

## INTERNATIONAL CRIMINAL TRIBUNALS

# Interview with Philippe Kirsch, President of the International Criminal Court\*

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### ***How do you view the development of international tribunals?***

It is important to understand first of all that international justice constitutes a system; it is not a series of courts that have no connection with one another. It should also be pointed out that the basic principle remains that states are responsible for prosecuting criminals. It is up to states to exercise jurisdiction over

\* Judge Kirsch was interviewed by Toni Pfanner (editor-in-chief of the *International Review of the Red Cross*) in The Hague on 1 February 2006.

crimes – all crimes, including the most serious ones such as genocide, crimes against humanity and war crimes. Having said that, it is clear that the particular experience of the twentieth century, especially the second half of the century, showed that in certain cases national jurisdictions were unable to perform their tasks fully or correctly, and that in certain cases the international community was unwilling to be satisfied with national jurisdiction. It is precisely in situations where the most serious crimes have been committed that national jurisdictions are least effective.

We began by understanding the need to set up international tribunals at Nuremberg and Tokyo, and subsequently in the former Yugoslavia and in Rwanda. But it became clear that we could not go on creating new tribunals, because these tribunals were turned towards the past and had limited geographical jurisdiction, and setting them up required a great deal of time and money. On each occasion their creation was also subject to a political decision by the international community. Immediately after the end of the Second World War, we realized that a permanent and independent court would one day be required. This process, thwarted by the cold war, was resumed at the end of the 1980s and stimulated by the creation of ad hoc tribunals.

***The United Nations is made up of states and has no real executive branch, but does have international legal authority in criminal matters. Isn't a permanent criminal court getting ahead of political reality?***

To begin with, it should be pointed out that the International Criminal Court is independent from the United Nations and every other political organization. An agreement does exist between the Court and the United Nations, but it is a co-operation agreement, the aim of which is to achieve concrete results, mutual recognition between the two organizations and co-operation at various levels. Co-operation is particularly important for the Court because it is a judicial institution that the states wanted to be strong, despite the lack of an executive authority. The Statute thus establishes a system of co-operation which, although demanding, is not comparable with a national system. There is no police force, no army, none of the tools normally available to a national court. This shortcoming must be remedied by other national or international mechanisms.

Returning to the central point of the question, the earlier international tribunals were imposed on states, whereas the International Criminal Court was created by states and reflects their will. If the system of co-operation is demanding, it has to be emphasized that it reflects the will of the states: the states wanted a demanding system of justice. Logically, apart from the situations imposed on the states, such as that in Darfur, the states parties are merely acting in accordance with their wishes. It is my impression, although I am not in the front line, that co-operation with the Court has been relatively good so far, with fewer of the snags and refusals to co-operate that we have seen so much of in the ad hoc tribunals.

***The ad hoc international criminal tribunals for the former Yugoslavia and Rwanda will at some time cease operations, perhaps without having been able to bring the most prominent defendants to trial. Will the permanent criminal court be able to continue the work of the two ad hoc tribunals once they have ceased to exist?***

No, I don't think that will be possible, for two reasons. First, because their mandate is restricted to certain situations which occurred during a given period. Both tribunals are likely to complete their work in a few years. Second, we are not part of the same system. The ad hoc tribunals belong to the United Nations. We are independent. On both sides – within the United Nations and among states party to the Statute of the International Criminal Court – I can see people being very reluctant to mix the two systems.

***Were the states seeking a court that would be different from the ad hoc tribunals?***

Yes, and the permanent Court offers many advantages. It gets around the shortcomings of the ad hoc tribunals that I mentioned earlier. It is a court that is available immediately. Also, one of the major practical differences between the permanent Court and the other international tribunals – and this is a difficulty – is that the tribunals handled crimes committed in the past, in the course of conflicts that were over. Although things were not always easy, they did not have the enormous practical problems confronting the International Criminal Court, which must deal with crimes that continue to be committed in the course of enduring conflicts in extremely fragile and troubled situations and regions.

***The Court relies primarily on the co-operation of states, especially of those where the acts have been committed. Wouldn't a lack of co-operation on the part of a state represent a challenge to the proper operation of the Court?***

If it is a state party within the framework of a referral by the state having territorial or national jurisdiction, the Court will refer the matter to the Assembly of States Parties and see what it decides to do.

***And if the Security Council refers a situation to the Court, as it did in the case of Sudan?***

If it is a referral by the Security Council, then the Court can refer the matter to the Security Council so that it can ask a state to co-operate and, in the event that the state fails to do so, take the necessary measures. This is rather hypothetical, because the Court is still extremely young. Two and a half years ago it did not yet exist, and it is still being built up. There are many concrete experiences that we have not had yet.

These situations are of course much more complicated, especially if the state is not yet party to the Statute of the Court and the situation concerning it was referred to the Court. The Prosecutor has his own strategy and must submit a report every few months to the Security Council. For now, he and he alone can assess co-operation. For example, the Prosecutor has publicly indicated that he is

not operating from within Sudan and that witnesses have been interviewed in a number of countries. Clearly, there are different ways of achieving a result.

***Many important states, including China, India, Russia and the United States, are not party to the Statute. This creates an impression of double standards. How are you dealing with these problems? How are you maintaining the perception of the Court as an impartial body, which it must have in order to be credible?***

Nationals of a state that is not party to the Statute are not necessarily beyond the Court's jurisdiction. In an international situation, for example when one state intervenes in the territory of another and crimes are committed by nationals of the first state, the Court has jurisdiction even if the first state is not a party but the second is.

But it is obvious that universality, or in any case near universality, is a basic aim of the Court for at least two reasons, one of principle and the other practical. The reason of principle is that it is the only international tribunal ever created by treaty and it must therefore democratically strive to reflect the universality of the international community. As for the more practical reasons, the Statute imposes constraints relating to the consent of certain states except in cases where a situation is referred by the Security Council. In order for the Court to exercise its jurisdiction, it must have either the consent of the state of which the accused is a national or the consent of the state in the territory of which the crime was committed. This leaves a certain number of situations outside the jurisdiction of the Court if there are not a sufficient number of ratifications.

An encouraging trend that I have observed in this context is the sharp increase in knowledge and understanding of the Court just about everywhere, even in states that are not party to the Statute. I have been pleasantly surprised during my recent travels: each time, I notice that the Court is increasingly better known and that it is, therefore, attracting greater appreciation and interest. One of the worst enemies of the Court is ignorance. As long as the Court is perceived in an abstract way, as a vague threat, as an institution that could engage in activities that are not very well understood, it is going to provoke a great deal of reluctance. Once this stage is past, appreciation and interest increase, not only the appreciation and interest of whole populations, but also the interest that certain states might have in being part of the system. It's a matter of time: the Court must be given the time to make itself known, to conduct its first proceedings and to see where that leads.

Once again, let us not forget that the Court is an extremely young institution. If we consider the Law of the Sea Convention, which clearly affected the internal interests of states to a much lesser degree, twelve years were needed before it entered into force. But the Statute of the Court took only four years to enter into force after its adoption at the 1998 Rome Conference. Relatively speaking, that is quite a success, and I think that having 100 ratifications after two and a half years of existence is not bad either.

***The session of the Assembly of States Parties held in November 2005 raised the issue of the Court's general strategy.***

We are still living with the inheritance of the special tribunals which developed in reaction to events. States parties have no desire for the Court to develop in an accidental way, under pressure of events. We are therefore working on a strategic plan for the years ahead, in which we attempt to set out the Court's mission, objectives and key activities.

***How many cases will the Court be able to handle?***

This will depend on resources, which in turn will depend mainly on the Office of the Prosecutor and on the Assembly of States Parties; on what the Prosecutor presents and on what the Assembly of States Parties accepts. But certain scenarios are nevertheless being examined. With given resources we are going to be able to meet certain challenges, with more resources we will be able to do more, with fewer resources we will be able to do less. We are also examining the organization and improvement of internal structures. Two and a half years ago we had fifty staff, while we now have approximately 600 employees of all kinds. Naturally enough, this dynamic and extremely rapid evolution has caused some clashes of culture, not only between the organs of the Court but also within some of them. Obviously, someone from the UN will not behave in the same way as someone from the private sector or from treaty diplomacy. All of that had to evolve over time. I think we have made a great deal of progress. We want structures that clearly lead us to success.

External relations are extremely important in several ways. In our relations with states parties, we need to have them understand what we are doing so that they will give us what we need. Concerning relations in the field, the Court needs to be understood and conditions need to be created in which victims, witnesses and whole populations are as willing as possible to co-operate with the Court. In our external relations in general, the focus is in fact on making the Court understood. Our policy is to do no promotion ourselves, since promoting the Court has to be the responsibility of states and of non-governmental organizations. But we consider it our responsibility to explain the Court when we are asked to do so.

***The international tribunals are often criticized as being slow. Will the permanent criminal Court be able to operate effectively?***

We are developing a judicial strategy for the Court in which we are trying to set up judicial procedures that are as effective as possible and to estimate the time that might be required for a trial, a preliminary phase and an appeals phase. We are also seeking to make efficient use of resources, both as regards the internal organization of the Court and the management of its external relations. For all of that, a strategy is being prepared for the Court.

As for the Court's effectiveness, we have taken the experience of the ad hoc tribunals into account. The Regulations we have adopted for the Court represent an attempt to draw the necessary conclusions. In the Statute itself we

already see that certain lessons have been learnt. The most obvious is the creation of the Pre-trial Chamber, which aims to relieve the trial itself of all matters that ought to be treated beforehand, such as issues of jurisdiction, issuing of arrest warrants, confirmation of charges, and certain matters relating to witnesses and victims. In all cases, the lessons learnt from ad hoc tribunals will lead to a situation where the trial itself will be much more streamlined and much less encumbered.

***Did the Statute of the permanent Court make international justice more efficient?***

Yes, the Statute brought certain improvements, including one improvement which has to do not with efficiency but with the attention granted to victims. In the other international tribunals, victims mainly served as witnesses, but in the International Criminal Court they have their own status as victims. The Court is doing what it can to bring about improvements in efficiency and effectiveness. But whatever it might do, whatever it might undertake, the fact is that for anything beyond legal and administrative matters it is essential for the Court to obtain the co-operation of states foreseen in the Statute and the co-operation of international organizations.

***There are currently four situations (Central African Republic, Democratic Republic of the Congo, Sudan and Uganda) in respect of which the Court is taking action.***

There are four situations, but three investigations. The Office of the Prosecutor has not yet taken a decision on the fourth: the Central African Republic.

***All four situations concern Africa. In the case of Sudan – which is exceptional in that it was referred to the Court by the Security Council – it has been said that the Court was an instrument of colonization or neo-colonization. How do you deal with the perception that the continent that is already poorest has been targeted while other countries and situations cannot be touched?***

There are three points. First of all, I would like to mention Africa's support for the Court. I used to be a diplomat, and I served as chairman of the Committee of the Whole of the Rome Conference. The most meaningful declarations that were made about the Court came from Africa, because Africa said, "You Europeans, you have humanitarian values, you want to promote humanitarian values, you want to bring about positive change to people's lives, and you also want this Court to make a contribution in terms of keeping the peace and achieving stability in regional peace. But we know the consequences of these crimes committed in our own territory and we want to use the Court as a preventive means of protection against crimes that other states, whether our neighbours or others, might commit in our territory." I was always convinced and I remain convinced now that without Africa's support, the Rome Statute would never have been adopted. So Africa is not a reluctant partner, but a partner that in a certain way has perhaps the greatest interest, or in any case a very great interest, in the Court.

Secondly, contrary to widespread opinion, the regional group most represented among the states parties is not western Europe but Africa.

Finally, and this is my third point, three requests come from the African states themselves. The Court has not sought the requests; it is the African states that have brought situations to the Court. Even in the case of Darfur, the charge of neo-colonialism is beyond me. It was the Security Council, facing a plainly tragic situation in which numerous serious crimes seemed to have been committed, that decided to refer this situation to the Court. And the Security Council is not made up of Western countries only.

It should also be pointed out that although four situations have been referred to us, the Prosecutor can also refer a matter to the Court on his own initiative. He can launch an investigation provided that the Pre-trial Chamber authorizes him to do so. He has not yet done so, but he has received over 1,600 communications from various sources, mainly non-governmental organizations, since July 2002. I think that almost 80 per cent of these communications, or possibly more, are not admissible, either because they concern crimes that are not covered by the Statute of the Court or because they concern events that took place before July 2002 –when the Court’s jurisdiction began – or else because the crimes involve situations where no state is party to the Statute. The Prosecutor has declared, however, that he is monitoring five other situations. I do not know which ones they are, that is the exclusive province of the Office of the Prosecutor, but I believe that they have to do with more than one continent.

Africa is thus not the only continent providing the Court with significant support. The Court has won broad backing in most parts of the world. Only in Asia and the Middle East have any reservations been expressed about it. In any case, this is not a Court that concerns itself primarily with Africa.

If there is a problem at present, it has to do with how things are presented; it is not a real problem. Of course, if the situation were to remain the same fifteen years from now, then probably there would be a real problem; but it should be pointed out once again that the Court is still very young.

***Despite the Court’s independence from the UN, the Court counts on that organization’s co-operation. However, the UN and its specialized agencies often have completely different mandates. Some have mandates advocating justice and human rights, others are more concerned with humanitarian issues, while still others are more active politically. Does the Court co-operate in different ways with different parts of the UN?***

Yes, of course. I have already emphasized how essential it is to have the co-operation of states, but the co-operation of international organizations, the United Nations in particular, is just as important. It is necessary for us to have the support of an organization such as the UN, which already has established operations in the field. We invited a certain number of international organizations to the Court mainly to determine how comfortable they are about co-operating with the Court, to what extent there might be problems and, if there are problems, to think about how they might be solved.

*One of the situations in which the Court has jurisdiction is when a state is not able to prosecute war criminals. At present, as can be seen in eastern Democratic Republic of the Congo and in northern Uganda, state structures are often lacking. In some places there are practically no local police to cooperate with the Court. The Court's Prosecutor has to build his case and gather evidence where he can. He therefore contacts everyone possible in these contexts, including humanitarian organizations. This poses problems for the ICRC, but potentially also for other humanitarian bodies and even for the United Nations. Is it possible to provide aid and at the same time to collect information that may be used in criminal proceedings? Do the interests of justice have priority over the immediate needs of the victims or is it the other way around?*

It is extremely difficult to answer. The question involves the Prosecutor and the organizations concerned, and also perhaps the Registrar. In addition, it is clear that interests of justice play a major role and will have to be defined. It's one of the great issues: what are we going to do with interests of justice? I find it very difficult to speculate about questions of this kind, not only as President of the Court but also as a judge in the Appeals Chamber. One day, I may have to contribute to a ruling on the matter. But it is clear that there is a problem, since in order for the Court to operate, it is absolutely necessary that it be able to count on those who are in the field.

*There can also be a certain tension between the interests of justice and political interests. Criminal prosecutions can prevent or delay a ceasefire or a peaceful solution to a conflict. Some people believe that it is hardly possible for reconciliation to be achieved while criminal prosecutions are taking place. The charges brought in Uganda are said to have provoked attacks against possible witnesses and to have led to renewed fighting. Is there a way to know how the Court will react in such situations?*

There are two provisions in the Statute that are directly or indirectly relevant. The first is that the Security Council is entitled not only to refer a situation to the Court but also to defer an investigation or prosecution for twelve months. Nothing in the Statute says that this deferral cannot be renewed by the Security Council, inasmuch as the Council takes this decision under Chapter VII of the United Nations Charter relating to international peace and security. The other provision concerns the interests of justice. The Prosecutor may decide not to initiate an investigation if he believes that a prosecution would not serve the interests of justice. It is very difficult to predict how this provision will be applied. Clearly, and here I am almost going back to square one in my chain of reasoning, if it is accepted that the Court is part of a global system of international justice, that system is not a legal system exclusively. It is a system that includes such mechanisms as truth and reconciliation commissions. I think it is entirely possible that all these mechanisms can coexist inasmuch as the Court was not created to supplant national mechanisms. The Court merely fills in for national mechanisms

when states are unwilling or unable to try those who have committed any of the crimes mentioned in the Statute.

***But no one should be able to evade justice from the outset?***

I think it is widely presumed that the Court was created to prosecute any persons responsible for crimes over which it has jurisdiction. The Court thus also has a preventive function. Its jurisdiction can be exercised only inasmuch as it aims at and lays the blame on the highest-placed people, those who order the crimes. The fact that the Court will never have the capacity to handle more than a few situations at a time and therefore, according to what I just said, a few people at a time, is related to this. That leaves many guilty people who will not be brought before the Court, whether for practical reasons or for reasons of principle. And yet these people will nevertheless have to be brought to trial, and that brings us to the national systems, which can in part apply the national legal mechanisms and in part apply the non-legal mechanisms.

***Isn't there a risk that the non-legal mechanisms – accompanied by amnesties – will nullify the obligation to prosecute war criminals?***

What is entailed by a situation is the basic criterion for the International Criminal Court. Does action taken by a state, or the use of a certain mechanism, involve as a consequence, deliberate or not, that national jurisdictions are unable or unwilling genuinely to carry out the necessary investigations or prosecutions? Legally, I think that is the way the Court will have to handle these situations, because the system will clearly have to work in its entirety and with ample flexibility.

***Despite the Court being so young, the expectation of success weighs upon it. Do you feel this pressure?***

Yes. For the time being, with the four situations that have been referred to us, we have an enormous amount of work. The Court clearly recognizes that it bears responsibility for establishing its own credibility. In legal matters, first of all, and I am not concerned about that. We are going to have to learn, of course, but it is evident that everyone at the Court has only one single aim: the proper administration of justice. There is no agenda. In time, I think it will inevitably be concluded that the Court is in fact what it ought to be, and what it claims to be, that is, a purely legal institution exercising a purely legal function without conducting politically motivated prosecutions. We waited fifty years for this Court and now it has to work, because there will be no second chance. This is very important, because success could eventually weaken the culture of impunity that has always prevailed and lead us to a system that guarantees a better application of the principle of individual responsibility.

# Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice

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## Abstract

*Truth commissions, international criminal tribunals, reparations, public apologies and other mechanisms of transitional justice are the new mantras of the post-cold-war era. Their purpose is to foster reconciliation in societies that have experienced widespread human-rights violations and to promote reform and democracy, the ultimate aim being to defuse tension. But to what degree are these mechanisms, which are financially and politically supported by the international community and NGOs, truly effective? Very little, in fact, is known about their impact. By examining the underlying hypotheses and workings of transitional justice and proposing a series of indicators to evaluate its results, this article helps to fill the gap.*

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Transitional justice has become the new mantra of domestic and international politics since the end of the cold war. Within two decades, truth commissions have multiplied throughout the world, there has been unprecedented development in international criminal justice, and there have never before been so many

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statements of public apologies and instances of reparations granted to the victims of human rights violations. Since 1989, the intensity of the process of remembrance of past atrocities has been unequalled.

Transitional justice bears the contradictory hallmarks of the 1990s – those of hope and of tragedy. On the brighter side, there has been the collapse of the communist dictatorships in the former Soviet empire, the end of the apartheid regime in South Africa, and the consolidation of democracies in Latin America. And on the darker side have been the genocide in Rwanda and the policies of ethnic cleansing in the Balkans, the Caucasus and Africa. In all of these regions, the efforts to cope with past and sometimes continuing crimes have resulted in a profusion of initiatives which stirred many passions. The virtually simultaneous creation of the South African Truth and Reconciliation Commission and the International Criminal Tribunal for the former Yugoslavia became emblematic of the heated debate in the mid-1990s between the advocates for a policy of forgiveness and those in favour of a policy of punishment, each claiming to better serve the goal of “reconciliation”.<sup>1</sup>

Today the international community places emphasis both on the non-judicial mechanisms geared to rebuilding society and on the stigmatizing dimension of criminal punishment. Within the field of transitional justice itself, restorative and criminal justice are both perceived as necessary, since they are complementary.<sup>2</sup> In the post-cold-war world, which is marked by the resurgence of a moral philosophy of international relations, this complementarity of criminal and restorative justice thus plays a fundamental role. It is both the safeguard for the pillars of civilization and the fragile hope for a better world.<sup>3</sup>

In the view of the states that are threatened with fragmentation, where values and the social fabric are crumbling, transitional justice presents itself as an alternative means of escaping escalating violence and vengeance. Attuned to the request of victims and societies, transitional justice seeks to contribute to their reparation. But it proposes to be more than that. It aims to mobilize the dynamic

1 See the writings of Desmond Tutu, and in particular, *No Future without Forgiveness*, Rider, London, 1999. Resolution 955 of the UN Security Council, which established the ICTR in 1994, explicitly assigns to the Tribunal the purpose of achieving “reconciliation” among Rwandans: “Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law ... would contribute to the process of national reconciliation and to the restoration and maintenance of peace ...”.

2 See in particular the Report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 3 August 2004, S/2004/616. The UN tested this combined approach in Sierra Leone by establishing a Special Court and a truth commission. Symptomatically, Desmond Tutu today advocates that the perpetrators of political crimes who have not asked the TRC for amnesty be prosecuted in South Africa. See “Tutu urges apartheid prosecutions”, <<http://news.bbc.co.uk/2/hi/africa/4534196.stm>> (last visited January 2006). The ICTY stated for its part that it was in favour of establishing truth commissions in the countries of former Yugoslavia.

3 See in particular Eleazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, W.W. Norton and Company, New York, 2000; Alex Boraine, *A Country Unmasked, Inside South Africa's Truth and Reconciliation Commission*, Oxford University Press, Oxford, 2000; Priscilla B. Hayner, *Unspeakable Truths, Confronting State Terror and Atrocity*, Routledge, New York and London, 2001; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998.

forces in those societies in order to help them face a past mass violation of human rights so that they can then advance along the road towards a dawning democracy. In that sense, transitional justice appears as a New Jerusalem: it shows the way to institutional and political reforms which will gradually contribute to the establishment and consolidation of peace and the rule of law. There is an eschatological dimension to transitional justice here – the will of a society to extricate itself from the tragedy of history, to thwart the fatality of a world.

Transitional justice is a utopia in the positive sense of the term, a utopia which, according to its postulates, enables societies to mobilize and to act, mindful of the fact that they are facing formidable challenges, as is pointed out in the UN report on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”:<sup>4</sup>

“Helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security.”

This programme, which aims to improve security in hotbeds of tension, is a truly Herculean task. As can be seen, transitional justice involves fundamental societal choices. It participates in establishing the norms that form the basis for the operation of the international system. At the crossroads of moral standards, politics, law, history and psychology; transitional justice has narrowly circumscribed the bounds of national sovereignty by limiting the definition of diplomatic immunities and the permissible scope of amnesties. This has also influenced the dynamics of conflict resolution and made the work of mediators in their negotiations with the warring parties more problematic, for what assurance can they give political and military leaders or warlords who may tomorrow be charged with heinous crimes?

Transitional justice has become one of the salient features of the post-cold-war era. The international community has heavily invested financially, politically and symbolically, in policies and mechanisms of forgiveness and punishment. The United Nations has played an essential role in certain truth commissions such as those established in El Salvador and Haiti. The UN Security Council has also created two ad hoc UN tribunals, for the former Yugoslavia and for Rwanda, whose operating costs account for over 15 per cent of the UN’s current budget. Since their inception in 1993–4, those two tribunals alone have

4 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, above note 2.

cost the United Nations over US\$1.6 billion; together they currently cost over \$250 million a year.<sup>5</sup>

Within fifteen years, transitional justice has become a branch of learning with its own systems, practices, institutions, specialists, scholars, publications and debates, and since 2000 has been included in the curricula of some universities. It is given wide media coverage, since it asserts the new values of societies and of the international community and is thus a subject of impassioned debate.

Whereas the literature on transitional justice is considerable, works that decipher its *modus operandi* and empirically evaluate its effects are in fact extremely rare. There are two major reasons for this: the methodological obstacles involved (see below), and the fact that the debates on transitional justice, and in particular on international criminal justice, are highly ideological. These are as polarized as they are ritualized and, in the final analysis, often prove frustrating. Traditionally, they range the advocates of transitional justice, who see this justice as a chaotic but necessary process to render politics more ethical by releasing the dynamic forces of society, against those who are radically opposed to it, criticizing either the entire process or at least several of its aspects. As one of many, General Gallois considers, for example, that international criminal justice is quite simply a selective political form of justice. A high-handed means of establishing “judicial apartheid” between an all-powerful West and weak countries:

The International Criminal Tribunal for the former Yugoslavia is a weapon of war just as a bombing or an economic blockade can be. Contemporary wars comprise a number of phases ... a phase of disinformation intended to demonize the enemy ..., a trial of the “vanquished” putting the finishing touches to the justification of the war. The right of intervention at the humanitarian and military level is now complemented by the right to intervene in the criminal-law field.<sup>6</sup>

Others, such as Indian anthropologist Nandini Sundar, see it as a sign of the hypocritical policy of the West, which supports international criminal institutions whenever they strike at its enemies but reserves the right to express timid regrets when it comes to its own crimes.<sup>7</sup>

In fact, many observers and practitioners of transitional justice rightly point out that its effects are hardly known. Scores of states set up transitional justice machinery with the support of the international community and many non-governmental organizations (NGOs). But what has been the return on this financial, symbolic and political investment? What have these judicial and non-judicial procedures yielded? To what extent have the promises of transitional justice actually been kept (reconciliation, stability, democratization ...)? How can

5 Above note 2, p. 14.

6 Pierre Marie Gallois, Jacques Vergès, *L'apartheid judiciaire: le Tribunal pénal international, arme de guerre*, L'Age d'Homme, 2002, p. 11.

7 Nandini Sundar, “Toward an anthropology of culpability”, *American Ethnologist*, Vol. 31, No. 2, pp. 145–63.

the international community better target its support in order to empower civilian societies and help them to overcome the divisions arising from internal conflicts?

The above-mentioned UN report already drew lessons.<sup>8</sup> As a modest contribution amongst others, the present article endeavours to help to fill this gap.<sup>9</sup> This article proposes to decipher the modus operandi of transitional justice and to assess some of its results. In order to do so, it is necessary to first define the transitional justice mechanisms, then analyse the underlying logic of it, and finally examine ten challenges which transitional justice proposes to take up.

### Transitional justice: a set of mechanisms

As mentioned above, the advocates of transitional justice argue that policies of forgiveness and/or punishment provide a means of restoring the dignity of victims, of contributing to national reconciliation through efforts to seek truth and justice, whether symbolic or criminal, of preventing new crimes, participating in the restoration and maintenance of peace, and establishing or strengthening the rule of law by introducing institutional and political reforms.

These are both individual and societal objectives, since they range from the psychological recovery of individual victims to “national reconciliation” through the forming of a new collective identity.

Transitional justice uses a number of practices to achieve these aims: judicial proceedings, truth commissions, lustration and screening laws, reparations, public apologies, development of a shared vision of history.<sup>10</sup> These practices are used selectively, simultaneously or even chronologically, depending on the situation. Some countries, for instance, have chosen not to prosecute, others have instituted parallel truth commissions and criminal proceedings, and yet others have begun with policies of forgiveness and subsequently implemented policies of punishment. As a counterpoint to this trend of extending transitional justice, Mozambique decided to grant a general amnesty at the end of an appalling civil war in 1992, and Algeria did virtually the same in the autumn of 2005.<sup>11</sup>

8 Above note 2.

9 To cite only some, Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy, Justice and Community in the Aftermath of Mass Atrocity*, Cambridge, 2004, Cambridge University Press, Eric Brahm, “Getting to the bottom of truth: evaluating the contribution of truth commissions to post-conflict societies”, paper presented at the International Studies Association Annual Meeting, Honolulu, Hawaii, March 1–5, 2005; *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, ICTJ and the Human Rights Center, University of California, Berkeley, July 2005; *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan*, <<http://www.aihrc.org.af>> (last visited January 2006); Hayner, above note 3.

10 This is the avenue chosen by most of the former Communist regimes of the Soviet bloc; it will not be discussed in this article.

11 The Algerian authorities organized a referendum in which, under heavy pressure from the authorities, the majority of the population voted in favour of a very extensive amnesty law for the perpetrators of crimes committed during the civil war. The international observers contested the results of this referendum.

