 15(4) of the Statute is probably misleading and most likely does not exclude investigations into a situation. Olásolo, above note 26, p. 67.

84 Pursuant to Article 11, 17.01.2006 PTC I Decision, above note 10, paras. 87 ff.

85 Pursuant to Articles 12 and 13 of the Statute, *ibid.* paras. 91 ff. PTC I noted that in cases referred to in Article 12(2) in connection with Article 13(a) or (c) of the Statute, ICC jurisdiction exists if (a) the state on the territory of which the conduct in question occurred, or (b) the state of which the person accused of the crime is a national, is a State Party to the Statute. According to the applicants' statements, all alleged acts were committed in the region of Ituri, in the Oriental Province of the Democratic Republic of Congo (DRC) and in North Kivu, also located in the DRC. As the crimes were committed in the territory of the DRC the Court may exercise its jurisdiction.

86 Pursuant to Articles 5–8 of the Statute. In order to determine whether the alleged acts fell within the ICC's jurisdiction, the Pre-Trial Chamber analysed the statements of each applicant and took a summary preliminary decision as to whether the aforesaid conditions were fulfilled.

87 As mentioned above, such re-qualification might have an adverse impact on the victims concerned. See 29.06.2006 PTC I Decision, above note 40, p. 6, and 17.01.2006 PTC I Decision, above note 10, paras. 66ff.

context of a situation or of a case”.⁸⁸ It was sufficient to prove that “the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent”.⁸⁹ This consideration is probably correct, as any further assessment of the causal link could lead to a violation of the presumption of innocence.⁹⁰ Once proceedings in a case are initiated, the causal link to be proved is much narrower and limited to the harm suffered in relation to the specific crimes for which the accused is presumed criminally responsible.⁹¹ Contrary to the opinion of Trial Chamber I, victim applications at a case level should be considered with regard to the crimes charged, and the right of victims to participate is not “principally dependent on whether their personal interests are affected in accordance with Article 68(3) of the Statute”.⁹²

Conditions for participation in Article 68(3) of the Statute

Once an applicant has cleared the first hurdle of the victim qualification pursuant to Rule 85 of the Rules, the Court must at the relevant point in the procedure take the second step of assessing whether the three requirements for participation stipulated in Article 68(3) of the Statute exist in relation to the stage of the proceedings in which the applicant wants to participate. The judges must determine whether there is sufficient personal interest for participation, whether such participation is appropriate at the procedural stage in question and whether it would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. These three requirements obviously change from one stage of the procedure to another and must therefore be re-evaluated by the chamber in charge at the relevant moment. As yet it is not very clear whether such re-examination is automatic, as suggested by Pre-Trial Chamber I for the step from situation to case level,⁹³ or is upon request by the applicant, as stipulated by the

88 17.01.2006 PTC I Decision, above note 10, paras. 94 ff.

89 10.08.2007 PTC II Decision on Victims' Applications, above note 53, para. 14. See, for case-by-case assessments, 17.01.2006 PTC I Decision, above note 10, paras. 125, 135, 153, 167, 176 and 186; 31.07.2006 PTC I Decision, above note 56, p. 15.

90 It is obvious that a sound re-examination of the causal link is indispensable when deciding reparation issues. See Article 75 of the Statute.

91 31.07.2006 PTC I Decision, above note 56, p. 9. The PTC refers in footnotes 23 and 24 to relevant human rights law documents and case law.

92 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, para. 93.

93 17.01.2006 PTC I Decision, above note 10, paras. 64 and 67: “...where any natural or legal person applying for the status of victim in respect of a situation requests to be accorded the status of victim in any case ensuing from the investigation of such a situation, the Chamber automatically takes this second request into account as soon as such a case exists, so that it is unnecessary to file a second application.” In the DRC situation, PTC I actually reviewed the initial victim application for participation in the investigation of the situation of the first six “situation victims” when the first case, that of *Thomas Lubanga*, came up: 29.06.2006 PTC I Decision, above note 40, para. 6f., where the PTC considered that the applicants had not demonstrated any causal link between the harm they suffered and the crimes contained in the arrest warrant against Thomas Lubanga Dyilo.

Appeals Chamber with regard to participation in an interlocutory appeal proceeding.⁹⁴

The applicant's personal interest in participating at the situation level is considered equivalent to the interest of identifying the potential perpetrators in an investigation as the "first step towards their indictment", especially in view of the impact investigations have on future orders for reparations.⁹⁵ With regard to the case level, the personal interest of the applicant must relate specifically to the concrete proceedings against a particular person. The decisions rendered so far were not clear about when this criterion was met, apparently suggesting that being affected by a crime was sufficient to establish such a personal interest.⁹⁶ The 18 January 2008 decision, however, introduced a new criterion: the critical question was whether the contents of the victim application must either establish that "there is a real evidential link between the victim and the evidence which the Court will be considering during [the] trial, leading to the conclusion that the victim's personal interests are affected" or determine whether the victim was "affected by an issue arising during [the] trial because his or her personal interests are in a real sense engaged by it".⁹⁷ For an interlocutory appeal, the Appeals Chamber held that personal interest in the issues raised on appeal must exist, and that these issues do not belong instead to the role assigned to the Prosecutor.⁹⁸

94 In its judgment on Lubanga's appeal against the PTC decision refusing his provisional release, the Appeals Chamber ruled that even those victims who are generally admitted to participate at a specific stage of the proceedings (*in casu* in the intermediate pre-trial phase between the issuing of a warrant of arrest and the confirmation of charges hearing) must, in order to participate in an interlocutory appeal within this specific procedural phase, first apply for leave to participate in the appeals proceeding in the Appeals Chamber: 13.02.2007 Appeals Chamber Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-trial I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, Key Finding No. 1, p. 3, with detailed explanation in para. 38 ff.

95 Article 75 of the Statute, 17.01.2006 PTC I Decision, above note 10, para. 72.

96 E.g. for a mother whose children were recruited by Lubanga's Union of Congolese Patriots (UPC), denied for the murder of her son "by a member of the APC who was not under the command or control of Thomas Lubanga Dyilo": 28.07.2006, Decision on the Applications for Participation in the Proceedings a/0001/06, a/0002/06 and /0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo ICC-01/04-01/06-228, p. 3 (the APC – Armée du Peuple Congolais – is another rebel group which was not under Lubanga's control when the alleged crimes were committed, see ICC document ICC-01/04-01/06-39-AnxD10, "Key Events and Military Engagements for Groups RCD-ML/APC and FNI/FRPI (July 2002 to December 2003)", dated 18.03.2006, available on www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxD10_English.pdf (last visited 2 July 2008)).

97 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, para. 95.

98 The Appeals Chamber was of the opinion that this was the case, following by and large the arguments put forward by the victims that an interim release would place them at considerable risk, as Lubanga could "establish their identities and thus potentially pressure them into withdrawing their requests to participate, or even seek revenge", and that he might "reassume the leadership of the UPC movement" and "launch new recruitment campaigns, likewise targeting children under the age of fifteen, which would directly endanger demobilized former child soldiers in transit camps or in locations still under UPC control". See the 15.12.2006 Submissions by Victims a/0001/06, a/0002/06 and a/0003/06 further to the Appeals Chamber's Decision of 12 December 2006 ICC-01/04-01/06-778, paras. 4 ff.; also 13.02.2007 Appeals Chamber Judgement, above note 94, para. 54. Not so in the 13.06.2007 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007 ICC-01/04-01/06-925, where the Appeals Chamber found that the victims' interests were not affected by the preliminary consideration of whether the appeal was correctly brought, a decision on a preliminary issue neither resulting in the termination of the prosecution nor precluding the victims from later seeking compensation; see paras. 24ff.

As regards the appropriateness of the participation and its consistency with fair trial standards and the rights of the accused, instead of completely rejecting victim participation the judges tend to rely more on defining certain modalities of participation that allow those interests to be safeguarded, based on the idea that it was more the mode of participation that could be prejudicial than the actual participation as such.⁹⁹ For the situation level, the Pre-Trial Chamber considered it sufficient to appoint an *ad hoc* counsel to defend the interests and rights of a potential future defendant.¹⁰⁰ Furthermore, only public and not confidential documents were accessible to victims. For participation at later stages it was considered as adequate protection of the defendant's rights that he be allowed, in accordance with Rule 91(2) of the Rules, to respond to the victims' views and concerns. Additionally, both in the confirmation of charges hearing¹⁰¹ and in the interlocutory appeal,¹⁰² the interests of the defendant were taken into account by restricting the modalities of participation.

Victim participation at different stages of the ICC proceedings

Neither the Statute nor the Rules give details about the substance and content of victim participation and their impact on the proceedings. It is, however, quite obvious that, as already discussed above, such participation differs considerably depending on the stage of the proceedings at which it takes place. Flexibility is the main characteristic of the provisions on victim participation. The modalities of participation are fully within the discretion of the chamber in charge and may be adapted by judges to the specific circumstances of the stage of the proceedings.¹⁰³ They are limited only by the requirement that victim participation must be appropriate and not prejudicial to or inconsistent with the rights of the accused and a fair, impartial and expeditious trial.¹⁰⁴

99 17.01.2006 PTC I Decision, above note 10, para. 58: "...the core consideration, when it comes to determining the adverse impact on the investigation alleged by the Office of the Prosecutor, is the extent of the victim's participation and not his or her participation as such."

100 *Ibid.*, para. 70.

101 The legal representatives of the victims were only allowed to make opening and closing statements, limited to points of law, including the legal characterization of the modes of liability in the charges, without enlarging upon the evidence or facts in the case. 07.11.2006 PTC I Decision on the Schedule and Conduct of the Confirmation Hearing, ICC-01/04-01/06-678, p. 4.

102 13.02.2007 Appeals Chamber Judgement, above note 94; para. 54. The Appeals Chamber limited the observations to be received from the victims to observations specifically relevant to the issues directly related to their personal interest, arising in the appeal rather than more generally.

103 Timm, above note 20, p. 298; Safferling, above note 54, pp. 377f.; Stahn et al., above note 18, p. 224; Donat-Cattin, "The role of victims in ICC proceedings", above note 4, p. 271.

104 Article 68(3) and Rule 91(3)(b). Read together with Article 21(3) of the Statute, this clause must be interpreted in the light of international human rights law concerning fair trial and rights of the accused. 17.01.2006 PTC I Decision, above note 10, paras. 70 ff.; Donat-Cattin, "On Article 68", above note 4, p. 881, para. 26; Margaret McAuliffe deGuzman, "On Article 21", in Triffterer, above note 4, p. 435, para. 23.

Initiation and triggering stage

Clearly, victims play an important role in the referral or triggering phase prior to the existence of a proper judicial procedure in a situation or a case, and without being formally admitted to participate in proceedings. Referrals by states, for example, must be accompanied by “supporting documentation as is available to the State”, which will to a large extent rely on information gathered from victims.¹⁰⁵ The same goes for referrals by the UN Security Council acting under Chapter VII of the UN Charter¹⁰⁶ and the initiation of investigations by the Prosecutor *ex proprio motu*.¹⁰⁷ The reality of conflict situations, where civilians are caught between opposing parties, is such that persons giving information to whatever organization obviously put themselves in considerable danger. Gathering information in such situations is an extremely sensitive matter. The formulation of a code of conduct, emphasizing the vital nature of confidentiality for ICC investigators and all organizations acting at the Court’s request,¹⁰⁸ therefore seems indispensable.

Some NGOs have raised the question of whether victims would have any capacity by legal means to instigate an investigation,¹⁰⁹ similar to institutions in certain civil law systems where the *partie civile* (a plaintiff who, as a private person, may initiate legal action for damages within the framework of a criminal trial as a

105 See Statute, Article 14, and RPE, Rule 104. Information gathering in a sensitive conflict situation may expose defenceless civilians to high risks. As no detailed information on the content of the referral documents is available, it can only be assumed that victim statements formed an important basis in the state referrals, as the Office of the Prosecutor (OTP) press release regarding the DRC referral suggests: “After receiving several communications from individuals and non-governmental organizations, the Prosecutor had announced in July 2003 that he would closely follow the situation in the DRC, indicating that the situation would be a priority for his Office.” See press release of 19.08.2004, “Prosecutor receives referral of the situation in the Democratic Republic of Congo”, ICC-OTP-20040419-50-En, available at www.icc-cpi.int/pressrelease_details&id=19&l=en.html, accessed 12 March 2008.

106 As in the case of the Security Council referral of the situation in Darfur by Resolution 1593 (2005) (UN Doc. S/RES/1593 (2005), “Reports of the Secretary-General on the Sudan”, available at www.un.org/Docs/sc/unsc_resolutions05.htm, accessed 12 March 2008. The decision was largely based on the January 2005 “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General”, adopted by the Security Council at its 5158th meeting on 31 March 2005, UN Doc. S/2005/60, available at www.ohchr.org/english/darfur.htm, accessed 12 March 2008. The report predominantly relied on victim testimonies, e.g. on p. 1: “During its presence in the Sudan, the Commission held extensive meetings with ... tribal leaders, internally displaced persons, victims and witnesses of violations, NGOs and United Nations representatives.”

107 Article 15 of the Statute. When analysing the seriousness of the information the Office of the Prosecutor (OTP) receives, it also relies on additional information from states, UN organs, NGOs or other reliable sources. See Reporters Without Borders, *Victims’ Guide to the ICC*, Reporters Without Borders/Damocles Network, Paris, 2003, available at www.reseau-damocles.org/IMG/pdf/doc-2255.pdf, accessed 12 March 2008, p. 9. The UNHCHR estimates that about 90 per cent of the information on massive human rights violations originates from NGOs, which are themselves in direct contact with the victims. See also Héctor Olásolo, “The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of the Office of the Prosecutor”, *International Criminal Law Review*, Vol. 1 (2005), pp. 121 ff., 127.

108 As stipulated in Rule 17(2)(a)(vi) of the Rules.

109 Reporters Without Borders, above note 107, p. 61: “It is thus entirely feasible that victims may one day raise before the PTC the issue of the Prosecutor’s inaction and the PTC’s power to review both the Prosecutor’s action, or lack thereof.”

third party, apart from the prosecution) is in a strong position.¹¹⁰ Nothing in the Statute or in the Rules indicates that such a possibility exists. It is evident, however, that by providing the Prosecutor with relevant information, victims' organizations and other NGOs will play an important role in "triggering" a *proprio motu* investigation, and that victim participation¹¹¹ puts a certain pressure on the Office of the Prosecutor to pursue an investigation or prosecution.¹¹² If the Prosecutor decides not to proceed,¹¹³ victims can apply for participation in the subsequent proceedings before the Pre-Trial Chamber, contrary to the referring state or the UN Security Council. In the light of this the contention that victims cannot refer matters directly to the Court, although such possibilities do exist in certain national judicial systems,¹¹⁴ seems less relevant, especially if one takes into consideration the above-mentioned dangers of an instrumentalization of victims and the security risks they might face in conflict situations.¹¹⁵

Investigation stage

The procedural rights of victims admitted to participate in the investigation phase under Rule 89 has so far not been clearly defined. The Pre-Trial Chamber stressed that participation should not be prejudicial to or inconsistent with the rights of the defendant and envisaged specific measures, such as appointing an ad hoc counsel to represent a potential future defendant's interests. The Pre-Trial Chamber also held that the victims' right to be heard by the Chamber entails the right to present views and concerns and to file documents pertaining to the ongoing investigation. It places the Court under a positive dual obligation, not only to allow the presentation of victims' views and concerns but also to examine them.

110 Alan N. Young, *The Role of the Victim in the Criminal Process*, Policy Centre for Victim Issues, Department of Justice, Canada, 2001, p. 47; see also *Handbook on Justice for Victims*, above note 1, pp. 36 and 38.

111 Provided for in Articles 15(3) and 53 of the Statute in connection with Rule 92(2) of the Rules. The compromise found in the Rome Statute to enable investigations to be triggered by the Prosecutor acting on his/her own initiative was a strict control of these *proprio motu* powers by the Pre-Trial Chamber, as laid down in Article 15(3) of the Statute: Bergsmo and Pejić, above note 19, pp. 360f.

112 Olásolo, above note 107, p. 127. Articles 13(c) and 15(1) of the Statute allow any physical or legal person to communicate directly with the Office of the Prosecutor (OTP), and Article 15(3) allows victims to make representations to the PTC with regard to the authorization of *proprio motu* investigations. Rule 92(2) of the RPE provides for notification of victims concerning the OTP's decision not to initiate an investigation or not to prosecute pursuant to Article 53 of the Statute, "in order to allow them to apply for participation in the proceedings in accordance with rule 89".

113 Due to the grounds listed in Article 53 of the Statute, e.g. because it would not be in the interest of justice, because of insufficient gravity of the crime or because a state prosecutes pursuant to Article 17 of the Statute.

114 *Handbook on Justice for Victims*, above note 1, p. 39.

115 The Prosecutor's decision to investigate on his or her own initiative is always subject to Pre-Trial Chamber scrutiny with victim involvement, as described above. Olásolo, above note 26, pp. 66 ff. In order to guarantee that victims can present their view, the Prosecutor must inform victims known to the Office of the Prosecutor or to the Victims and Witnesses Unit (VWU) prior to seeking authorization from the PTC. (RPE, Rule 50). The rationale of this provision is that victims are close to the situation and therefore best able to inform the Pre-Trial Chamber about the situation presented by the Office of the Prosecutor. Stahn et al., above note 18, p. 226.

Furthermore, victims are generally entitled to participate in public proceedings unless it is otherwise decided by the chamber.¹¹⁶ Victims are also entitled to request the Pre-Trial Chamber to order specific proceedings and to issue all notifications.¹¹⁷

As already mentioned, Article 19(3) of the Statute provides for another possibility of victim participation in the pre-trial phase, namely in proceedings on challenges to the jurisdiction of the Court and the admissibility of a case¹¹⁸ either by the accused/suspect or by a state with jurisdiction over a case. It is not clear whether the Article 19 provision is also regulated by the general rules on participation. In the *Lubanga* case, the small group of persons accepted as victims according to Rule 89 of the Rules were invited to submit their views.¹¹⁹ This suggests that only persons accepted as victims under Rule 89 of the Rules may participate in the proceedings in accordance with Article 19(3) of the Statute.

Confirmation of charges hearing

Article 61 of the Statute provides that the charges brought against a person must be confirmed within a reasonable time after the person's surrender or voluntary appearance before the Court. In order to assess the charges, the Pre-Trial Chamber holds a hearing in the presence of the Prosecutor, the person charged and his or her counsel. It confirms the charges if it considers that "there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".¹²⁰ Although the right of victims to participate in the confirmation hearing is not evident at first sight when reading Article 61 of the Statute, they do seem to have an interest in participation, *inter alia* to influence the final formulation of the charges or even to request measures regarding forfeiture.¹²¹ Four victims

116 Whereas in confidential proceedings no victim participation is possible unless the Chamber decides otherwise. 17.01.2006 PTC I Decision, above note 10, paras. 71 ff.

117 Rule 92(5). These are: notification of proceedings before the Court, including the date of hearings and any postponement thereof, and the date of delivery of the decision; victims are also entitled to be "informed about requests, submissions, motions and other documents relating to such specific proceedings, where they are held in public or where persons having the status of victims are authorised to participate". 17.01.2006 PTC I Decision, above note 10, para. 76.

118 Article 17 of the Statute regulates whether a case is admissible or not, which is mainly a question of complementarity, an issue that is not the subject of this study. In brief, a case is not admissible if it is being investigated or prosecuted by a state that has jurisdiction over it, unless that state is unwilling or genuinely unable to carry out the investigation or prosecution.

119 In particular with regard to the alleged illegal detention of Thomas Lubanga by the DRC authorities prior to his transfer to The Hague, and the alleged irregularities in the subsequent arrest and the transfer to the Court in execution of the warrant of arrest. 24.07.2006 Decision inviting the Democratic Republic of the Congo and the Victims in the Case to Comment on the Proceedings pursuant to Article 19 of the Statute, ICC-01/04-01/06-206, p. 4.

120 Statute, Article 61(7). This system is inspired by the French *Chambre d'accusation*; see Gauthier de Beco, "The confirmation of charges before the International Criminal Court: evaluation and first application", *International Criminal Law Review*, Vol. 2–3 (2007), pp. 469 ff., 470 f. On 29 January 2007, Pre-Trial Chamber I rendered the first confirmation of charges decision, approving the charges against Thomas Lubanga. 29.01.2007 Decision on the Confirmation of Charges, above note 63.

121 Furthermore, Rule 92(3) of the RPE provides for notification of the victims about the confirmation of charges hearing, which implies the right to participate. Stahn et al., above note 18, p. 235.

participated through their legal representatives in the confirmation of charges hearing in the *Lubanga* case.¹²² Their participation was limited to an opening and a closing statement, both containing only legal observations, as their request for anonymity did not allow any personal statements, and the presentation of facts other than those put forward by the Prosecutor would have resulted in anonymous accusations.¹²³ Yet if the purpose of victim participation is to give victims a voice and the possibility of telling their story, purely legal presentations do not fulfil that purpose. The hope is that views of a more personal nature might subsequently be presented.¹²⁴ In addition, the prosecution and the defence were ordered to draw up a list of the public documents included in their evidence and provide that list to the victims' legal representatives. Those representatives themselves were not allowed to present evidence or to question witnesses.¹²⁵

Trial stage

Unlike the participation discussed in the previous sections, the participation in further procedural stages seems to be regulated solely by the regime of Article 68(3) of the Statute and Rule 93 of the Rules, independently of the stage of the proceedings.¹²⁶ It would go beyond the scope of this paper to discuss in detail the right to notification and legal representation of victims,¹²⁷ although these are essential for victim participation. In the *Lubanga* case the representatives of the four victims who had participated in the confirmation of charges hearing were allowed to present their views in written¹²⁸ and oral¹²⁹ form with regard to all the procedural and substantive issues that arose prior to the actual trial procedure.¹³⁰ In the 18 January 2008 decision, Trial Chamber I specified further where and how victims may participate in a trial. It held, for instance, that victims "may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has

122 See 07.11.2006 PTC I Decision on the Schedule and Conduct of the Confirmation Hearing, above note 101.

123 22.09.2006 PTC I Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462, p. 7.

124 De Beco, above note 120, pp. 479f.

125 Apart from one exceptional occasion where leave was granted for one representative to put one question to the single witness called by the prosecution. 18.01.2008 Trial Chamber I Decision on Victims' Participation, above note 11, para. 12.

126 Stahn et al., above note 18, p. 224, speak of "... three regimes for victim involvement in the pre-trial phase: the submission of "representations" and "observations" pursuant to Articles 15(3) and 19; participation pursuant to Articles 53(3) and (61); and the "seeking [of] the views of victims" by a Chamber pursuant to Rule 93."

127 See Rules 90 to 92.

128 E.g. the submission of responses to the defence request for interim release of Thomas Lubanga Dyilo, 11.06.2007 PTC I Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo", ICC-01/04-01/06-924.

129 E.g. participation in the first hearing of Trial Chamber I aimed at resolving certain matters of law and other procedural issues on 04.09.2007, Transcript ICC-01/04-01/06-T-50 available at www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-50_en.pdf, accessed 12 March 2008.

130 See the section "Outline of the ICC victim participation framework", above.

“requested” the evidence”. They are allowed to put appropriate questions whenever the evidence under consideration engages their personal interests.¹³¹ The participating victims had access to the public redacted version of the prosecution’s “summary of presentation of evidence” and the public evidence listed in the prosecution’s annexes thereto.¹³² On the other hand, inspection pursuant to Rules 77 and 78 relates only to the prosecution and the defence.¹³³ Further, victims may, upon request, be permitted to participate in closed and *ex parte* hearings, depending on the circumstances and the facts of the particular application and subject to consultation with the parties.¹³⁴

Victim representation

An important procedural difference exists between victims who are legally represented and those who are not. Rule 91 makes it clear that only victims assisted by legal representatives enjoy the specific “enhanced” procedural rights which go beyond the right to participate in hearings. According to Pre-Trial Chamber I it could even entail questioning of witnesses, experts or the accused, whereby such procedural actions would be strictly reserved to the legal representative of victims in order to protect the rights of the accused.¹³⁵ The Court seems to go beyond the modalities stipulated in Rules 89 or 144.

As to the issue of common legal representation,¹³⁶ Trial Chamber I held in the 18 January 2008 decision that “the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings” and that “victims’ common views and concerns may sometimes be better presented by a common legal representative”. The decision whether or not there should be joint representation would be decided at any particular stage in the proceedings *proprio motu* or upon request of a party or participant¹³⁷ It is indeed necessary “to apply a flexible approach to the question of the appropriateness of common legal representation, and the appointment of any particular common legal representative”, and “detailed criteria cannot be laid down in advance”.¹³⁸

131 Such questioning is not restricted to reparations issues. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 108.

132 Even confidential documents “should be made available in a suitably redacted form”. *Ibid.*, paras. 110f.

133 However, the prosecution should, upon request, provide individual victims with any materials within its possession relevant to the personal interests of victims. *Ibid.*, para. 111.

134 The same applies for confidential or *ex parte* written submissions by victims. *Ibid.*, paras. 113 f.

135 See 01.02.2007 PTC I Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 ICC-02/04-01/05-134, para. 3.

136 Rule 90(2).

137 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, para. 116.

138 *Ibid.*, paras. 123–125. In order to protect the individual victim interests the chamber would apply a flexible approach, taking into consideration criteria such as the language spoken by the victims, “links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims will all be potentially of relevance”. An application of the victims’ representatives to participate in the appeals procedure initiated by the defence against the confirmation of charges was rejected, due to lack of personal interest. 13.02.2007 Appeals Chamber Judgement, above note 94, para. 55.

Appeal and review proceedings

Whereas the right to appeal against acquittal or conviction or against a sentence pursuant to Article 81 of the Statute is clearly limited to the Prosecutor and to the convicted person, Article 82(4) of the Statute explicitly mentions the right of victim representatives to appeal against an order for reparations. With regard to other appeals, the general participation rules mentioned above seem to apply and the key question here is again whether the “personal interests of the victims are affected” by the matter under appeal. This could conceivably be so if the victims’ security would be affected. In the *Lubanga* case the Appeals Chamber accepted victim participation in the defendant’s appeal against the Pre-Trial Chamber decision to refuse provisional release; observations were, however, “limited and had to be specifically relevant to the issues arising in the appeal rather than more generally”.¹³⁹

The same probably goes for participation in the revision procedure,¹⁴⁰ especially because in a revision a new trial is opened and victims’ personal interests might again be affected.¹⁴¹

Reparation procedures

As mentioned above, special procedural rules are laid down for the reparation proceedings, which are also open to persons who did not previously participate as victims in the ICC proceedings.¹⁴² A decision on reparation must be requested by the victims in writing, in quite a comprehensive and detailed application that differs from other participation applications,¹⁴³ as the Court would only in exceptional circumstances act on its own motion. While the Statute and Rules seem to foresee that the reparation decision would normally be taken within the regular trial proceedings, Article 76(3) of the Statute suggests that if a separate sentencing hearing¹⁴⁴ had been requested, reparations would be dealt with in a distinct sentencing proceeding of that nature or even, where necessary, in another additional reparation hearing. In any form of reparation procedure, the Court considers representations from or on behalf of the convicted person, victims, other interested persons or interested states,¹⁴⁵ and then makes an order directly against

139 13.06.2007 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, ICC-01/04-01/06-925, paras. 28 ff.

140 Article 84 of the Statute.

141 Anne-Marie La Rosa, “Revision procedure under the ICC Statute”, in Cassese, above note 5, pp. 1559 ff., 1570f.

142 There seems to be a specific interest of the Court to make reparation procedures widely public. See e.g. RPE, Rule 96.

143 Rule 95 ff. of the RPE lay down a quite detailed set of norms spelling out the application procedure.

144 Article 76(2) of the Statute.

145 State co-operation is an important condition for the functioning of the reparation regime, thus Articles 75(4) and (5) of the Statute refer to Articles 93(1) and 101 thereof, which both contain provisions

a convicted person, specifying appropriate reparations to, or in respect of, victims, such as restitution, compensation or rehabilitation.¹⁴⁶ Unlike victims' representations in other proceedings, the questioning in a reparation hearing is more comprehensive, and cannot be limited to written observations or submissions pursuant to Rule 91(4). On the contrary, the victim representative can, subject to leave by the Chamber concerned, even question witnesses, experts and the person concerned. Reparation hearings aim at establishing injury, harm or loss resulting from a crime committed by the convicted person. Pre-Trial Chamber II has already indicated that the standard of proof with regard to the nexus element of the victim definition is much higher for reparation purposes than for other stages of the proceedings.¹⁴⁷ Awarding reparations on a collective basis is explicitly provided for in Rule 97(1), which also stipulates that such awards may be handled by the Trust Fund "where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate".¹⁴⁸

Specific problems in relation to victim participation

One of the most evident problems arising from the participation regime of the ICC is that of striking a balance between victim interests and other interests in criminal procedures.¹⁴⁹ It has often been argued that such participation impedes the equilibrium between prosecution and defence, and that it interferes with the suspected or accused person's right to a fair¹⁵⁰ and expeditious trial¹⁵¹ and the interest of the Prosecutor in preserving evidence and bringing victims into play as witnesses. Also victim participation, especially if granted with the proviso of protection measures, might obstruct the public's interest in a public hearing which

designed to secure assets for potential forfeiture, such as Article 93(1)(k), "The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture ...", and Article 109 on "Enforcement of fines and forfeiture measures". See also the 31.03.2006 Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Dyllo ICC-01/04-01/06-62, and the detailed rules of Rule 99 of the RPE on "Cooperation and protective measures for the purpose of forfeiture".