## The principal machinery of transitional justice

### *Judicial proceedings*

These constitute the various forms of punitive policy, first implemented by the creation of the International Military Tribunal in Nuremberg; international criminal tribunals, semi-international tribunals, the International Criminal Court and national courts. Their purpose is to suppress international crime (war crimes, crimes against humanity and crimes of genocide) and, also according to their mandate, serious human rights violations.

### *Truth commissions*

Truth commissions (sometimes called truth and reconciliation commissions) are oriented towards the victims. They form an extrajudicial process which, depending on the context, complements or replaces criminal proceedings.

### *Reparations*

Reparations are as old as war itself. But what we mean here by reparations is a relatively new phenomenon intended for the victims or for the legal successors of persons who were persecuted because of their origin or allegiance. The first reparations of this kind were those granted by the Federal Republic of Germany from 1952 onwards to the survivors of the Nazi extermination and concentration camps. They are voluntary payments by a state for moral and political purposes to individuals or groups.<sup>12</sup> In addition, there are now reparations that can be ordered by criminal courts.

### *Public apologies*

The expression of regret by a head of state or by high-ranking state officials is nothing new. But since the end of the cold war the increase in the number of such acts of remorse has been unprecedented. In the late 1990s all Western leaders voiced public apologies for past crimes, some of them committed several centuries ago. Tony Blair, for instance, apologized for British responsibility for the Irish famine in the nineteenth century, Jacques Chirac for France's responsibility in the deportation of Jews, Gerhard Schröder for Germany's Nazi past, and Bill Clinton for his country's attitude during the Rwandan genocide, for the slave trade and slavery, and for the support of dictatorial regimes in Latin America.

12 This definition is based to a large extent on that of Eric Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, Vol. 103, pp. 689–748, 2003, esp. p. 694.

*Developing a shared vision of history*

Judicial proceedings, truth (and reconciliation) commissions, public apologies and the payment of reparations all play a part in how a nation construes its history by stating its identity and its new values. This process of historical awareness is combined with a more extensive process that is marked by the opening up of archives, the rewriting of history textbooks, the construction of memorials and memorial museums, and the institution of days of remembrance.

**The postulates of transitional justice**

Very few theoretical works have focused on the postulates of transitional justice. On closer examination transitional justice is based on two fundamental and complementary axioms. The first is that the establishment of norms backed by a carrot and stick policy socializes “bad students” by inculcating respect for human rights. It is a normative method of education intended for the political elite and the military, in other words a top-down process. The second axiom, on the other hand, is a so-called bottom-up process. It stems from the idea that societies stained by the bloodshed of civil wars or peoples victimized by dictatorial regimes must be healed in order to exorcize their traumatic past. This process of “national catharsis” seeks to release the members of the society in question from their emotional stress by channelling those emotions towards the rebuilding of national identity.

**Peace through the institution of norms**

The development of transitional justice is based on the idea that the establishment of new norms gradually socializes “ethnic cleansers” and warlords, for example, and eventually enables the international system to be stabilized. Two authors, Martha Finnemore and Kathryn Sikkink, have explained with great conviction that norms act as a corset on states, progressively limiting their room for manoeuvre.<sup>13</sup> They control the behaviour of the various players, redefine their identities and impart new values, which gradually pervade the national institutions.

According to Finnemore and Sikkink this normative change acts like a three-stage rocket: to begin with, the “norm entrepreneurs” – the NGOs – use their power of denunciation in order to outlaw and isolate human rights violators; this is the “law of noise”. To do so NGOs create alliances with states which have developed a niche market in international relations, where their role is that of guardians of moral values, arbitrators or mediators, such as Switzerland, Sweden, Norway and Canada. They are generally Protestant countries which are not major

13 Martha Finnemore and Kathryn Sikkink, “International norm dynamics and political change”, *International Organization*, Vol. 52, No. 4 (Autumn 1998), pp. 887–917. See also Jack Snyder and Lesli Vinjamuri, “Trials and errors, principle and pragmatism in strategies of international justice”, *International Security*, Vol. 28, No. 3 (Winter 2003/04), pp. 5–44.

powers and are unencumbered by the millstone of a colonial past, and thus have no exclusive reserve to protect as do, for example, France and the United Kingdom.

Subsequently, the NGOs work to achieve universal recognition of these norms with the support of international organizations and states. The latter see the political advantage of adopting a moral stance. And in the final stage, according to this approach, all states gradually adopt these norms.

Recalcitrant players are subjected to “strategic bargaining.” If they accept the rules of the international community they will be entitled to the gains offered by respectability (such as access to World Bank and International Monetary Fund loans, application for accession to the European Union), and if they refuse, they pay the price for their isolation. The co-operation of the countries of the former Yugoslavia with the Hague Tribunal is a perfect example of this approach: Serbia only handed over Slobodan Milošević to the International Criminal Tribunal for the former Yugoslavia (ICTY) because the West had made the granting of a loan of US\$10 billion conditional on the former Serbian president’s transfer to the ICTY prison. This cheque-book diplomacy was later compounded by the European Union countries’ decision to make co-operation with the ICTY a prerequisite for negotiations on Serbian and Croatian accession to the European Union. It is this pressure which explains the fact that practically all of the accused were arrested. Such strategic bargaining forces recalcitrant states to establish procedures within their own structures which satisfy the Western sponsors. And in the final stage, these external constraints end up by becoming internalized to such an extent that they form part of the integrative culture in those institutions. Once this socialization process has been completed, pressures arise from within, leading to the emergence of a state genuinely governed by the rule of law.

### Peace through popular catharsis

This normative approach is combined with a psychologistic approach based on the concept of a metamorphosis of national identity. Its objective is “national reconciliation,” a process whereby former enemies manage to coexist without violence. This calls for a new societal pact to be drawn up which breaks “the cycle of violence and vengeance” – one of the fundamental tenets of transitional justice. It is based on a redemptive conception of narration, namely that by recounting their suffering in the solemn context of a criminal tribunal or truth commission, victims are enabled to “regain” their dignity.

Through this voicing of truth a national catharsis takes place, allowing a common history to be written in lieu of mutually exclusive and antagonistic memories and identities. The national identity is transformed. The most emblematic example is that of South Africa: by setting up the Truth and Reconciliation Commission and changing the flag and national anthem, symbols were very effectively mobilized to promote this metamorphosis of national identity centred on the idea of the Rainbow Nation, the new South Africa.

## Evaluation of results

We have so far defined both the mechanisms and postulates of transitional justice, but to what extent are these mechanisms achieving their goals? First of all, the difficulties they face should be stressed. To start with methodological difficulties: how does one assess the political and symbolic value of an international criminal tribunal or truth commission in the eyes of public opinion? First, the specific effect of such institutions must be isolated from other factors in which they play a part, such as the political evolution of a country. This initial difficulty is compounded by the use of vague moral concepts such as truth, forgiveness or reconciliation. Let us take the example of reconciliation alone: is it to be defined as the absence of vengeance? As the peaceful coexistence of erstwhile enemy groups? Or as a social reality marked by the close interaction of the various groups? Besides, some authors are wary of this term, preferring to use the expression “social reconstruction”.<sup>14</sup> The third difficulty is the question of the yardstick to be used for measuring the prevention of new crimes, an effect on which transitional justice prides itself. Deterrence is by definition difficult to apprehend and requires hypothetical arguments based on “what if?”

In short, the difficulty of isolating variables, the use of ambiguous concepts, reasoning based on hypothetical constructions – all this makes for an arduous task. Despite all these difficulties, however, let us try to clarify the concepts in view of the importance of the societal issues at stake.

### The temporal dimensions of transitional justice

It should be noted first of all that transitional justice has its effect in different phases. The German example is particularly striking. Analyses show that until the 1960s most Germans saw the Allies’ tribunal in Nuremberg only as rendering the justice of victors. To their mind, the blanket-bombing of Dresden, Hamburg and Berlin by the US and UK air forces was the price already paid by German society for Nazi crimes. It was not until the 1970s that the Nuremberg Tribunal became an integral part of the German frame of reference and played a part in the younger generation’s questioning of their elders’ attitude during the war, a questioning reflected in the rapid rise of pacifism.

To examine the impact of post-cold-war transitional justice, it is necessary to define temporal variables. Unlike the Nuremberg Tribunal, international justice is sometimes exercised even before the end of hostilities; examples of this are the ICTY, established at the height of the conflict in the former Yugoslavia, and the International Criminal Court (ICC), to which the UN Security Council similarly referred the ongoing Darfur crisis (in Sudan).

It is all the more essential to take the temporal dimension into account, for the very reason that the mechanisms of transitional justice reflect the balance of

<sup>14</sup> See, for example, Eric Stover and Harvey M. Weinstein (eds.), above note 9, pp. 13–15. We ourselves have conformed to general usage and use the term “reconciliation”.

power but are also instrumental in changing it. An assessment over time reveals this dynamic reality. Defeated or weakened leaders often initially retain sometimes disruptive influences which may enable them to negotiate the form that the new internal order takes. However, their strength and ability to rally support tends to dwindle in the long run, mainly due to the effectiveness of transitional justice mechanisms. This is what happened in Chile, where the truth commission contributed to the erosion of General Pinochet's popularity, promoting a new balance of power and opening the way, years later, for judicial proceedings which had formerly been impossible.

Four phases can be distinguished in the work of transitional justice, depending on the context.

1. The armed conflict or the repression phase, in which those political and military leaders with their partial or total grip on power make the work of international courts (the most used transitional justice mechanisms capable of intervening in this period) particularly difficult, for the war effort and propaganda have mobilized the population.<sup>15</sup>
2. The immediate post-conflict period (the first five years), when the warlords can (but do not necessarily) use their ability to cause disruption and can mobilize the media and networks loyal to them.
3. The medium term (from five to twenty years), when the society undergoing social and political reconstruction works out new points of reference. In the new political environment the persons charged with offences and the networks which support them are weakened. Hence the series of arrests in the former Yugoslavia, since more than 80 per cent of the accused – except for the two most famous fugitives – were taken into custody during this period.
4. The long term, with the rise of a new generation much more receptive to the need to overcome old divisions.

The mechanisms of transitional justice must be evaluated in relation to these various phases.

## The ten indicators for evaluating transitional justice

We have selected ten indicators for assessing the effectiveness of transitional justice in attaining the objectives assigned to it by the international community, namely to help bring about national reconciliation, regional stability and international security.

These indicators all constitute markers of the effects of transitional justice. Some apply only to policies of punishment, others to policies of forgiveness and others to both. They also reflect the promises made to societies and in particular to the victims of major human rights violations. They are the terms of reference for transitional justice.

<sup>15</sup> Transitional justice mechanisms are also established in situations other than war and/or internal conflict, as was the case in South Africa.

### *Indicators for international (and semi-international) criminal justice*

1. The penal effectiveness of international and hybrid criminal tribunals
2. The impact of “show trials”
3. Deterrence

### *Indicators for truth commission*

4. Production of the “truth”
5. Presentation of the “truth”
6. Recommendations for institutional reforms and implementation

### *Common indicators*

7. The therapeutic impact
8. The effectiveness of public apologies
9. The effectiveness of reparations
10. The process of building a common narrative

### Indicators for international criminal justice

#### *The penal effectiveness of international justice*

According to the advocates of international criminal justice, establishment of the truth and the punishment of criminals are indispensable for reconciliation and for the restoration and maintenance of peace.<sup>16</sup>

In this section we shall consider only the question of the effectiveness of criminal justice. What are the conditions conducive to such effectiveness? A brief examination shows that the penal effectiveness of international tribunals depends on two kinds of parameters: external parameters related to co-operation by states, and internal parameters related to the functioning of these judicial institutions. Two limitations of international justice are set out below. One clearly shows that unless states co-operate with a tribunal, its capacity for action is very much reduced. The other underscores the ambiguity of the existing norms for the main perpetrators of mass crimes to be prosecuted during or immediately after a conflict.

*The external parameters.* The ability of international tribunals to dispense justice largely depends on those who hold political and military power. Briefly, the latter can be divided into two groups: powerful states, in particular the permanent members of the UN Security Council, and state or sub-state entities (army, militias, guerrilla forces, etc.), over which the authority of international justice is to be exerted.

16 See in particular UN Security Council Resolutions 808, 827 and 955, which established the two ad hoc UN Tribunals.

In the case of the two ad hoc UN tribunals, the major powers help in various ways to determine their penal capacity: it is they who have defined the mandate and selected the judges and prosecutor, who decide whether or not to provide political and financial support, who regulate their co-operation in accordance with their national interests, who have sophisticated monitoring systems at their disposal to retrace links up through the chains of command and help the prosecutor to establish evidence, who arrest the accused, often in the course of robust commando operations, and who exert (or refrain from exerting) pressure on the warring parties to induce them to co-operate with the prosecutor.

Each of these factors is essential if international justice is to be effective. Conversely, if the political will of the major powers is absent, the capacity for international justice is very limited, as is demonstrated by the example of the International Criminal Tribunal for Rwanda (ICTR).

In adopting Resolution 955, which established the International Criminal Tribunal for Rwanda, the Security Council set “national reconciliation” as the Tribunal’s objective. The resolution gives it the power to punish the main perpetrators of the genocide in which 800,000 Tutsis were massacred, as well as the perpetrators of war crimes and crimes against humanity committed in retaliation by the Rwandan Patriotic Army. Justice was seen as the indispensable precondition for reconciliation among Rwandans.

But what actually happened? The Rwandan government co-operated initially with the ICTR in order to prove the reality of the genocide to those who still had doubts and also in view of negationist arguments. Once that had been achieved and certain key members of the regime were at risk of being charged with the crimes they had allegedly committed, the government embarked on a policy of active obstruction. And that policy was successful. In the ten years that have elapsed since the ICTR was established it has not issued one single bill of indictment for the crimes committed in retaliation for the genocide. When ICTR Prosecutor Carla del Ponte publicly announced her intention to indict persons close to the regime, the Kigali government sought her removal and finally obtained it, even though the diplomatic conventions of her departure were respected.

The Rwandan government’s capacity to obstruct international justice worked all the better since the serious dysfunctional problems which tainted the first few years of the ICTR had affected its credibility. It is also a fact that for both political and geostrategic reasons Rwanda was never subjected to the same pressure to co-operate with international criminal justice as was exerted on Serbia.<sup>17</sup>

In such circumstances, how can the truth that is produced satisfy the objective of national reconciliation if only some of the international crimes

17 The Security Council did not extend the mandate of the tribunal, for instance, whenever 200,000 Hutu refugees were assassinated in 1996–7 in what was formerly eastern Zaire. This selectivity in prosecuting crimes is to be explained essentially by the West’s guilty conscience: it was difficult for Washington, Paris or London to accuse the Rwandan authorities of international crimes when, in 1994, it was the forces of the Tutsi-dominated Rwandan Patriotic Army which had put an end to the genocide committed under the indifferent eye of the West. What is more, the Rwandan government is a precious ally of the United States and the United Kingdom in that part of Africa.

committed are subjected to prosecution? Alison Desforges, one of the leading experts on the region of the Great Lakes and expert on the ICTR, wonders whether this international justice helped to unify the population or to divide it even further.<sup>18</sup> Scepticism is in order here, although the tribunal can be credited with making the genocide of the Tutsis an undisputed fact, which was not the case ten years ago. The US\$700 million which the ICTR has cost to date would doubtless have been better invested in rebuilding the judicial system and the rule of law in Rwanda, thus curbing the government's drift towards authoritarianism.

*The internal parameters.* These parameters concern the functioning of the actual judicial mechanism per se, thus respect for the due process of law, the security of lawyers and witnesses, the prosecutor's penal strategy, the determination of proof, the sentence and so on.

Let us take a closer look here at the one example of the penal strategy of prosecutors during or immediately after a conflict. This is the trickiest period for international justice to handle, since it introduces competition between two international relations systems – one focusing on seeking justice, the other giving precedence to seeking peace. The appropriateness of prosecuting heads of state or key figures who are suspected of international crimes but are the only persons in a position to sign peace agreements is debatable. What norm should be adopted? Ambiguity prevails – also in the ICC, where the Statute entitles the prosecutor to refrain from prosecuting war criminals in “the interests of the victims.”<sup>19</sup> International reality also shows contradictory decisions. In disagreement with Mary Robinson, the UN High Commissioner for Human Rights, Lakhdar Brahimi, the UN Administrator in Afghanistan, was against prosecuting ministers suspected of war crimes who were members of the government supported by the United Nations. Brahimi considered that the efforts to seek peace and stability would suffer.<sup>20</sup>

The Prosecutor of the Special Tribunal for Sierra Leone, on the other hand, publicized the indictment of the Liberian president on the very day he was en route to the peace negotiations; this torpedoed the negotiations but, in doing so, reconfigured the political order.<sup>21</sup> We have two different models here. Discussion of the tension between peace and justice would warrant reflection going far beyond the scope of the present article, but it is essential to devote such

18 Alison Desforges, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, 1999, p. 41.

19 Note the evolution of the international community. Prosecutor Richard Goldstone stated in accordance with the 1993 Statute of the ICTY that “unless it is endorsed by war criminals, peace without justice is worth no more than the paper and ink used”, for it would be illusory. Conversely, the mediators of the former Yugoslavia considered that seeking a just peace would result in the continuation of the war and in the death and suffering of entire populations. The ICC Statute allows the Prosecutor a wider margin of discretion than does that of the ICTY.

20 John F. Burns, “Political realities impeding full inquiry into Afghan atrocity”, *New York Times*, 29 August 2002.

21 We would point out that, although the peace negotiations ended before they ever got off the ground, the Liberian president lost legitimacy as a result of the indictment, which immediately made him a war criminal. It thus weakened his position and, under international pressure, he stepped down and sought asylum in Nigeria ... which then refused to hand him over to his judges.

attention to the effects of transitional justice. There are many factors to be taken into account, for the prosecutor does not act in a vacuum but in a specific setting determined by the internal balance of power in the conflict, the ability of the international community to exert pressure, the loss of political legitimacy through possible indictment and the timing to be observed in the sequences of negotiation and justice.

### *The impact of “show” trials*

Major trials are “didactic monuments,” to quote Mark Osiel.<sup>22</sup> They are intended to recount barbarity to society, to remind society of fundamental norms and to make known the new national and international order. In a way, the verdict is merely of secondary importance: given the horror of the crimes committed, no punishment can match the tragedy. These major trials are thus only of value if they are effective from the educational point of view. That is their sole merit. Criticizing international tribunals on the ground that they are an exhibition of justice is the wrong approach, because the purpose of that justice is precisely to show that it is taking place. Justice must not only be done, but must be seen to be done, as the saying goes. It is thus a question of examining the nature of the exhibition and assessing its effectiveness.

Here again, the indicators need to be refined. This “show” trial is performed on several stages at once. The various audiences must therefore be considered separately in order to assess its effectiveness. There are the societies most directly concerned, those for which this theatre of truth and punishment is primarily intended and which, in theory, are the target group, such as the populations of the former Yugoslavia, Rwanda, Sierra Leone, Sudan, Uganda, and so on. Then there is the international public. As the ICC Prosecutor put it, both are clients of international justice, but their expectations, reactions, and perceptions are radically different. Neither group is homogeneous. The whole difficulty for international justice is to take a line which is acceptable to all the parties concerned, and especially to the target group: the victims, the police forces, the army, the militias and so on.

There is a great deal to be learned from the case of the ICTY. Whatever its mandate might say, its role – at least while the atrocities were still being committed in the former Yugoslavia – was to appease the guilty conscience of Western opinion. The designers of the ICTY gave it a mission based on triangulation logic, which works according to the billiard ball principle: the player aims at a first ball in order to hit the one that he is really aiming at. In the case in point, the ICTY was mandated to address the populations of the former Yugoslavia, but its actual target group was the West, at least while the war was still raging. Another look at our temporal categories will show more clearly the effects of this discrepancy between the real and the supposed target group. In the period

22 Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, Transactions Publishers, New Brunswick, 1999, p. 4.

of justice during and immediately after the hostilities – thus soon after the events – the Tribunal was a tremendous success in Western public opinion, at least until the war in Kosovo.<sup>23</sup> The ICTY triggered the fight against impunity and the increase in international litigation subsequently leading to the creation of numerous tribunals – the ICTR, the Special Court for Sierra Leone, the ICC – and the development of universal jurisdiction, which resulted in the criminal charges brought by Spanish and Belgian judges against former dictators Augusto Pinochet and Hissène Habré (Chad). The ICTY's success is essentially institutional and symbolic, since there were practically no trials of high-ranking state officials at that time. In the medium term, when the accused have to answer for their acts, the media and Western public opinion are wearied by the heavy technicality of the debates and the length of the trials (eighteen months on average). The Milošević trial, which Western governments hoped would demonize the former master of the Balkans and justify NATO's intervention, was totally ineffective from that point of view.

The scenario was very different on the Balkan stage. During and immediately after the conflict, the Tribunal was regarded by the Bosnians as an alibi for non-intervention or perceived as a Western instrument by a large majority of Serbs and Croats. Its legitimacy was widely cast in doubt. The international community and the ICTY bore their share of responsibility. The banning of nationals of the former Yugoslavia to senior ICTY posts, the fact that the UN General Assembly ruled out any Muslim or Orthodox judges in the initial composition of the Tribunal, its geographical location in The Hague hundreds of miles away, the absence of any ambitious communication policy in the area of the former Yugoslavia, and the hostility of nationalist Serb and Croatian media to the Tribunal all served to widen the gap between it and the populations of the former Yugoslavia for whom it was in principle intended. The NATO member states' eagerness to increase their co-operation with the ICTY at the height of the war in Kosovo confirmed the large majority of Serbs in their perception of it as the legal arm of the Atlantic alliance.

The Tribunal thus never succeeded in asserting itself either during or immediately after the various periods of war, or even in the medium term, except in Bosnia.<sup>24</sup> The arrest of Croatian General Gotovina in December 2005, charged with being responsible for the death of Serb civilians, and in particular of old people, provoked a huge demonstration by 40,000 people in Split praising the "hero" and "liberator" and mocking the ICTY. In Serbia itself, public opinion was massively hostile to the ICTY and probably created an environment ultimately

23 Western public opinion's perception of the ICTY was favourable to a large extent, even if the indictment of Slobodan Milošević in the midst of the Kosovo war gave rise to debate on how independent the Tribunal could be in view of its main sponsors and political support in the West. There are many reasons for that support.

24 In an opinion poll conducted in April 2002, only 20 per cent of the Serbians interviewed said they were convinced that co-operation with the ICTY was "morally right", and only 10 per cent considered that the ICTY was "the best way to serve justice", "Serbia: Reform Constituency Shrinks", results of the nationwide survey conducted by Greenberg Quilán Rosner Research, NDI, June 2002, p. 2.

leading to the assassination of the Prime Minister, Zoran Djindjić, in March 2003 and to an attempt to assassinate the ICTY Prosecutor, Carla del Ponte.

There was a further factor that exacerbated the hostility of many Serbs and Croats to the ICTY, which we shall call the pressure of the meta-norm. Why should the former Yugoslavs submit to international justice when the Americans were seeking to free themselves from it? This policy of double standards concurred with other factors to blacken the Tribunal's reputation in the Balkans. How could it be otherwise when the United States was threatening the republics of the former Yugoslavia, particularly Serbia and Croatia, with economic reprisals if they refused to co-operate with the ICTY, but also if they ratified the Statute of the ICC?

Thus far we have observed the various groups' perception of the Tribunal during the war and then in the short and medium term. The key issue is that of its long-term impact. How far will the work of the ICTY help to pave the way for a consensus in ten or twenty years' time on the crimes committed in that region in the 1990s? If the ICTY proves to have been able to deter the denial of mass crimes – and there are certain signs pointing in that direction, such as the fact that courts in Croatia, Serbia and Bosnia have tried their own war criminals, the Serbs' recognition of the Srebrenica massacres, and the apologies expressed by the authorities of the Republika Srpska – then the work of international justice will have borne fruit.

### *Deterrence*

One of the principal objectives of international justice is to deter new crimes. This is stated in particular in UN Security Council Resolutions 808 and 827 establishing the ICTY. This deterrent dimension is also central to NGO vindication of human rights in the fight against impunity. It is said on the Human Rights Watch website, for example, that “Justice for yesterday's crimes supplies the legal foundation needed to deter atrocities tomorrow”.<sup>25</sup>

At first sight an empirical analysis is rapidly made. Two years after the creation of the ICTY the Bosnian Serb forces committed the greatest massacre in Europe since the end of the Second World War in the UN-declared “safe zone” of Srebrenica. The UN Security Council founded the ICTR in 1994. In 1996–7 the forces of the Rwandan Patriotic Army took part in mass crimes in Kivu. Deterrence was an even greater failure at the regional level: various organizations estimate that over three million people (the vast majority of them civilians) died in the Democratic Republic of the Congo between 1998 and 2003 due either to the direct consequences of the war or to the indirect effects thereof. It is hard to imagine a more complete fiasco.

Is the deterrent capacity of the Tribunal necessarily nil? The real question is how the warring parties perceive the risk of prosecution. According to empirical observations, which should be corroborated through more comprehensive

25 See <<http://www.hrw.org/justice/about.php>> (last visited January 2006).

research, the belligerents are aware of the legal risk and act accordingly when prosecution is identified as a short-term personal threat. The UN peacekeeping forces present in the former Yugoslavia reported that the warring parties took account of the legal risk during the first few weeks after the creation of the ICTY in 1993. They later realized that the Tribunal was weak and, confident of impunity, committed the Srebrenica massacres. In Darfur, too, according to eyewitness reports, the militia scaled down their acts of violence when they felt that they might be in trouble because of them. These two examples tend to demonstrate that warring parties take the risk of prosecution into account as long as the tribunal is perceived as being determined and backed by the political and military support of the major powers. But they also show that the deterrent effect soon diminishes without prompt indictments and arrests.

Beside these parameters, which play a part in how the belligerents construe the legal risk, there is the influence of the “meta-norm”, that is, the scale of values of the international community at a given point in time. The “war on terrorism,” which is marked in particular by the US superpower’s questioning of certain areas of international humanitarian law, its challenging of the prohibition and definition of torture, and the fierce hostility of the Bush administration to the ICC, no doubt modifies the perception of the legal risk. Here, too, research would be necessary to confirm these hypotheses.

## Indicators for truth commissions

### *Production of the “truth”*

The advocates of transitional justice argue that expressing the truth leads to a process of national catharsis which channels energies towards national reconciliation. One of the key questions is the nature of the “truth” that will emerge.

The term “truth” has itself given rise to numerous debates. Let us adopt the approach of South African Truth and Reconciliation Commission Vice-Chairman Alex Boraine, who makes a distinction between three levels of truth – factual truth, personal truth, and social or dialogical truth – although they all aim to “document and analyse both actual human rights violations and the structures which have allowed or facilitated them.”<sup>26</sup> Factual truth provides a family with concrete information about the mortal remains of a deceased relative. Personal truth, in theory, allows a cathartic effect to take place for the person who voices that truth.<sup>27</sup> And finally, according to South African Judge Albie Sachs, “dialogical truth” is the truth which society adopts: “Dialogical truth is social truth, truth of experience that is established through interaction, discussion and debate”.<sup>28</sup> Here we are concerned with factual and dialogical truth (see indicator 7 for personal

26 Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission*, Oxford and New York, Oxford University Press, 2000, p. 287.

27 *Ibid.*, p. 290.

28 *Ibid.*

truth). What are the conditions which allow these two levels of truth to emerge? It transpires that factual truth and dialogical truth are each determined by specific parameters.

The capacity to establish factual truth depends to a large extent on co-operation by the former organs of repression: the minister of the interior, the army, the police, the intelligence service, the militia and so on. But it also depends on a network of institutions, hospitals, morgues and cemeteries, whose registers often prove essential.

The state holds a trump card for ascertaining the factual truth. It can decide to vest the commission with subpoena powers enabling it to obtain documents and compel witnesses, including the perpetrators of crimes, to appear in court. This was the case in South Africa. Similarly, the South African decision to make hundreds of agents of repression appear in court helped to bring the *modus operandi* of that political criminality to light. In other words, the stronger the mandate of the commission, the greater its ability will be to establish factual truth, and hence personal and dialogical truth.