146 Where appropriate, Article 75 of the Statute provides for reparations through the Trust Fund established pursuant to Article 79.

147 10.08.2007 PTC II Decision on Victims' Applications, above note 53, para. 14.

148 Rule 98 even provides for awards for reparations to "an intergovernmental, international or national organization approved by the Trust Fund".

149 Due to the limited scope of this article, it will not be possible to deal adequately with this vast topic.

150 Especially as regards protection measures and its impact on the right to be heard. Although this problem is more closely related to witness protection, it may also be an issue in terms of victim participation. Extensive case law of the European Court of Human Rights exists with regard to anonymous witnesses: e.g. ECtHR Jud.: *Lüdi v. Switzerland*, 25.06.1992, appl. 12433/86, para. 47; *Windisch v. Austria*, 27.09.1990, appl. 12489/86, para. 26.

151 Anne-Marie La Rosa, *Juridictions pénales internationales: La procédure et la preuve*, Presses universitaires de France, Paris, 2003, p. 268; Florence Mumba, "Ensuring a fair trial whilst protecting victims and witnesses: balancing of interests?" in May, above note 3; pp. 361 ff.; Christoph Safferling, *Towards an International Criminal Procedure*, Oxford University Press, Oxford, 2001, pp. 276 ff.

offers full scrutiny of the administration of justice.¹⁵² There is an additional concern specific to the ICC as a treaty-based institution, namely the interests of the member states in expeditious trials and the limitation of costs and expenses. As shown above, early victim participation at the investigation phase might interfere with the Prosecutor's interests in an objective, impartial and confidential investigation.¹⁵³ The balancing of these conflicting interests must be taken into account by the judges when granting access to victims, especially when defining the scope and modalities of participation. The issue of the balancing of interests may also be seen in a broader context when discussing general aspects of the purposes of punishing and sentencing in international criminal law.

Another important issue to consider in relation to victim participation is the ambiguity of how to deal with victims who are of interest as witnesses; this issue is especially pertinent in international criminal law processes, which largely rely on victim testimonies.¹⁵⁴ Whereas the ad hoc International Criminal Tribunal for the former Yugoslavia and for Rwanda (ICTY and ICTR) had to deal with the problem of excessive instrumentalization of victims by the parties, the ICC will face the far more complex dilemma of admitting persons to participate as victims in the proceedings who are at the same time of potential interest as witnesses. Neither the Statute nor the Rules excludes victims from participating in the proceedings to testify as witnesses. However, a person who participates as a victim in the ICC proceedings could be lost as witness, mainly because of that person's quasi-party position akin to that of a *partie civile* in civil law systems and its impact on fair trial guarantees.¹⁵⁵ In view of the above-mentioned limitation of the "enhanced" participation rights to the victims' representatives, it could be assumed that the personal involvement of a victim does not reach such a level that his or her participation would be incompatible with the role of a witness.¹⁵⁶ However, even if victims can be heard as witnesses, their testimony could be somewhat flawed because of a certain appearance of partiality and the clear interests they have in the outcome of the procedure, that is, with regard to reparations. The Prosecutor's strong opposition to early and extensive victim

152 *Stefanelli v. San Marino*, ECtHR (Judgment, 2000), paras. 16ff.

153 25.06.2007 Prosecution's Reply under Rule 89(1), above note 10, para. 27: "[a]ll investigative functions, including the determination of the incidents warranting investigation and of the crimes and perpetrators that should be prosecuted, must accordingly unfold pursuant to this principle of objectivity. Allowing victim participation in the situation could give rise to the perception that the Prosecution is subject to external influences into the investigative process." See also n. 36 thereto.

154 Pascale Chifflet, "The role and status of the victim", in Gideon Boas et al.(eds.), *International Criminal Law: Developments in the Case Law of the ICTY*, Nijnhof Publishers, Leiden, 2003, pp. 75 ff., 75 f., 98. Criticism that their dignity had not been respected when they were testifying before the ad hoc tribunals was often expressed, mainly by NGOs, victims' organizations and victims. See e.g. Reporters Without Borders, above note 107, p. 9: "If one of the ultimate aims of international justice is to restore victims' dignity, this objective has obviously still not been reached – far from it." Also Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, pp. 222 f.

155 Jorda and de Hemptinne, above note 5, p. 1409. Not so Robert Cryer, above note 22, p. 362, who assumes that a victim may also give testimony as a witness.

156 Claus Kreß, "Witnesses in proceedings before the International Criminal Court: an analysis in the light of comparative criminal law", in Horst Fischer et al.(eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Arno Spitz Verlag, Berlin, 2001, pp. 309 ff., 320f.

participation, as discussed above, consequently becomes somewhat understandable. Trial Chamber I addressed the issue of dual status of victim-witnesses in its 18 January 2008 decision, stating that their status would depend on whether they are called as witnesses during the proceedings and that witnesses would not be generally banned from participating as victims, as this would “be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber’s obligation to establish the truth”.¹⁵⁷

Change of paradigm in punishing international crimes

Victims’ interests in sentencing

When discussing the influence of victim participation on sentencing in international criminal trials, consideration of some general issues of sentencing in international criminal law cannot be avoided. Penal lawyers and criminologists have discussed them extensively.¹⁵⁸ The focus here therefore centres on the specific role victims play in international sentencing practice mainly in the context of the ICC, which, unlike the statutory provisions of the ad hoc tribunals,¹⁵⁹ provides some guidelines for the determination of sentences. As none of the cases before the ICC has yet reached the sentencing stage, this issue is analysed in the light of general considerations with regard to sanctions and their purposes.

One would expect that the scale of the atrocities and the immensity of international crimes would be reflected in the sentences rendered, or at least that justifications for punishment in international criminal law would take into account the magnitude and abhorrence of the acts.¹⁶⁰ This raises the question of whether sanctions and their justifications can and should, in one way or another, reflect victims’ interests. “Classic” theories of justifications of punishment – such as deterrence, retribution, rehabilitation – usually do not. However, in specific purposes of punishment that are inherent in international criminal law, victims play a more important role than is usually the case in domestic legal contexts.¹⁶¹

157 Yet it must be established on a case-by-case evaluation “whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case”. The judges did not, however, explain in detail what measures could be taken to avoid adverse effects on these rights. 18.01.2008 Trial Chamber I Decision on Victims’ Participation, above note 11, paras. 132 ff.

158 Some recent works give a good overview. See, for the Anglo-Saxon legal systems, Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice*, Oxford University Press, Oxford, 2005; for the French-influenced jurisdictions Noëlle Languin et al., *L’art de punir: Les représentations sociales d’une “juste” peine*, Schulthess Verlag, Zurich, 2006; for the international justice system Ralph Henham, *Punishment and Process in International Criminal Trials*, Ashgate, Aldershot, 2005.

159 ICTR Statute, Article 23(2), and ICTR-RPE, Rule 101; ICTY Statute Article 24(2), ICTY-RPE, and Rule 101; SCSL Statute, Article 19(1), and SCSL-RPE, Rule 101. Ralph Henham “Some issues for sentencing in the International Criminal Court”, *International and Comparative Law Quarterly*, Vol. 52 (2003), pp. 81 ff., 87 ff.

160 Mark A. Drumble, “Collective violence and individual punishment: the criminality of mass atrocity”, *Northwestern University Law Review*, Vol. 99 (2) (2005), pp. 539 ff., 541 ff.

161 Ralph Henham, “International sentencing in the context of collective violence”, *International Criminal Law Review*, Vol. 7 (2007), pp. 449 ff., 454 f.; Henham, above note 159, pp. 109 ff.

Such particular “international” sentencing purposes, tailored for crimes committed in the context of collective and/or state violence, could, for instance, be an expression of international solidarity with the victims and a documentation of the facts that goes beyond state propaganda.¹⁶²

Seen from a human rights perspective, the obligation of states to prosecute perpetrators of gross violations of human rights and international humanitarian law is generally acknowledged for acts constituting crimes under international law, such as genocide, crimes against humanity and war crimes.¹⁶³ Although this obligation is not explicitly spelt out in international human rights instruments, it is nevertheless deemed by international¹⁶⁴ and regional¹⁶⁵ human rights supervisory bodies to be part of the right to remedy and of the states’ obligation to ensure respect for human rights.

The judges of the ad hoc tribunals, although given considerable scope with regard to sentencing,¹⁶⁶ nevertheless dealt with the question of the purpose of penalties. Yet victim-related issues played a rather insignificant role in the judges’

162 Frank Neubacher, “Kriminologie und internationale Strafgerichtsbarkeit”, in Frank Neubacher et al. (eds.), *Vom Recht der Macht zur Macht des Rechts? – Interdisziplinäre Beiträge zur Zukunft internationaler Strafgerichte*, Duncker & Humblot, Berlin, 2006, pp. 17 ff., 24 f.; Daniel Joyce, “The historical function of international criminal trials: re-thinking international criminal law”, *Nordic Journal of International Law*, Vol. 4 (2004), pp. 461 ff.

163 E.g. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, above note 70, Principle 4, “In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.” Principle 5 goes even further, establishing an obligation for states to provide domestic norms allowing universal jurisdiction “where so provided, in an applicable treaty or under other international law obligations”, to facilitate extradition or surrender of offenders “to other States and to appropriate international judicial bodies and provide judicial assistance...”.

164 UN Human Rights Committee (HRC), *Bautista de Arellana v. Colombia*, Comm. No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995), para. 10: “... the Committee urges the State party to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista.” Also *Josi Vicente and Amado Villafaqe Chaparro, Lums Napolesn Torres Crespo, Angel Marma Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Comm. No. 612/1995 (14 June 1994), CCPR/C/60/D/612/1995 (“*Arhuaco* case”), para. 5.2.; *Basilio Laureano Atachahua v. Peru*, Comm. No. 540/1993, UN Doc. CCPR/C/56/D/540/1993 (1996), para. 10; *Rodríguez v. Uruguay*, Comm. No. 322/1988, UN Doc. CCPR/C/51/D/322/1988 (1994), para. 12.4.

165 The IACtHR was the first international human rights body to highlight clearly the specific obligation of states “to prosecute and punish the perpetrator in cases of such serious human rights violations: *Velásquez Rodríguez v. Honduras*, IACtHR Judgment of 29.07.1988 (Ser. C) No. 4 (1988), paras. 178, 181, 186. The ECtHR followed this jurisprudence only recently, in its case law on “effective remedy” under Article 13 of the European Convention on Human Rights (ECHR), mainly in cases concerning serious human rights violations occurring in the context of south-east Turkey, e.g. ECtHR Judgement of 25.09.1997, *Aydın v. Turkey*, appl. 23178/94, para. 103 and Judgement of 25.08.1998, *Kurt v. Turkey*, appl. 24276/94; Judgement of 18.12.1996, *Aksoy v. Turkey*, appl. 21987/93, para. 98. And see Manfred Nowak, “The right of victims of gross human rights violations to reparation”, in Fons Coomans et al. (ed.), *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven*, Kluwer Law International, The Hague, 2001, para. 70.

166 E.g. *Prosecutor v. Rutanganda*, Case No. ICTR-96-3-T Judgement and Sentence (Trial Chamber), 09.12.1999, para. 458; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A Judgement (Appeals Chamber), 20.02.2001, paras. 717 f.; Drumble, above note 160, p. 558f.

considerations,¹⁶⁷ although they indicated that sanctions in international criminal law do have certain objectives that differ from those typically found in national legal contexts.¹⁶⁸ The purposes of penalties considered by the ad hoc tribunals were mainly retribution, deterrence, rehabilitation, the protection of society, justice, ending impunity, promoting reconciliation and restoring peace.¹⁶⁹ Only one sentencing judgment specifically mentions victims' interests¹⁷⁰ as a particular purpose of punishment.

The constitutive documents of the ICC do not specifically refer to the purposes of punishment, although they are implied in some way in the Preamble to the Statute,¹⁷¹ thus leaving the ICC judges with broad discretion. Some victim-oriented sentencing principles might, however, be drawn from the above-mentioned case law. Retribution, often referred to as the main objective of punishment,¹⁷² could to some extent accommodate victims' interests as long as it is not understood as revenge. In view of the specific circumstances of massive and collective violence, retributive sentiments of victims and their relatives cannot be completely disregarded. Such considerations are, however, a balancing act, as they may hamper reconciliation¹⁷³ and impede efforts to respect the right of the accused or convicted person to individualized, fair and proportional punishment. Reconciliation and reconstruction efforts are seen as an important aim of international justice, and punishing those most responsible for gross violations of human rights and international humanitarian law can in many respects add to

167 Jan Christoph Nemitz, *Strafzumessung im Völkerstrafrecht: ein Beitrag zur Strafzwecklehre und zur Strafzumessungsmethode unter besonderer Berücksichtigung des Römischen Statuts*, Edition Iuscrim, Freiburg im Breisgau, 2002, pp. 149 ff.

168 *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgement (Trial Chamber), para. 62.

169 See e.g. Nemitz, above note 167, pp. 21ff., 145 ff. For a detailed discussion of "classic" sanction purposes and specifically international criminal sentencing purposes, see Christina Möller, *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte*, Lit Verlag, Münster, 2003, pp. 438ff.

170 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement (Trial Chamber), 16.11.98, para. 1231.

171 The second preambular paragraph, "*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity", suggests that the interests of victims have an important place in all the considerations of the Court, including those when sentencing. The absence of "penological justifications" has been criticised by Henham, who is of the opinion, that this lack of guidelines "weakens [the ICC's] claim to provide a rational foundation for the exercise of democratic principles of criminal justice." Henham, above note 159, p. 87. Rule 145 of the RPE gives some guidance as to how judges should determine a sentence. Some of the elements of this provision contain, in a certain manner, components of victim interests. Besides other factors, "the extent of the damage caused, in particular the harm caused to the victims and their families" should be considered. Furthermore, efforts of the convicted person to compensate the victims might be considered as mitigating factor, whereas the commission of crimes in cases where the victim was particularly defenceless or where there were multiple victims is seen as an aggravating circumstance. Rule 223 of the RPE contains the criteria to be taken into account by the Appeals Chamber for review with regard to reduction of sentences. It also lists in sub-para.(d) the victim-related criteria of "significant action taken by the sentenced person for the benefit of the victims" and possible impacts on the victims and their families as a result of the early release.