Dialogical truth aims to clarify the political responsibilities for the crimes committed. For the government it is a historical political exercise which has legitimating potential but also carries the risk of getting out of hand, since it is from the debate within society that a new consensus on the past will emerge and the present political balance will be transformed. This explains the fierceness of negotiations between old and new elites to set the stage on which dialogical truth will emerge. Factors such as defining the mandate of the commission and the victims,<sup>29</sup> determining whether or not the perpetrators shall appear in court, the possibility of prosecution for certain high-ranking officials, the commission's public presentation (indicator 5), the recommendations made in the report (indicator 6) and how they are followed up can therefore be crucial.

Each of these factors will play a part in deciding the commission's impact. The other essential aspect is the ability of a society to take note of and identify itself with the work of the commission. The weight of influence of the victims, the attitude of the political parties, churches, trade unions and former warring parties, the balance of power between the various entities and the specific nature of the transition process all condition the extent to which dialogical truth emerges. NGOs play a decisive role. In South Africa, where they are powerful, they helped to "carry" the Truth and Reconciliation Commission (TRC), even if they criticized it. In Sierra Leone, where they are weak but have strong links with the Western world, they induced the international community to create, and then back, a truth commission, but were not in any real position to enlist support in their own country, and this made itself apparent.<sup>30</sup>

29 The Chilean commission's mandate, for example, was to establish the truth about the deaths of thousands of people, but not to take account of the torture inflicted on thousands of former political prisoners. Some of the population considered themselves excluded from this truth-finding exercise, since it did not acknowledge that they were among the victims of the dictatorship.

30 Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, USIP Special Report No. 130, 2005.

Let us take two very different examples here, Chile and El Salvador, which highlight the ability of a society to identify itself with the work of a commission in order to change the internal balance – or not to identify with it, as the case may be.

The truth produced is partly conditioned by the balance of power between the former and the new government. In Chile, for instance, the commission's composition reflected a balance between former Pinochet supporters and democrats. The result confirmed a view of the past that endorsed "the theory of the two demons," placing the repression carried out by state agents and the acts of violence committed by left-wing extremist groups (but limited by their restricted capacity) practically on an equal footing, whereas the overwhelming majority of the crimes had been committed by the military junta. This consensual but historically questionable interpretation nonetheless discredited the Pinochet view under pressure from victims' associations, trade unions, NGOs and certain political parties. Thus, despite its limitations, the work of the commission did change the internal balance in Chilean society and promote the emergence of a dialogical truth in the medium term, which tallied with the historical truth. As a result judicial proceedings were resumed, whereas, owing to opposition from the junta's supporters, the commission's *raison d'être* had, on the contrary, been to act as a substitute for those proceedings.

Although the El Salvador commission (composed exclusively of foreign members) had more latitude in its work to establish and interpret the facts than the Chilean commission, the dialogical truth that ultimately emerged was greatly limited by the former warring parties. Their representatives, far from following the commission's recommendations to prosecute some fifty state officials and guerrilla leaders, agreed instead that the parliament would declare a general amnesty.

### *Presentation of the "truth"*

The only value of truth commissions, like trials in international courts, lies in their public impact. It is their very teaching of the policy of forgiveness that is designed to reconcile a divided society.

The key question here is the way in which the authorities and the commission should put over the message stigmatizing the past: how is this presentation of human cruelty to be staged? Should the approach be minimalist? Or, on the contrary, should public hearings be held which evoke the venerable nature of the judicial environment? And if so, should the criminals also appear in court? Should these public hearings be broadcast on television?

The choice is often dictated by the kind of message to be conveyed and by the balance of power between the human rights activists and those who embody the erstwhile repression. The greater the will to break with the past, the stronger the temptation will be to use some form of symbolic expression to convey that message. The cases of South Africa and Morocco illustrate these differences in message. In South Africa a dual objective was pursued, the aim being to demonstrate the criminal nature of the former regime (and of abuses by the African National Congress) while legitimizing the deal struck between

F. W. De Klerk and Nelson Mandela, that is, the truth in exchange for amnesty. In Morocco the commission's aim was to gain more space for democracy without undermining the continuity of the regime. In all cases, commission members are identity entrepreneurs, since they play a part in creating new rituals for the nation.

The form of presentation in fact reveals the underlying political project of which the commission is the messenger. By starting the public hearings in South Africa with prayers, a clear political message was sent out, namely that the truth-seeking exercise and, through it, the truth–amnesty transaction had the blessing of the highest religious authorities. The dramatic intensity of the confrontation between victims and tormentors reflected public expectations: ignominious censure of the criminals, but also the renunciation of justice for the sake of the higher interests of the new nation.

Commission Chairman Archbishop Desmond Tutu's handling of the religious and cultural symbols and his celebration of the "superiority" of African restorative justice over Western criminal justice were intended to legitimize the new political balance achieved. They also transformed amnesty into forgiveness.

In Morocco, the victims testified to the truth commission in 2005 before portraits of the present king, Mohammed VI, and of his late father and predecessor, King Hassan II, under whose rule they had been tortured by the security squads. In contrast to South Africa, the torturers, kidnappers and, in some cases, killers of the past did not appear before the commission. The message sent out by the royal palace was intended both to condemn the repression of those dark years and to continue the democratization process, while safeguarding the continuity of the monarchy and the organs of repression.

These two commissions were perfectly in keeping with the objectives assigned to them. They were not alibi commissions, even though they undeniably played a part in legitimizing the new government. Truth commissions must be evaluated in the light of their specific objectives.

### *Recommendations for institutional reforms and implementation*

One of the potential impacts of truth commissions lies in the recommendations published in their reports, for these recommendations draw lessons from past crimes and lay down the reforms that are essential to build a state genuinely governed by the rule of law.

Eric Brahm lists some twenty truth commissions and points out that three of them held public hearings and published reports, eight others issued public reports (without having held any public hearings), three others distributed their reports sparingly and five (Bolivia, Zimbabwe, Uganda 1986, the Philippines, Ecuador) did not issue any report at all.<sup>31</sup> In Argentina the accounts of the commission were a bestseller for months. The distribution of the report is a key factor: it helps to give the society in question the feeling that it has a hand in its

31 For a more detailed discussion see in particular Eric Brahm, above note 9, p. 35.

own destiny. The acts of violence of the past are described, the persons responsible are named, and the course to be followed in order to consolidate the rule of law is set. It is then up to society to exert pressure on the state machinery in order to ensure that the proposed reforms – with the typical purposes of improving the conduct of the police and army, truly prohibiting torture and guaranteeing fair trials – are adopted. Experience in Chile, where the recommendations made in the report were largely applied, has been one of the most favourable. Among other things, the report had advocated reparations for the victims, suggesting further that the work of the commission be taken as a basis for determining their entitlements, and it was carried out. The various recommendations served to strengthen the rule of law and to calm feelings that still ran high. In its report, the Moroccan commission announced that some 10,000 former political prisoners would be granted reparations and advocated far-reaching institutional and political reform with a view to guaranteeing justice, strengthening parliamentary control over state organs and limiting the powers of the executive.

Unfortunately, no analysis has as yet been carried out, to our knowledge, on the authorities' implementation of the recommendations set out in the reports of the truth commissions. Neil Kritz of the United States Institute of Peace in Washington, DC put forward the idea that governments should issue periodic reports on the follow-up to the recommendations and, where necessary, should explain why they consider them inappropriate.

It seems, however, that most of the recommendations have not been implemented; nor has there been any substantive discussion of them. The question is to what extent these recommendations nevertheless contribute to the democratic development of society, even if they have not been put into practice. In other words, does the commendable fact that these recommendations for institutional reforms have been put forward open a new arena for democratic debate within these societies, which will lead to future reforms?

## Indicators common to international justice and truth commissions

### *The therapeutic impact*

Transitional justice devotes special attention to the victims. The intention is that through their recovery and the amends made to them, society itself will also recover from the scars of the past and will reunite once the truth has been established and a symbolic or criminal punishment has been imposed. But do “recognition,” “justice,” and “truth” indeed have a therapeutic effect on the victims, as is claimed by many advocates of transitional justice?<sup>32</sup>

To start with, many psychologists see the non-prosecution of the tormentors as a continuation of the torture: “Impunity generates feelings of

32 For detailed research see Jamie O'Connell, “Gambling with the psyche: Does prosecuting human rights violators console their victims?”, *Harvard International Law Journal*, Vol. 46, No. 2, 2005, pp. 295–345.

defencelessness and abandonment, accompanied by symptoms such as nightmares, depression, insomnia, and somatizations.<sup>33</sup>

The fight against impunity, on the other hand, is a means of assuaging the need of certain victims for factual and personal truth. Knowing the circumstances in which a close relative died, where that person is buried and who was responsible for his or her suffering facilitates the grieving process. Personal truth is connected in particular with clarification of the past, but also with the need felt by many witnesses to express their suffering and thus to have it acknowledged by the state. These witnesses considered it indispensable to state their evidence in a public arena, whether judicial or extrajudicial. We shall discuss only these victim-witnesses here. Some of them told us that unless the perpetrators of the crimes were punished they considered it their duty to instil into their descendants the duty of avenging the dead.<sup>34</sup>

Irrespective of the motives which prompt victims to testify (a sense of moral obligation towards the dead, ideological conviction or a psychological need), they hope that their testimony will restore their dignity and will free them to some extent from their traumatic past. But this testimony is also a perilous undertaking and will affect the therapeutic potential of testifying, for the victim has to recall extremely stressful events. The psychological imperilment differs, depending on whether the victim is speaking in a court of law or in the context of a truth commission. A distinction must therefore be made between the two.

### *Risks within the context of judicial proceedings*

*The physical danger of testifying.* In Rwanda and the former Yugoslavia as well as in other judicial proceedings, the tribunals guaranteed that victim-witnesses would remain anonymous. Unfortunately, the identity of some of these witnesses was revealed, particularly in Rwanda, and as a result they received threats to their lives and those of their families, which in some cases forced them to flee. This endangerment affects the therapeutic dimension, since it destabilizes the witness and stirs up past suffering.

*The risk of retraumatization.* In the case of the two ad hoc UN tribunals, the victims only have witness status since the procedures are based on common law.<sup>35</sup> They are not there to recount their tragic experiences but to help to substantiate the prosecutor's indictment. They are then subjected to cross-examination procedures, which are sometimes conducted by particularly aggressive lawyers. In accordance with US practice, these lawyers seek to disorient the witnesses in order to weaken the prosecutor's case. Carla Del Ponte, then the ICTR

33 Diana Kordon *et al.*, "Argentina: Psychological and clinical consequences of political repression and impunity", *Q.J. Rehab of Torture and Prevention of Torture*, Vol. 8, 1998, pp. 43–4.

34 Pierre Hazan, *Justice in a Time of War. The Secret History of the International Tribunal for Former Yugoslavia*, Texas A&M, 2004, p. 160.

35 The International Criminal Court has drawn "lessons" from these dysfunctional problems of the ICTY and the ICTR and has virtually granted victim-witnesses civil party status.

Prosecutor, deplored the fact that the cross-examination should become “an instrument of torture” in the context of the Arusha Tribunal.<sup>36</sup> This is an exaggeration, but one which nevertheless underlines the perverse nature of the cross-examination when conducted by lawyers out to destabilize very vulnerable witnesses, such as women who have been subjected to multiple rapes. Drawing lessons from these precedents, the ICC has formulated procedures which are intended to prevent the retraumatization of victims. A further point to be considered is the verdict: often victims are disappointed with the sentence, which they consider too lenient, and are adversely affected by it. But justice is not a therapeutic process, even though it does sometimes have favourable effects.

*North–South disparities.* International justice is the product of rich countries. It grants the accused elementary rights according to the criteria of affluent societies, rights which victims in poor countries do not necessarily enjoy. Rwanda is the most extreme case, with the shocking discrepancy between surviving victims of the Rwandan genocide and its perpetrators, who contaminated them with the AIDS virus but who, due to the Rwandan state’s lack of funds, are the only persons to enjoy the privilege of treatment. This appalling difference in treatment between tormentors and victims can affect the therapeutic dimension of testifying.

We have stressed here that the therapeutic dimension of testifying can never be taken for granted and that the conditions in which testimony is given must be borne in mind.

### *Risks within the context of truth commissions*

The dynamics of truth commissions differ from those of judicial proceedings. The fact that the culprits are not punished gives rise to a variety of reactions in the victims, which, depending on their individual response, range from a profound feeling of injustice to the granting of pardon and the return to some measure of serenity. Generally speaking, the risk taken in truth commissions seems to be lower in psychological terms for victims than in judicial proceedings. They are not confronted with their tormentors (except in the case of South Africa). Nor are they a “ping-pong ball” between the prosecution and the defence. They even personify the subject of law – the leading role on this stage. At first sight, all these factors confirm the idea that this restorative justice is beneficial for the victims, particularly for those who testify.

Yet the Trauma Centre for Victims of Violence and Torture in Cape Town, South Africa, estimates that 50 per cent to 60 per cent of the hundreds of people with whom it has worked experienced serious psychological problems after testifying or said that they regretted having taken part in the TRC’s hearings.<sup>37</sup> A number of them were “retraumatized” to such a point that Trudy de Ridder,

36 In the TV documentary *Rwanda: la justice prise en otage*, ARTE/TSR/Article Z, produced by Gonzalo Arijon and Pierre Hazan, 2003.

37 Hayner, above note 3, p. 144.

one of the psychologists who worked with the victims who testified before the TRC, wonders whether the political benefit gained by society justifies the suffering caused to the victims by the truth commission hearings.<sup>38</sup> Moreover, as Rosalind Shaw points out, a TRC might disrupt traditional justice mechanisms, as happened in Sierra Leone.<sup>39</sup>

Our purpose is not to assert here that witnesses are systematically ill-treated but to underline the fact that testifying is not necessarily therapeutic for the victims. Some victims do actually derive satisfaction from publicly stating their share of the truth. They sometimes obtain precious details of the circumstances in which relatives died and the whereabouts of their remains, which facilitates the grieving process. They may also find it satisfying to see society punish their tormentors, either with penal sanctions or at least symbolically. Some have been calmed by the remorse expressed by their torturers or by the killers of their relatives. For other victims, however, public disclosure of their suffering (about which their relatives often knew nothing) and the fact of recalling that past brings little relief. On the contrary, it causes serious psychological problems. The tribunals and truth commissions recognize this reality implicitly, since those which have the means to do so provide psychological support for victims in order to prevent them from breaking down during their testimony.

### *The effectiveness of public apologies*

Transitional justice attaches particular importance to apologies. The reason is simple: whenever judicial proceedings are excluded or those who are in power have had no responsibility for the crimes committed, the purpose of public expressions of regret is that the state should acknowledge its responsibility and thus prevent a repetition of those criminal practices.

The most emblematic case was that of German Chancellor Willy Brandt, who on 9 December 1970 knelt in respectful meditation at the monument to the Warsaw ghetto, thus prefiguring an era of public apologies. The novelty and forcefulness of this act on the part of an anti-Nazi veteran set a virtuous cycle in motion: through his gesture of repentance he took upon himself the crimes committed by others in order to offer an apology. In so doing he took part in a process to restore normal relations between the victims and Germany and thus contributed to Germany's symbolic re-entry into the concert of civilized nations. It is a process of virtuous triangulation, in which the expression of regret modifies the relationship between the person who expresses it, the victims, and the public, in this case the international community. That act of humility also brought a symbolic benefit for the person offering the apologies: his sacrificial position (since

38 Trudy de Ridder, *The Trauma of Testifying: Deponents' Difficult Healing Process*, Track Two, Vol. 6, Nos. 3 & 4, December 1997 <[http://ccrweb.ccr.uct.ac.za/archive/two/6\\_34/p30\\_deridder.html](http://ccrweb.ccr.uct.ac.za/archive/two/6_34/p30_deridder.html)> (visited October 2004).

39 Shaw, above note 30.

he was apologizing for acts which he had not himself committed) enhanced his moral prestige.

Inspired by this precedent and induced by the prevalent moralizing ideology of the post-cold-war era, expressions of regret have multiplied over the last few years. There have been so many that count has been lost of the number of heads of state and high-ranking officials who have apologized for crimes committed recently or centuries ago.

These apologies are now demanded by NGOs, which consider that expressions of regret help to consolidate the rule of law and to boost the confidence of citizens in institutions by marking a clear boundary between the “dark years” and the present time.<sup>40</sup> The effectiveness of such apologies is very relative, however. An apology can serve to purify, provided that it is not perceived by the society concerned as a routine, trivial gesture devoid of substance. This fundamental criteria distinguishes a sincere expression of regret from one that is perceived in the public domain as symbolically and politically charged. The apology expressed by President Chirac acknowledging for the first time the responsibility of the French state for the round-ups of the Jews during the Second World War had real impact. Conversely, President Bill Clinton’s apology for slavery and the slave trade, made outside the United States and moreover in an African country which historically was not directly concerned, had no impact whatsoever. Afro-Americans and the African countries affected by the transatlantic slave trade regarded it as a flimsy apology and scarcely took any notice. The inappropriateness of the location (Uganda) and the lack of precision by the addressee made it ineffective. The expression of regret, on the other hand, is ostensibly addressed in accordance with the billiard ball principle to certain victims, but is in fact destined for a different target group. The apology offered by UN Secretary-General Kofi Annan in 1999 for his responsibility in the failure to protect the populations of the former Yugoslavia and Rwanda was a case in point. The real purpose of those expressions of regret was not so much to convince the victims of the sincerity of the apology, as to “purify” the UN peacekeeping operations in the eyes of the international community and reinstate them. This objective was achieved with the real target public (the international community) but not with the target group for which the apology was in theory intended (former Yugoslavs and Rwandans).

Acts of repentance work according to various models. It is essential to identify how this dramatic art operates. What is the most appropriate setting? Which are the real target groups? Must the logic of triangulation be applied in order to reach them? The example of Willy Brandt shows that acts of repentance can play a part in pacifying societies.

40 To quote an example, the US organization Human Rights Watch asked the Moroccan authorities to “Acknowledge that grave human rights abuses in the period under study by the ERC [truth commission] were systematic and ordered at the highest levels of the state, and offer official statements of regret to the victims and their families”. “Morocco’s truth commission: Honoring past victims during an uncertain present” <<http://hrw.org/reports/2005/morocco1105/>> (last visited January 2006).

### *The effectiveness of reparations*

The establishment of truth and the stigmatization of the criminals are conceived as making amends to the victims. But in the past few years, over and above policies of forgiveness and punishment, emphasis has been laid on granting material compensation to the victims, who often live in conditions of extreme poverty. Unlike the ad hoc UN tribunals, the ICC has set up a voluntary fund for reparations to victims.

The money issue is intensely symbolic. First of all, it raises the question as to the kind of reparation, a term which itself is profoundly ambiguous.<sup>41</sup> What exactly is to be compensated? The loss of a relative? The suffering? The income lost as a result of illegal detention? The loss of material assets? Reparations carry a message: that of acknowledgement of the crime. There is a political dimension and a societal dimension at both the collective and the individual level.

In the case of Adenauer's Germany, reparations were the price of the country's return to normal. The United States had stipulated that the payment of reparations to the Hebrew state and to the survivors of the camps was a *sine qua non* for West German membership in the UN and NATO. The reparations paid to Israel were West Germany's admission ticket for joining the international community.

Alongside this political dimension there is also a societal dimension, which primarily concerns the victims. Some victims feel that such money cannot make good what is irreparable and cannot be accepted because it is blood money for the dead. Others consider, on the contrary, that the suffering of the past must entail some reparation, even if it can never bring back the years that have been lost. Thus, for many South Africans, the truth commission was based on a transaction: the perpetrators obtained amnesty, and the victims received reparations in exchange.<sup>42</sup> Besides, that was what the TRC had recommended, but the reparations offered by the authorities were meagre and belated.<sup>43</sup> Many former victims of apartheid felt that they had been cheated and began to resent the commission and the very idea of reconciliation.<sup>44</sup>

In addition to the individual attitudes of victims, there is a debate which involves society as a whole. For reparations are the fruit of negotiations, indicating that standards are changing and that a new balance is emerging within the society.

41 The concept of reparation is vague: it refers to a complex reality in which several operations often overlap and merge: restitution, indemnification, compensation and reparation. It is important to clarify the nature of the payment in order to prevent any use of it for demagogical purposes and to enable public opinion to judge the terms of this ethical-financial transaction in full knowledge of the facts.

42 Of the 7,112 perpetrators who requested amnesty, 849 were granted it. The others were never greatly disturbed.

43 The government did not begin paying compensation to victims until December 2003, more than five years after the TRC had presented its findings. A fund of 660 million rand (US\$100 million) was set aside to make one-off payments of 30,000 rand to 22,000 victims – considerably less than the fund of 3 billion rand recommended by the TRC.

44 The connection between two terms as ambiguous as “reparation” and “reconciliation” is itself problematic, as is demonstrated by the different attitudes adopted by the mothers and grandmothers of the Plaza de Mayo in Buenos Aires: some “want their hatred to remain intact”, seeing it as loyalty to their murdered children; others are more inclined to accept reparations, for example because of other ethical choices or out of financial necessity.

The crucial issue here is the nature of this ethical-political transaction. Just how acceptable are its terms? This question thus concerns not only the victims and governments involved but all of the various societies concerned.

The case of Switzerland clearly shows that the acceptability of this transaction is not a matter solely for the society whose members receive reparations but is also evaluated in the society that grants them. For example, in a referendum held in Switzerland, the majority of the Swiss population voted against the government's plan to sell some of the gold reserves of the Swiss National Bank in order to create a humanitarian fund, that would have served, *inter alia*, to make reparations for the policy of rejecting Jews at the Swiss borders during the Second World War. This plebiscite revealed a general truth: reparations are not merely a binary relationship between the party granting them and the receiving party, but by virtue of their symbolic power they involve and activate entire societies. In Israel, for instance, the tension created in one section of public opinion by the Ben Gurion government's announcement of an agreement on German reparations sparked violent demonstrations. So violent, in fact, that the security services set up a bodyguard for the Prime Minister, fearing for the first time ever an Israeli attempt to assassinate him.

In Indonesia, a government project was set up to grant compensation to victims on condition that they pardon the culprits. This transaction, which placed the victims in the morally shocking position of feeling that they were selling their conscience, was later abandoned. In Argentina, reparations were granted to victims at the same time as the so-called Punto Final (amnesty) laws were passed. In both cases, the *quid pro quo* for reparations was intended to be the release of the tormentors.

In the final analysis, the acceptability of the terms of this ethical-financial transaction depends on the choices made by society and victims. Depending on how they are interpreted, reparation payments will either bring tension into the process of societal normalization or, on the contrary, will contribute to it.

### *The process of building a common narrative*

The advocates of transitional justice highlight the need to write a common narration transcending introverted, identity-related accounts. In this regard the opening of archives, the creation of memorials and museums, the work of historians, the rewriting of school textbooks, the work of artists and so on play a major role.

In his book *Purifier et détruire*, Jacques Sémelin introduces the concept of "delusional rationality" to account for the process of de-bonding and de-civilization among human groups which creates an environment conducive to massacres and acts of genocide.<sup>45</sup> The logic of social reconstruction, on the other hand, aims to re-ritualize, re-humanize and re-civilize relations with

<sup>45</sup> Jacques Sémelin, *Purifier et détruire: Usages politiques des massacres et génocides*, Seuil, 2005, p. 87 (*Purify and Destroy: The Political Uses of Massacre and Genocide*, Hurst, April 2006).

others through a series of mechanisms. This process of upgrading norms can only be multidimensional (institutional, political, symbolic, artistic), and it is a continuous process. It also reflects a cultural dimension. In Mozambique, practically no memorials were built after the civil war that ended in 1992, since the traditional mechanisms of social reintegration were based on ritual and not on verbalization.

Remembrance is by definition a continuing process. It plays a part in transitional justice, but at the same time reflects what the mechanisms of that justice have already accomplished. As such, it is both an indicator in itself and a process providing information over time on the effectiveness of all the other transitional justice mechanisms. The rebuilding of the Mostar bridge linking the two communities, the determination of the widows and mothers of Srebrenica to rebury their relatives nearer to the place where they died, or again the writing of a school textbook on the Arab–Israeli conflict by both Israeli and Palestinian historians – all of this can soothe wounds but will never heal them completely. The challenge for these conflict-riven societies is to develop a symbolic bonding system without denying the past, mindful of the fact that memory is fortunately a dynamic process which also involves forgetting, and that each generation reinterprets the events of the past on its own.

## Conclusion

Since the end of the cold war, Western governments and NGOs have invested financially, politically and symbolically in the mechanisms of transitional justice – to the point where these mechanisms have gradually become a vector of globalization, seeking to stabilize, pacify and reassure entire populations.

These mechanisms have a long-term “re-civilizing” capacity, on condition that they do not become a set of tools used automatically in any context, whatever its specific individual nature. Because of the appeal they have for Western public opinion, transitional justice mechanisms have all too often been introduced by the international community, sometimes at great expense, without regard for the internal dynamics of the populations for which they were intended. In some cases the short term political benefits of media announcements have been treated as more important than the reality of local needs. Transitional justice mechanisms can play a crucial role in societies torn apart by the violence of conflict, but they must contribute effectively to the will of the local actors to take their destiny into their own hands by devising political and institutional safeguards to prevent a repeat of mass crimes.

It is essential to establish evaluation processes in order to better define the role of the international community, to understand the reasons for the dysfunctioning of transitional justice mechanisms when it occurs and to identify the potentialities of transitional justice for social transformation and democratization. Our intention here has thus been to create a set of criteria to that effect, using temporal categories and indicators. Unless there is transparency, and unless

monitoring procedures are introduced, transitional justice mechanisms may prove ineffective and become a convenient alibi for inertia, or even defeat the very purpose of social reconciliation, for which they have been created.

# International and internationalized criminal tribunals: a synopsis

**Robin Geiß and Noémie Bulinckx**

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## Abstract

*The proliferation of judicial bodies is of particular prevalence in the field of international criminal law, where, despite the creation of an operational International Criminal Court, the political or factual exigencies of different situations have led to the establishment of specific criminal justice systems. The object of this synopsis is to study their variety and to sketch out the differences and similarities between existing international and internationalized criminal tribunals. The complexity and the sheer illimitable amount of information necessitated a condensed and synthesized visualization.*



## Introduction

The proliferation of international judicial and quasi-judicial bodies has become a common feature of the international landscape.<sup>1</sup> The dispersion of international and internationalized criminal tribunals is but one important aspect of this modern phenomenon, which in turn forms part of a larger tendency to which the International Law Commission is referring as the fragmentation or, for the sake of more neutral connotations, the diversification of international law.<sup>2</sup> The proliferation of judicial bodies is of particular prevalence in the field of international

criminal law, where, despite the existence of an operational International Criminal Court (ICC), the political or factual exigencies of different situations have led to the establishment of specific criminal justice systems, namely the Special Court for Sierra Leone (SCSL), the Iraqi Special Tribunal (IST), the Extraordinary Chambers for Cambodia (EC-Cambodia), the Special Panels for Serious Crimes in East Timor (SPSC) and the UNMIK court system in Kosovo.<sup>3</sup> While the completion strategy for the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) has taken shape, there are good reasons to believe that the proliferation of international or internationalized criminal justice systems will continue in the future. Most recently, the assessment mission to Burundi in its report to the Security Council recommended a judicial accountability mechanism in the form of a special chamber within the court system of Burundi.<sup>4</sup> Similarly, before the situation in Darfur had been referred to the ICC by the UN Security Council,<sup>5</sup> the establishment of an international criminal tribunal for Sudan had been seriously contemplated.<sup>6</sup>

While debate continues as to the risks ensuing from this fragmentation process and while discussion goes on with respect to the question as to which factual circumstances warrant which particular criminal justice model, it is the purpose of this synopsis to sketch out the differences and similarities between existing international and internationalized criminal tribunals. Even though the differences between some of the existing tribunals are systemic, that is, some tribunals are truly of an international nature whereas others form part of the national criminal justice system and merely feature certain international elements, a number of common *tertia comparationis* could be identified. Comparing apples with pears thus is not a veritable objection if one intends to compare fruit, that is, international and internationalized tribunals. In this regard it bears mentioning that the UNMIK court system in Kosovo, established by UNMIK Regulation 1999/24 and Regulation 2001/9,<sup>7</sup> 15 May 2001, has not been included in the synopsis because of its uniqueness, in that there is no fixed court, panel or chamber but rather international judges permeate the court system on a case-by-case basis.<sup>8</sup>

1 For the first comprehensive mapping of the international judicial system see The PICT Research Matrix which encompasses 18 international judicial bodies, Status as of 2000, available at: <<http://www.pict-pecti.org/matrix/matrixintro.html>> (last visited 28 July 2005).