172 Faiza P. King and Anne-Marie La Rosa, "Penalties under the ICC Statute", in Flavia Lattanzi et al., *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, Editrice Il Sirente, Ripa Fagnano Alto, 1999, pp. 311 ff., 329 f.

173 William A. Schabas, "Sentencing by international tribunals: a human rights approach", *Duke Journal of Comparative & International Law*, Vol. 2 (1997), pp. 461 ff., 502.

such efforts,¹⁷⁴ although the inherent risk exists that it may be misunderstood by the public and potentially lead to adverse effects, such as the self-victimization of the perpetrators or perception of that punishment as ineffective¹⁷⁵ victors' justice.¹⁷⁶ Therefore aspects of restorative justice should also be taken into consideration, as reflected for example in the Statute's Article 75 on reparations and Article 79 on the Trust Fund.¹⁷⁷ Moreover, the declaratory value of criminal law¹⁷⁸ can have a healing impact on victims at both a collective¹⁷⁹ and an individual level.¹⁸⁰ The public perception that justice is done is one way to break the vicious circle of hatred and violence.¹⁸¹ Even classic purposes such as deterrence and incapacitation could accommodate the interests of victims by giving them a general, collective feeling of security in knowing that the former regime will not return, and a personal awareness that the perpetrator is not at liberty and able to repeat what he or she did to them.¹⁸² A more systematic and coherent approach to sentencing, which would enhance the foreseeability of the sanction and thus better respect the principle of legality, would also help victims to cope with the difficult psychological process of following a criminal proceeding.¹⁸³

Selectivity

One factor to be taken into account in international criminal procedure is the high level of selectivity due to the very aim of international criminal prosecutions, namely to focus on the most heinous crimes and on the perpetrators who bear the

174 It is widely acknowledged that criminal procedures allow for reconstruction of the truth and therefore help traumatized societies to recover, stabilize and rebuild. Francois-Xavier Nsanzuwera, "The ICTR contribution to national reconciliation", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 944 ff., 948: "By arresting the architects of the genocide, the ICTR deprived the perpetrators of their main leaders. The overarching feeling among survivors is that without such arrests, the former political and military leaders involved in the genocide would have continued to destabilize Rwanda, eliminate witnesses and aggravate the moral suffering of survivors."

175 Helena Cobban, *Amnesty after Atrocity? Healing Nations after Genocide and War Crimes*, Paradigm, Boulder, 2007, p. 209.

176 Pierre Marie Gallois and Jacques Verge, *L'apartheid judiciaire: Le Tribunal pénal international, arme de guerre*, L'Age d'Homme, Lausanne, 2002.

177 Also the penalty, provided for in Article 77(2)(b) of the Statute, of forfeiture of proceeds, property and assets derived directly or indirectly from the crime for which the person is convicted, contains restorative elements. Adrian Hole, "Sentencing provisions of the International Criminal Court", *International Journal of Punishment and Sentencing*, Vol. 1 (2005), pp. 37 ff., 58.

178 Schabas thinks that it "is probably its most important contribution to the struggle against impunity", above note 173, p. 513.

179 Pierre Hazan, "Measuring the impact of punishment and forgiveness: A framework for evaluating transitional justice", *International Review of the Red Cross*, No. 861 (March 2006), pp. 19 ff., 25: "They control the behaviour of the various players, redefine their identities and impart new values, which gradually pervade the national institutions." Also, Report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 03.08.2004, S/2004/616.

180 Martha Minow, "Breaking the cycles of hatred", in Martha Minow (ed.), *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton University Press, Princeton, 2002, pp. 14 ff., 16 ff.

181 Nancy L. Rosenblum, in Minow (ed.), above note 180, pp. 76 ff., 80.

182 Tom J. Farer, "Restraining the barbarians: can international criminal law help?", *Human Rights Quarterly*, Vol. 22 (2000), pp. 90 ff., 91ff.

183 La Rosa, *Juridictions pénales internationales*, above note 151, p. 210.

greatest responsibility.¹⁸⁴ This extreme selectivity is expressed in the very object and purpose of the ICC as set out in the Preamble to the Statute, and is inherent in the structure of ICC procedure as a whole.¹⁸⁵ With regard to victim interests to be reflected in that procedure the selectivity is even greater, as shown by the practical and individual impediments facing victims wishing to approach the Court and the high procedural thresholds explained above. This high degree of selectivity results in a somewhat prejudiced conception of the events in question; the resulting sanction thus cannot make up for the atrocities committed and the suffering caused, as it might be able to do in a national system of penal sanctions. However, as pointed out by several authors, it is ultimately impossible to determine empirically whether international punishment really contributes to peace and reconciliation and is thus justifiable from this perspective.¹⁸⁶ Sentencing therefore takes on a more symbolic dimension, which might serve not only the victims able to put forward their views directly, but ultimately the victimized group as a whole. The trials of the few selected perpetrators, representing only a very small proportion of all that has occurred, acquire a kind of *pars pro toto* character;¹⁸⁷ they are a symbolic act, which is of course of limited effect for the society concerned or the international community as a whole if the main perpetrators cannot be brought to justice. The sanction becomes exemplary, and the demand for one-to-one compensation for the injustice suffered thus becomes less relevant.

The necessity of reparation

However, to leave the rather theoretical and philosophical discussion on purposes of sanctions and return to the harsh reality of the problems facing victims in their everyday lives, it must be stressed that there are often many material needs that are more important for their survival.¹⁸⁸ The aspect of material reparation, going beyond the immaterial satisfaction of judgment and sentence, should consequently not be neglected. Yet the threshold for victims to be compensated under Article 75 of the Statute is even higher than for their participation in proceedings under Article 68(3) thereof. In situations with typically large numbers of victims, only a very small number of them would finally receive reparation. The ICC will probably

184 Herbert Jäger, “Makroverbrechen als Gegenstand des Völkerstrafrechts: Kriminalpolitisch-kriminologische Aspekte”, in Gerd Hankel and Gerhard Stuby, *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, Hamburger Edition, Hamburg, 1995, pp. 325 ff., 420 ff.

185 E.g. in Articles 5 and 6; Article 17(1)(d) and Article 53(1)(c) of the Statute. See Olásolo, above note 26, p. 182. Claudia Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof: Zur Auslegung des Article 17 IStGH-Statut unter besonderer Berücksichtigung von Amnestien und Wahrheitskommissionen*, Berliner Wissenschafts-Verlag, Berlin, 2005, p. 176.

186 Ralph Henham, above note 161, p. 452.

187 Felix Bommer, “Strafzwecke im Völkerstrafrecht”, in Hans Münk (ed.), *Die Vereinten Nationen sechs Jahrzehnte nach ihrer Gründung: Bilanz und Reformperspektiven*, Peter Lang Verlag, Berne, 2008, pp. 29 ff., 53.

188 Henham, above note 161, p. 452: “Consequently, however we theorise the presumed effects of international criminal law or punishment, the gulf between the social reality of what victims and victimised communities perceive as justice and what passes as ICJ remains.”

therefore have to envisage collective reparations rather than individual ones. Otherwise, a large and costly mass claims administration would need to be set up¹⁸⁹ similar, for example, to the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) for Bosnia and Herzegovina¹⁹⁰ or the UN Compensation Commission (UNCC).¹⁹¹ The ICC Trust Fund seems to focus more on reparation based on community projects benefiting the victimized community as a whole, rather than only individual victims.¹⁹²

A discrepancy between victims who participate in ICC proceedings and those who do not will nonetheless still remain. Another factor to be considered with regard to selectivity is that of victim protection. Since the situation in regions where ICC investigations take place can continue to be extremely volatile and insecure even during those investigations, the singling out of certain victims or witnesses might create problems not only for them but also for others who, unlike them, remain unprotected. One solution proposed to counterbalance the high level of selectivity inherent in international criminal jurisdiction is to combine it with other transitional justice mechanisms such as truth and reconciliation commissions, as for instance in Sierra Leone.¹⁹³

Concluding remarks

If the ICC wants to keep its promise of serious consideration for victims' interests, it urgently needs to define a more comprehensive, concerted and defined approach towards victim participation. Without this, the laudable project of giving victims a voice in criminal proceedings on the most serious crimes of concern to the international community risks ending as a farce. Today it is already clear that the Court's capacity to handle huge numbers of victim applications is limited. Solutions must therefore be found to allow the ICC to discharge its primary mandate, namely to "put an end to impunity for the perpetrators of these crimes" and thus to contribute to their prevention, while at the same time according due respect to the opposing interests of the accused, the prosecution, the public and the victims and complying with general standards of a fair, impartial and

189 Marc Henzelin, Veijo Heiskanen and Guénaél Mettraux, "Reparations to victims before the International Criminal Court: lessons from international mass claims processes", *Criminal Law Forum*, Vol. 17 (2006), pp. 317 ff., 333 ff.

190 Hans van Houtte, "The Property Claims Commission in Bosnia-Herzegovina: A new path to restore real estate rights in post-war societies?", in Karel Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Martinus Nijhoff, The Hague, 1998, pp. 549 ff. See also the commission's website, www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm, accessed 12 March 2008.

191 Created in 1991 as a subsidiary organ of the UN Security Council by SC Res. 687/91, to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait. Information available at <http://www2.unog.ch/uncc/resoluti.htm>, accessed 12 March 2008.

192 Information available at www.icc-cpi.int/vtf/vsfmeetings.html, accessed 12 March 2008. See "ICC Trust Fund, goals, mission and mode of operation: A programmatic framework", The Hague, May 2007, p. 7.

193 This was one of the conclusions of the Secretary-General's Report: The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 23 August 2004.

expeditious trial. If this delicate balance is not attained throughout the whole trial, in such a way that the Court remains just and credible to all participants and to the society affected by the crimes, even sentencing will become insignificant and fail to meet the purposes of punishment in international criminal law.

The attempt of Trial Chamber I to develop a more consistent approach to victim issues is indispensable. The organs of the ICC must promptly devise and establish a common strategy to bring about a meaningful victim participation that respects to the fullest extent possible the rights, needs and interests of all participants. Serious consideration of victims' interests also implies an obligation not to create erroneous hopes and expectations that cannot be fulfilled, will leave victims frustrated and may place them in an even more difficult situation than they would have been without participating in ICC proceedings. Overenthusiastically allowing victims to take part in investigations at situation level, for instance, gave rise to such hopes. In addition, a more transparent, precise and above all cohesive and consistent jurisprudence would enhance the credibility and predictability of the Court's case law, enabling victims and their representatives to estimate better whether their application has a chance at all. Otherwise, the Court is in danger of becoming paralysed by processing applications and handling purely procedural submissions without substantially advancing cases. Finally, sentencing practice needs to compensate in some way for the extremely selective character of international criminal trials, taking into consideration the effects of punishment on victims and the societies affected by the massive crimes under review, although without impeding the rights of the accused.

Victims and international criminal justice: a vexed question?

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Abstract

Despite the growing attention being paid to “victims” in the framework of criminal proceedings, this attention does not seem to be meeting their needs under either national criminal justice systems or the international regime. In the latter, the difficulties encountered by the victims are aggravated by factors specifically arising from the prosecution and punishment of mass crimes at international level. This has prompted the authors to point out that the prime purpose of criminal law is to convict or acquit the accused, and to suggest that the task of attending to the victims should perhaps be left to other entities.

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Une société dans laquelle pour certaines personnes l'unique porte de sortie d'un état victimaire (celui qui a été fui par l'émigration) est l'entrée dans un statut de victime jette un éclairage cruel sur la vulgate psychologique prétendant que la reconnaissance du statut de victime est la condition sine qua non de l'évolution

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des personnes traumatisées vers la reconquête de l'autonomie. (...) S'il y a tant de victimes aujourd'hui, c'est qu'elles sont littéralement suscitées, aspirées par une offre de statuts agrémentés de bénéfices symboliques ou matériels divers. Ne jetons pas la pierre aux « victimes » ainsi façonnées et mises en concurrence parfois lamentable: c'est d'abord le jeu en lequel elles sont placées qui devrait être critiqué.

Jean-Michel Chaumont¹

After a long period of neglect, the victim is today the focal point of political concerns and is attracting ever greater interest both in the field of criminal justice and in debate on social issues.² However, although it has certain positive aspects, this interest is not without hazards and problems which are engendering discussion and even controversy among researchers and others involved in the world of criminal justice. The prominence of the victim appears to be rising, not only within the criminal justice system but also on the current socio-political scene. This is clearly noticeable in numerous Western countries, but also, as we shall see, at the level of international criminal justice and of international humanitarian law, as regards attending to the victims of armed conflicts and the status accorded to them when the fighting stops.

Victims are increasingly taken into account

This trend is the result of far-reaching political, social and legal developments, which began in the 1960s with the advent of government policies to compensate victims and the rise in the number of associations for the defence of victims, all prompted by social movements fighting for civil and political rights and women's rights. There has been a rapid increase in attention paid to victims in social and criminal policy. National and international victimization surveys have brought to light victims' dissatisfaction at their treatment under the criminal justice system. They feel that they have been victimized twice over, with the result that people are less likely to report criminal acts committed against them. The surveys also emphasized the diversity and above all the scale of the traumas sustained by victims, in particular those who had suffered personal violence such as rape or domestic violence. In addition, around 1950 a new discipline – victimology – branched out, first as part of criminology but swiftly becoming an independent field. This field of research deals with the study of the victim and his or her psychological and physical reactions to the trauma sustained, but also with the victim's experience regarding treatment and his personal experience of the

1 Jean-Michel Chaumont, "Celles qui ne voulaient plus être victimes", *Revue Suisse d'Histoire*, Vol. 57 (1) (2007), pp. 40–1.

2 Robert Cario, *Victimologie – De l'effraction du lien*, Paris, L'Harmattan, 2000; Robert Zauberger, "La victime, usager de la justice pénale", in Michel Chauvière and Jacques Godbout (eds.), *Les usagers entre marché et citoyenneté*, Paris, L'Harmattan, 1995; Sandra Walklate, *Imagining the Victim of Crime*, London, McGraw-Hill, 2007.

criminal justice system and society in general. These various findings gave rise to government victim-aid schemes which have spread more or less throughout the world. Thus the victim has become a political issue.³

The legal status of crime victims has also changed significantly under most national criminal law systems, but recently also in international criminal law. These trends have helped to create a veritable social status of *victim*, one reflecting the magnitude of society's recognition for his suffering. At national level, criminal law has for some decades been shifting significantly, from a traditional view of the victim as someone who is owed compensation towards the current perception of the victim as one who suffers and whose suffering must be taken into account.⁴ Criminal proceedings are no longer concerned solely with punishing those found guilty and with upholding public order, but must now also put an end to the victims' suffering and help them to rebuild their lives. This rebuilding process is often regarded as requiring not only recognition of the wrong committed and the consequent guilt of the perpetrator, but also the acknowledgement by judicial institutions and society as a whole of the victims' suffering.⁵ However, the criminal law system cannot serve therapeutic purposes, since it does not have the resources needed and was not designed to attend to the victims.⁶ At the international level, increased recognition of victims and their rights is noticeable as much at the political and humanitarian level as at the level of criminal justice.

The first milestone in obtaining recognition of victimhood by the international community was without question the 1985 United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. Following this declaration, a number of decisions and recommendations were drawn up both at international⁷ and European level,⁸ which helped to place the victims at the centre of the international community's deliberations and

3 Sebastian Roché, "Les victimes: de la communauté à l'assurance en passant par l'Etat", *Déviance et Société*, Vol. 19 (4) (1995), pp. 357–70.

4 Xavier Pin, "Les victimes d'infractions – Définitions et enjeux", *Archives de politique criminelle*, Vol. 28 (2006), pp. 49–72.

5 See Cario, above note 2.

6 Maria Louisa Cesoni and Richard Rechtman, "La réparation psychologique de la victime: une nouvelle fonction de la peine?", *Revue de droit pénal et de criminologie*, Vol. 2 (2005), pp. 158–78.

7 For example, the UN Office on Drugs and Crime published the *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) in order to promote and guide the implementation of victims' rights in national criminal justice systems. See also the *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999). The Commission on Crime Prevention and Criminal Justice was set up to implement the 1985 UN declaration. Resolution 2003/30 of 22 July 2003 of the Economic and Social Council set up an Intergovernmental Expert Group to develop an information-gathering instrument on UN standards and norms related primarily to victimhood issues. The results of their work may be seen in document E/CN.15/2007/3.

8 See the European Convention on Compensation of Victims of Violent Crime, adopted on 24 November 1983. See also the recommendations of the Council of Europe R (85) 11 of 25 June 1985 on the "position of the victim in the framework of criminal law" and R (87) 21 of 17 September 1987 on "assistance to victims and the prevention of victimisation". See also "Framework Decision of the Council of the European Union", *Official Journal of the European Communities*, 15 March 2001. See also R (2006)8 of the Committee of Ministers to the Member States adopted on 14 June 2006 at the 967th meeting of Members/Ministers.

concerns. A draft convention on victims' rights is currently being studied by the United Nations. However, victims have only recently gained access to the mechanisms of international penal law. The position of the victim in this context was determined by the Statute of the International Criminal Court, adopted on 17 July 1998. Until then victims were recognized only in their capacity as witnesses and the only compensation possible was acknowledgement that an international crime had been committed which was therefore punishable.

The crucial issue is what status should be accorded to victims in order to guarantee them optimum reparation while respecting the rights of the accused. Therefore, if the intention is to grant adequate reparation to the victim, we need to know the nature and extent of the victims' real expectations and needs as regards the criminal justice system.

Victims' expectations of and needs in terms of criminal proceedings

Victims expect from the system not only an outcome (a sentence and compensation for damages), but also the substance of the process itself (respect, information, participation).⁹ More precisely, Strang¹⁰ has identified the following fundamental needs expressed by victims regarding criminal proceedings:

1. making their voice heard;
2. participating in the handling of the case that concerns them;
3. being treated with respect and fairness;
4. obtaining information on the progress and outcome of the case concerning them; and
5. obtaining economic and emotional redress.

Victims are often represented as demanding retribution (the imposition of a sentence) and the restoration of their status in the community as well as neutralization of the perpetrator. However, retribution might not be as important to victims as is generally thought,¹¹ since they seek above all restitution or compensation,¹² plus the opportunity to make a fresh start, to recover and to be protected from further victimization.

As regards criminal proceedings, victims seem more satisfied when they are kept informed of developments¹³ or when they have the opportunity to play an active part, for example by giving their opinion on the proceedings.¹⁴ Research

9 Marijke Malsch and Raphaela Carriere, "Victims' wishes for compensation: the immaterial aspect", *Journal of Criminal Justice*, Vol. 3 (1999), pp. 239–49.

10 Heather Strang, *Repair and Revenge: Victims and Restorative Justice*, Oxford University Press, Oxford, 2002.

11 Edna Erez and Pamela Tontodonato, "The effect of victim participation in sentencing on sentence outcome", *Criminology*, Vol. 28 (1990), pp. 451–74.

12 John Braithwaite and Stephen Mugford, "Conditions of successful reintegration ceremonies: dealing with juvenile offenders", *British Journal of Criminology*, Vol. 2 (1994), pp. 139–71.

13 Jo-Anne Wemmers, *Victims in the Criminal Justice System*, Amsterdam, Kugler Publications, 1996.

14 Edna Erez and Eva Bienkowska, "Victim participation in proceedings and satisfaction with justice in the continental systems: the case of Poland", *Journal of Criminal Justice*, Vol. 21 (1993), pp. 47–60.

carried out within European legal systems shows that the majority of victims are not satisfied with their experience of the criminal justice system and feel that their needs are not met.¹⁵ Victims expect the participation afforded them by some criminal justice systems to have a restorative power for them,¹⁶ and most current criminal justice systems, national as well as international, do allow victims participation in one form or another, to a greater or lesser degree. In some common-law countries, victim participation has taken the form of “victim impact statements” or “victim statements of opinion”. They are able to make their voices heard throughout the proceedings, describing the consequences that the criminal act has had for them and saying what they wish to see happen. In Belgium and in Canada there is even an extreme form of “victim statements of opinion” which allows victims to have an influence on the carrying out of the sentence (decision regarding release on parole).

But this trend towards taking into account the victims’ needs does not seem to have satisfied all their expectations.¹⁷ Increased victim participation in the case concerning them does not always improve their experience of the criminal justice system and does not appear to bring them the emotional, psychological and financial benefits desired.¹⁸ Victims often prefer not to be obliged to take part, but rather to leave it to the judges to decide on sentencing¹⁹ – they are content to express their point of view during the trial.²⁰ This clearly indicates that too great an involvement in the criminal justice system might not be the most judicious path towards the recovery and reparation desired by the victim.

Some say that the victim experiences a profoundly healing effect from the right to take part in a fair trial and to be heard. However, according to Cario,²¹ victims who have not had access to psychological and social assistance outside the legal system are the ones who focus on the sentence, demanding that it should match their suffering. The very real risk of secondary victimization can be the result of arbitrary, cynical and non-empathic treatment of a case in criminal court, something well known and well documented. Taking part in judicial proceedings frequently causes victims to relive traumatic experiences and to suffer anew as a result of evidence given and the questioning to which they are subjected. Indeed, it

15 Matti Joutsen, “Victim Participation in Proceedings and Sentencing in Europe”, *International Review of Victimology*, Vol. 3 (1994), pp. 57–67; Jan Van Dijk, “Who is afraid of the crime victim? Criminal victimisation, fear of crime and opinions on crime control in an international perspective”, keynote lecture at the VII Symposium of the World Society of Victimology, Adelaide, 21–26 August 1994; Joanna Shapland, Jonathan Willmore and Peter Duff, *Victims and the Criminal Justice System*, Aldershot, Gower, 1985.

16 Walklate, above note 2.

17 Marion Brienen, Ernestine Hoegen and Marc Groenhuijsen, “Evaluation and meta-evaluation of the effectiveness of victim-oriented legal reform in Europe”, *Criminologie*, Vol. 33 (2000), pp. 121–44.

18 Basia Spalek, *Crime Victims: Theory, Policy and Practice*, London, Palgrave, 2006.

19 Jo-Anne Wemmers, “Victim policy transfer: learning from each other”, *European Journal on Criminal Policy and Research*, Vol. 11 (1) (2005), pp. 121–33.

20 Tom Tyler, “What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures”, *Law and Society Review*, Vol. 22 (1) (1988), pp. 103–35.

21 Robert Cario, “La reconnaissance de la victime: instrumentalisation ou restauration”, *Journal des accidents et des catastrophes*, 53 (2005).

frequently happens that the victim is confronted with a perpetrator who shows neither remorse for his acts nor acknowledgement of the harm inflicted; and may even go so far as to deny his actions and accuse in his turn the victim of wrongdoing.

That being the case, one might wonder what role could be assigned to victims in a system which was not designed to take account of their suffering and which therefore cannot have the healing power often wrongly attributed to it. To answer that question we must first determine a number of things: the real needs expressed by victims vis-à-vis the criminal justice system, their actual experience of the judicial handling of the cases concerning them, and the factors tending to influence that experience in either a positive or negative way (including which factors might improve their situation).

Difficulties in attending to victims in national criminal law

A study is currently being carried out by the *Centre d'étude, de technique et d'évaluation* at the University of Geneva to ascertain the views of crime victims and persons working in the legal and social fields who have contact with them.²² The study is focusing on the point of view of the victims, their experience of the criminal justice system, their needs and their expectations. The victims, questioned during semi-controlled interviews, were selected from three categories of crime – sexual assaults, physical assaults and domestic violence – in a manner that reflects Swiss crime statistics.

The initial results of the survey indicate a gap between what victims expect from the handling of their case in the criminal courts and what the courts are actually able to offer them.

Criminal law and how the victims experience it

Different victims have different viewpoints on their victimhood. Most of them mention a major need for recognition by the criminal justice system, which amounts to the need to have a place in that system, to be taken into consideration by the system, to be heard and to have a voice, but also to have a certain “control” over the case pertaining to them and to play an active part in it. They need to be believed, to be taken seriously and to be understood. In addition, they criticize the disproportionate attention paid to the perpetrator and suffer from a corresponding lack of attention paid to themselves. Victims complain of incompetence, inefficiency and slowness in the system, but also of the tendency to concern itself with appearances and a failure to take account of the facts in a consistent and objective manner. The victims questioned have spoken of disillusionment and the gap between their expectations and their actual experience of criminal

²² The results referred to here are of a study entitled “Law and emotions” being carried out by the Centre d'étude, de technique et d'évaluation under the aegis of the Centre Interfacultaire en Sciences Affectives.

proceedings. This is reflected by their disenchantment, perplexity and disappointment regarding the way the cases were handled. Finally, some victims expressed practical needs: to be kept informed and to receive advice and general assistance in the matter.

The victims' statements reveal dissatisfaction with the verdict and the sentence. They consider that the sentence imposed was not severe enough or was inadequate in nature (e.g. a suspended sentence). Retribution is also mentioned by a number of victims, who express their wish and need to see a sentence in proportion to the suffering and violence they experienced. The desired sentence might be viewed as the victim's need for recognition of the fact that he has suffered as an individual and been the victim of injustice. It is obvious that victims feel disenchantment based on their ideals of justice.

The initial results indicate that the statements of the victims questioned vary according to their experience of criminal proceedings and that more bitter views have been expressed by those who have experienced advanced criminal proceedings as compared with those whose complaint did not lead to substantial measures being taken by the investigating judge or who did not lodge a complaint in the first place. Victims whose complaints have been acted upon and those whose complaints have resulted in advanced criminal proceedings frequently express a need for recognition from the criminal justice system. They are more critical of the way it works and seem to regard the response to their practical need for information and advice as unsatisfactory. Those whose complaints have not been acted upon and who have therefore not experienced complete criminal proceedings make no criticism. Going through the actual experience of the proceedings therefore seems to affect the way in which the victims view the result of the proceedings and the outcome of their case. Thus victims who have been through criminal proceedings state a clear need for retribution and for recognition regarding the sentence desired for the perpetrator, whereas the victims who have not been through criminal proceedings express no vindictive sentiments; very few think that the sentence imposed on the perpetrator has reflected recognition of their suffering.

A more detailed analysis, concentrating solely on the emotions expressed regarding the acts committed against them, shows that social support has a positive effect on victims. Victims who consider that they have obtained support from their immediate circle – whether or not they found this satisfactory – made statements that were on the whole much more positive than those made by victims who considered that they had not received such support. The first group see their victimhood rather as an opportunity and a source of strength, expressing the need to get on with life, whereas the others tend to emphasize what is irreparable and the punishment that should result from their victimhood, and have the impression that they are living in hell and feel like they are “about to explode”. At the same time, an analysis of the emotions according to the victims' experience of criminal proceedings and support from their immediate circle also shows that social support seems to have a more positive impact than criminal proceedings. Victims who have experienced criminal proceedings and received from their immediate

circle support which they regard as unsatisfactory express more negative feelings than those who have not experienced criminal proceedings and who had received support which they regard as satisfactory. The first group has a marked tendency to highlight the injustice and their own rage and need for recognition, whereas the second group stresses far more the need for understanding, putting the clock back and returning to normal.

These results clearly indicate that experiencing criminal proceedings does not appear to satisfy the victims' needs and address their dissatisfaction in terms of recognition, involvement and retribution. On the contrary, it appears to aggravate them. Victims who have experienced criminal proceedings are the very ones expressing feelings of hatred, guilt and injustice. Conversely, those who have received support from their immediate circle report a more positive experience. Support from the immediate circle is thus an essential factor in helping victims to overcome their confusion and suffering. It can therefore be concluded that the victims' healing process can be promoted if they receive satisfactory support from their immediate circle and do not go through criminal proceedings. Finally, mention must be made of a general feeling that the criminal justice system is unfair. This was noted throughout the statements of all the victims questioned, which perhaps indicates that the victims, whether or not they have specific experience of that system, perceive it as somewhat negative on the whole. That conclusion finds support in the fact that most victims, whatever their experience of the criminal proceedings, seem disillusioned about the criminal justice system and the reality of their personal experience, and regard the sentences as inadequate given the degree of suffering caused by the criminal act that prompted the trial.

The penal system – a source of dissatisfaction for the victims

The results of the study support the idea that experiencing the criminal justice system can be a further source of suffering for victims rather than an opportunity for them to overcome their trauma, and that the symbolic restorative powers attributed to the system might be questioned as not being sufficiently well founded. The study appears to indicate that part of the healing process can be initiated by support from individuals, both personal and professional, surrounding the victim.