2 ILC Report, “Risks ensuing from fragmentation of international law,” subsequently renamed “Fragmentation of international law: difficulties arising from the diversification and expansion of international law,” report in progress.

3 For a comprehensive analysis of internationalized criminal tribunals, see Cesare P. R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *International Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, New York 2004.

4 See Letter dated 11 March 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/158, 11 March 2005.

5 SC/RES/1593 (2005).

6 Norman Kempster, “U.S. May Back Creation of Special Atrocity Tribunals,” *L.A. Times*, 2 August 2001, available at: <<http://www.sudan.net/news/posted/3155.html>> (last visited 30 August 2001).

7 UNMIK derives its mandate from UN Security Council Resolution 1244, para. 10, S/RES/1244 (1999).

8 See John Cerone and Clive Baldwin, “Explaining and Evaluating the UNMIK Court System” in Romano, Nollkaemper and Kleffner, above note 3, p. 42.

Naturally, the chosen criteria emphasize certain aspects over others that would have been equally worthy of comparison. Such limitations are due mainly to the availability of information and their suitability for comparison, and they seem justified by the fact that the value of any such synopsis does not lie in the data and information provided but in their synthesized compendium.

Rather than aiming even to approximate the provision of comprehensive data about these international criminal justice mechanisms it is the object of this synopsis to study their variety and to this end to sketch out similarities as well as differences. Any such attempt must necessarily fall short of adequately resembling the complexities of this particular domain, and for the sake of enhanced visual representation many of the information given had to be reduced further, to a straightforward “yes” or “no” answer. Yet it is precisely this complexity and the sheer illimitable amount of information which in the view of the authors necessitated a condensed and synthesized visualization.

## General issues

	ICC	ICTY	ICTR
Established in	1998	1993	1994
Established by <sup>1</sup>	Rome Statute of the International Criminal Court, Rome, 17 July 1998	UN Security Council Res. 827, 25 May 1993	UN Security Council Res. 955, 8 Nov. 1994
Permanent <sup>2</sup> Seat <sup>3</sup>	Yes The Hague, Netherlands	No The Hague, Netherlands	No Arusha, Tanzania

## Administrative issues

	ICC	ICTY	ICTR
Staff <sup>4</sup> Budget <sup>5</sup>	306 (June 2005) €66 million (2005)	1,062 (2005) Approximately. US\$272 million (2005)	1,042 (2005) Approximately US\$256 million (2005)
Working language <sup>6</sup>	English, French	English, French	English, French
Judge's term <sup>7</sup>	3, 6 and 9 years	4 years (permanent); max. 3 years ( <i>ad litem</i> )	4 years (permanent); max. 3 years ( <i>ad litem</i> )
Re-election <sup>8</sup>	Depending on term	Yes (permanent); no ( <i>ad litem</i> )	Yes (permanent), no ( <i>ad litem</i> )

SC-Sierra Leone	Iraqi ST	EC-Cambodia	SP-East Timor
2002 Agreement between the UN and the government of Sierra Leone, 16 Jan. 2002	2003 Statute No. (1), 10 Dec. 2003, enacted by the Iraqi Governing Counsel	2003 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (NS/RKM/0801/12), promulgated on 10 Aug. 2002, as amended on 27 Oct. 2004; agreement between the UN and the government of Cambodia, signed 6 June 2003	2000 UNTAET Reg. 2000/15, 6 June 2000; UNTAET Reg. 2000/11, 6 March 2000; UN Security Council Res. 1272, 25 Oct. 1999
No Freetown, Sierra Leone	No Baghdad, Iraq	No Phnom Penh, Cambodia	No Dili, East Timor

SC-Sierra Leone	Iraqi ST	EC-Cambodia	SP-East Timor
294 (2005) US\$29.9 million (2004/2005)	n.a. Borne by the regular budget of Iraqi government	n.a. Borne mainly by the Cambodian national budget and the UN Trust Fund (three-year budget: US\$56.3 million)	n.a. Approximately US\$6.3 million (2002)
English	Arabic	Khmer, English, French	Tetum, Portuguese, Bahasa, Indonesia, English
3 years	5 years	Appointed for the period of the proceedings	Initially 2–3 years, then appointment for life
Yes	Yes	No (appointed for the period of the proceedings)	Yes

## Procedural aspects

	ICC	ICTY	ICTR
Applicable law <sup>9</sup>	ICC Statute/international law, including humanitarian law/general principles of law	International humanitarian law	International humanitarian law
Hearings <sup>10</sup>	Public	Public	Public
Majority required <sup>11</sup>	Attempt unanimity, or decision by majority	Majority of judges	Majority of judges
<i>Amicus curiae</i> <sup>12</sup>	Yes	Yes	Yes
Burden of proof <sup>13</sup>	Guilt beyond reasonable doubt	Guilt beyond reasonable doubt	Guilt beyond reasonable doubt
Trials <i>in absentia</i> <sup>14</sup>	Not laid down	Not laid down	Possible
Highest penalty <sup>15</sup>	Life imprisonment  Life imprisonment possible	Life imprisonment possible Imprisonment for determined number of years	Death penalty

## Composition

	ICC	ICTY	ICTR
Pre-trial chamber <sup>16</sup>	Yes	Pre-trial judge	Pre-trial judge/pre-trial conference
No. of trial chambers <sup>17</sup>	1	3	3
No. of trial chamber judges <sup>18</sup>	3	3–9	3 permanent and maximum 4 <i>ad litem</i>
Appeal	Yes	Yes (AC shared with ICTR)	Yes (AC shared with ICTY)
No. of appeal chamber judges <sup>19</sup>	5	5	5
Integrated*/External	External	External	External

SC-Sierra Leone	Iraqi ST	EC-Cambodia	SP-East Timor
humanitarian law/Sierra Leonean law	International criminal law/humanitarian law/Iraqi laws	Cambodian penal law/humanitarian law and custom/international conventions recognized by Cambodia	Law of East Timor/international law, including humanitarian law
Public Majority of judges	Public Simple majority of judges	Public Attempt unanimity or affirmative vote of at least four judges (TC); affirmative vote of at least 5 judges (SC)	Public Majority vote
Yes Guilt beyond reasonable doubt Not laid down	Yes Not laid down	Not laid down Not laid down	Not laid down Not laid down
	Possible	Not laid down	Not possible in principle, but exceptions made
Life imprisonment	Imprisonment not in excess of 25 years		

SC-Sierra Leone	Iraqi ST	EC-Cambodia	SP-East Timor
None	Designated judge/pre-hearing judge	Yes	None
1 3, ratio: 2 international/1 national	1 5, ratio: n.a.	1 5, ratio: 2 international/3 national	3 Panels (Feb. 2005) 3, ratio: 2 international/1 national
Yes 5, ratio: 3 international/2 national	Yes 9, ratio: n.a. – international possible	Yes 7, ratio: 3 international/4 national	Yes 3 (exceptionally 5), ratio: 2 international/1 national (3 international/2 national)
External	External	Integrated	Integrated

## Jurisdiction

	ICC	ICTY	ICTR
Temporal jurisdiction <sup>20</sup>	Since 1 July 2002	Since 1 Jan. 1991	1 Jan. 1994–31 Dec. 1994
Personal jurisdiction <sup>21</sup>	Natural persons	Natural persons	Natural persons
Territorial jurisdiction <sup>22</sup>	Territory of states party/ territory of non-party states when crimes committed by states party's nationals/ territory of non-party states that accepted the jurisdiction of the court	Territory of the former SFRY	Territory of Rwanda (Rwandans, non-Rwandan citizens)/territory of neighbouring countries (Rwandans)

## Subject matter jurisdiction

	ICC	ICTY	ICTR
Genocide	Yes	Yes	Yes
War crimes	Yes	Yes: grave breaches and violations of laws and customs of war	Yes: violations of common Art. 3 Geneva Conventions I-IV and AP II
Crimes against humanity	Yes	Yes	Yes
Other Crimes <sup>23</sup>	Yes: aggression	No	No
Appellate Jurisdiction	Yes	Yes	Yes
Concurrent Jurisdiction vis-à-vis national courts <sup>24</sup>	Complementarity	Concurrent jurisdiction, primacy of the ICTY	Concurrent jurisdiction, primacy of the ICTR
Parallel TRC <sup>25</sup>	No	No	No

SC-Sierra Leone	Iraqi ST	EC-Cambodia	SP-East Timor
Since 30 Nov. 1996	17 July 1968–1 May 2003	17 April 1975–6 Jan. 1979	1 Jan. 1999–25 Oct. 1999
Persons who bear the greatest responsibility for serious violations of international humanitarian law	Any Iraqi national or resident of Iraq	Senior leaders and those most responsible for crimes committed in Democratic Kampuchea	Universal jurisdiction
Territory of Sierra Leone	Territory of Iraq/ 'elsewhere', including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait	Territory of Cambodia (senior leaders and those most responsible for crimes committed in Democratic Kampuchea)	Universal jurisdiction

SC-Sierra Leone	Iraqi SC	EC-Cambodia	SP-East Timor
No	Yes	Yes	Yes
Yes	Yes	Yes: grave breaches of the 1949 Geneva Conventions	Yes
Yes	Yes	Yes	Yes
Yes: crimes under Sierra Leonean law	Yes: violations of Iraqi laws	Yes crimes defined by the Cambodian law instituting the ECs	Yes: murder, sexual offences and torture
Yes	Yes	Yes	Yes
Concurrent jurisdiction: decisions of SCSL take precedence	Concurrent jurisdiction, primacy of IST	Exclusive jurisdiction	Exclusive jurisdiction
Yes	No	No	Yes

<nb. each note is in the form of an unnumbered list>

<sup>1</sup>ICC: Statute of the International Criminal Court, Rome, 17 July 1998, corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, UN Doc. A/CONF.183/9 (hereinafter “ICC Statute”).

ICTY: SC Res. 827, 25 May 1993.

ICTR: SC Res. 955, 8 November 1994.

SC Sierra Leone: Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, in Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone transmitted by the Secretary-General to the President of the Security Council by Letter dated 6 March 2002, UN Doc. S/2002/246, <<http://www.sc-sl.org/scsl-agreement.html>> (hereinafter “UN-Sierra Leone Agreement”); Statute of the Special Court of Sierra Leone, 16 January 2002, *ibid.*, <<http://www.sc-sl.org/scsl-stature.html>> (hereinafter “SCSL Statute”).

Iraqi ST: Statute No. (1), 10 December 2003, enacted by the Iraqi Governing Council, <<http://www.iraq-ist.org/en/about/statute.htm>> (hereinafter “IST Statute”).

EC Cambodia: Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (NS/RKM/0801/12), promulgated on 10 August 2002, as amended on 27 October 2004 (NS/RKM/1004/006) (hereinafter “Establishment Law”); Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea, 6 June 2003 (hereinafter “UN-Cambodia Agreement”). By virtue of Art. 2 of the Agreement, the Agreement is implemented in Cambodia through the Law on the establishment of the Extraordinary Chambers as adopted and amended.

SP East Timor: UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, <<http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>> (hereinafter “SPSC Reg.”); UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor, 6 March 2000, UNTAET/REG/2000/11 (hereinafter “UNTAET Reg. 2000/11”), <<http://www.un.org/peace/etimor/untaetR/Reg11.pdf>> (last visited 29 July 2005).

<sup>2</sup>ICC: See ICC Statute, Preamble, para. 9.

ICTY: For the completion strategy for the ICTY, and more particularly the estimation that the ICTY’s trial activities would probably run until end of 2009, see “Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004)”, 25 May 2005, Annexed to Letter dated 25 May 2005 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc. S/2005/343.

ICTR: For the completion strategy for the ICTY, and more particularly the estimation that the ICTY would complete a certain number of trials by the end of 2008, see “Completion strategy of the International Criminal Tribunal for Rwanda”, enclosed in Letter dated 23 May 2005 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 addressed to the President of the Security Council, UN Doc. S/2005/336.

SC Sierra Leone: For the completion strategy for the SCSL, see “Special Court for Sierra Leone Completion strategy (18 May 2005)”, annexed to Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, UN Doc. A/59/816–S/2005/350. With regard to the phasing out of the Special Court for Sierra Leone, see Art. 23 of the UN-Sierra Leone Agreement.

Iraqi ST: See limited temporal jurisdiction as described in IST Statute, Art. 1.

EC Cambodia: Establishment Law, Art. 47: “The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.” See also limited temporal jurisdiction as described in Art. 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

SP East Timor: On 20 May 2005 the SPSC’s mandate finished and trials were completed. A total of 84 defendants were convicted and three defendants were acquitted of all charges, see <<http://www.jsmp.minihub.org/courtmonitoring/spsc.htm>> (last visited 29 July 2005).

<sup>3</sup>ICC: ICC Statute, Art. 3.

ICTY: ICTY Statute, Art. 31.

ICTR: SC Res. 977, 22 February 1995.

SC Sierra Leone: UN-Sierra Leone Agreement, Art. 10.

Iraqi ST: IST Statute, Art. 2.

EC Cambodia: Establishment Law, Art. 43.

SP East Timor: SPSC Reg., Sec. 1.1.

<sup>4</sup>ICC: ICC Staff is currently composed of 57 Nationalities (as of June 2005), see *ICC Newsletter*, June 2005, available at <[http://www.icc-cpi.int/library/about/newsletter/4/pdf/>/ICC-CPI\\_NL4\\_En.pdf](http://www.icc-cpi.int/library/about/newsletter/4/pdf/>/ICC-CPI_NL4_En.pdf)> (last visited 16 August 2005).

ICTY: ICTY Staff is currently composed of 79 Nationalities (as of 2005), see <<http://www.un.org/icty/glance/index.htm>> (last visited 18 August 2005).

ICTR: ICTR Staff is currently composed of 85 Nationalities (as of 2005), see <<http://www.ictor.org/default.htm>> (last visited 18 August 2005).

SC Sierra Leone: "There are 164 Sierra Leonean nationals and 130 internationals working at the Special Court", see <<http://www.sc-sl.org/faq.pdf>> (last visited 14 August 2005).

<sup>5</sup>ICC: Assembly of States Parties, *Draft Programme Budget for 2005*, Third session, The Hague, 6-10 September 2004, ICC-ASP/3/2, p.3, available at <[http://www.icc-cpi.int/library/asp/ICC-ASP3-2\\_budget\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP3-2_budget_English.pdf)> (last visited 16 August 2005).

ICTY: Available at <<http://www.un.org/icty/glance/index.htm>> (last visited 29 July 2005).

ICTR: Available at <<http://www.ictor.org/default.htm>> (last visited 29 July 2005).

SC Sierra Leone: Special Court for Sierra Leone, *Budget 2005-2006*, presented by Robin Vincent, registrar, p.6, available at <<http://www.sc-sl.org/Documents/budget2005-2006.pdf>> (last visited 14 August 2005).

Iraqi ST: See IST Statute, Art. 35.

EC Cambodia: Establishment Law, Art. 44. For the figures, see "Agreement between UN and Cambodia on Khmer Rouge trials takes effect", *UN News Service*, 29 April 2005, available at <<http://www.un.org/apps/news/story.asp?NewsID=14134&Cr=Cambodia&Cr1=>>> (last visited 16 August 2005).

SP East Timor: Thordis Ingadottir, "The financing of internationalized criminal courts and tribunals", in Cesare P. R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts*, Oxford University Press, Oxford, 2004, p. 283.

<sup>6</sup>ICC: ICC Statute, Art. 50: The official languages of the Court are Arabic, Chinese, English, French, Russian and Spanish, but the working languages are English and French.

ICTY: ICTY Statute, Art. 33.

ICTR: ICTR Statute, Art. 31.

SC Sierra Leone: The working language is English but the accused has the right to use his own language. See Rules of Procedure and Evidence of the Special Court of Sierra Leone, as amended at sixth Plenary, 14 May 2005, <<http://www.sc-sl.org/rulesofprocedureandevidence.pdf>> (last visited 17 August 2005) (hereinafter "the SCSL Rules of Proced. and Ev."), Rule 3.

Iraqi ST: IST Statute, Art. 34.

EC Cambodia: Establishment Law, Art. 45.

SP East Timor: UNTAET Reg. 2000/11, Sec. 36.

<sup>7</sup>ICC: ICC Statute, Art. 36(9)(b).

ICTY: ICTY Statute, Arts. 13 *bis* and 13 *ter*.

ICTR: ICTR Statute, Arts. 12 *bis* and 12 *ter*.

SC Sierra Leone: UN-Sierra Leone Agreement, Art. 2(4); SCSL Statute, Art. 13.3: The judges shall be appointed for a three-year term and shall be eligible for re-appointment.

Iraqi ST: IST Statute, Art. 5.

EC Cambodia: Establishment Law, Art. 12.

SP East Timor: UNTAET Reg. 2000/11, Sec. 28.

<sup>8</sup>ICC: ICC Statute, Art. 36(9): Judges elected for nine years are not eligible for re-election. A judge who is selected to serve for a term of three years shall be eligible for re-election for a full term.

ICTY: ICTY Statute, Arts. 13 *bis* para. 3 (Permanent judges) and 13 *ter* para. 1(e) (*ad litem* judges).

ICTR: ICTR Statute, Arts. 12 *bis* para. 3 (Permanent judges) and 12 *ter* para. 1(e) (*ad litem* judges).

SC Sierra Leone: UN-Sierra Leone Agreement, Art. 2(4); SCSL Statute, Art. 13.3: judges shall be appointed for a three-year term and shall be eligible for re-appointment.

Iraqi ST: Not laid down in the IST Statute, but Rule 16 of the Rules of Procedure and Evidence stated that "In case of re-appointment, the total period of service as a Judge of the Special Tribunal shall be taken into account", which considers the possibility for a judge to be re-appointed. See Rules of Procedure and Evidence of the Iraqi Special Tribunal, 23 December 2004, <<http://www.iraq-ist.org/en/laws/rules.htm>> (hereinafter "IST Rules of Proced. and Ev.").

EC Cambodia: Establishment Law, Art. 12.

SP East Timor: UNTAET Reg. 2000/11, Sec. 28.1.

<sup>9</sup>ICC: ICC Statute, Art. 21.

ICTY: ICTY Statute, Art. 1.

ICTR: ICTR Statute, Art. 1.

SC Sierra Leone: UN-Sierra Leone Agreement, Art. 1; SCSL Statute, Art. 1.

Iraqi ST: IST Statute, Arts. 11–14.

EC Cambodia: Establishment Law, Art. 1.

SP East Timor: SPSC Reg., Sec. 3: "In exercising their jurisdiction, the panels shall apply: (a) the law of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and (b) where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict."

<sup>10</sup>Exceptions to the rule that hearings be public are laid out in:

ICC: ICC Statute, Art. 67(7): "The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in Art. 68, or to protect confidential or sensitive information to be given in evidence."

ICTY: ICTY Statute, Art. 20(4): "The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."

ICTR: ICTR Statute, Art. 19(4): "The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."

SC Sierra Leone: SCSL Statute, Art. 17(2): "The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses."

Iraqi ST: IST Statute, Art. 21: "... unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence. The decision to close the proceedings shall be exercised on a very limited basis."

EC Cambodia: Establishment Law, Art. 34: "Trials shall be public unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force", Art. 12 of the Agreement (above note 1): "Any exclusion from such proceeding ... shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice."

SP East Timor: UNTAET Reg. 2000/11, Sec. 25.2: "The hearings of the court, including the pronouncement of the decision, shall be public, unless otherwise determined by the present regulation or by law, insofar as the law is consistent with Section 3.1 of UNTAET Regulation No. 1999/1." See also UNTAET Reg. 2000/30 on Transitional Rules of Criminal Procedure, 25 September 2000, UNTAET/REG/2000/30, <<http://www.un.org/peace/etimor/untaetR/reg200030.pdf>>: "28.1 Trial hearings shall be open to the public. 28.2 The court may exclude the public from all or part of a hearing in circumstances where: (a) qualified information of national security may be disclosed; (b) it is necessary to protect the privacy of persons, as in cases of sexual offences or cases involving minors; or (c) publicity would prejudice the interest of justice."

<sup>11</sup>ICC: ICC Statute, Art. 74(3): "The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges." Art. 83(4) 4. The judgment of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court.

ICTY: ICTY Statute, Art. 23.

ICTR: ICTR Statute, Art. 22.

SC Sierra Leone: SCSL Statute, Art. 18.

Iraqi ST: IST Statute, Art. 23.

EC Cambodia: Establishment Law, Art. 4: "The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply: a. A decision by the Trial Chamber shall require the affirmative vote of at least four judges; b. A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges."

SP East Timor: UNTAET Reg. 2000/11, Secs. 9.2 and 15.2.

<sup>12</sup>ICC: Rules of Procedure and Evidence of the International Criminal Court, 9 September 2002, ICC-ASP/1/3 (part II-A), <[http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf)> (hereinafter "ICC Rules of Proc. and Ev."), Rule 103.

ICTY: Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 11 February 1994, <<http://www.un.org/icty/legaldoc/procedureindex.htm>> (hereinafter "ICTY Rules of Proc. and Ev."), Rule 74.

ICTR: Rules of procedure and evidence of the International Criminal Tribunal for Rwanda, 29 June 1995,

<<http://www.ictor.org/ENGLISH/rules/070605/070605.pdf>> (hereinafter "ICTR Rules of Proced. and Ev."), Rule 74.

SC Sierra Leone: SCSL Rules of Proced. and Ev., Rule 74: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization of person to make submissions on any issue specified by the Chamber." See *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT, Decision on the Application for Leave to Submit Amicus Curiae Briefs, 17 July 2003, at para. 8; *Ibid*, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions, 1 November 2003, para. 5.

Iraqi ST: IST Rules of Proced. and Ev., Rule 66: "Interveners: A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any organization or person to make submissions on any issue specified by the Chamber."

EC Cambodia: Not laid down in Establishment Law. However Art. 33, as amended, provides that: "If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level."

<sup>13</sup>ICC: ICC Statute, Art. 66(3).

ICTY: ICTY Rules of Proced. and Ev., Rule 87.

ICTR: ICTR Rules of Proced. and Ev., Rule 87.

SC Sierra Leone: SCSL Rules of Proced. and Ev., Rule 87.

Iraqi ST: Not laid down in the IST Statute or in the Rules of Proced. and Ev. It is not required either by the existing Iraqi law which supplements the Statute and the Rules, by virtue of Rule 65 ("The proceedings before trial chambers should comply with provisions set forth in the law of criminal proceedings No. 23 of 1971 as well as these rules"). See Paragraph 182 of the Law on Criminal Proceedings with Amendments, No. 23 of 1971, which requires that the court is "satisfied" that the defendant committed the offence of which he is accused.

EC Cambodia: Not laid down in Establishment Law. But see Art. 33, as amended (above note 12).

SP East Timor: UNTAET Reg. 2000/30, Sec. 39.1. It only mentioned that the court "shall pronounce on the guilt or innocence of the accused".

\*The criminal justice mechanism forms part of the national court system.

<sup>14</sup>ICC: The only mention of the absence of the accused are found in Rule 125 "Decision to hold the confirmation hearing in the absence of the person concerned", and Rule 126 "Confirmation hearing in the absence of the person concerned", of the ICC Rules of Proced. and Ev.

ICTY: Not laid down in the ICTY Rules of Proced. and Ev.

ICTR: ICTR Rules of Proced. and Ev., Rule 82 *bis*.

SC Sierra Leone: Not laid down in the SCSL Rules of Proced. and Ev.

Iraqi ST: Rules of Proced. and Ev., Rule 56.

EC Cambodia: Not laid down in Establishment Law. But see Art. 33, as amended (above note 12).

SP East Timor: UNTAET Reg. 2000/30, Sec. 5.1: "No trial of a person shall be held in absentia, except in the circumstances defined in the present regulation."

<sup>15</sup>ICC: ICC statute, Art 77.

ICTY: ICTY Statute, Art. 24.

ICTR: ICTR Statute, Art. 23.

SC Sierra Leone: SCSL Statute, Art. 19.

Iraqi ST: By virtue of Art. 24 of the IST Statute, the Iraqi Penal Code as amended (Law No 111 of 1969) applies: its Paragraph 85, on the primary penalties, included death.

EC Cambodia: Establishment Law, Arts. 38 and 39.

SP East Timor: SPSC Reg., Sec. 10.1(a).

<sup>16</sup>ICC: Art. 39 para. 2 (b)(iii) of the ICC-Statute.

ICTY: Rule 65 *ter* of the ICTY Rules of Proced. and Ev.

ICTR: Rule 73 *bis* of the ICTR Rules of Proced. and Ev.

SC Sierra Leone: Art. 11 of the SCSL Statute.

Iraqi ST: IST Rules of Proced. and Ev., Rule 13(4), and Rule 27.

EC Cambodia. UN-Cambodia Agreement, Art. 7.

<sup>17</sup>ICC: ICC Statute, Art. 39(2)(c): Possibly more than 1 TC if the efficient management of the Court's workload so requires.

ICTY: ICTY Statute, Art. 11.

ICTR: ICTR Statute, Art. 10.

SC Sierra Leone: SCSL Statute, Art. 11: one Trial Chamber, but possibly more.

Iraqi ST: IST Statute, Art. 3(a)(1): one Trial Chamber, but possibly more.

EC Cambodia: UN–Cambodia Agreement, Art. 3(1) and (2); Establishment Law, Art. 9 (as amended).

SP East Timor: See Sylvia de Bertodano, “East Timor: Trials and Tribulations”, in *Internationalized Criminal Courts*, above note 5, p. 87.

<sup>18</sup>ICC: ICC Statute, Art. 39(2)(b)(ii): The functions of the Trial Chamber shall be carried out by three judges of the Trial Division. To be combined with Art. 39 para. 1: the Trial Division is composed of no fewer than six judges.

ICTY: ICTY Statute, Art. 12.

ICTR: ICTR Statute, Art. 11(2): “Three permanent judges and a maximum at any one time of four *ad litem* judges shall be members of each Trial Chamber ....”

SC Sierra Leone: SCSL Statute, Art. 12(1)(a).

Iraqi ST: IST Statute, Art. 4(b).

EC Cambodia: UN–Cambodia Agreement, Art. 3(2)(a); Establishment Law, Art. 9 (as amended).

SP East Timor: SPSC Reg., Sec. 22.

<sup>19</sup>ICC: ICC Statute, Art. 39(2)(b)(1): The Appeals Chamber shall be composed of all the judges of the Appeals Division. To be combined with Art. 39(1): the Appeals Division is composed of President and four other judges.

ICTY: ICTY Statute, Art. 12(3): “Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.”

ICTR: ICTR Statute, Art. 11(3): “Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.”

SC Sierra Leone: SCSL Statute, Art. 12(1)(b).

Iraqi ST: IST Statute, Art. 4(c). For the possibility of having non-Iraqi judges, see Art. 4(d): “The Governing Council or the Successor Government, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity.”

EC Cambodia: UN–Cambodia Agreement, Art. 3(2)(b); Establishment Law, Art. 9 (as amended).

SP East Timor: SPSC Reg., Sec. 22.

<sup>20</sup>ICC: ICC Statute, Art. 11(1).

ICTY: ICTY Statute, Art. 8.

ICTR: ICTR Statute, Art. 7.

SC Sierra Leone: SCSL Statute, Art. 1.

Iraqi ST: IST Statute, Art. 1.

EC Cambodia: Establishment Law, Art. 2.

SP East Timor: SPSC Reg., Sec. 2.3: “With regard to offences listed under Section 10(1)(d)–(e) of UNTAET Regulation No. 2000/11 the panels established within the District Court in Dili shall have exclusive jurisdiction for the period between 1 January 1999 and 25 October 1999.”

<sup>21</sup>ICC: ICC Statute, Art. 25. See also Art. 26 on the exclusion of jurisdiction on persons under 18.

ICTY: ICTY Statute, Art. 6.

ICTR: ICTR Statute, Art. 5.

SC Sierra Leone: SCSL Statute, Art. 1. See also Art. 7 on the exclusion of jurisdiction on persons under 15.

Iraqi ST: IST Statute, Arts. 1 and 10.

EC Cambodia: Establishment Law, Art. 2.

SP East Timor: SPSC Reg., Sec. 2.2: “For the purposes of the present regulation, “universal jurisdiction” means jurisdiction irrespective of whether: (a) the serious criminal offence at issue was committed within the territory of East Timor; (b) the serious criminal offence was committed by an East Timorese citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen.”

<sup>22</sup>ICC: ICC Statute, Art. 12: The State on the territory of which the conduct in question occurred if this same State is Party to the Statute or has accepted the jurisdiction of the Court in accordance with paragraph 3; or if the State of which the person accused of the crime is a national, is Party to the Statute or has accepted the jurisdiction of the Court in accordance with paragraph 3.

ICTY: ICTY Statute, Art. 8.

ICTR: ICTR Statute, Art. 7.

SC Sierra Leone: SCSL Statute, Art. 1.

Iraqi ST: IST Statute, Art. 1.

EC Cambodia: Establishment Law, Art. 1 (No territorial jurisdiction is mentioned explicitly).

SP East Timor: SPSC Reg., Sec. 2.2: “For the purposes of the present regulation, “universal jurisdiction” means jurisdiction irrespective of whether: (a) the serious criminal offence at issue was committed within the territory of East Timor; (b) the serious criminal offence was committed by an East Timorese

citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen.”

<sup>23</sup>ICC: ICC Statute, Art. 5(2): the jurisdiction on the crime of aggression will not be exercised until the crime has been defined.

SC Sierra Leone: SCSL Statute, Art. 5: namely violations of the Prevention of Cruelty to Children Act, 1926 and the Malicious Damage Act, 1861.

Iraqi ST: IST Statute, Art. 14.

EC Cambodia: Establishment Law, Ch. II.

SP East Timor: SPSC Reg., Sec. 1.3.

<sup>24</sup>ICC: ICC Statute, Art. 1: The Court shall be complementary to national criminal jurisdictions.

ICTY: ICTY Statute, Art. 9: “Concurrent jurisdiction : 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.”

ICTR: ICTR Statute, Art. 8: “Concurrent Jurisdiction: 1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighboring States, between 1 January 1994 and 31 December 1994. 2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.”

SC Sierra Leone: SCSL Statute, Art. 8: Special Court and the national courts of Sierra Leone have concurrent jurisdiction, but the Special Court’s decisions take precedence over national courts.

Iraqi ST: IST Statute, Art. 29: “(a) The Tribunal and the national courts of Iraq shall have concurrent jurisdiction to prosecute persons for those offences prescribed in Article 14 that fall within the jurisdiction of the Tribunal. (b) The Tribunal shall have primacy over all other Iraqi courts with respect to the crimes stipulated in Articles 11 to 13.”

EC Cambodia: Establishment Law, Arts. 1 and 47.

SP East Timor: SPSC Reg., Sec. 1.1: Panels within the District Court of Dili have exclusive jurisdiction to deal with serious criminal offences.

<sup>25</sup>SC Sierra Leone: Sierra Leone Truth and Reconciliation Commission founded in 2002, see official website: <<http://www.sierra-leone.org/trc-documents.html>> (last visited 14 August 2005).

SP East Timor: Commission for reception, truth and reconciliation in East Timor, UNTAET/REG/2001/10. 13 July 2001, see official website: <<http://www.easttimor-reconciliation.org/>> (last visited 14 August 2005).

# The relationship between international humanitarian law and the international criminal tribunals

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## Abstract

*International humanitarian law is the branch of customary and treaty-based international positive law whose purposes are to limit the methods and means of warfare and to protect the victims of armed conflicts. Grave breaches of its rules constitute war crimes for which individuals may be held directly accountable and which it is up to sovereign states to prosecute. However, should a state not wish to, or not be in a position to, prosecute, the crimes can be tried by international criminal tribunals instituted by treaty or by binding decision of the United Nations Security Council. This brief description of the current legal and political situation reflects the state of the law at the dawn of the twenty-first century. It does not, however, describe the work of a single day or the fruit of a single endeavour. Quite the contrary, it is the outcome of the international community's growing awareness, in the face of the horrors of war and the indescribable suffering inflicted on humanity throughout the ages, that there must be limits to violence and that those limits must be established by the law and those responsible punished so as to discourage future perpetrators from exceeding them.*



## Short historical overview

International humanitarian law has played a decisive role in this development, as both the laws and customs of war and the rules for the protection of victims fall

within its material scope. Indeed, an initial proposal to reach agreement on the establishment of an international criminal court was formulated in the nineteenth century with a view to prosecuting violations of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which was adopted in 1864.

In 1907 the states codified the laws and customs of war applicable to war on land in the Hague Convention No. IV and its annexed Regulations. The Convention provides that the obligations set down in its rules are binding on the states parties, but at the end of the First World War the peace treaty signed at Versailles in 1919<sup>1</sup> established that Kaiser William II of Germany, whom it publicly arraigned for a supreme offence against international morality and the sanctity of treaties, and those who had carried out his orders were personally responsible. It thus recognized the right of the Allied and associate governments to establish military tribunals for the purpose of prosecuting persons accused of having committed war crimes.<sup>2</sup>

The responsibility, not only of the states but fundamentally of individuals, was thus established as a principle of international law, allowing grave breaches of international humanitarian law to be prosecuted by international tribunals established for that purpose.

The situation continued to evolve. During the Second World War various Allied governments expressed the desire to investigate, try and punish war criminals. The Moscow Declaration, adopted in October 1943, set the stage for the 1945 London Agreement to which was appended the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (the Nuremberg Tribunal). The commander-in-chief of the occupying forces in Japan established the Tokyo Tribunal for the same purpose.<sup>3</sup> Once again, therefore, it was agreed that, in the context of international law, certain kinds of conduct could qualify as crimes and that by virtue of the law those considered to be responsible for them could be prosecuted.

The adoption of the Charters of the Nuremberg and Tokyo Tribunals gave significant impetus to the codification of international humanitarian law: for the first time treaty-based rules defined a series of criminal offences for which individuals could be held accountable, and at the same time courts were instituted

1 Part VIII of the 1919 Peace Treaty sets out, in Articles 231 to 247, the obligation for Germany to pay reparations to the Allies for the damages inflicted; the amount of the reparations was to be set by a Reparation Commission.

2 See J. F. Wills, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood, Westport, Conn., 1982, and Yoram Dinstein and Mala Tabory, *War Crimes in International Law*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1996, pp. 149–50.

3 For the texts of the London Agreement, the Charter of the International Military Tribunal appended thereto, the proclamation of the Commander-in-Chief of the Allied Powers in Tokyo and the Charter of the International Military Tribunal for the Far East, see M. Cherif Bassiouni, *Crimes Against Humanity in International Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992, pp. 579–86 and 604–11.

that took effective action and set out a series of universally recognized principles.<sup>4</sup> It must be borne in mind, however, that at that point in the development of the law, for conduct to be considered unlawful it had to be connected with war, that is, with an armed struggle between two or more states.

In the late twentieth century, the serious violations of international humanitarian law perpetrated during the armed conflicts in the former Yugoslavia gave rise, no longer by agreement between sovereign states but rather by decision of the United Nations Security Council,<sup>5</sup> to the establishment of an international criminal tribunal for the prosecution of the presumed perpetrators; shortly thereafter another ad hoc international criminal tribunal was established in the wake of the grave events that had taken place within a state: Rwanda.<sup>6</sup> In other words, developments in the law that took the form of collective and effective measures to prevent and eliminate threats to peace resulted in the establishment of international jurisdictions whose mandate is to prosecute individuals accused of having committed crimes under international law. These are international bodies that do not make law or legislate in respect of the law; their role is to apply existing law.

- 4 See also *Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)*, S/25704, 3 May 1993, paras. 41–44, which states that the Nuremberg Tribunal recognized that many of the provisions contained in the Hague Regulations had been recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war, and that the war crimes defined in Article 6(b) of the Nuremberg Charter had already been recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable; see *inter alia* George A. Finch, “The Nuremberg Trial and International Law”, *AJIL*, Vol. 41 (1947), pp. 20 ff.; Quincy Wright, “The Law of the Nuremberg Trial”, *ibid.*, pp. 38 ff.; F. B. Schick, “The Nuremberg Trial and the International Law of the Future”, *ibid.*, pp. 770 ff.
- 5 In Resolution 808 (1993), this time in application of the rules set forth in Chapter VII of the United Nations Charter, the Security Council decided to establish the International Criminal Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (ICTY), which was given jurisdiction in respect of serious violations of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity. In one of its first appeal judgements, the ICTY stated that the Security Council’s establishment of an international tribunal constituted the adoption of a measure that did not involve the use of force, as provided under the terms of Article 41 of the Charter, and had been decided in the exercise of the Security Council’s mandate under Chapter VII to maintain international peace and security in the former Yugoslavia (*The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995). In *The Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-PT, Decision on Motion Challenging Jurisdiction – with Reasons, 22 September 2000, the ICTY referred to that precedent, adding that although the Charter enshrines the principle of sovereignty and the non-intervention of the United Nations in matters which are essentially within the domestic jurisdiction of the state, Article 2(7) establishes an exception by providing that said principle shall not prejudice the application of enforcement measures under Chapter VII; hence, when the Security Council acts pursuant to its powers under Chapter VII, it does so on behalf of all member states of the United Nations. See *inter alia* M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, New York, 1996, and Karine Lescure, *International Justice for Former Yugoslavia: The Workings of the International Criminal Tribunal of the Hague*, Kluwer Law International, The Hague, 1996.
- 6 Resolution 955 (1994). See *inter alia* Mubiala Mutoy, “Le tribunal international pour le Rwanda: vraie ou fausse copie du tribunal pénal international pour l’ex Yougoslavie?”, *RGDIP*, Vol. 99 (1995), pp. 929 ff.; Mame Mandiaye Niang, “Le Tribunal Pénal International pour le Rwanda. Et si la contumace était possible!”, *RGDIP*, Vol. 103 (1999), pp. 379 ff.; Catherine Cissé, “The end of a culture of impunity in Rwanda?”, *Yearbook of International Humanitarian Law*, 1998, pp. 161 ff.

The final step was the establishment by treaty of the International Criminal Court, a permanent body whose role is to prosecute what the international community as a whole considers to be the most serious misconduct, including, of course, war crimes.<sup>7</sup>

Thus the institution of international criminal courts authorized to prosecute individuals for their conduct when states do not want or are not in a position to do so is related to and directly influenced by the content of international humanitarian law and the definition as war crimes of grave breaches thereof. In the following pages we shall try, albeit briefly, to trace the emergence of this interrelationship step by step, in order to outline its present scope.

## The present

The development of international humanitarian law has been accompanied by the formulation of principles and the adoption of multilateral treaties intended to be universal and applicable to war crimes. The rules set down in the statutes of international criminal courts and the work the courts have done and are doing within the scope of their respective mandates reflect that development and at the same time highlight the direct relationship between the object and purpose of international humanitarian law and the establishment of the tribunals. Their jurisprudence, although not an independent law-making process, is a particularly useful additional means of determining the existence of a rule of law, its meaning and its scope.

## No retroactivity

The principle *nullum crimen sine lege* is one of the fundamental principles of criminal law; it holds that no one may be held accountable for an unlawful act unless it has been established that at the time the act was committed it was subject to clear rules making it a crime *ante factum*. This principle, which is applicable in domestic legal orders, is also relevant in international law. Ultimately, individuals incur international responsibility for their conduct if the said conduct is unlawful under international law, no matter what the provisions of domestic law are.<sup>8</sup> At the Nuremberg Tribunal, the defence invoked the principle of non-retroactivity, which is a consequence of the *nullum crimen sine lege* principle. The Tribunal held that the Charter establishing it did not reflect the arbitrary exercise of power by the

7 The states parties to the Rome Statute of the International Criminal Court state in the preamble that they are conscious that all peoples are united by common bonds, their culture pieced together in a shared heritage, thus affirming that there are values that it is in the interests of the international community as a whole to preserve; see Bruce Broomhall, *International Justice and the International Criminal Court*, Oxford University Press, Oxford, 2003, pp. 41 ff.

8 International Covenant on Civil and Political Rights, Articles 14 and 15; Luigi Condorelli, “La définition des infractions internationales, Présentation de la II<sup>ème</sup> Partie”, in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit International Pénal*, Pedone, Paris, 2000, pp. 241 ff.

victorious nations but was rather the expression of the international law in force at the time, adding that the law of war stemmed not only from treaties but also from state customs and practices that had gradually obtained universal recognition, and from the general principles of justice applied by legal scholars and military tribunals. The law was not static; it was constantly being adapted to the needs of a changing world, in such a way that many treaties do no more than reflect and define in more concrete terms existing principles of law.

### Individual criminal responsibility

The Nuremberg Tribunal thus emphasized the relationship between the treaty-based and customary rules of international humanitarian law prohibiting certain forms of individual conduct and its institution as a court with a mandate to apply that positive legal order.

The 1949 Geneva Conventions for the protection of the victims of armed conflicts define a series of acts as grave breaches of their rules and stipulate that the states parties are under the obligation to search for persons alleged to have committed them or to have ordered them to be committed, and to bring them before their own courts or, if they prefer, to hand them over for trial to another state provided that state has made out a *prima facie* case against them.<sup>9</sup> The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)<sup>10</sup> and the Rome Statute of the International Criminal Court<sup>11</sup> also work on the assumption of individual criminal responsibility. Ultimately, because it has been generally accepted in the absence of any objections, this type of responsibility has become part of international law, which originally only regulated relations between states and under which only the states could be held accountable for the commission of an internationally unlawful act, even though the responsibility may be civil in nature.<sup>12</sup>

Criminal responsibility, on the other hand, falls on natural persons who commit an act specifically defined as a crime by international law. This is the field of international law that refers to the individual as such and that can therefore be assimilated to the rules of international human rights law, given that the direct object of both branches of the law – although their content and purpose are different – is the human being.<sup>13</sup>

Of course, this responsibility can take different forms. In the light of the provisions of the Versailles Peace Treaty, of the Charters of the Nuremberg and Tokyo Tribunals and of the 1949 Geneva Conventions, it is clear that criminal

9 GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146.

10 ICTY Statute, Article 7, and Statute of the International Criminal Court for Rwanda (ICTR), Article 6.

11 Rome Statute of the International Criminal Court, Article 25.

12 In this regard, see United Nations General Assembly resolution A/56/83 on the responsibility of states for intentionally wrongful acts and the report of the International Law Commission on which it is based.

13 Victoria Abellán Honrubia, “La responsabilidad internacional de l’individu”, RCADI, Vol. 280 (1999), pp. 172 ff.

responsibility for war crimes falls not only on the individuals who commit them, but also on those who order them to be committed, no matter what their official function. The ICTY and ICTR Statutes and the Rome Statute expressly mention both forms of responsibility; they also reflect customary law and specify the extent of that responsibility, providing that those who plan or induce the commission of the crime and those who help in any way to plan, prepare or execute it are also culpable.<sup>14</sup> Of course, in order to consider that someone is culpable for having helped in any way whatsoever in the commission of a wrongful act, the acts of those bearing primary responsibility must be established to have a link with those alleged to have been of help.<sup>15</sup> Thus responsibility lies not only with those who committed the crime but also with their accomplices, those who covered for them and those who ordered, proposed or induced the commission of the crime or the attempt to commit it, as the case may be.<sup>16</sup>

Furthermore, individual criminal responsibility is incurred not only by acting, but also by intentionally or imprudently ignoring a rule that stipulates a clear obligation to act in a certain way, that is, by failure to act. Examples of conduct that is punishable because there has been a failure to act are wilful killing by withholding food or assistance, and denying a prisoner the right to a fair and impartial trial. Basically, however, this form of responsibility is incurred *de jure* and *de facto* by military leaders and other superiors who fail to take the necessary and reasonable measures to prevent or suppress the commission of unlawful acts by those who are subordinate to them. This is command responsibility,<sup>17</sup> which is incurred within a more or less well-organized structure in relation to the existence of one or several subordinates.<sup>18</sup>

14 According to the ICTY's jurisprudence, the secondary responsibility of those participating in the commission of the crime is also punishable if the participation is direct and substantial, something that is not expressly stated in the Rome Statute, Article 25(3)(a); see *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, paras. 691 and 692.

15 See ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000, which reiterates the criteria set down in *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, paras. 174-186.

16 Both the ICTY and the ICTR, referring to the jurisprudence of the British military tribunals and German courts that acted in the wake of the Second World War and their application of Allied Control Council Law No. 10, have ruled that collaboration or aid in the commission of an unlawful act does not necessarily require a physical act; suffice it for the person to provide moral support to the person committing the crime, or to urge him to commit it, so long as such support or encouragement has a substantial effect on the person carrying out the act; ICTY, *Prosecutor v. Anto Furundzija*, above note 15; ICTR, *Le Procureur c. Jean-Paul Akayesu*, ICTR-96-4-T, Jugement, 2 September 1998.

17 This type of responsibility is part of customary law, as established in Protocol I additional to the 1949 Geneva Conventions, Arts 86 and 87, and confirmed in the jurisprudence of the ICTY and the ICTR; ICTY: *The Prosecutor v. Zeynil Delalic et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, para. 383; *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 290; *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss for Lack of Jurisdiction. Portions of the Amended Indictment alleging Failure to Punish Liability, 2 March 1999; *The Prosecutor v. Momcilo Krajisnik*, above, note 5; ICTR: *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, 4 September 1998.

18 The ICTY found that the temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander; *The Prosecutor v. Dragoljub Kunarac, Radimir Kovac and Zoran Vukovic*, Case No. IT-96-23-T and No. IT-96-23/1-T, Judgment, 22 February 2001, para. 399.

## Command responsibility

The first postulate – the responsibility of military leaders – originates from the law of war and was codified in the Hague Convention No. IV of 1907 and its Regulations respecting the laws and customs of war on land.<sup>19</sup> A military leader or someone acting as such is responsible for the conduct of those under his command or authority and over whom he has effective control,<sup>20</sup> given that he not only should but indeed is obliged to know what they are doing and to adopt the necessary and reasonable measures within his power to prevent or suppress the commission of unlawful acts;<sup>21</sup> this obligation, plus the fact that the superior knows or had reason to know that the crime was going to be or had been committed and that there exists a superior–subordinate relationship, are the three constituent elements of command responsibility.<sup>22</sup>

The extension of this kind of responsibility to other superiors who are not military leaders springs, on the other hand, from customary law, as established by the ICTY and the ICTR when they interpreted the corresponding rules of their Statutes. In their decisions, both tribunals concluded that a public official, agent or person invested with the prerogatives of the public authorities or who de facto represents the government, and who has effective control over subordinates, can be held accountable for failure to act, although in that hypothesis the person in question must have known about the acts and not just failed in his duty of vigilance and allowed the acts to happen, as is the case for the responsibility of a military leader.<sup>23</sup>

This means, in other words, that as concerns both military leaders and other superiors, responsibility by failure to act requires that a superior–subordinate relationship exists, that the superior knew, had reason to know or,

19 Regulations, Article 1(1), according to which the members of armed forces must be commanded by a person responsible for his subordinates.

20 The ICTY is of the view that effective control emerges from the superior's capacity to give orders to those under his command, there being no requirement for the order to be given in writing or in any particular form; *Prosecutor v. Tihomir Blaskic*, above note 17; *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, para. 388.

21 P I, Arts 86 and 87; Rome Statute, Article 28.1; see Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, Manchester University Press, Manchester, 2002, and ICTY, *The Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001, para. 241, in which the ICTY ruled that the principle that the superior is criminally responsible because he "had reason to know" that his subordinate was going to commit a crime implies that the superior is responsible only if information was available to him which would have put him on notice of offences committed by subordinates; this interpretation was reiterated in *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgment, 29 July 2004.

22 ICTY, *The Prosecutor v. Zlatko Aleksovski*, above note 15, paras. 74–76.

23 ICTR: *Le Procureur c. Jean Paul Akayesu*, above note 16; *Le Procureur c. Clément Kayishema et Obed Ruzindana*, ICTR-95-1-T, Jugement et Sentence, 21 May 1999; ICTY: *The Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21, Judgment, 16 November 1998, and above note 21, para. 241; *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, paras. 66–81. These are some of the cases which, referring to cases tried internally in the wake of the Second World War, considered that this type of responsibility could be incurred by civilian as well as military leaders if the former used their influence to order the commission of a crime or if they did not exercise influence to prevent that crime; see Rome Statute, Article 28(2).

as the case may be, should have known that the act had been or was going to be committed, and that he negligently failed to take the necessary and reasonable measures to prevent the act or punish the perpetrators.<sup>24</sup> Of course, the responsibility they may incur is independent of that which may be incurred by their subordinates, given that it exists whether or not the wrongful act has been committed.<sup>25</sup> The case of a superior who knows that a crime is going to be committed and deliberately does not stop his subordinates from committing it is different, because in this hypothesis the superior incurs responsibility not by failing to act but rather by participating in the commission of the act.<sup>26</sup> The situation would be identical for a superior who, by virtue of his position, plans, instigates or participates in the planning, preparation or execution of crimes by his subordinates, because in all these cases his responsibility would arise from something he did.<sup>27</sup> It therefore cannot be considered that a person can at one and the same time incur responsibility as a superior and as the perpetrator of a crime; rather, his position as a superior could constitute an aggravating circumstance resulting in harsher punishment.<sup>28</sup>

This aspect of individual criminal responsibility – command responsibility – is linked to the responsibility of the subordinate who commits the crime. Once again, the origins of this general principle are to be found in the Charter of the Nuremberg Tribunal, which stipulates that the fact that the defendant acted pursuant to the orders of his government or of a superior does not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal

24 The ICTY found that the superior must have had information indicating that an additional investigation was required and that it had to be determined in each case whether the superior had taken the measures that were within his material possibilities; *The Prosecutor v. Zejnil Delalic et al.*, above note 17, para. 354, in which case the Appeals Chamber specified that a de facto commander is responsible for the conduct of his subordinates when he has effective control and if information was available to him which put him on notice of their conduct, Judgment, 20 February 2001, para. 241. It subsequently specified, in respect of the offence of torture, that it is not enough that a superior has information about beatings inflicted by his subordinates on detainees, he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture; *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003, para. 155.

25 The ICTY ruled that superiors who plan or incite or order their subordinates to commit an unlawful act are subject to an aggravating circumstance that should result in a longer sentence; *The Prosecutor v. Zlatko Aleksovski*, above note 15, para. 183.

26 See also ICTY, *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgment, 17 September 2003, para. 52, and *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Appeal Judgment, 19 April 2004, paras. 137–40.

27 See also ICTY, *The Prosecutor v. Radovan Karadzic and Ratko Mladic*, Case No. IT-95-5, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 83; *Prosecutor v. Dario Kordic and Mario Cerkez*, above note 20, para. 371; *Prosecutor v. Tihomir Blaskic*, above note 21, in which the ICTY ruled that superiors who order an act or failure to act in the knowledge that a crime will probably be committed in the discharge of that order have the necessary *mens rea* to be considered individually culpable for the crime in relation to the order they gave. In this case it was the ICTY's opinion that issuing an order with such knowledge is tantamount to acceptance of the crime.

28 See also ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 34, which reiterates the opinion set down in *Prosecutor v. Tihomir Blaskic*, above note 21, paras. 90–91, and *Prosecutor v. Zlatko Aleksovski*, above note 15, para. 183.

determines that justice so requires.<sup>29</sup> The ICTY and ICTR Statutes,<sup>30</sup> using roughly similar wording, also provide that the 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 Tribunal determines that justice so requires.<sup>31</sup> Although obeying orders is inherent in a military-type system, every individual is responsible for acts freely committed in full possession of his mental faculties, which supposes that he has verified the lawfulness of the order received, that is, whether it is contrary to international customary or treaty-based law, and is in a position so to judge.

### War crimes in all situations of armed conflicts

While individual criminal responsibility for the commission of war crimes is a principle of general international law set down in the Versailles Peace Treaty and in the Charter of the Nuremberg Tribunal, it must not be forgotten that the crimes referred to in the former and tried by the latter were violations of the laws and customs of war committed specifically during a war. The 1949 Geneva Conventions and their Additional Protocols extend the scope of application to any international armed conflict but contain no provisions on whether such crimes can also be perpetrated in non-international armed conflicts. In this respect, the case-law of the ICTY and the ICTR is especially valuable for determining the scope of international humanitarian law, since these were the first international courts called on to prosecute such crimes.

When the Security Council adopted Resolution 827 (1993) approving the ICTY Statute, the United States expressed the view, shared by the United Kingdom and France, that the article of the Statute that gave the Tribunal jurisdiction over violations of the laws and customs of war covered the obligations established by the international humanitarian law in force on the territory of the former Yugoslavia at the time those acts were committed, including Article 3 common to the four 1949 Geneva Conventions and the two Additional Protocols of 1977. This meant that, in the view of those three permanent members of the Security Council, war crimes can be committed in the context not only of an international armed conflict, but also in that of an armed conflict that is not international in character,

29 Charter of the Nuremberg Tribunal, Article 8; see O. Sara Liwerant, "Les exécutants", in Ascencio, Decaux and Pellet, above note 8, pp. 211 ff., and M. J. Osiel, "Obeying orders: atrocity, military discipline, and the law of war", *Cal. Law Rev.*, Vol. 86 (1998), pp. 939 ff.

30 ICTY Statute, Article 7.4, and ICTR Statute, Article 6.4.

31 Before the ICTY, the defence invoked the argument of the duty to obey an order given under duress, it being understood that in that hypothesis there should be a case-by-case examination whether the accused did not have the duty to disobey, whether he had the moral choice to do so or to try to do so; it was added that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, 12 November 1996, para. 19, and Judgment in the Appeals Chamber, 7 October 1997, para. 19; see Peter Rowe, "Duress as a Defence to War Crimes after Erdemovic: A Laboratory for a Permanent Court?", *Yearbook of International Humanitarian Law*, Vol. I (1998), pp. 210 ff.

given that both common Article 3 and 1977 Additional Protocol II regulate such conflicts and prohibit certain kinds of conduct.

However, the rules of Protocol II are applicable in a specific kind of armed conflict that is not international in character: the conflict must take place on the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.<sup>32</sup> Common Article 3, on the other hand, stipulates that it applies in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, with no further conditions, leaving its scope open to interpretation. One could infer that the situations to which it applies are not limited to those referred to in Protocol II, even though the rights and obligations established constitute a minimum that each party to the conflict is bound to apply.