That being the case, should we rebuild totally the criminal justice system? Some authors²³ consider that the system in its present form could be harmful for both victims and perpetrators, since it places the entire emphasis on punishment and does not allow for the constructive and healing settlement of conflicts. It is undeniable that a system mainly based on retribution can only lead to intensification of conflict.²⁴

23 Jacques Faget, *La médiation: Essai de politique pénale*, Erès, Ramonville-Saint-Agne, 1997; Ezzat A. Fattah, "Toward a victim policy aimed at healing, not suffering", in Robert C. Davis, Arthur J. Lurigio and Wesley G. Skogan (eds.), *Victims of Crime*, Thousand Oaks, CA, Sage, 1997, pp. 257–72.

24 Fattah, above note 23.

However, since a radical reform of the criminal justice system is not very a realistic prospect, one solution might be to encourage innovations such as restorative justice. This allows the victims, the perpetrators and the communities affected to recognize that a specific criminal act has caused injury and suffering and to find ways to restore the social fabric destroyed by that act. Such restorative processes also have the advantage of affording greater participation for perpetrators and their victims and of making all parties aware of the consequences of their actions.²⁵ These practices also offer the perpetrator an opportunity to express sorrow and regret and the victim an opportunity to forgive, which can reduce the victim's desire for punishment and retribution²⁶ and contribute to his emotional recovery.²⁷

Although it has been fairly clearly established that the criminal justice system has difficulty in taking account of suffering and in helping victims overcome the trauma they have suffered, we might wonder whether it is possible for the international legal system to take adequate restorative action in the cases of the thousands of victims of war and armed conflict. This is provided for under the statute of the International Criminal Court and other international instruments of criminal justice. We must therefore study how international criminal justice can meet the needs of individual victims and entire communities who have been affected, often very seriously and irreparably, by an armed conflict.

This prompts us to examine the relevance and adequacy of international criminal justice for victims of war crimes, crimes against humanity and genocide. The question is how the attention given to victims under international criminal justice differs from or is similar to looking after them in national criminal justice systems.

The difficulties in attending to victims under international criminal law

Although the suffering and damage sustained by victims are indisputably real and must be recognized, we should nevertheless bear in mind that the role of the criminal justice system is above all to maintain law and order. It is not an instrument to ensure that the severity of sentences reflects the suffering of individuals, although it is on this suffering that the victims' demands are based. The system punishes people for the fact that they have breached the law, not for the fact that they have inflicted trauma as perceived subjectively.²⁸ The increasing importance attached to the victim in criminal proceedings might hamper the achievement of the aims of those proceedings and in some cases impede the

25 David Miers, *An International Review of Restorative Justice*, Home Office Research, Development and Statistics Directorate, London, 2001.

26 Hannah Arendt, *The Human Condition*, University of Chicago Press, Chicago, 1958.

27 Strang, above note 10.

28 Denis Salas, "L'inquietant avènement de la victime", *Sciences humaines*, Vol. 47 (2004), pp. 90–3.

accused in exercising his/her right to defence. And increased victim participation in the proceedings might not be as beneficial for the victims as some people seem to think.²⁹ In any case, whether the trial helps to relieve the victims' suffering and helps them rebuild their lives remains very much open to debate.³⁰

The difficulties now known to be faced by the victims of crimes under national law may be extrapolated, in certain respects, and applied to the victims of international crimes. The needs of victims of human rights violations and breaches of international humanitarian law might prove even more urgent and compelling, given the high degree of violence involved, the scale of harm done and the political nature of those crimes,³¹ but also for reasons of a cultural and social nature. This factor makes the manner in which victims of international crimes are looked after even more complicated and pitfall-prone than the question of how best to look after victims of crimes under national law. The reasons for this will be presented in more detail later.

The specific nature of harm done to victims of international crimes

The victims of crimes committed in the context of internal armed conflict have for the most part suffered particularly serious violence affecting not just one individual in particular but thousands of members of a community or of an ethnic, religious or national group. This has various consequences. First, the probability of trauma grows in proportion to the scale of the violence.³² In the case of human rights violations, it is often entire communities that are the target of violence and genocide on ethnic, political, ideological or economic grounds. Like the victims of crime under national law, the victims of international crimes seek to understand why they were the target and what their aggressors' motives were, in an attempt to regain control of their lives and give meaning to their experience. Above all they feel a need to understand why the social group to which they belong was the target of these crimes. The quest for truth is not therefore confined to the individual and his personal identity, but concerns also the community.

The wrong suffered by the victim also has an effect on his identity as a member of a given group. This fact increases still further the risk of psychological trauma.³³ Victims in the context of international conflict are affected not only as regards their perception of self, of others and of their conception of justice. They are also affected in their relationship with their community. Moreover, the purpose of attacking a population or social group as part of an armed conflict by means of large-scale violence and collective massacres is often to destabilize and

29 Cesoni and Rechtman, above note 6.

30 Jamie O'Connell, "Gambling with the psyche: does prosecuting human rights violators console their victims?" *Harvard International Law Journal*, Vol. 46 (2005), pp. 295–345.

31 Wemmers, above note 19.

32 Spalek, above note 18.

33 Yael Danieli, "Essential elements of healing after massive trauma: complex needs voiced by victims/survivors", in Dennis Sullivan and Larry Tiftt (eds.), *Handbook of Restorative Justice: A Global Perspective*, Routledge, London, 2006, pp. 387–400.

gradually bring about the disintegration of the community, both physically and in terms of identity. This explains why, following a collective trauma caused by armed conflict and affecting an entire community or country, the victims must not only overcome their individual suffering but also take part in a process of social healing involving all those involved in the conflict. Violence with racial or ethnic motives that targets a given social group can cause generalized fear among the members of the community and be the cause of post-traumatic stress reactions such as denial, anger, sadness or other distress.³⁴ It also appears that this type of trauma generally affects not only the direct victims of violence and their immediate circle, but is often passed down through subsequent generations. This has been observed, for example, in the children of survivors of the Holocaust,³⁵ who seem to have absorbed, more or less unconsciously, the victimization by which their parents were marked.

It should be noted that the ad hoc international criminal tribunals mention victims merely in terms of the protection to which they are entitled. Since the principal aim of the international criminal tribunals is to prosecute individuals presumed guilty of serious violations of international humanitarian law, victims are not assigned an active role. The prosecutor in the ad hoc tribunals is in charge of the way the case is conducted. Victims cannot set out their own objectives, which sometimes differ from the prosecutor's.³⁶ Their role in the proceedings is only that of witness.³⁷ Moreover, there is no provision for any compensation for victims for the harm suffered. This has been regarded as an injustice towards the victims and many NGOs have protested against it.³⁸ As Walleyn writes, "the ICTR [International Criminal Tribunal for Rwanda] itself recognized the problem and tried to compensate by allowing the participation, as *amicus curiae*, of the representatives of certain victims' associations and experts closely associated with them ... On 12 October 2000 the president of the ICTR sent to the secretary-general of the United Nations a detailed report on the problem of compensating victims and their participation in proceedings. The report advocated the setting up

34 Thema Bryant-Davis and Carlota Ocampo, "Racist incident-based trauma", *Counselling Psychologist*, Vol. 33 (4), 2005, pp. 479–500.

35 Yael Danieli, *International Handbook of Multigenerational Legacies of Trauma*, Plenum Press, New York, 1998.

36 Claude Jorda and Jérôme de Hemptinne, "The status and role of victims", in Antonio Cassese, *The Rome Statute of International Criminal Court*, Oxford University Press, Oxford, 2002, Vol. II, pp. 1389 ff.

37 Carsten Stahn, Hector Olásolo and Kate Gibson, "Participation of victims in the pre-trial proceedings of the ICC", *Journal of International Criminal Justice*, Vol. 3 (2005); Jorda and de Hemptinne, above note 36.

38 See in particular the various reports on victim participation published by Human Rights Watch (in particular *Memorandum to the International Criminal Court*, March 2004), the International Federation for Human Rights (in particular *Garantir l'effectivité des droits des victimes*, October 2004), Redress (in particular "Ensuring the effective participation of victims before the International Criminal Court comments and recommendations regarding legal representation for victims", March 2005). All these documents plus other reports may be consulted at www.vrwg.org/Publications/1.html (consulted in February 2007). See also G. Ndobu, "Les victimes face à la justice. Rwanda, deux ans après le génocide: quelles juridictions pour quels criminels?", in A. Destexhe, and M. Foret (eds.), *De Nuremberg à La Haye et Arusha*, Bruylant, Brussels, 1997.

of a compensation fund with explicit reference to the United Nations Compensation Commission.³⁹ (our translation).

The failure of international criminal proceedings vis-à-vis victims

The pace of the action taken by the international criminal justice system is also very important, for the healing and restoration of the victims of large-scale violence is a complex and dynamic process. Their needs may vary according to their strategies for adapting and coming to terms with their suffering. This also depends on the people who surround them and the types of help they receive.⁴⁰ The sheer length of the entire procedure often poses a problem for the victims of crimes under national law: the various pre-trial stages sometimes spread themselves over several years after the act that prompted them, and are often ill-timed in terms of the victims' personal healing.⁴¹ This is even more the case for the victims of international crimes, since international judicial mechanisms are very slow and dependent on economic and political factors.⁴² The end of an internal conflict is generally synonymous with rebuilding political and other institutions, holding free elections, legislative reforms, setting up an independent judicial apparatus and police force, stabilizing the national currency, rebuilding the economic infrastructure and so forth. The time-scale for the judicial process is therefore not necessarily in tune with victims' needs or with the process of tapping and developing personal and collective restorative resources.

At the same time we know that few of the accused found guilty by the ad hoc tribunals pleaded guilty (for example, of twenty-two cases completed before the ICTR in which the accused was found guilty, only about a third of the accused pleaded guilty). Even among those who pleaded guilty, the purpose was sometimes not an to acknowledge guilt but rather to obtain a reduced sentence.⁴³ In fact, international legal systems have regarded an acknowledgement of guilt as proof of honesty on the part of the perpetrator.⁴⁴ Here we might recall that the judges found that "weight and importance" should be ascribed to a guilty plea.⁴⁵ This paucity of guilty pleas means that the victim often faces denial, which poses a further setback to healing.

Moreover at the international level, victims have a right to reparation. While there is no need to go into the details of this process, a number of questions arise:

39 Luc Walleyn, "Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole", *Revue Internationale de la Croix-Rouge*, Vol. 84, No. 845 (2002).

40 Spalek, above note 18.

41 Noëlle Languin and Christian-Nils Robert, *Criminalisation et décriminalisation. Victimes: rôles, attentes et déceptions*, Bruxelles – Fondation universitaire presentation at a conference, 20–21 avril 2007.

42 David Bloomfield, Teresa Barnes and Luc Huyse, *Reconciliation after a Violent Conflict. A Handbook*, International Institute for Democracy and Electoral Assistance (IDEA), Stockholm, 2003.

43 Thierry Cruvellier, *Le tribunal des vaincus, un Nuremberg pour le Rwanda?* Paris, Calmann-Lévy, 2006.

44 ICTY, *Prosecutor v. Erdemovic*, Case no. IT-96-22, Judgement of the Appeal Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese.

45 ICTR, *Prosecutor v. Ruggiu*, Case IT-97-10, Judgement of the Chamber of First Instance, 1 June 2000, para. 55.

- Will it be necessary to wait for the end of a trial and a guilty verdict against the accused before reparation for the victims can be decided?
- Could the victims receive reparation, as soon as their status as victims has been recognized, by means of a fund created for that purpose? In other words, could the stage of the judicial process at which victimhood is established (i.e. that ascertains what acts were committed against whom) be sufficient to serve as a legal basis for reparation?
- If reparation can be paid only when a verdict has been delivered in a criminal trial, what will happen to individuals who are recognized as victims but then regarding whom no one is convicted.
- Is it fair that certain victims who manage to present their cases before a court receive reparations while thousands of other victims receive nothing?
- What about victims who “come too late” – that is, after the perpetrator of the crimes from which they suffered has been convicted?
- What form will the reparation take? If the reparation is financial, will there be enough resources to compensate all the victims?
- It is important to note, along with Wemmers, that the application form for reparations that the victims must fill out seems to allow them broad scope for expressing different claims. There seems little likelihood that those claims will be granted given the possibilities (in particular the financial means) available to the International Criminal Court.⁴⁶ This could also cause a second victimization.

Collective social and cultural factors

This leads us to consider the impact of the socio-political situation on the way in which victims are looked after by the international criminal justice system. In the immediate aftermath of a conflict between several subgroups of a given population or country, social peace and national reconciliation require not only the healing of individuals but also the healing of society as a whole. The recovery of individuals requires the restoration of the socio-political fabric. Consequently society as a whole, including its institutions, must acknowledge the events of the past and assume responsibility for any acts or omissions vis-à-vis the civilian population. Social recovery presupposes coming to terms with the events and an effort to create collective memory – that is, official recognition of a truth.

Setting up an instrument of international criminal justice also presupposes an appropriate approach in cultural terms, taking account of local customs and sensitivities as regards justice and the reaction to victimization. The example of the *gacaca* courts in Rwanda clearly shows the need for entities suited to the specific context of the conflict and the communities affected it. The *gacaca* courts are based on a traditional dispute-settlement method in which respected male elders of the community pass judgment on disputes concerning private

46 Wemmers, above note 19.

property, inheritance, physical assault or marital relations. The sentence imposed by these tribunals is not aimed only at the individual who committed the act, but also at the members of his family and clan, and typically involves providing beer for the community as a token of reconciliation.⁴⁷ This method allows swift justice, requires scant financial and human resources and is not too harsh towards those found guilty. It is accepted and understood by everyone and entails a high degree of participation by the public. However, these courts have been modernized with a view to trying those accused of genocide, and a law to that effect was adopted in 2001 and subsequently amended in 2004. The formal, modernized version of these courts is quite different from the traditional *gacaca*, with the new version allowing imprisonment and consisting of judges elected by local officials. And it should not be forgotten that the very concept of “victim” is a cultural construct. In African and Asian societies, for example, “victim” is understood in a broader sense and encompasses the person’s immediate family and community. Consequently, in cases brought under the international system of criminal justice in such contexts, account must also be taken of indirect victims if that system wishes to provide a remedy that actually meets the expectations of the victims of human rights violations.