In this respect, the ICTY considered that its Statute gave it jurisdiction only in respect of the law of war relating to the conduct of hostilities, but also in respect of violations of common Article 3, given that if the prohibitions set down in common Article 3 constitute the minimum to be applied by the parties involved in an armed conflict that is not international in character, then that minimum must be applied in any kind of armed conflict. In its view, under customary law, which stipulates that all violations of the rules of international humanitarian law entail individual criminal responsibility, violations of the prohibitions set down in common Article 3 constitute war crimes.<sup>33</sup> It must be pointed out that in the case which gave rise to this jurisprudence, the prosecution had based the charges in this respect on violations of common Article 3 and of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention No. IV of 1907, namely the prohibition of pillage, framing them within the jurisdiction attributed to the ICTY to prosecute violations of the laws and customs of war. In reaching its conclusion, the ICTY first considered that the Statute was to be construed as giving it jurisdiction to prosecute any violation of international humanitarian law that was not covered in another of its provisions, that is, in either the so-called Law of Geneva – essentially the four Geneva Conventions, partially supplemented by the two additional Protocols – or in what is known as the Law of The Hague, essentially the rules adopted in 1907 supplemented by other rules of the Protocols. Moreover, in the sentence it recalled the customary law nature of the content of common Article 3, referring expressly to the

32 P II, Article 1(1).

33 Article 3 of the Statute stipulates that the International Tribunal shall have the power to prosecute persons violating the laws or customs of war; see also ICTY, *The Prosecutor v. Dusko Tadic*, above note 5; ICTY, *The Prosecutor v. Zejnir Delalic et al.*, above note 17, a view confirmed by the Appeals Chamber, Judgment, 20 February 2001, paras. 140–3; ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2PT, Decision on Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the Limited Jurisdictional Reach of Articles 2 and 3, 12 March 1999.

jurisprudence in this respect of the International Court of Justice<sup>34</sup> and of the ICTR,<sup>35</sup> to the report submitted by the United Nations Secretary-General to the Security Council pursuant to Resolution 808 (1993), and to the statement made by the United States on the Statute's adoption and to which no objections had been raised. Moreover, in response to defence allegations that such an interpretation violated the principle *nullum crimen sine lege*, it stated that the crimes established in common Article 3 also constituted crimes in the national legislation in force at the time when the acts in question had been committed. It therefore considered that the list of offences in the Hague Convention of 1907 contained in Article 3 of its Statute was explicit and gave it the capacity to try any violation of customary international humanitarian law not considered in that legal instrument to constitute a grave breach of the 1949 Geneva Conventions, genocide or crimes against humanity.<sup>36</sup> In the Tribunal's opinion, the object of those provisions was to prevent it from being unable to prosecute a crime and to ensure that the purpose for which it had been established by the Security Council was met, in other words, that the guilty did not go unpunished no matter what the context in which they had perpetrated the violations. The teleological method of interpretation and the rule of effectiveness are obvious in the Tribunal's reasoning.

It is clear from the Tribunal's jurisprudence that the provisions of common Article 3 constitute minimum obligations to be met by the parties involved in any situation of armed conflict. This being so, and given that Additional Protocol II was adopted to develop and supplement those rules, the logical conclusion is that an armed conflict that is not international in character and to which common Article 3 is to be applied does not necessarily need to meet all the requirements of Protocol II for the Protocol's provisions to apply. This, indeed, is what the ICTY concluded when it established that an armed conflict exists whenever armed force is used between states or protracted armed violence breaks out between government authorities and organized armed groups or between such groups on the territory of a state.<sup>37</sup> This final option is not, of course, part of the material scope of application of Protocol II, as it is not a form

34 ICJ, *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, ICJ Reports 1986.

35 ICTR, *Le Procureur c. Jean Paul Akayesu*, above note 16.

36 The "umbrella" nature of this rule of the Tribunal's Statute was reiterated in *The Prosecutor v. Anto Furundzija*, above note 15, in which a Bosnian Croat leader was also accused of violating the laws and customs of war against Bosnian Muslims; the Tribunal found that in this case torture and outrages against human dignity, including rape, were crimes it had jurisdiction to prosecute under the provisions of Article 3 of its Statute. It expressed the same opinion in *The Prosecutor v. Zlatko Aleksovski*, above note 15, in which the commander of a Bosnian Serb camp was accused, by virtue of command responsibility, of violating the laws and customs of war in the form of outrages on personal dignity and of physical and psychological ill-treatment of detainees, and in *The Prosecutor v. Goran Jelusic*, Case No. IT-95-10-T, Judgment, 14 December 1999, in which the accused was charged with murder, cruel treatment and pillaging as violations of the laws and customs of war and murder and other inhumane acts as crimes against humanity.

37 ICTY, *Prosecutor v. Dusko Tadic*, above note 5.

of hostilities involving government armed forces. The provisions of common Article 3 are nevertheless binding.<sup>38</sup>

For this reason the ICTY, referring to the practice of states, state military handbooks, national legislation to implement the obligations undertaken in the 1949 Geneva Conventions, the intention of the Security Council, the logical interpretation of its Statute and customary law, considered that under general international law criminal responsibility is also incurred by those committing serious breaches of common Article 3, whether by failing to provide the victims with the protection to which they are entitled or by violating the rules governing the methods and means of combat. It concluded that it has jurisdiction over such breaches irrespective of whether the alleged acts were committed in the context of an internal or an international armed conflict. Taking the interpretation a step further, it specified that under customary law this rule is definitely applicable to any kind of conflict, whether international in character or not, as it encompasses the minimum obligations to be respected by the parties involved.<sup>39</sup>

### An expanded notion of war crimes?

Consequently, since the material jurisdiction attributed to the ICTY by the Security Council concerns rules that, at the time of its establishment, formed part of both international customary and treaty-based law, the ICTY's decisions will tell us whether in the years since the institution of the Nuremberg Tribunal the notion of war crime has been expanded. In fact, that notion applies not only to grave breaches of international humanitarian law committed in the context of a war as such, but also to acts perpetrated in connection with an armed conflict, be it international or not; this is true even in cases in which the only protagonists of the protracted armed violence are organized armed groups on the territory of a state.<sup>40</sup>

This interpretation is confirmed by the fact that when the Security Council instituted the ICTR it gave it jurisdiction specifically to prosecute violations not just of common Article 3 but also of Protocol II;<sup>41</sup> both apply in the case of an armed conflict that is not international in character. The ICTR

38 See Paul Tavernier, "The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda", *International Review of the Red Cross*, No. 321, Nov.-Dec. 1997, pp. 605–21. This interpretation was reiterated by the ICTR in *Le Procureur c. Jean Paul Akayesu*, above note 16, in which it ruled that international humanitarian law should make a clear distinction, in respect of its scope of application, between situations of international armed conflict, in which all its rules are applicable, situations of armed conflict that are not international in character and in which common Article 3 and Additional Protocol II apply, and armed conflicts that are not international in character and in which only the provisions of common Article 3 apply.

39 ICTY: *The Prosecutor v. Anton Furundzija*, Case No. IT-95-17, Decision on the Defendant's Motions to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), 29 May 1998; *Prosecutor v. Zejnir Delalic et al.*, above note 21, para. 143.

40 See Djamchid Momtaz, "War crimes in non-international armed conflict under the Statute of the International Criminal Court", *Yearbook of International Humanitarian Law*, 1999, pp.177 ff., and Daryl Robinson and Herman von Hebel, "War crimes in internal conflicts: article 8 of the ICC Statute", *ibid.*, pp. 193 ff.

41 ICTR Statute, Article 4.

established that the intensity of such a conflict does not depend on the subjective opinion of the parties involved, adding that common Article 3 is customary in nature and establishes individual criminal responsibility for serious violations, meaning violations of a rule protecting important values and entailing serious consequences for the victim.<sup>42</sup>

The ICTR Statute stipulates that such violations include, but are not limited to, violence to the life, health and physical or mental well-being of persons, in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishment, the taking of hostages, acts of terrorism, outrages against personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, pillage, the passing of sentences and the carrying out of executions without a previous judgment pronounced by a regularly constituted court and without affording all the judicial guarantees which are recognized as indispensable by civilized peoples, and threats to commit any of those acts. It is interesting to note that the violations mentioned are forms of conduct prohibited in roughly the same terms in Protocol II<sup>43</sup> and in common Article 3<sup>44</sup> in respect of all those who do not or no longer participate directly in the hostilities, whether deprived of their freedom or not.

Common Article 3 stipulates that protection is extended to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, without any adverse distinction.<sup>45</sup> The ICTY considered that violations of this rule committed against people detained by the forces of the adverse party, no matter what the nature of their participation in the hostilities up to that time, should be deemed to have been committed against members of the armed forces placed *hors de combat* by detention. Ultimately, such people are entitled to benefit from the protection of the rules of customary international law applicable to armed conflicts, such as those set down in common Article 3.<sup>46</sup>

From the Statutes of the ICTY and the ICTR and from their jurisprudence interpreting international humanitarian law, it emerges that violations of the prohibitions contained in common Article 3 constitute war crimes in any situation of armed conflict. It must be borne in mind, however, that the ICTY Statute has

42 ICTR, *Le Procureur c. Jean Paul Akayesu*, above note 16; it must be pointed out, as the Tribunal did in this sentence, that Rwanda had acceded to the Geneva Conventions on 5 May 1964 and to Additional Protocol II on 19 November 1984. According to General Dallaire, one of the witnesses in the case, the territory of Rwanda was the scene of a civil war between the governmental forces (FAR) and the RPF under the command of General Kagame, both of which were organized armed groups. The RPF started to increase their control over the territory in mid-May 1994 and sustained military operations were carried out until the ceasefire of 18 July 1994; the sentence therefore states that the requirements had been met for the application of Protocol II.

43 P II, Article 4(2).

44 GC I-IV, Article 3(1), in particular (d).

45 GC I-IV, Article 3(1).

46 ICTY, *The Prosecutor v. Zejnil Delalic et al.*, above note 17.

two distinct rules, one granting it jurisdiction to prosecute violations of the laws and customs of war,<sup>47</sup> the other to try grave breaches of the 1949 Geneva Conventions.<sup>48</sup> In connection with the latter, the Tribunal has the power to prosecute any of the acts listed and committed against persons or objects protected by the provisions of the Conventions; in this case, this refers to acts connected with a type of armed conflict, namely international armed conflicts.

### The question of control

In this respect the ICTY stated that for this provision of its Statute to apply – as opposed to the provision referring to violations of the laws and customs of war – the conflict would have to be international. This would be the case if the conflict concerned clashes between two states but also if a third state sent in troops or one of the parties to the conflict acted in the interests of another state; it further recalled that paramilitary forces and other irregular troops can be considered combatants if they belong to one of the parties to the conflict, if that party exercises control over them and if there is a relationship of allegiance and dependence between the two. In the ICTY's opinion, the control required for the units concerned to be considered *de facto* agents of the state involves not only financing and equipping such units but also the planning and supervision of military operations. The state concerned does not, however, have to issue orders or instructions for every individual military action; in other words, it must exercise overall control.<sup>49</sup>

The characterization of an armed conflict as international because of the intervention in an internal conflict of a third state exercising overall control over one of the parties involved is particularly relevant as concerns the application of the rules of the 1949 Geneva Conventions regarding grave breaches, because for a form of conduct to be defined as a war crime the victims have to be protected persons within the meaning of the Conventions. In this respect, Article 4 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. In other words, one of the conditions for the Convention's application is that the detainee not be a "national" of the detaining authority. In the opinion of the ICTY, and in view of the object and purpose of the Fourth Geneva Convention, protection should be extended to people who find themselves in the power of a party that does not grant them diplomatic protection and to detainees who do not owe it allegiance.<sup>50</sup> In this interpretation, the criterion used

47 ICTY Statute, Article 3.

48 *Ibid.*, Article 2.

49 ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment, 15 July 1999; *The Prosecutor v. Zlatko Aleksovski*, above note 15, paras. 145–51.

50 ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, above note 49; *The Prosecutor v. Zlatko Aleksovski*, above note 15, paras. 151–52.

is that of effective nationality, established many years earlier by the International Court of Justice.<sup>51</sup> The logical conclusion, therefore, is that only if nationality reflects a genuine connection between the person and the state does it have effects in international law; in the case at hand, the effect is to prevent the person being granted the treatment to which he is entitled under international humanitarian law.<sup>52</sup>

## The connection to the armed conflict

War crimes are therefore serious violations of an international treaty-based or customary rule that enshrines basic values, entails serious consequences for the victim and incurs the perpetrator's responsibility. Such crimes must be perpetrated in direct connection with the armed conflict, be it international or not international in character. However, this link between the conduct and the conflict does not necessarily mean that the act must have been carried out in the combat zone or in the course of an attack. Indeed, the application of the rules of international humanitarian law does not depend on the will of the parties involved but rather on the objective fact of the existence of an armed conflict.<sup>53</sup> The ICTY specified the scope of the obligations thus assumed, adding that the fact that the accused's action had to be related to the conflict did not imply that it had been carried out in the combat zone; the laws of war apply throughout the territory of the parties to the conflict or, in the case of armed conflicts not international in character, throughout the territory under the control of one of the parties, until such time as peace is restored or – in the second hypothesis – a peaceful solution is found to the issue placing the parties in opposition to each other.<sup>54</sup> The ICTY reiterated that opinion in a subsequent decision, adding that there were a number of factors for determining whether the acts concerned had sufficient bearing on the armed conflict to constitute war crimes: whether the perpetrator was a combatant; whether the victim was a non-combatant or a member of the adverse party; whether it could be alleged that the act had furthered the purpose of a military campaign; and whether the crime was committed as part or in the context of the official duties of the accused.<sup>55</sup> The victims can be members of the enemy armed forces, civilians from the adverse party, or internationally protected persons

51 ICJ, *Nottenbohm case, Liechtenstein v. Guatemala*, ICJ Reports 1955.

52 The ICTY, in view of the evidence produced, considered in the *Tadic* case that the victims were protected persons in that they did not owe allegiance to the Federal Republic of Yugoslavia, and that the conflict was international because the Bosnian Serb forces were acting in the interests of the Federal Republic of Yugoslavia. In the *Aleksovski* case it ruled that the conflict was international because of the participation of Croatia and that the victims – Bosnian Muslims – were protected persons, adding that in certain circumstances protected persons had to be granted that status even though they had the same nationality as their captors.

53 Article 1 common to the four 1949 Geneva Conventions stipulates that the High Contracting Parties undertake to respect the Conventions in all circumstances.

54 ICTY, *The Prosecutor v. Dusko Tadic*, above note 5, para. 70.

55 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vucovic*, Case No. IT-96-23 and IT-96-23/1A, Appeals Judgment, 12 June 2002, para. 59.

– those not or no longer playing a direct part in the hostilities<sup>56</sup> – and the crime committed take the form either of violence against a human being or the employment of prohibited methods and means of combat.

## The jurisdiction of the International Criminal Court

Many of the principles of international humanitarian law highlighted in the jurisprudence of the ICTY and the ICTR, interpreting the rules contained in their Statutes in the light of developments in that branch of positive law, and many provisions of the multilateral treaties adopted with a view to limiting violence were taken into account when the conference convened in Rome in 1998 under the auspices of the United Nations adopted the Statute of the International Criminal Court (Rome Statute). The Court was given the power to exercise its jurisdiction over persons<sup>57</sup> whose conduct was a crime under the Court's jurisdiction at the time it occurred;<sup>58</sup> the official capacity of a person does not exempt that person from responsibility;<sup>59</sup> and, while the Rome Statute establishes the responsibility of commanders and other superiors,<sup>60</sup> it also provides that, in principle, the fact that the crime was committed pursuant to an order of a government or of a superior does not relieve the person concerned of responsibility.<sup>61</sup>

The Court has jurisdiction *inter alia* over war crimes.<sup>62</sup> While the Rome Statute, it is true, has the most extensive list of war crimes, it deals with them somewhat differently because a state, on becoming party to the Statute, may declare that, for a period of seven years after the Statute comes into force for it, it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its nationals or on its territory.<sup>63</sup> Moreover, it is only in respect of war crimes that the accused can claim to be exempt from responsibility because of an order given by a government or a superior if he was under a legal obligation to obey the order, he did not know the order was unlawful and the order was not manifestly unlawful.<sup>64</sup> And it is only in connection with war crimes that self-defence can be invoked not for the person but for an object essential to that person's survival or to the accomplishment of a military mission.<sup>65</sup>

The Rome Statute, reflecting developments in customary law highlighted by the Statutes and jurisprudence of the ICTY and the ICTR, defines four

56 ICTY, *The Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigid and Dragoljub Prac*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, para. 124.

57 Rome Statute, Arts 1 and 25.

58 *Ibid.*, Arts 22 and 23.

59 *Ibid.*, Article 27.

60 *Ibid.*, Article 28.

61 *Ibid.*, Article 33.

62 *Ibid.*, Article 5.

63 *Ibid.*, Article 124.

64 *Ibid.*, Article 33.

65 *Ibid.*, Article 31(1)(c).

categories of war crimes, two in respect of international armed conflicts<sup>66</sup> and two in respect of conflicts not international in character.<sup>67</sup> However, the Elements of Crimes adopted by the Assembly of States Parties to assist in the interpretation and application of the Court's jurisdiction<sup>68</sup> specify that there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international, nor is there a requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict because a war crime must occur in the context of such a conflict and be associated with it.

However, although in customary law war crimes can be committed by a person acting on his own and not having received an order to perpetrate them, for the Court to exercise its jurisdiction over this kind of crime the Rome Statute requires "in particular" that such crimes be "committed as part of a plan or policy or as part of a large-scale commission of such crimes".<sup>69</sup> The term "in particular" allows the Court itself to interpret the scope of this rule, given that any judge is judge of his own jurisdiction and on that basis may have to decide whether there are legal grounds for prosecuting individual cases.<sup>70</sup>

The first category of crimes defined in respect of situations of international armed conflict is grave breaches of the 1949 Geneva Conventions.<sup>71</sup> The Elements of Crime, pursuant to the ICTY's interpretive jurisprudence, specify that it is not necessary for the perpetrator to know the nationality of the victims, but only that they belong to the adverse party, because, for example, even if the victims have the same nationality as the perpetrator, the state concerned may no longer protect them because they belong to an ethnic minority. The second category of crimes concerns other serious violations of the laws and customs applicable in international armed conflicts, "within the established framework of international law".<sup>72</sup> The reference to international law could lead one to construe that an individual incurs responsibility whenever he violates principles of international humanitarian law, such as the principle of distinction between combatants and civilians, the principle of proportionality and the principle of military necessity.

The crimes identified are related to the Law of The Hague<sup>73</sup> and are considered to be war crimes under Protocol I additional to the Geneva

66 Ibid., Article 8(2)(a) and (b).

67 Ibid., Article 8(2)(c) and (e).

68 Ibid., Article 9.

69 Ibid., Article 8(1).

70 H. Von Hebel and D. Robinson, "Crimes Within the Jurisdiction of the Court", in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, on this point in particular, p. 124.

71 Rome Statute, Article 8(2)(a)(i-viii).

72 Ibid., Article 8 (2)(b).

73 Regulations respecting the laws and customs of war on land, annexed to the 1907 Convention, Articles 23 and 28.

Conventions.<sup>74</sup> However, this category also includes acts that violate the right to protection of humanitarian assistance or peacekeeping missions conducted in accordance with the United Nations Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict, that is, so long as they do not participate directly in the hostilities.<sup>75</sup> In addition, intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated,<sup>76</sup> and intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives,<sup>77</sup> are also war crimes over which the Court has jurisdiction. It is interesting to note, in direct connection with the rules specifically protecting cultural property in the event of armed conflict, that this provision of the Rome Statute only refers to intentional attacks against one kind of such property: buildings dedicated to art or monuments. No account appears to have been taken of archaeological sites, books or other movable or immovable property of great significance to the cultural heritage of peoples.<sup>78</sup> The transfer, directly or indirectly, by the occupying power of parts of its 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, is

74 P I, Articles 11, 85(2), (3) and (4), even though the wording is not exactly identical.

75 Ibid., Article 8(2)(b)(iii); Convention on the Safety of United Nations and Associated Personnel, 1994.

76 Ibid., Article 8(2)(b)(iv); in P I, Article 35(3) – a fundamental rule – prohibits the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, and Article 55 stipulates that care is to be taken in warfare to protect the natural environment against such damage and prohibits attacks against the natural environment by way of reprisals. In 1976, the United Nations adopted the Convention on the prohibition of military or any hostile use of environmental modification techniques.

77 Ibid., Article 8(2)(b)(ix).

78 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict, Article 1. Articles 10 and 15 of the Convention's Second Protocol, adopted in 1999, stipulate that each state party must establish as criminal offences under its domestic law *inter alia* attacks against cultural property, as defined in the Convention, that is cultural heritage of the greatest importance for humanity, that is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection, and that is not used for military purposes or to shield military sites, the party which has control over the cultural property having confirmed that it will not be so used. P I, Article 85(4)(d), provides that it is a war crime to make 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 the object of attack, when such property is not located in the immediate proximity of military objectives. The ICTY, on the basis of P I, Articles 52 and 53, on the general protection of civilian objects and the protection of cultural objects and places of worship, ruled that there are two kinds of protection, one general, the other special. The first applies to civilian objects, which, by virtue of that protection, must not be the object of attack or reprisals unless they constitute a military objective affording the attacking side a definite military advantage at the time of the attack. Special protection, for its part, shields cultural property and places of worship that are part of the cultural or spiritual heritage of peoples; it is absolutely prohibited to commit acts of hostility against such property. In the ICTY's opinion, schools and places of worship benefit from general protection; ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, above note 28, paras. 89–90.

also listed as a war crime.<sup>79</sup> Other provisions in this article refer to the prohibition to use certain weapons – poisons, asphyxiating, toxic or other gases, expanding bullets – that was set down in international treaties in 1899 and 1925 and has become part of customary law.<sup>80</sup> However, when it comes to modern weapons – such as nuclear weapons, anti-personnel landmines, or chemical and biological weapons – which are of a nature to cause superfluous injury or unnecessary suffering and which have inherently indiscriminate effects, their use would only be a crime under the Court’s jurisdiction if in the future they were the subject of a comprehensive prohibition included in an annex to the Rome Statute adopted seven years after its entry into force by the Assembly of States Parties or by a Review Conference.<sup>81</sup> Another important rule in the light of recent developments on the international stage is that which considers it a crime to recruit or enlist in the national armed forces children under the age of 15 or to use them to play an active part in the hostilities. The antecedents for this provision are the Convention on the Rights of the Child and Protocol I additional to the 1949 Geneva Conventions.<sup>82</sup> Other types of conduct prohibited in the Conventions or in Protocol I but which are not defined by them as grave breaches or war crimes for which individual criminal responsibility is incurred are defined as such by the Rome Statute, to wit: outrages on personal dignity, in particular humiliating and

79 Rome Statute, Article 8(2)(b)(viii), a rule which Israel considered, when the text of the Rome Statute was adopted, did not reflect the customary law in force at the time, since it referred not only to the transfer of people in the occupied territory but also to the transfer by the occupying power of its own population into the occupied territory, on which grounds Israel decided to vote against the text of the Statute. However, the ICTY has maintained that the unlawful deportation or transfer of civilians can be defined as a war crime since it is a grave breach of the Fourth Geneva Convention. It added that the material element of the crime is constituted by an act or failure to act the aim of which is to transfer the person from the occupied territory or to the occupied territory and that is not based on the safety of the population or on imperative military necessity. The subjective element is the intention of the perpetrator to transfer the person; ICTY, *The Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment, 31 March 2003, paras. 519–21.

80 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925; Declaration of The Hague concerning Expanding Bullets, 1899.

81 Rome Statute, Article 8(2)(b)(xx). Account should nevertheless be taken of the adoption of multilateral international humanitarian law treaties limiting the means of combat: the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972; the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980, and its Protocols (Protocol I on Non-Detectable Fragments, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol IV on Blinding Laser Weapons, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997; 2001 amendment of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocols I, II and III, 1980; Protocol on the Explosive Remnants of War, 2003.

82 Rome Statute, Article 8(2)(b)(xxvi); Convention on the Rights of the Child, Article 38, and P I, Article 77.

degrading treatment;<sup>83</sup> rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;<sup>84</sup> utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;<sup>85</sup> intentionally using starvation of civilians as a method of warfare;<sup>86</sup> or intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.<sup>87</sup>

The Rome Statute also defines two categories of war crimes committed in armed conflicts that are not international in character. The first is made up of serious violations of common Article 3,<sup>88</sup> it being specified that the relevant article of the Rome Statute does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.<sup>89</sup> The second refers to other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.<sup>90</sup> It is specified that the rules apply to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups,<sup>91</sup> and the participation of the governmental armed forces is therefore not necessary in order to define the conflict to that end. This category includes as war crimes some of the acts prohibited in Additional Protocol II that are directed intentionally against the civilian population as such or against civilians not participating directly in the hostilities,<sup>92</sup> against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law,<sup>93</sup> and against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.<sup>94</sup> Other acts listed as war crimes are sexual and gender crimes,<sup>95</sup> conscripting or enlisting children under the age of 15

83 Rome Statute, Article 8(2)(b)(xxi); P I, Article 75(2)(b).

84 Rome Statute, Article 8(2)(b)(xxii); GC IV, Article 27.

85 Rome Statute, Article 8(2)(b)(xxiii); GC IV, Article 28; P I, Article 51(7).

86 Rome Statute, Article 8(2)(b)(xxv); P I, Article 54(1).

87 Rome Statute, Article 8(2)(b)(xxiv); GC I Articles 19, 20, 24, 35, 53; GC II, Articles 22, 23, 36, 39, 41–45; GC IV, Articles 18, 20–22; P I, Articles 8, 12, 18, 21, 22, 24, 38, 85(3)(f), in that it defines perfidious use of the emblem as a war crime; these emblems, the red cross and the red crescent, are of signal importance in international humanitarian law because in time of armed conflict they are the visible manifestation of the protection conferred by the Conventions and the Additional Protocols on medical personnel and means of transportation, and the states must adopt internal regulations for their use.

88 Rome Statute, Article 8(2)(c).

89 *Ibid.*, Article 8(2)(d); P II, Article 1.2.

90 Rome Statute, Article 8(2)(e).

91 *Ibid.*, Article 8(2)(f).

92 *Ibid.*, Article 8(2)(e)(i); P II, Articles 13.2.

93 Rome Statute, Article 8(2)(e)(ii); P II, Articles 9, 10, 11(1) and 12.

94 Rome Statute, Article 8(2)(e)(iv); P II Article 16.

95 Rome Statute, Article 8(2)(e)(vi), as long as they also constitute a grave breach of common Article 3.

into armed forces or groups or using them to participate actively in hostilities,<sup>96</sup> ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demands,<sup>97</sup> pillaging a town or place, even when taken by assault,<sup>98</sup> and subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.<sup>99</sup> Lastly, the Rome Statute includes as war crimes in situations of armed conflict that are not international in character some of the prohibitions as to methods of combat set down in the Regulations annexed to the Hague Convention No. IV of 1907, such as killing or wounding treacherously a combatant adversary,<sup>100</sup> declaring that no quarter will be given<sup>101</sup> or destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict,<sup>102</sup> and intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.<sup>103</sup>

## Conclusions

Grave breaches of international humanitarian law constitute war crimes that incur the individual criminal responsibility of those who commit them by their action or failure to act.

Of course, this system of legal rules is applicable in situations of international armed conflict, that is, when recourse is had to armed force between states. But it can also apply in a conflict that breaks out on the territory of a state when a third state sends in its troops or one of the parties acts in the interests of another state that has overall control over it.

Situations of internal unrest and strife, on the other hand, are not covered by this system, for it is the responsibility of the state to maintain or restore order and defend its territorial unity. However, if protracted armed violence takes place between governmental authorities and organized armed groups or between such

96 *Ibid.*, Article 8(2)(e)(vii); P II, Article 4.3.c.

97 Rome Statute, Article 8(2)(e)(viii); P II, Article 17.

98 Rome Statute, Article 8(2)(e)(v); P II, Article 4(2)(g).

99 Rome Statute, Article 8(2)(e)(xi); P II, Article 5(2)(e).

100 Rome Statute, Article 8(2)(e)(ix); Regulations, Article 23(b).

101 Rome Statute, Article 8(2)(e)(x); Regulations, Article 23(d) and P II, Article 4, final paragraph.

102 Rome Statute, Article 8(2)(e)(xii); Regulations, Article 23(g).

103 Rome Statute, Article 8(2)(e)(iii); Convention on the Safety of United Nations and Associated Personnel, 1994.

groups on the territory of a state, the parties involved have the rights and duties established by international humanitarian law and, ultimately, their engagement in prohibited conduct is also a war crime.

Responsibility for prosecuting the perpetrators falls first and foremost to the states, but if they do not wish or are not in a position to do so, practice has led to the establishment of international criminal tribunals so that those engaging in prohibited conduct do not go unpunished, no matter what the context in which the conduct took place. Punishing those responsible obviously constitutes effective application of the law, giving full effect to rules that are of interest to the entire community. It may thus be possible in the future to provide the victims with better protection, it being utopian to think that human beings will decide to eradicate violence once and for all.

# On co-operation by states not party to the International Criminal Court

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## **Abstract**

*Before the International Criminal Court (ICC) came into being, world public attention was focused on issues such as the significance of the Court's establishment, the importance of implementing international criminal justice and the time when the Rome Statute could enter into force. Once the Court was established, attention naturally turned to practical issues, such as whether it would be able to operate normally and perform its historic mission. The question of whether the ICC can operate effectively and perform its mission largely depends on the scope and degree of co-operation provided to it by states. This co-operation concerns not only states party to the ICC but also non-party states. This article offers to explore the obligation of non-party states to co-operate under international law, the prospects of their co-operation and the legal consequences of non-co-operation. The author suggests that beyond the general principle of the law of treaties according to which treaties are binding only on states parties, when viewed in the light of other general principles of international law, co-operation with the ICC is no longer voluntary in nature, but is instead obligatory in the sense of customary international law. Therefore, while a state may not have acceded to the ICC, it may still be subject to an obligation to co-operate with it in certain cases.*

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On 11 April 2002 the number of states that had ratified the Rome Statute exceeded the number required for its entry into force,<sup>1</sup> thus enabling the International

Criminal Court (ICC) formally to be established on 1 July 2002.<sup>2</sup> The creation of a worldwide permanent international criminal court could be described as one of the most significant events in the history of contemporary international relations and international law. It reflects the real status quo in the world since the fall of the Berlin Wall and the end of the Cold War between the Eastern bloc and the West in 1989–91, and is a specific achievement in the development of international criminal law and international human rights law. It will also inevitably have a far-reaching impact on the development of the international order and of international law in general.

Before the ICC came into being, world public attention was focused on issues such as the significance of the Court's establishment, the importance of implementing international criminal justice and the time when the Rome Statute could enter into force. Once the Court was established, however, attention naturally turned to practical issues, such as whether it would be able to operate normally and perform its historic mission.

For the ICC to operate normally and be effective, certain fundamental conditions have to be fulfilled. Besides an adequate financial budget and professional personnel, another indispensable factor is state co-operation. The ICC differs from national courts in that it has neither a police force under its own jurisdiction nor its own armed forces. While it seems particularly powerful because it can issue indictments and pursue the criminal responsibility of international criminal suspects on a worldwide scale, it cannot take judicial action, such as executing arrests of defendants charged in indictments. In addition, in the course of investigating, trying cases and executing judgments, the ICC has to rely on the co-operation of states in areas such as assistance in investigation and evidence-gathering, making arrests, transferring the accused and executing judgments. It could therefore be said that whether the ICC can operate effectively and perform its mission will depend largely on the scope and degree of co-operation provided to it by states.

The state co-operation required by the ICC is all-dimensional in that it needs the co-operation of both large and small states; it needs the co-operation of the European states and that of Asian, African, and other states; and it needs the co-operation both of state parties and of states not party to it (hereinafter "non-party states"). Of course, the ICC hopes to acquire the necessary co-operation of all the relevant states in the course of its judicial investigations and trials. Whether states can satisfy the requests of the Court for co-operation should be considered as the key to its success.

1 Article 126 of the Rome Statute of the ICC provides that: "This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." On 11 April 2002, nine states ratified or acceded to the Statute of the ICC, raising the number of states that had ratified or acceded to it from 57 to 66 at one stroke. For the names of the specific states, see the *ICC Monitor*, the newspaper of the NGO Coalition for the International Criminal Court, Issue 28, November 2004, at <<http://www.iccnw.org>> (last visited 1 March 2006).

2 For the background to the establishment of the ICC, see <<http://www.un.org/international-law/icc>> (last visited 1 March 2006).

The issue of co-operation with the Court is a very practical one that concerns state sovereignty. This article will mainly discuss the obligation of non-party states to co-operate with the ICC from the dual perspective of theory and practice.

## The obligation of non-party states to co-operate under international law

Treaties are binding in principle only on state parties. For non-party states, there is neither harm nor benefit in them (*pacta tertiis nec nocent nec prosunt*). Therefore, according to the general principle of the law of treaties as embodied in the Vienna Convention on the Law of Treaties, the obligation of non-party states to co-operate differs from that of state parties.

In the Rome Statute, the provisions on the obligation to co-operate differ for state parties and non-party states. Article 86 of the Statute is a general provision concerning state co-operation and judicial assistance. In accordance with this provision, “States Parties shall, in accordance with the provisions of this Statute, co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

Article 87(5) is a provision on co-operation by non-party states with the ICC. It stipulates that the Court “may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.”

Only state parties are obligated to co-operate. This corresponds to the general principles of treaty law. Article 35 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, clearly provides that “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.” Article 34 of the said Convention also clearly provides that a treaty does not create either obligations or rights for a third state without its consent. This is also one of the general principles of treaty law.

That is precisely why the Rome Statute makes different provisions for state parties and for non-party states on the issue of state co-operation. To state parties the ICC “is entitled” to present “co-operation requests” and they are obliged to “co-operate fully” with it in ICC investigations and prosecutions of crimes. But as for non-party states, the ICC only “may invite” them to “provide assistance” on the basis of an ad hoc arrangement.<sup>3</sup> The word “invite” shows that co-operation by non-party states with the ICC is in the legal category of co-operation of a “voluntary nature” alone.

The above are general principles and provisions of international treaty law. However, co-operation with the ICC in particular by non-party states may, if

3 Article 87(5) of the Rome Statute.

analysed in terms of the authority of the UN Security Council, the jurisdiction of the ICC or the general principles of international law, be an obligation of a mandatory nature in certain specific cases.

## The UN Security Council and the ICC

Non-party states may in certain cases have a mandatory obligation to co-operate with the ICC, due primarily to the relationship between the UN Security Council and the ICC and to the authority of the Security Council under the UN Charter. The authority of the UN Security Council is closely linked to the Rome Statute's provisions laying down the ICC's jurisdiction.

Article 1 of the Rome Statute stipulates that the role of the ICC shall be “complementary to national criminal jurisdictions” (the “complementarity principle”). Part 2 of the Statute gives a further description of the Court's specific system of jurisdiction. Its main points include the following provisions:

- (1) The jurisdiction of the Court shall be limited to the most serious international crimes of concern to the international community as a whole, that is, the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>4</sup>
- (2) A state which becomes party to this Statute thereby accepts the jurisdiction of the Court with respect to the said crimes; a state not party may accept by declaration the exercise of jurisdiction by the Court with respect to the crime concerned.<sup>5</sup>
- (3) The Court may exercise jurisdiction as long as the state on the territory of which the crime occurred, or the state of which the person accused of the crime is a national, is party to the Rome Statute or is a state not party thereto that has accepted the Court's jurisdiction. The Court has jurisdiction, however, over all cases referred to it by the Security Council.<sup>6</sup>
- (4) There are three trigger mechanisms for the Court's jurisdiction, namely (i) a state party refers a case to the Prosecutor; (ii) the UN Security Council refers a case to the Prosecutor under Chapter VII of the UN Charter; or (iii) the Prosecutor himself or herself initiates an investigation on the basis of relevant material.<sup>7</sup>
- (5) The ICC shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, or where the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted under its Statute.<sup>8</sup>

4 Ibid., Article 13.

5 Ibid., Article 12, para. 3.

6 Ibid., Article 12, paras. 1–2.

7 Ibid., Articles 13–15.

8 Ibid., Articles 1 and 17.

Thus for the ICC to exercise its jurisdiction, not only can the Court Prosecutor trigger the investigation and prosecution mechanism, but state parties and the UN Security Council can also do so by referring situations to the ICC in which one or more crimes have occurred. Since the states, whether party to the Rome Statute or not, are all essentially members of UN agencies, when the UN Security Council refers a case to the Court for investigation and prosecution, it involves the UN member states. In other words, it involves the obligation to co-operate of both state parties and states not party to the ICC.

The authority of the UN Security Council is derived from the UN Charter. By virtue of Article 25 of the UN Charter, all decisions made by the UN Security Council are binding upon all UN member states. Consequently the UN Security Council can, when it refers to the ICC a criminal case related to the maintenance of world peace, ask all UN member states to co-operate in the Court's process of investigating that case. Owing to the nature of the UN Security Council, such requests are binding upon all UN member states. There are already cases to show the influential role of the UN Security Council in the ICC and of its requests for co-operation with the Court.

In view of the war crimes and crimes against humanity that had occurred in the Darfur region of Sudan, the International Commission of Inquiry submitted a report to the UN Secretary-General on 25 January 2005. In it the Commission recommended that the Security Council refer the situation in Darfur to the ICC, because "the Sudanese judicial system is incapable and the Sudanese government is unwilling to try the crimes that occurred in the Darfur region and to require the perpetrators to assume the accountability for their crimes".<sup>9</sup>

After receiving the report the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1593 on 31 March 2005, in which it decided to "refer the situation in Darfur since 1 July 2002 to the ICC Prosecutor".<sup>10</sup> The Security Council further decided "that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to co-operate fully".<sup>11</sup>

The adoption of Resolution 1593 concerning the situation in Darfur was the first case in which the Security Council triggered the ICC's investigation mechanism in accordance with Article 13(b) of the Statute. While Sudan is the state concerned by the enforcement of that resolution, it is not party to the ICC. Although it expressed opposition to the Security Council resolution,<sup>12</sup> it must as a

9 "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General", 25 January 2005, at <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)> (last visited 1 March).

10 Security Council Resolution 1593 of 31 March 2005, para. 2.

11 *Ibid.*

12 *Beijing Evening News*, 1 April 2005, p. 8.

UN member state nevertheless abide by the provisions of the UN Charter and obey the Security Council resolution by co-operating with the Court.

The statement in Resolution 1593 “that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution” clearly shows that all non-party states, including Sudan, must co-operate with and assist the ICC accordingly.

The rights and obligations of non-party states are related to the UN Security Council and to its treaty mechanisms. In accordance with the principle of “complementary jurisdiction” in the Rome Statute, any state concerned may challenge the jurisdiction of the ICC. If Sudan opposes the investigation and prosecution by the ICC and can prove that it is actually willing and able to exercise jurisdiction in accordance with that principle, the ICC will not have jurisdiction. However, discussion of the principle of “complementary jurisdiction” per se has implied that as it requires non-contracting states to submit to the procedures provided for in the Rome Statute and to act accordingly, those states are also required to comply with the obligations in the Statute. This could be said to be a new development of the traditional legal principle that “a treaty does not create obligations and rights for a third state”.

## The obligation to respect and ensure respect for international humanitarian law

States not party to the ICC are obliged to co-operate with it not only in instances of referrals by the UN Security Council but also under the provisions in the Geneva Conventions whereby states must “respect and ensure respect” for international humanitarian law (IHL).

The crimes under ICC jurisdiction fall into the category of the most serious international crimes, including war crimes. As stated in Article 8 of the Rome Statute, “war crimes” means “[g]rave breaches of the Geneva Conventions of August 12, 1949”. There is therefore a close link, in terms of war crimes, between the Rome Statute and the 1949 Geneva Conventions.

Nearly all the states of the world have meanwhile ratified or acceded to the 1949 Geneva Conventions,<sup>13</sup> which have indisputably become a part of customary international law. Article 1 common to those Conventions and the corresponding Article 1 in Protocol I thereto lays down the obligation to respect and ensure respect for IHL: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention [Protocol] in all circumstances.” Therefore, in accordance with this provision, the contracting states must not only respect, but must also ensure respect for, the Geneva Conventions and Protocol I.

13 As at 31 March 2005, 191 states had ratified or acceded to the 1949 Geneva Conventions. See <[www.icrc.org](http://www.icrc.org)> (last visited 1 March).

Because it emphasizes the special nature of the IHL legal system, which has no commitments that take effect on the basis of reciprocal relations, this provision has the particular meaning of requiring non-contracting states to cooperate. Whereas the reciprocity clauses in international law are binding upon every state party only when their obligations are observed by the other state parties, the absolute nature of IHL standards means that they are obligations that must be assumed vis-à-vis the entire international community, and every member of the international community is entitled to demand that these rules be respected.

The International Court of Justice (ICJ) said in its 27 June 1986 decision in the *Nicaragua* case that: “There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances,” since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.”<sup>14</sup>

Hence Common Article 1 is based on customary law and ensures that every state, regardless of whether it has ratified a treaty or not, has obligations that must be assumed. It was precisely on this theoretical basis that the ICJ said, “The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four Geneva Conventions”.<sup>15</sup>

Since the United States distributed military operations manuals to the Nicaraguan anti-government military forces (Contras), encouraging them to take action that was contrary to general IHL principles, it obviously went beyond its negative responsibility not to encourage violations of humanitarian law, because the obligation to respect and to ensure respect for IHL is a dual obligation incumbent on all states. “Respect” means that states must do everything possible to ensure that their organizations and all others within their scope of jurisdiction respect the rules of international humanitarian law. “Ensuring respect” means that all states, regardless of whether they are parties to a conflict or not, must take all possible steps to ensure that all persons, and particularly the parties to that conflict, respect those rules.

The repeated calls by the absolute majority of member states of the UN Security Council and UN General Assembly and the states party to the four Geneva Conventions of 1949 for application of the principles of Common Article 1, asking third states to oppose actions taken by Israel in the Israeli-occupied territories that violate the provisions of those Conventions, are based on that very obligation of all states to “ensure respect” for IHL “in all circumstances”.<sup>16</sup>

14 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 114, para. 220.

15 *Ibid.*

16 See UN Security Council Resolution 681 (1990), 20 December 1990, para. 5; UN Security Council Resolutions ES-10/2, 25 April 1997, ES-10/3, 15 July 1997, and ES-10/6, 9 February 1999, and the report by the chairman of the Meeting of Experts on the Four Geneva Conventions that was held in Geneva on 27–28 October 1998.

The provision in Common Article 1 on ensuring respect means that states can take action when the rules of IHL are violated. This may also be construed from Article 89 of Additional Protocol 1, which reads, “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” Its scope of application is therefore very broad, in that it not only promotes the realization of the IHL rules but also requires a response to behaviour that violates IHL. While such action must be taken on the basis of co-operation with the United Nations and full respect for the UN Charter, the obligation to take action is obviously very important. And while it clearly permits third states to take action, it also logically provides the obligation to co-operate when serious violations of the Geneva Conventions need to be pursued.

While legal obligations are created on the basis of the principle that it is necessary to “ensure respect” “in all circumstances,” it is still not very clear from the four Geneva Conventions which steps states should take and through which procedures. However, one of the objectives of establishing the ICC is to pursue serious violations of the 1949 Geneva Conventions. States not party to the ICC but party to the Geneva Conventions are obliged to “ensure respect” “in all circumstances”; this includes the extended obligation to co-operate with the ICC. In any event, the obligation to co-operate should be understood as requiring non-party states at least to make an effort not to block actions taken by the ICC to punish or prevent serious violations of the Geneva Conventions.

To counter the war crimes and crimes against humanity that occurred in the Darfur region of Sudan, the UN Security Council adopted Resolution 1593 on the premise of having determined that the Sudanese legal system was unable and the Sudanese government was unwilling to try the crimes concerned, and thus deciding to refer the situation in Darfur to the ICC. Resolution 1593 was adopted by a vote of 11 in favour, none against, and four abstentions.<sup>17</sup> The four states that abstained included China and the United States. These two states are not party to the ICC, but are permanent members of the UN Security Council with veto power. While they have their own stance with regard to the ICC and the particular status of the war crimes and crimes against humanity that have occurred in the Darfur region of Sudan, neither of them blocked the adoption of the resolution to address the need for the ICC to prevent or punish those crimes. In a certain sense, this was also a performance of their obligation to “ensure respect” for the rules of IHL.

## **The prospects of co-operation by states not party to the ICC**

What are the prospects of co-operation by states not party to the ICC? The ICC naturally hopes that all states will co-operate fully and unconditionally with it and

<sup>17</sup> Security Council Resolution 1593 (2005), 31 March 2005, para. 2.

provide it with the necessary assistance so that it can perform the mission entrusted to it by the international community. However, from the point of view of states, it is evident that in providing any assistance to the ICC, they would first have to give full consideration to their own national sovereignty and security. Indeed, the states not party to the ICC have not yet ratified the Rome Statute just because of their concern that ratification would infringe on their national sovereignty.

The experience of the two ad hoc UN Tribunals hitherto has shown that obtaining the co-operation of non-party states will be a challenge to the normal operation and development of the ICC.

### Practical issues in co-operation by states not party to the ICC

The work of the ICC has already begun. All eighteen Court judges were elected on 7 February 2003 in accordance with the procedure provided for in the Rome Statute, and they all have taken up their official posts in The Hague;<sup>18</sup> Chief Prosecutor Luis Moreno-Ocampo and the Deputy Prosecutors began working proactively after taking office in March 2003.<sup>19</sup>

The dynamic role of the Chief Prosecutor is the key to triggering the prosecuting procedures of the whole Court. Formal investigations into the situation in the Democratic Republic of Congo<sup>20</sup> and northern Uganda,<sup>21</sup> referred to the ICC in accordance with Article 14 of its Statute, were for instance opened by the Office of the Prosecutor on 23 June and 29 July 2004 respectively.

The mandate of the Office of the Prosecutor is, in short, to investigate and prosecute “the crime of genocide”, “crimes against humanity” and “war crimes” in accordance with the rules laid down in the Statute. While state parties and the UN Security Council also play a role in the trigger mechanism, they can, as provided for in the Rome Statute, only submit a request in respect to “a situation”.<sup>22</sup> Specific issues relating to that situation, such as whether there is a “crime”, whether a “prima facie case” has been established and whether the request needs to be placed on file for investigation and prosecution, all need to be determined by the Chief Prosecutor. This means that the authority of the Chief Prosecutor in that mechanism is more specific and more important. In the judicial system of a state, police work and prosecution work are separate, assigned to two different authorities. In the ICC, however, the Office of the Prosecutor assumes

18 For the backgrounds of all eighteen judges and the status of work since they took office, see Hans-Peter Kaul, “Construction site for more justice: The International Criminal Court after two years”, *American Journal of International Law*, Vol. 99, No. 2, April 2005, pp. 370, 375–79.

19 ICC Press Release, “Election of the Prosecutor – Statement by the President of the Assembly of States Parties, Prince Zeid Ra’ad Al Hussein”, 25 March 2003.

20 ICC Press Release, “Prosecutor receives referral of the situation in the Democratic Republic of Congo”, 19 April 2004; ICC Press Release, “The Office of the Prosecutor of the International Criminal Court opens its first investigation”, 23 June 2004.

21 ICC Press Release, “Prosecutor of the International Criminal Court opens an investigation into northern Uganda”, 29 July 2004.

22 Article 13 of the Rome Statute.

responsibility both for prosecution and for investigation (the police function). The Prosecutor must therefore also have extensive contacts with the state in order to conduct investigations and to ensure the execution of arrest warrants, and so on.

The Office of the Prosecutor is divided into three branches: the Division of Jurisdiction, Complementarity and Co-operation (JCCD); the Investigation Division; and the Prosecution Division. Pursuant to the requirements of Articles 15 and 53 of the Statute, the duties of the JCCD are to conduct in-depth analyses of the facts of situations referred to, and within the scope of jurisdiction of, the ICC, and to provide recommendations concerning the areas of jurisdiction, the complementarity principle and co-operation for the situations under investigation and analysis. The Investigation Division is charged with opening investigations and is divided internally into a number of investigation groups, including various consultants with professional knowledge of issues such as military affairs, politics and economics. The Prosecution Division comprises prosecution and appeals lawyers, and their duty is to bring cases to the Court and to try them.<sup>23</sup>

Under the Rome Statute the Chief Prosecutor is obliged to evaluate particular cases, including pre-investigation evaluations of the facts of crimes. After the UN Security Council adopted Resolution 1593 on 31 March 2005, requiring the ICC to try the crimes that had occurred in the Darfur region of Sudan and demanding that the criminal responsibility of the perpetrators be pursued, ICC Chief Prosecutor Moreno-Ocampo took the necessary steps on 1 April 2005 concerning ways to implement the UN Security Council resolution, and expressed his willingness to engage in and seek co-operation with the states and international organizations concerned, including the United Nations and the African Union (AU).<sup>24</sup>

Since the ICC is located in the Netherlands, far from the states such as Uganda, Congo and Sudan in which the crimes occurred, the investigation and evidence-gathering the Court has to conduct requires co-operation from the local states concerned, and the Prosecutor needs to work together with the local police forces. Although the Security Council has already adopted Resolution 1593, the Prosecutor and the ICC itself will be faced with a very difficult situation if Sudan, as a state not party to the ICC, and the third states of the AU and the United Nations will not provide the assistance and support the Court wishes to have. Evidently the continued support of the Security Council is also indispensable. The way in which the ICC copes with the situation in Darfur will unquestionably have a major influence on the future development of the Court.

Just before the UN Security Council asked the ICC to investigate the Sudan case, another African state that had not yet ratified or acceded to the ICC, Côte d'Ivoire, took the initiative of accepting the jurisdiction of the ICC pursuant to Article 12(3) of the Statute.<sup>25</sup> Whether the Côte d'Ivoire government did so in

23 Kaul, above note 18, p. 373.

24 Ibid.

25 ICC Press Release, "Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court", 15 February 2005.

order to refer a situation to the ICC or to ask the Prosecutor to come and initiate an investigation is still not very clear. But it is certainly interesting that a state not party to the ICC has taken that initiative and accepted the Court's jurisdiction without any outside pressure.

Co-operation is a particular and very practical issue. In view of the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) in terms of co-operation, it seems that the ICC might not find it easy in practice to obtain the co-operation of non-party states.

### Implementing co-operation through national legislation

In order to co-operate with the ICC a state must pass national legislation enabling its legal provisions to be brought into line with those of the Rome Statute.

In the development of international criminal law to date, quite a few international bodies exercising criminal jurisdiction have been created, such as the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Tribunal for Sierra Leone, and the ICC itself. Although they were all established in different ways and the jurisdiction differs from one to another, they have one thing in common, namely that none of them has its own armed forces or police. In other words, they all need the co-operation and support of states in order to discharge their mandate. However, the manner of establishment of such a judicial body means much in obtaining co-operation from the states, as the following two examples of the ICTY and the ICC will show.

The ICTY was established by the UN Security Council through the adoption of Resolutions 808 and 827 in 1993 under Chapter VII of the UN Charter. Because of the Council's authority, the universality of the UN and the nature of the applicable rules as part of customary international law,<sup>26</sup> co-operation was not really an issue for the ICTY, which, in theory, has the great advantage that all member states of the UN must co-operate with it and give it their support.

The establishment of the ICC was first discussed by the UN General Assembly in 1994 on the basis of the International Law Commission's draft. The draft was discussed in depth by the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) and finally adopted at a diplomatic conference held in Rome in July 1998. Since the Rome Statute is an international legal document that had to be ratified by the statutory number of states to enter into force, there is automatically a distinction between state parties and non-party states, and their obligations to co-operate also differ.

As mentioned above, state co-operation with the international criminal judicial organs requires the adoption of national legislation. Generally speaking,

26 "[I]n the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." Report of the Secretary-General, UN Doc. S/25704, para. 34.

national law has always played a decisive role in the international criminal justice system, particularly with regard to conditions for judicial assistance, the procedures for submitting and executing assistance requests and so on. When the UN Security Council established the ICTY, it asked states to draft or amend their related national laws for the purpose of performing their co-operation obligations.

Article 29 of the ICTY Statute stipulates that “States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.” UN Security Council Resolution 827 adopted for the establishment of the ICTY provides specifically that

[A]ll States shall co-operate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and ... consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.

Because of the authority of the Security Council under the UN Charter and the binding nature of its resolutions, more than twenty states had enacted national legislation in just under three years after the establishment of the ICTY.<sup>27</sup> These states included France, the United Kingdom, the United States, Russia, Germany, Australia, New Zealand, Italy, Poland and Croatia.<sup>28</sup> In their legislation, for example in Australia, co-operative relations with the ICTY were simply pursuant to the judicial interaction between them and other states.<sup>29</sup>

Since the ICTY’s jurisdiction is limited to “serious violations of international humanitarian law committed in the territory of the former Yugoslavia”, co-operation by the states of the former Yugoslavia is of the utmost importance. On 14 December 1995, as a result of the efforts of the international community, Bosnia and Herzegovina, Croatia and Yugoslavia signed the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement);<sup>30</sup> Yugoslavia signed the agreement on its own behalf and on behalf of the Republika Srpska. Since these parties had all played an active role in the

27 1996 *Yearbook of the International Criminal Tribunal for the Former Yugoslavia* (hereinafter *ICTY Yearbook*), chapter V, “State co-operation”, p. 226.

28 For the texts of the laws adopted by these states on co-operation with the ICTY, see *ibid.* and 1995 *ICTY Yearbook*.

29 “Judicial assistance to the International Tribunal shall be furnished in accordance with the applicable provisions relating to judicial assistance in criminal cases in Australia”, Australia, *International War Crimes Tribunals Legislation 1995* (unofficial translation), Section Two, “Judicial assistance”. See 1995 *ICTY Yearbook*, p. 233.

30 Article XIII (4) of Annex 6 (Agreement on Human Rights) of the Dayton Agreement provides that “All competent authorities in Bosnia and Herzegovina shall co-operate with and provide unrestricted access to the organizations established in this Agreement of International Tribunal for the Former Yugoslavia; and any other organization authorized by the UN Security Council with a mandate concerning human rights or humanitarian law.” See 1996 *ICTY Yearbook*, Chapter V, “State co-operation”, p. 229.

armed conflict in the territory of the former Yugoslavia, this document is particularly important for the issue of co-operation. The Dayton Agreement does in fact stress, particularly in Article IX and in Article X of Annex 1-A, that all signatories have agreed to promote the peace and security of the region and promised to co-operate with the ICTY.<sup>31</sup>

“Extradite or prosecute” (*aut dedere, aut judicare*) is a principle generally accepted and commonly used in the course of judicial assistance for the purpose of combating international crimes. Its basic meaning is that if the requested state refuses extradition on certain grounds, it should refer the case to its competent authorities for prosecution in accordance with the request of the requesting state. The practice of the ad hoc Tribunals is not governed by the “extradite or prosecute” principle. While the ICTY has “concurrent jurisdiction” with national courts, it has “primacy” along with “concurrency”.<sup>32</sup> States thus have to enact legislation prescribing that in the course of judicial proceedings against a person, once the state receives a transfer request from the International Tribunal for the said person for the same crime, it must suspend its national judicial proceedings and give primary consideration to the Tribunal’s request. For instance, the laws of Bosnia and Herzegovina on co-operation with the ICTY specifically state that regardless of the stage of a trial of a criminal case in the national courts of Bosnia and Herzegovina, as long as the ICTY submits a request for the defendant, the Supreme Court of Bosnia and Herzegovina is required to suspend the trial and transfer that defendant to the Tribunal. Germany has similar provisions,<sup>33</sup> and Duško Tadić, the defendant in the first case of the ICTY, was accordingly transferred to The Hague at the request of the ICTY while being tried in Germany’s national courts.<sup>34</sup>

31 Article IX of the Dayton Agreement declares that “The Parties shall co-operate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to co-operate in the investigation and prosecution of war crimes and other violations of international humanitarian law.” Article X of Annex 1-A, entitled “Agreement on the military aspects of the peace settlement” calls for the full co-operation of the parties “with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, including the International Tribunal for the former Yugoslavia”. See *1995 ICTY Yearbook*, p. 321.

32 Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia on “Concurrent jurisdiction” provides that the International Tribunal and national courts shall have concurrent jurisdiction, but the International Tribunal shall have “primacy” over national courts.

33 Article 19 of Bosnia and Herzegovina’s Law on Cooperation with the International Criminal Tribunal (Decree with Force of Law on Extradition at the Request of the International Tribunal) provides that “In the case of one or more criminal proceedings being conducted in the Republic against the same accused person for whom the extradition request has been submitted, the Supreme Court shall suspend the criminal proceedings for those acts in favour of the criminal acts referred to in Article 1 of the Decree (in the ICTY). See *1995 ICTY Yearbook*, p. 337.