These victims find themselves confronted with a further destabilizing event, since we know that a person recognized as a victim in the early stages of the proceedings can, depending on the accusations on the final charge sheet, later lose this status as the proceedings progress.⁴⁸ How can these victims be expected to accept being abandoned in this way by international justice? It probably amounts

47 Alice Karekesi, “Juridictions gacaca: lutte contre l’impunité et promotion de la réconciliation nationale”, *Cahiers du Centre de Gestion des Conflits*, Vol. 3 (2001), pp. 9–96.

48 The first phase is the “situation phase”. Directed principally by the prosecutor, it involves investigating the acts committed in the context of a given situation, at present the Democratic Republic of the Congo, Uganda, Darfur in Sudan and the Central African Republic. The victims may take part in this stage of the proceedings under a decision taken by Pre-Trial Chamber I on 17 January 2006 (ICC Decision on applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 [public redacted version], ICC-01/04-101, 17 January 2006, hereafter referred to as the “Decision of 17 January 2006”) and confirmed by a decision of Pre-Trial Chamber II on 10 August 2006 (ICC Public Redacted Version of the Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02-04-101, 7 August 2007). At this stage they are recognized as “victims of a situation”. Thus they may give their opinion on the work of the Prosecutor, may be consulted on numerous specific procedures and are kept informed about the progress of criminal proceedings. They have the right to request specific measures, to have access to confidential documents, and to take part, under the supervision of the Pre-Trial Chamber, in all procedural acts connected with the case. Large numbers of victims might therefore be involved, since a “situation” generally concerns an entire state or at least a very large area. The only restriction on recognizing someone as having the status of victim is that he must meet the conditions set out in the definition contained in the Statute. As we shall see, those conditions are fairly broad. The second phase begins following the issuing of an arrest warrant or a summons to appear (Decision of 17 January 2006, para. 65). This is the phase dealing with the specific case, as opposed to the “situation”, in which a specific person is concerned on whom the investigation will focus. Recognition of victim status in “the situation phase” automatically involves verification of that status in this next phase. However, not all victims of a “situation” are necessarily victims of a “case”. So it has been possible to recognize an individual as having suffered harm in the Democratic Republic of the Congo and therefore include that

to a second “victimization”, and the justice system thus fails to achieve its goal (illusory though it may be) of helping the victims by means of criminal trials.

International justice faces one further problem – it is, as Hazan⁴⁹ says, justice divorced from local realities. Clearly justice must be rooted in a society and a culture, a need the international criminal tribunals do not appear to meet. This also entails a number of problems regarding victim protection. In the case of the ad hoc tribunals it was not possible to give adequate protection to some witnesses and “witness-victims” – some were threatened and even killed.⁵⁰ Therefore victims who take part in criminal proceedings run a greater risk under international criminal law than under national law.

Conclusion: a need for various types of justice?

According to Villa-Vilencio,⁵¹ the social reconstruction needed for the transition from a situation of internal conflict to a stably restored, durable socio-political framework often requires a range of varying types of justice, including punishment-based justice but also schemes intended to resolve the conflict by means of reparation. Democracy and lasting peace in a society emerging from conflict requires also reconciliation between victims, perpetrators and the community at large by means of restorative justice.⁵² Restoring the judicial process is essential for victims, perpetrators and the entire community to lay a new foundation for the society in which they live.

In any case, it is not possible to implement a viable, lasting peace within a society and the rule of law without a reasonable degree of co-operation between victims, perpetrators and the rest of the community. This requires restoration of social ties. The goals of punishment and reparation must be fixed within the context of transitional justice. The wrongs, the crimes of the past must be condemned in order to reaffirm morality and human dignity and to deal with feelings aroused by victimization.⁵³ This requires a punishment paradigm to meet

individual as a victim of that “situation” without his being a victim of the crimes allegedly committed by the person apprehended or named on the arrest warrant. This was the case for the persons recognized as victims by the Decision of 17 January 2006 who were nevertheless not victims of the crimes allegedly committed by Thomas Lubanga Dyilo, the only accused currently on trial at the ICC in the context of that “situation” (ICC, *Decision on the applications for participation in the proceedings of VPRS 1 to VPRS 6 in the Case Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-172, 29 June 2006). This fact alone brings the risk of great frustration among those initially attributed victim status at the “situation” stage and then who, from one day to the next, find themselves barred from participation in the process. How might they react if, in addition, the crimes of which they were the victims were not prosecuted for lack of proof, lack of an accused or simply lack of time?

49 Pierre Hazan, *La justice face à la guerre, De Nuremberg à La Haye*, Stock, Paris, 2007.

50 Laetitia Bonnet, “La protection des témoins par le TPIY”, *Droits fondamentaux*, no. 5 (2005); Cruvellier, above note 43.

51 Charles Villa-Vilencio, “Transitional justice and prosecution”, in Sullivan and Tifft, above note 33, pp. 343–54.

52 Howard Zehr, *Changing Lenses*, Herald Press, Scottsdale, PA, 1995.

53 Jeffrie G. Murph and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1994.

the need for retributive justice, but also restorative justice to make it possible to identify the wrong done to the victim and the perpetrator's responsibility for this. In addition, improving the lot of the victims – by means of various remedies such as restitution, compensation and assistance – is also necessary. The victim's entitlement to these remedies is clearly established in the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. But the adoption in 2005 by the UN General Assembly of 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 Law⁵⁴ opened the door for the introduction of more restorative responses than those typical of the traditional legal mechanisms, namely restitution, compensation and rehabilitation.

In addition to these traditional types of reparation, these principles also recommend measures more focused on restoring social ties, remedies such as “satisfaction” (which includes the search for the truth, an end to violence, verification of the facts and complete and public revelation of all the facts, public apologies and commemoration ceremonies, official recognition of the facts, and establishment of days and places dedicated to the memory of victims) and guarantees that there will be no repetition (for example, effective control of the armed and security forces, strengthening of judicial power and reform of laws which encouraged violations in the past, and instruction on human rights and international humanitarian law for all sectors of society, particularly members of the police force, the army and the security services).

Criminal prosecution of the perpetrators of serious international crimes is increasingly regarded as an obligation under international law.⁵⁵ However, although the punishment-based justice of the ad hoc tribunals and the International Criminal Court exists to aid transitional justice in the wake of conflict, criminal proceedings are not always without risk⁵⁶ and are not always politically feasible in highly unstable situations. They can compromise or even destabilize a fragile peace process, create tension within a society – fragmenting it rather than uniting it – and even endanger a country's very government apparatus by purging its administrative and executive officials. In such situations the legal apparatus is often hindered and its human and financial resources affected. A society being rebuilt following internal conflict must often take crucial decisions regarding the priority to be given to certain reforms and developments vital to its basic functioning. Often it must engage not only in the material reconstruction of infrastructure but also in the rebuilding of various bodies, both private and public, that can contribute to the socio-economic and political stability indispensable to lasting peace. That was the case in South Africa, for example, which quite simply, both for political reasons and for lack of resources within the legal system, could

54 Resolution 60/147, adopted by the General Assembly on 16 December 2005.

55 Diane Orentlicher, “Settling accounts: the duty to prosecute human rights violations of a prior regime”, *Yale Law Journal*, Vol. 100 (1991), pp. 2537–615.

56 Bloomfield et al., above note 42.

not have sustained lengthy proceedings.⁵⁷ A Truth and Reconciliation Commission was set up to help to seek the truth about human rights violations during the apartheid years, launch a process of reconciliation and achieve real national unity.⁵⁸

It is worth pointing out that many aspects of the South African Truth and Reconciliation Commission are in keeping with the principles of restorative justice. One clear illustration is the fact that the Commission stressed, as a central pillar of the quest for truth, the public acknowledgement of past violations. This recognition was perceived as a way of restoring the victims' dignity.⁵⁹ The Commission also recommended measures for material reparation in the form of victim-rehabilitation programmes as well as symbolic measures such as a national remembrance day, monuments in memory of victims and museums on the theme of past violence. Such measures are very much in keeping with the principles of restorative justice, placing the emphasis as they do on reconciliation between victims and perpetrators, the various communities concerned and the society as a whole. Nevertheless, a number of authors have expressed reservations about memorial legislation, commemorations and the erection of monuments.⁶⁰

There are many definitions of restorative justice, but despite the lack of consensus this concept seems to be increasingly accepted at the international level as a "process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future".⁶¹ Along the same lines, Parmentier⁶² explains that the truth and reconciliation commissions may be comparable to restorative justice for several reasons. They regard crime above all as a violation of human rights and aim to heal and restore those affected by the crime. They encourage all parties involved to take part in resolving the conflicts, stress the responsibilities of those who committed the crimes and, in so doing, not only encourage expression by the victims of their personal experience and acknowledgement of their victimization, but also help to restore dignity to the perpetrators. They provide a better understanding of why the perpetrators did what they did and also the nature of the socio-political structures that allowed those acts to be committed in the first place. Such practices may lead to the rebuilding of the collective memory of a country and to an understanding shared by all parties concerned, but also to recommendations as to how to improve the functioning of the society as a whole

57 D. Tutu, *No Future without Forgiveness*, Rider, London, 1999.

58 R. Lyster, "Why a truth and reconciliation commission?", *Current Issues in Criminal Justice*, 12 (1), 2000, pp. 114–22.

59 Ibid.

60 N. Loraux, *La cité divisée, l'oubli dans la mémoire d'Athènes*, Payot & Rivages, Paris, 1997; P. Ricoeur, *La mémoire, l'histoire et l'oubli*, Ed. du Seuil, Paris, 2003.

61 T. Marshall, "The Evolution of Restorative Justice in Britain", *European Journal of Criminal Policy and Research*, 4 (4), pp. 21–43, 1996.

62 S. Parmentier, "La Commission "vérité et réconciliation" en Afrique du Sud: possibilités et limites de "justice restaurative" après conflits politiques majeurs", in D. Salas (ed.), *Victimes de guerre en quête de justice*, Collection Sciences criminelles, L'Harmattan, Paris, pp. 55–88, 2004.

so that such serious violations of human rights and generalized violence do not recur.

Certain aspects of truth and reconciliation commissions differ markedly from the practices of restorative justice. The South African Commission's principal aim was to facilitate communication between the different parties rather than actually to mediate between them. It might also be added that the final aim was not to ensure that the parties involved agreed on the details of adequate reparations to compensate the victims. This is the traditional role of a mediator. The purpose of the Commission in South Africa was rather to devise moral reparations, such as the nurturing of a collective memory and the putting forward of recommendations for the future.

The many facets of restorative justice are intended to encourage dialogue and reconciliation between victims, perpetrators and the community.⁶³ It offers an opportunity for the perpetrators to accept responsibility for their deeds and scope for repairing the wrongs done, strengthening social ties between victims and perpetrators and building more stable and more peaceful communities. These principles correspond closely to the needs of a society in political transition, rebuilding itself after an internal conflict.⁶⁴ Some authors⁶⁵ believe that restorative justice can play an important role in dealing with the aftermath of armed conflict at judicial level, such as in criminal cases brought before the ad hoc tribunals for crimes perpetrated in Rwanda and in Yugoslavia as well as the International Criminal Court. Community restorative-justice programmes in Northern Ireland have been an important part of the process of maintaining peace there.⁶⁶ These methods appear to have helped to reduce violence and change attitudes towards violence while encouraging dispute-settlement mechanisms at community level. The development of these methods for other internal disputes, such as in South Africa,⁶⁷ shows that it is essential to involve the community in implementing this type of justice and to ensure that the conflict-resolution models take account of the needs and cultural norms specific to the community concerned. Despite the many benefits offered by methods of conflict resolution and reconciliation, such as truth and reconciliation commissions and other “restorative justice” practices, the international community still largely prefers to deal with the aftermath of internal conflicts in terms of criminal law. There are many arguments in favour of this approach.⁶⁸ Prosecution under criminal law, it is said, prevents private revenge, summary executions and the resulting disturbances in society. It also prevents any return to power of those responsible, directly or indirectly, for instigating the

63 J. Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, Oxford, 2002.

64 R. G. Teitel, *Transitional Justice*, Oxford University Press, New York, 2000.

65 P. Roberts, “Restoration and retribution in international criminal justice: an exploratory analysis”, in A. Von Hirsch, J. Roberts, A. E. Bottoms, K. Roach and M. Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Hart Publishing, Oxford, 2003.

66 K. McEvoy and A. Eriksson, “Restorative justice in transition – ownership, leadership and “bottom-up” human rights”, in Sullivan and Tifft, above note 33, pp. 321–35.

67 Roche, D., “Restorative justice and the regulatory state in South African townships”, *British Journal of Criminology*, 42, (2002), pp. 514–33.

68 Bloomfield et al., above note 42.

conflict. Some also consider that only proceedings in a court of law provide clear recognition of the value and the dignity of the victims of past crimes and that a society recovering from an internal conflict has a moral obligation to prosecute and punish those who perpetrated violent acts. Some feel that court proceedings are needed to establish individual responsibility and thus to avoid the perception that an entire community (“the Serbs”, “the Muslims”, “the Hutus”, “the Tutsis”, etc.) is responsible for the acts committed. As Semelin explains when discussing memory of victimhood,⁶⁹ it is important to avoid stigmatizing a particular social group in such situations, for this brings the risk of provoking even more violence and rekindling the conflict. It must nevertheless be pointed out that it is easier to single out scapegoats⁷⁰ and bring cases against a limited number of individuals than to take into consideration the overall geopolitical situation in a given region. Some feel that dealing with the aftermath of conflict through the international criminal justice system serves to strengthen the legitimacy and process of democratization in a given country or region, because it boosts public confidence in the new regime’s capacity for democratic governance. Criminal proceedings are now part of the international scene but, as we have observed, they do not give the victims what they need. Helping the victims requires a restorative approach oriented towards the rebuilding of their lives and of their societies. Examples of this type of restorative justice are given above.

Finally, we should not forget that criminal prosecution is often regarded as the best way of countering impunity. But, although this idea is very widespread, it is not necessarily true, because only a very small percentage of the criminals are ever brought to trial under the international criminal justice system – one of the design features of the international criminal tribunals for the former Yugoslavia and Rwanda, as well as of the International Criminal Court itself.

69 Jacques Sémelin, *Purifier et détruire: usages politiques des massacres et génocides*, Ed. du Seuil, Paris, 2005.

70 Christian-Nils Robert, *L’impératif sacrificiel: justice pénale: au-delà de l’innocence et de la culpabilité*, Ed. d’en bas, Lausanne, 1986.

REPORTS AND DOCUMENTS

Analysis of the punishments applicable to international crimes (war crimes, crimes against humanity and genocide) in domestic law and practice

This analysis of the punishments applicable to international crimes (war crimes, crimes against humanity and genocide) covers 64 countries. The sample is satisfactory in terms of geographical distribution and covers countries with a Romano-Germanic (civil law) tradition and others with a common law tradition. The relevant legislation and case law of these States, where such exists and is available, have been studied in order to examine as accurately as possible the punishments applied or applicable by the competent courts. For each of the countries examined, the following questions were explored:

- the main laws applicable;
- the texts of heads of indictment where they are provided for in the laws;
- the persons targeted;
- the competent court(s);
- what provision is made in respect of command responsibility;
- what provision is made regarding the exclusion of the “superior orders” defence;
- the scales of punishments applicable;
- applicable attenuating and aggravating circumstances;
- the objectives of the punishment.

Detailed tables by country and region have prepared and are available at the Advisory Service of the ICRC. The main observations concerning the punishments applicable to these crimes are summarized below.

States' obligations under IHL to prosecute and punish international crimes

A substantial number of the IHL rules are set out in the four 1949 Geneva Conventions and the 1977 Additional Protocols. States are obliged to put an end to all the violations set out in these texts. There are special obligations in respect of certain serious violations referred to as "grave breaches".

Grave breaches comprise some of the most flagrant violations of IHL. These are specific acts, listed in the Geneva Conventions and Protocol I, and include wilful killing, torture and inhuman treatment as well as wilfully causing great suffering or serious injury to body or health. The annexed table provides a full list of such grave breaches. Grave breaches are considered war crimes. War crimes can also be committed in non-international armed conflicts.

Both the Conventions and the Protocol clearly stipulate that grave breaches must be punished. However, these texts do not themselves define specific penalties. Nor do they institute jurisdiction to try the perpetrators. It is up to States to take the necessary legislative measures to punish those responsible for grave breaches of humanitarian law.

Generally, the criminal law of a State applies only to acts committed on its territory or by or against its nationals. IHL goes further because it requires of States that they seek out and punish all those who have committed serious breaches, irrespective of the nationality of the perpetrator and the place of the offence. This principle, known as the principle of *universal jurisdiction*, is essential to ensure effective prosecution and punishment of serious breaches.

IHL imposes on States the obligation to take the following specific measures in respect of grave breaches:

Firstly, the State must promulgate national laws that prohibit and provide for prosecution and punishment of grave breaches, either by enacting laws to that effect or by amending existing laws. These laws must cover all persons, whatever their nationality, who commit or order others to commit grave breaches, including cases where the breaches resulted from dereliction of a duty to act. The laws must cover acts committed both inside and outside the State's own territory.

Secondly, the State must seek out and prosecute persons alleged to have committed grave breaches. It must prosecute these persons itself or extradite them to another State where they will be tried.

Thirdly, the State must institute a responsibility on the part of its military commanders to prevent the perpetration of grave breaches, to stop them when they occur and to take measures against persons under their authority who perpetrate such offences.

Fourthly, States must provide each other with judicial assistance in any procedures relating to serious breaches.

States must perform these obligations in peacetime as well as in time of armed conflict. To be effective, the measures set out above must be adopted before the grave breaches have occurred. Finally, it can be affirmed that, with the

exception of some minor differences, the same obligations apply in respect of genocide and crimes against humanity.

National legislation

Although the Geneva Conventions enjoy practically universal adherence and ratification, the national legislation of a great many States is not in compliance with the above requirements of IHL. For example, several countries have not incorporated into their criminal law the provisions necessary for the prosecution and punishment of international crimes, including grave breaches, and the punishments that apply to them.

Where measures have been taken, the solutions adopted vary from country to country. Most of the provisions relating to the implementation of IHL, particularly as regards the prosecution and punishment of the most serious breaches, are dispersed in a number of implementing texts (penal code, code of military justice, code of military discipline, special laws...). These provisions are rarely to be found in a single text. The relevant crimes are sometimes included in general criminal law texts or in military ones or in both. In some cases, the ordinary courts have exclusive jurisdiction to try the perpetrators of these crimes (even for members of the military, as is the case for example in South Africa, Belgium, Canada and in a number of Central European countries, such as Bosnia and Herzegovina, Estonia, Lithuania, Macedonia, Montenegro, Serbia and Slovenia), whereas in others, it is the military courts that have jurisdiction (even for civilians, as is the case in Switzerland and the Democratic Republic of the Congo (DRC)). Other systems have instituted concurrent jurisdiction, the division of labour following the status of the accused (civilian or military) or the fact that he was on duty or not.

Since the adoption of the Rome Statute, there has been a tendency for States to use the crimes included in the Statute as a vehicle for implementing a large part of the IHL obligations incumbent on them, even in the case of States that have not ratified the Rome Statute. This trend is particularly marked when it comes to the implementation of the criminal law provisions in respect of war crimes in non-international armed conflicts.

It is also interesting to note that the clarity of the system adopted, particularly in terms of the sharing of jurisdiction between the civil and military courts, may depend on whether or not the State has had relevant practical experience (Colombia, Peru). In the case of Columbia, for instance, it is expressly stated that international crimes may be committed on duty and therefore fall under the jurisdiction of civilian tribunals. The same observation may be made with regard to the impact of some form of international technical assistance on the degree to which domestic law is in line with international law (Rwanda, Timor Leste, Cambodia).

However, it may be observed that, regrettably, in many cases, the measures taken are incomplete. For example:

- the list of crimes included in national law is frequently incomplete;
- the laws often do not contain references to the general principles of international criminal law. Consequently, the general provisions of national criminal law remain applicable to international crimes and provide a basis for obstacles to be placed in the way of criminal prosecutions. Such obstacles may be contrary to international law, for example the application of a statute of limitations (Kenya, Argentina, Peru and Poland) or the defence of superior orders (Nicaragua, Guatemala, Brazil, Thailand);
- in some cases the necessary amendments and adjustments are not made to all the relevant texts, particularly those that apply to members of the military. As a result, the door is left open to parallel prosecution on the basis of the same facts under both the law on international crimes and the law on military offences. These crimes are generally tried by distinct tribunals and give rise to very different sanctions (for example, in some instances, the serious breach committed against the civilian population is punished by life imprisonment, whereas the military offence against the civilian population based on the same facts carries a maximum sentence of two years' imprisonment).

As regards punishments provided for in the case of international crimes, they cover a wide range. Almost systematically, national legislation provides the most severe punishments for genocide and crimes against humanity. Capital punishment is sometimes the only one provided for (Burkina Faso, Burundi, Congo-Brazzaville, Côte d'Ivoire, Mali, Niger). Some States reserve the most severe punishment for cases of genocide and crimes against humanity involving death (Canada, United Kingdom (UK), India). A very small number of systems provide for scales of punishment covering a significantly wide range. It is the case, for instance, for Central and Eastern European countries. Finally, some national law systems have introduced a reduced sentence for incitation to or complicity in genocide (the United States (US), El Salvador, Guatemala, Honduras, Mexico, Brazil, Nicaragua and France).

There is a wide variety in the sentencing systems for war crimes. Some systems make no distinction between the various crimes and impose the most severe sentence, be it the death penalty (Burundi, Congo-Brazzaville, Côte d'Ivoire and Mali) or life imprisonment (Congo-Brazzaville, as an alternative to capital punishment) or lifelong penal servitude (DRC). Other laws make a distinction between war crimes that have caused death and others. The death penalty (Nigeria, DRC, the US, India) or life imprisonment (Uganda, Canada, the UK, and as an alternative to the death penalty in the US and India) are reserved for the former category, while limited-duration prison sentences or lifelong penal servitude (DRC) are prescribed for the latter. By the same token, other regimes provide for differentiated penalties for the various crimes depending on whether they targeted the civilian population or prisoners of war. The former attract life imprisonment and the latter limited-duration prison sentences (Kenya). Finally, some legal systems provide a detailed scale of sentences for each of the crimes identified as war crimes (very detailed: Belgium, Colombia, Niger and Rwanda; less detailed:

Poland, Slovakia, Lithuania, Bulgaria, Estonia, Macedonia, Czech Republic and Russia).

Some war crimes can also be military offences under military texts and tried as such by the competent courts or tribunals. The crimes to which this dual regime applies and which are among the most frequently encountered are pillage, acts of violence against a person *hors de combat* with a view to despoiling him or her, and abuse of the emblem and distinctive signs. Pillage with violence attracts severe penalties, including lifelong penal servitude and life imprisonment (Burundi, Congo-Brazzaville, DRC, Honduras, Algeria, Côte d'Ivoire and Niger). In these cases, the heaviest sentence is often expressly reserved for the instigator(s). Other types of pillage are generally associated with limited-duration prison sentences ranging from five to 20 years. Acts of violence against a person *hors de combat* also carry severe penalties: death (Algeria, Côte d'Ivoire), life imprisonment (Niger), lifelong forced labour (Congo-Brazzaville) or limited-duration forced labour (Burundi) and limited-duration prison sentences (El Salvador, China). Abuse of the distinctive emblem carries a limited-duration prison sentence ranging from one to 10 years (Algeria, Congo-Brazzaville, Côte d'Ivoire, Niger, DRC and Mexico). In some cases, a military tribunal is left full discretion regarding the sentence to be imposed for certain military offences (US, Honduras), while other legal systems provide excessively flexible sentencing scales for the same crime, ranging in some cases from 60 days to 20 years or internment (for an indefinite period) (Peru).

Some judicial systems provide for additional optional penalties, generally in the form of fines (South Africa, Timor Leste, US, Colombia, Mexico) or deprivation of certain rights (US, Peru, Honduras, Mexico, Romania). Some military texts also include accessory penalties that generally affect the individual's military grade and status (Rwanda, Colombia). Finally, some texts add remedies for and compensation of victims (Belgium, US, UK, Burundi), including the institution of a fund to provide aid for victims (Canada, Timor Leste).

National practice

Whereas the international criminal courts and tribunals publish copious case law, the case law published by national courts in relation to international crimes is much more meagre, even though the situation tends to change in some regions which were affected by conflicts (former Yugoslavia, Rwanda). It is therefore more difficult to identify trends. Furthermore, some decisions have been handed down in highly politicized contexts and should accordingly be interpreted with some caution. Others that might be relevant eliminate all discussion about international crimes, particularly war crimes, by refusing to acknowledge the existence of an armed conflict and applying the law on ordinary crimes (murder, manslaughter, assault). Finally, it should be borne in mind that national courts apply national law, which limits or in some cases reduces to a minimum the exercise of discretion

on the part of the judiciary when it comes to applying sentences for the most severe crimes.

Both military and civilian courts have been involved in prosecution and punishment of international crimes at national level. The choice does not seem to be systematically guided by the status of the person being tried. It is interesting to note that, in one case, the civilian courts have been seized with cases, the purpose of which was to determine whether a civilian court or a military tribunal had jurisdiction on the merits (United States, *Hamdam* case (2005)). Moreover, civilian courts can also be called upon to hear cases of torture, where responsibility for the acts in question lies with superior military officers, in order to grant compensation and damages to the victims. (United States, *Ford v. Garcia* (2002) and *Romagoza v. Garcia* (2006)).

With respect to the superior orders defence, many courts consider that such defence can be entertained where the order is not manifestly illegal. Also, in some countries (for example the United States courts, when judging the responsibility of Salvadoran commanders for acts of torture committed by their subordinates – see cases of *Ford v. Garcia* and *Romagoza v. Garcia* referred to above), the principle of command responsibility has been confirmed, even if this form of participation is not specified in the legislative texts. The US courts rely on, i.e., the case law of international criminal courts and tribunals (ICTY – *Delalic* case (2001)) to reaffirm the need for there to have been effective control of the superior over the subordinate.

As regards the sentences applied, they depend in the first instance on national legislation and cover the death sentence and prison sentences of varying lengths. For example, the sentences handed down in the case of crimes against humanity by the Dili Special Chamber in Timor Leste are generally 10-year prison sentences, whereas the law prescribes a maximum sentence of 25 years. The Belgian courts condemned four people accused of war crimes to sentences ranging from 12 to 20 years in prison. Few of the decisions specify the objectives of the sanctions applied. In Timor Leste, for example, the decisions specify that the sentence aims at a deterrent effect and to further the struggle against impunity, the advent of peace and the promotion of national reconciliation. On this last point, a controversial South African decision considers that amnesty helps to serve the same objective while encouraging disclosure of the truth (*Azapo* case (1996)).

Several of the decisions examined accompany these sentences with other, accessory ones: payment of sums towards reparation for the damage caused (US, Philippines, Rwanda), including payments into a special fund for the victims (Belgium, Rwanda); confiscation or seizure of the condemned persons' property (Rwanda); perpetual and full deprivation of civil rights (Rwanda). Finally, whenever a soldier is sentenced, he is dismissed or stripped of his rank (Belgium, US, Philippines).

*Advisory Service
ICRC Legal Division*

ANNEX

 Grave breaches defined by the 1949 Geneva Conventions and
the Additional Protocol I of 1977

Grave breaches defined by the four 1949 Geneva Conventions (articles 50, 51, 130 and 147 respectively)	Grave breaches defined by the III and IV 1949 Geneva Conventions (articles 130 and 147 respectively)	Grave breaches defined by the IV Geneva Convention of 1949 (article 147)
<ul style="list-style-type: none"> - wilful killing; - torture or inhuman treatment; - biological experiments; - wilfully causing great suffering; - (wilfully) causing serious injury to body or health; - extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. <i>(this provision does not feature in article 130 of the III Geneva Convention)</i> 	<ul style="list-style-type: none"> - compelling a prisoner of war to serve in the armed forces of the hostile Power; - wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions. 	<ul style="list-style-type: none"> - unlawful deportation or transfer; - unlawful confinement of a protected person; - taking hostages.

 Grave breaches defined in Additional Protocol I of 1977 (Articles 11 and 85)

- | | |
|---|---|
| <ul style="list-style-type: none"> - Endangering by any unjustified act or omission the physical and mental health 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 a situation of armed conflict; in particular, carrying out on such persons: physical mutilations; medical or scientific experiments; | <ul style="list-style-type: none"> - making a person the object of attack in the knowledge that he is hors de combat; - the perfidious use of the distinctive emblem of the red cross, red crescent or other recognized protective signs. - <i>The following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of the</i> |
|---|---|
-

removal of tissue or organs for transplantation, except where these acts are indicated by the state of health of the person concerned and are 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.

- ***The following acts, when committed wilfully and causing death or serious injury to body or health:***
- making the civilian population or individual civilians the object of attack;
- 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;
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- making non-defended localities and demilitarized zones the object of attack.

Conventions or the Protocol:

- the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, the object of attack, causing as a result extensive destruction thereof, when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- depriving a person protected by the Conventions or Protocol I of the rights of fair and regular trial.

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