34 Germany’s “Law on co-operation with the International Tribunal in respect of the former Yugoslavia”, Article 2, stipulates as follows: Status vis-à-vis criminal proceedings in the Federal Republic of Germany (1) At the Tribunal’s request, criminal proceedings involving offences which fall within its jurisdiction shall be transferred to the Tribunal at any stage. (2) Should a request pursuant to paragraph 1, be submitted, no proceedings may be conducted against any person for an offence falling within the jurisdiction of the Tribunal for which they are standing or have stood trial before that Tribunal. (*Ibid.*, p. 345)

In order to ensure the authority of the ICTY and the validity of its orders, more specific laws were also enacted. For instance, Article 9(I) of the Dayton Peace Agreement's Annex 4 on the Constitution of Bosnia and Herzegovina states that any person who has been convicted of a crime, been prosecuted, or not responded to the Tribunal after being indicted by the ICTY is excluded from being a candidate for any government department post in Bosnia and Herzegovina.<sup>35</sup>

In contrast, the ICC has no such advantage with regard to national legislation. Article 88 of the Rome Statute provides that "States Parties shall ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under this Part." This provision is general and, moreover, is addressed to state parties alone. There are no such requirements for states not party to the Rome Statute.

The ICC is a permanent international criminal judicial organ that can bring charges on a worldwide basis for war crimes, crimes against humanity, the crime of genocide and the crime of aggression.<sup>36</sup> So not only are its requests for co-operation not limited to the states on whose territory the crime(s) in question occurred, but it is also very likely to submit requests for assistance in investigation and evidence gathering to knowledgeable informants in other states concerned that are not party to its Statute. In this case the requests could involve evidence controlled by the said states that originates in the area of the secret service or intelligence authorities. All this makes co-operation by states not party to the ICC seem even more important and sensitive.

### Co-operation in investigation and evidence gathering

Co-operation by states with the ICC is specific in practice, with one party conducting the investigation and evidence gathering.

Investigation is also an indispensable procedure of the ICC in placing cases on file for investigation and prosecution, and independent and effective investigation by the Prosecutor is a prerequisite for the performance of its functions. Since the ICC per se has no means of enforcement, it has to rely on the co-operation of the local states concerned.

In accordance with the present system of criminal assistance between states, the judicial authorities of all states can generally exercise judicial authority only within the territory of their own state, and requests for judicial assistance should be executed by the judicial authorities of the requested state. If the judicial officers of the requesting state need to execute on-site requests in the requested state or conduct investigations and gather evidence directly within its territory, they need the prior permission of the requested state and may not violate its laws or take coercive measures. In the course of investigations, arrangements by and the presence of officials of the requested state are generally required.

35 See *1996 ICTY Yearbook*, chapter V, "State co-operation", p. 228.

36 See Article 13 of the Rome Statute on the "Exercise of jurisdiction" of the ICC.

However, the importance of the crimes under the jurisdiction of the ICC means that their investigation involves highly sensitive issues. If the presence of the national competent authorities is permitted during the investigation, the persons being investigated will feel pressured, and this will affect the objectivity and credibility of the investigation results. The investigators or prosecutors of international judicial authorities on criminal matters consequently hope that the relevant national authorities will recuse themselves, so that they can conduct independent investigations. In which case, should the ICC Prosecutor be unconditionally permitted to conduct on-site investigations within the territory of state parties in order to facilitate the legal proceedings, or should the consent of the states concerned be obtained in advance? In this respect there is a very big difference between the ICC and the ICTY.

Article 29 of the ICTY Statute specifically stipulates that all states shall comply without undue delay with any request for assistance issued by a trial chamber of the ICTY, including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons and the transfer of the accused to the International Tribunal. Conversely, Article 86 of the Rome Statute requires “full co-operation”, which implies that state parties must do everything possible to perform their obligation to co-operate, but also includes the phrase “in accordance with the provisions of this Statute”, which requires that it be construed together with other provisions of the Rome Statute on co-operation.

The ICTY is an organ established by the UN Security Council under Chapter VII of the UN Charter, on the basis of a particular situation at the time. Thus UN member states have a mandatory obligation to co-operate which originates in the lofty status of the UN Charter and the responsibility and authority of the UN Security Council in maintaining world peace and security. The UN Security Council therefore plays a critical role of the utmost importance in the co-operation obligations assumed by states.

This is precisely why Bosnia and Herzegovina is taking a particularly proactive stance toward the judicial activities of the ICTY within its territory. It has reached a special agreement on co-operation issues with the ICTY’s Office of the Prosecutor of the ICTY, offering ICTY staff free access to Bosnia and Herzegovina to conduct investigations and gather evidence.<sup>37</sup> Article 13 (4) of Annex 6 to the Dayton Agreement, on human rights, specifically provides that all competent authorities in Bosnia and Herzegovina shall co-operate with and provide unrestricted access to the organizations established in this Agreement; any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in the Appendix to this Annex; the International Tribunal for the Former Yugoslavia; and any other organization authorized by the U.N. Security Council with a mandate concerning human rights or humanitarian law.<sup>38</sup>

37 See 1996 *ICTY Yearbook*, chapter V, “State co-operation”, p. 232.

38 *Ibid.*, p. 228.

The ICTY Statute stipulates that “The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.”<sup>39</sup> So when the ICTY goes to other states to execute search warrants, it collects and investigates trial-related documents with local co-operation. While such on-site investigations are generally conducted with the co-operation and participation of the local authorities, the Tribunal holds that due to the “primacy” provided for in the ICTY Statute, such on-site investigations require neither the advance consent of the states concerned nor the presence of the local state authorities.

The experience of the ad hoc ICTY shows that while most states that have signed co-operation agreements with it have not attached restrictive provisions to on-site investigations, a few states have set certain prerequisites. For instance, Germany’s Law on Co-operation with the International Tribunal in respect of the Former Yugoslavia provides for members and authorized officials of the Tribunal to consult with the competent German authorities and independently conduct evidence-gathering activities such as conducting interrogations and collecting evidence from witnesses. It stipulates, however, that in these cases also, the initiation and execution of coercive measures shall remain the preserve of the competent German authorities and shall conform to German law.<sup>40</sup> Swiss law on “Special Assistance” provides that Tribunal Prosecutors may conduct investigations within the territory of Switzerland only after obtaining the authorization of the Federal Department of Justice and Police, and that before the Federal Department of Justice and Police grants authorization, it should consult with the local (cantonal) authorities.<sup>41</sup>

In conducting investigations and seeking evidence, the ICTY even has favourable conditions for obtaining the support of the Implementation Force (IFOR) as a third party. IFOR was established by Security Council Resolution 1031, after the Dayton Agreement had been signed. Although it was neither a party to the Dayton Agreement nor specifically obliged to co-operate with the ICTY, IFOR was in the unique position of possessing both the legal and logistic capacity to assist the Tribunal. With approximately 60,000 soldiers, it was able to do so by requiring signatories of the agreement to comply with their obligation to co-operate, and by providing security guards for ICTY investigators in Bosnia and Herzegovina and protection for staff members uncovering mass graves. In this way IFOR has made a great contribution by ensuring the smooth accomplishment of the ICTY’s investigation and evidence-gathering work in the territory of the former Yugoslavia.<sup>42</sup>

As to the ICC, Article 99 of the Rome Statute provides that if the Prosecutor needs to execute requests for assistance within a state party, he or she

39 Article 18, para. 2 of the ICTY Statute.

40 Germany, Law on Cooperation with the ICTY, Article 4, para. 4; see also *1995 ICTY Yearbook*, p. 347.

41 Switzerland, Federal Order on Cooperation with the International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law, Article 22. *Ibid.*, pp. 330–31.

42 For IFOR’s co-operation and support to the ICTY, see *1996 ICTY Yearbook*, p. 232.

should consult with that state in advance and observe any reasonable conditions or concerns raised by it; that is, the state's consent is a prerequisite. However, if the said state is a state on the territory of which the crime is alleged to have been committed and there has been a determination of admissibility, the Prosecutor may directly execute the request for assistance following all possible consultations with the requested state party; that is, its consent is not required.

If the ICC Prosecutor requires the prior consent of a state party to conduct an investigation within its territory and needs to observe any reasonable conditions or concerns raised by it, then the consent of a state not party to the Rome Statute is naturally and inevitably also a prerequisite, and it is even more necessary to observe any reasonable conditions raised by that state.

### Coordinating international law with national law in the co-operation process

Even though states have enacted legislation for the purpose of co-operation, the practical issue of how to interpret and apply that legislation remains.

From a theoretical perspective, the ad hoc Tribunals were established by the UN Security Council under Chapter VII of the UN Charter. The UN Charter is an international treaty with constitutional significance.<sup>43</sup> Therefore, while states may not oppose in their national laws the treaty obligations of international law, and must consequently abide by treaties in the area of judicial co-operation, the requested state may have its own interpretation with regard to issues such as how to determine whether the relevant conditions are met.

In the experience of the ICTY, while many states have enacted legislation expressing willingness to co-operate, they still attach certain restrictive conditions to such legislation, which are marked by the search for ways to reconcile it with their own national legislation. While the ICTY hopes that its Statute and Rules of Procedure and Evidence will be applicable in any possible circumstances, there are very likely to be differences between the rules of the Tribunal and the national legislation of some states. To deal with such circumstances, some states have insisted on the need for their own laws to apply. For instance, Swiss legislation expressly provides that the relevant rules of the International Criminal Tribunal are applicable only on the premise that the crimes under investigation would need to be punished under Swiss criminal law.<sup>44</sup> German law also specifies that the pertinent articles of German law on judicial co-operation in criminal matters

43 Article 103 of the UN Charter stipulates that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter *shall prevail*" (emphasis added).

44 Article 17 of the Federal Order on Cooperation with the International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law provides that "Excluding any other condition, assistance shall be granted if the request and the attached documents demonstrate that the offence: a. falls within the jurisdiction of the international tribunal and b. is punishable under Swiss law if the measures requested by an international tribunal are coercive as provided by the law of procedure. See *1995 ICTY Yearbook*, p. 329.

apply to such co-operation.<sup>45</sup> Croatian law requires requests or decisions of the ICTY to be based on the ICTY's Statute and Rules of Procedure and not in contravention of the Constitution of the Republic of Croatia.<sup>46</sup> In contrast to the obligations to co-operate with the ad hoc Tribunals, the provisions of the Rome Statute on co-operation use more neutral and more general terms. Article 86 reads: "States Parties shall, in accordance with the provisions of this Statute, co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." The wording of this provision reflects the obligation of state parties to co-operate while at the same time not overemphasizing its mandatory nature.

In fact, co-operation with the ICC should be specific and technical in practice. For example, the key to co-operation and an important component of it is how to transfer the accused to the Court, since a trial can proceed only when the accused is present. This is indeed one of the fundamental principles of international human rights law. So once the ICC issues an indictment against a suspect, an important question to be resolved immediately is how to arrest and transfer that accused person to the Court. Thus the Court's prospects of success may be decided by the question of co-operation.

In principle, in order to ensure the operation and success of the Court, the transfer of accused to the Court by states should be a mandatory obligation not to be refused on any grounds. Moreover, since compliance with the human rights standards is in principle fully ensured by the international criminal justice system, states should not refuse transfer requests. However, if viewed from another angle – namely that since requests may involve fundamental national interests and basic principles, such as the sovereignty issue, states consider it necessary to have some reservations on certain issues, for instance that the person whose transfer is requested must not be one of its own nationals – the materials attached to the request must conform to the requested state's national procedural rules, the principle that "one may not be tried twice for the same crime" (*ne bis in idem*) must be observed and so on.

The ICTY Statute does not provide any grounds for refusing to co-operate. The states which have adopted legislation for co-operation with the ad hoc Tribunal do not explicitly list any reasons that would entitle them to refuse to co-operate. However, some states have nevertheless attached certain conditions to their co-operation with it.

45 Article 4 of Germany's Law on Cooperation with the ICTY concerning "Other mutual assistance" provides that "Should the Tribunal require the personal appearance of a person at liberty within the area where this Law is in effect as a witness for the purposes of cross examination, confrontation or investigation, the same legal means may be employed to ensure their appearance as would be permissible in the case of a summons to appear before a German court or a German public prosecutor."

46 The original text of Article 3 of Croatia's Law on Cooperation with the International Criminal Tribunal in respect of the Former Yugoslavia reads: "The request for co-operation or enforcement of a decision of the Tribunal shall be granted by the government of the Republic of Croatia if the request or decision is founded on appropriate provisions of the Statute and Rules of Procedure and Evidence of the Tribunal, and if it is not in contravention of the Constitution of the Republic of Croatia." See *1996 ICTY Yearbook*, p. 249.

For instance, Swiss law on co-operation with the international Criminal Tribunal stipulates that transfers must be for crimes that are within the scope of jurisdiction of the International Tribunal and that are punishable under Swiss law, that is, that the principle of “dual criminality” must be observed.<sup>47</sup> Italian law states that if an Italian court has pronounced a final judgment for the same fact and against the same person, it will not, under the principle that “one may not be tried twice for the same crime”, consent to deliver this person again to the International Criminal Tribunal.<sup>48</sup> New Zealand law on co-operation with the International Criminal Tribunal specifically provides that if a request by the International Criminal Tribunal prejudices national sovereignty or security, it is entitled to refuse to co-operate. In addition, if the steps that must be taken are not in compliance with its own laws, New Zealand may also refuse to co-operate.<sup>49</sup>

In fact, the ad hoc Tribunals are not very satisfied with the performance by some states of their obligations to co-operate. For instance, although the ICTY indicted Ratko Mladić in 1995, it has never succeeded in arresting and bringing him to justice. In May 1996 he attended the funeral of General Đukić in Belgrade and went scot-free; on 22 May 1996 the President of the ICTY wrote a letter to the UN Security Council asking for an investigation of the Federal Republic of Yugoslavia (FRY) for non-performance of its obligation to co-operate in his arrest or prevent his leaving the territory of the said state.<sup>50</sup> He also expressed dissatisfaction with the negative response and failure of the FRY to execute many of the orders issued by the Tribunal to arrest and transfer persons.<sup>51</sup> In addition, although Croatia has enacted a national law on co-operation with the International Criminal Tribunal and promised co-operation and support, it has still been unwilling to provide the relevant materials and documents in the *Tihomir Blaškić* case. In that respect, the Chief Prosecutor of the ICTY lodged a protest at the Peace Implementation Council for the Dayton Peace Agreement that was held in Florence, Italy, in 1996.<sup>52</sup>

In the light of the ICTY’s experience, the provision of the Rome Statute pertaining to extraditions for state parties or non-party states prescribes that:

47 1995 ICTY Yearbook, p. 329.

48 “The Court of Appeal shall render judgment declaring that the conditions for the surrender of the accused have not been met only in any one of the following cases ... a final judgment was pronounced in the Italian State for the same fact and against the same person”, Italy, Decree-Law No. 544 of December 1993 (unofficial translation), 1994 ICTY Yearbook, p. 167.

49 “The Act contains a number of miscellaneous provisions including the following: there are a number of circumstances under which the Attorney-General may decline to comply with requests for assistance by the Tribunals, including (1) where compliance with the request would prejudice the sovereignty, security, or national interest of New Zealand.” See 1995 ICTY Yearbook, p. 349.

50 Letter of the ICTY President to the President of the Security Council of the United Nations, 22 May 1996; 1996 ICTY Yearbook, p. 231.

51 For instance, statement by Judge Antonio Cassese, President of the ICTY, at the Florence Mid-Term Conference on the Implementation of the Dayton Accord (13-14 June 1996), *ibid.*, pp. 261–64.

52 “On compliance and co-operation by the parties in the former Yugoslavia”, status report by the Office of the Prosecutor, 3 June 1996, at p. 1; *ibid.*, p. 231.

1. A State Party which receives a request from the ICC and from another State for the transfer/extradition of the same person for the same offence should notify the Court and the requesting State of that fact.
2. In the above circumstances, and where the requesting State is a State party to the Statute, the request from the Court takes priority if the Court has made a determination that the case is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State. If the Court has not yet made that determination, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State, but shall not extradite the person until the Court has determined that the case is inadmissible.
3. In the above circumstances, if the requesting State is a State not party to this Statute, the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request from the Court, if the Court has determined that the case is admissible. Otherwise, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State. But if the requested State is under an existing international obligation to extradite the person to the requesting State not party to this Statute, the requested State shall determine whether to deliver the person to the Court or the requesting State after considering all relevant factors.<sup>53</sup>

Under this provision, if a state party receives a request for extradition from the Court and from a non-party state, the state party has an international obligation to the non-party state to extradite, but it may independently choose to extradite to either the Court or the non-party state. This differs from the “primacy” of the UN ad hoc Tribunals, showing the flexibility of the ICC towards the issue of co-operation.

## **On the legal consequences of non-co-operation by non-party states**

While the ICC hopes that all states concerned will co-operate with the Court, one nevertheless has to ask what the consequences may be if states refuse to co-operate.

The Rome Statute stipulates that the Assembly of States Parties shall discuss and deal with, pursuant to Article 87, paragraphs 5 and 7, “any question relating to non-co-operation” between states and the ICC.<sup>54</sup> This provision mainly gives the ICC the authority to refer circumstances of non-co-operation by states to the Assembly of States Parties. Of course, if that non-co-operation concerns situations that have been referred by the Security Council to the ICC, the Court may refer the matter to the Security Council.

<sup>53</sup> Article 90 of the Rome Statute.

<sup>54</sup> Article 112.2(f) of the Rome Statute.

With regard to co-operation by states not party to the ICC, the following situation may arise. Such a state may initially agree to co-operate with the ICC, but as the case deepens and the need for co-operation becomes more specific and more sensitive, it may change its attitude and no longer be willing to co-operate with it. To address this issue, it is particularly important to clarify whether obligations to co-operate do exist. If the said state has reached an agreement with the ICC on co-operation, it has by so doing assumed international obligations to co-operate with the Court. If it fails to perform those obligations after reaching such an agreement, that state should assume state responsibility under international law. Article 87(5) of the Rome Statute that was finally adopted by states accordingly provides that: “Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to co-operate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council”.

Thus there are referrals in both cases, but the provision on non-co-operation by state parties, unlike that on non-co-operation by other states, stipulates in addition that the ICC may “make a finding to that effect” (i.e., of the circumstances of non-co-operation) before making a referral. The distinction in this phrase shows the somewhat differing obligations, in terms of co-operation, of states parties and states not party to the Rome Statute.

While it may be said that there are only slight differences in the wording of the Statute with regard to states parties and non-party states, they are of very practical significance in that they reflect ways of dealing with the issue of non-co-operation by states. The key to resolving it lies in the following questions. When a non-party state fails to co-operate, does the ICC have competence to handle that issue? If it has, which particular organ of the ICC will do so, and which procedure should be followed? If the ICC cannot handle it, to which body should it then be referred?

If the matter is referred by the UN Security Council to the Court, the ICC may inform the Security Council of the failure of the non-party state to co-operate. The Security Council has authority to deal with it in accordance with the UN Charter. If necessary, the Security Council may even consider taking the appropriate sanctions against the state(s) concerned. In all other cases, the ICC can at least refer non-co-operation to the Court’s Assembly of States Parties. However, no specific provision is made in Article 112(2)(f) as to the kind of measures the Assembly of States Parties may take upon receipt of a referral.

If a non-party state fails to co-operate with the Court, the ICC Assembly of States Parties obviously does not have the authority or capacity to censure it or ask it to assume state responsibility. Since non-party states have not ratified the Statute, they do not have any direct and binding obligation under general principles of international law. Moreover, there should be an essential difference between their rights and obligations and those of states parties to the ICC. Of course, if a non-party state has expressed a willingness to co-operate and has reached agreement with the ICC on a specific case, it has consequently incurred an

obligation to co-operate in that particular case just like the states parties. The ICC or states parties to the Court are entitled to ask it to perform its co-operation obligations.

The same principle also governs cases referred by the UN Security Council to the ICC. If the UN Security Council adopts a resolution under Chapter VII of the UN Charter, it is binding on all UN member states. All states must therefore comply, and all have obligations of co-operation. If a certain UN member state fails to co-operate, the Court can, even though that state is not party to the ICC, refer the situation to the UN Security Council, which can take the necessary steps under the relevant provisions of the UN Charter.

It should be noted, however, that the ICC differs somewhat from the two ad hoc Tribunals. Since they were established by the UN Security Council as subsidiary organs of the Council, a state may, if it refuses to co-operate with them, be held to be in non-compliance with its direct obligations under the UN Charter. The Security Council is entitled to respond directly by taking steps under Chapter VII thereof, and can go all the way to deciding to impose sanctions on such states. This authority of the Security Council authority has a legal basis and is ensured.

The ICC is not a subsidiary of the UN Security Council, nor is it an organ of the United Nations. If a case has not been referred to the Court by the Security Council, the Court has no legal grounds for referring it to the Council. Referral to the Assembly of States Parties hardly ensures any practical outcome either, for it does not enjoy the same authority as the UN Security Council and has no authority to impose sanctions on sovereign states for non-compliance.

However, the Assembly of States Parties is a *sui generis* entity. It is clear from the overall provisions in the Rome Statute that it can at least adopt resolutions on behalf of the whole Court to censure non-compliance and ask the state concerned to assume its responsibility. Resolutions by the Assembly therefore do have an effect both on states parties and on non-party states, and thus influence the latter's attitudes towards co-operation with the Court. Logically, the more states that become members of the ICC, the more influential the Assembly of States Parties would be, and the more readily it could have an effect on co-operative relations between non-party states and the Court.

## Conclusion

Treaties are binding in principle only on states parties and do not create rights or obligations for non-party states. However, if viewed in the light of the general principles of international law, that is, taking into account the authority of the UN Security Council under the UN Charter, the possible referral by the Security Council to the Court and the provisions of Article 1 common to the Geneva Conventions of 1949, co-operation with the ICC is no longer voluntary in nature, but is instead obligatory in the sense of customary international law. Therefore, while a state may not have acceded to the ICC, it may still be subject to an obligation to co-operate with it in certain cases.

Article 87 of the Rome Statute provides for the Court to invite any state not party to the Statute to reach agreement on co-operation and judicial assistance on the basis of an “ad hoc arrangement”. The words “or any other appropriate basis” in that same article mean that the ways and means of co-operation by such states are quite flexible. In other words, as long as the parties concerned hold that they are appropriate, the ICC and states not party to it can pursue any means of co-operation and judicial co-operation, regardless of whether such means are official or unofficial.

Since the formal establishment of the ICC on 1 July 2002, three and a half years have passed. The international community expects the Court to start making a real entry into the trial stage. This is understandable. Yet the effectiveness and success or failure of the ICC should not be judged by the number of cases it has actually tried. It was established for the purpose of punishing international crimes, achieving conciliation between ethnic groups and maintaining world peace through justice. The “principle of complementarity” laid down in the Rome Statute reflects these objectives. So either international trials or national trials will do, provided they try and punish those who have committed international crimes. If the development of international criminal law and the deterrent effect of the ICC results in the efficient operation of national legal systems, its establishment should consequently be regarded as a success, even if it is not engaged in many trial procedures. Although the ICC has obtained the support of the entire international community, its resources and capacity are after all limited. Moreover, while the international criminal courts are able to handle certain important cases, the fight against international crime and for international justice continues to depend mainly on the national systems.

On the other hand, if those who should be held responsible for the crimes they have committed were able to evade trial and punishment owing to non-compliance by states with their obligation to co-operate, it would undoubtedly constitute a failure of the ICC and of the entire international community as well.

Co-operation by all states with the ICTY has also been largely obstructed in practice, and quite a few arrest warrants issued by the Tribunal have not been executed. It is thus obvious that even in circumstances where mandatory resolutions of the UN Security Council require states to co-operate, some of them will still place restrictions through their national laws on doing so, so co-operation with the ICC will not be smooth sailing in practice. Whereas many indictments issued by the ICTY were executed by NATO troops and UN peacekeeping forces in the territory of the former Yugoslavia, there are no such armed forces available in countries such as Uganda, Congo or Sudan. This is a very practical problem. If an arrest warrant is issued by the Court in response to a request by the Prosecutor pursuant to Article 58 of the Rome Statute, but is eventually delayed or not executed because of lack of co-operation by the states concerned, the authority of the Court will definitely be damaged.

Moreover, co-operation is a matter for both sides. This article has focused so far on the issue of state co-operation with the Court. Beside the question of co-operation by states, there is also the policy issue of whether a case will be accepted

by the ICC. For instance, Côte d'Ivoire submitted a request to the ICC pursuant to the provisions of Article 12 of the Rome Statute, asking the Court to investigate the situation there.<sup>55</sup> This is something outside the legislators' intent. The original idea in establishing the ICC was to put an end to "the culture of impunity". In other words, it is designed to try those who have committed crimes within its jurisdiction when the relevant national authorities would be unwilling to prosecute their own officials and especially their national leaders, such as Slobodan Milošević, or would be incapable of doing so because they were involved in armed conflicts, for instance Bosnia and Herzegovina, and Rwanda. Hence the "complementarity principle" drawn up by the ICC, which provides for the ICC to exercise jurisdiction when a state is "unwilling" or "unable" to prosecute and, as explained, is a back-up aimed at preventing persons who have committed international crimes from evading punishment.

Côte d'Ivoire is not party to the ICC. It has submitted a request to the ICC *per se* just because it is "unwilling" to prosecute. The exercise of jurisdiction by the ICC is therefore in compliance with the requirements of the Statute. But if states not party to the ICC referred to it all cases they are unwilling to prosecute but which come within its jurisdiction, that, too, would be a difficult problem to solve.

In short, the issue of co-operation by states not party to the ICC is a specific, sensitive and important practical issue that must be dealt with in each case according to the particular circumstances. Finding ways to resolve it and doing so successfully will be of the utmost importance to the development of the ICC.

55 ICC Press Release, "Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court", 15 February 2005.

# An overview of the international criminal jurisdictions operating in Africa

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## Abstract

*Whilst the African continent has been beset with many of the modern- day conflicts, and with them violations of international humanitarian law, through the work of the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court, African states have demonstrated their intent to hold accountable the perpetrators of the gravest international crimes. By the end of 2005, the International Criminal Tribunal for Rwanda celebrated its eleventh year, the Special Court for Sierra Leone will have completed its fourth year and the International Criminal Court will be more than three and a half years old. As the present review of their activities shows, the delivery of justice through international jurisdictions is a complex and often time-consuming process.*



Whilst the African continent has been beset with many of the modern-day conflicts, and with them violations of international humanitarian law (IHL), including genocide and crimes against humanity, the establishment in 1994 of the International Criminal Tribunal for Rwanda (ICTR) sent out the message that the continent would no longer allow impunity to reign where crimes which shock the conscience of humanity had been committed. This commitment to pursue those responsible for such crimes has been further underscored with the creation, at the request of the government of Sierra Leone, of the Special Court

\* The article reflects the views of the author alone and not necessarily those of the ICRC.

for Sierra Leone (SCSL), a “mixed jurisdiction” combining international and national components or characteristics, to create a hybrid system of justice. Ultimately, the renewed efforts to fight impunity for war crimes, crimes against humanity and genocide culminated in the creation of a permanent international criminal jurisdiction. In 1998, with the adoption of the Rome Statute, the permanent International Criminal Court (ICC) was born, opening its doors as of 1 July 2002.

The ICC has so far been looking into crimes allegedly committed in Sudan, the Democratic Republic of the Congo (DRC), Uganda and the Central African Republic. Importantly, the latter three situations have been referred to it by the respective governments of each country. Thus, with most of the current developments in international justice through the work of these three institutions, two based on the continent, emanating from Africa, African states have demonstrated their intent to hold accountable the perpetrators of the gravest international crimes.

This article intends to provide an overview of some of the operations of the ICTR, of the SCSL, as well as of the burgeoning ICC, to review these efforts and to highlight a few possible lessons which have been heeded. It proceeds by recalling the main differences and similarities between the ICTR, the SCSL and the ICC in terms of their respective creations and mandate, the early legal challenges to their jurisdictions and logistical obstacles to their set-up and operations, before concluding on how these institutions are planning to “finish” their work.<sup>1</sup>

## Three models of international criminal justice

### A United Nations subsidiary organ

The grave crimes committed in Africa which caught the world’s attention, and led to the creation of the ICTR, occurred in Rwanda in 1994. The first officially released UN report to conclude that genocide had taken place in Rwanda was presented on 28 June 1994 by the Special Rapporteur of the UN Commission on Human Rights. Not only did this report find that a well-planned and systematic

1 Whilst it is not being reviewed in the present article, mention should also be made of the Eritrea-Ethiopia Claims Commission which was established and operates pursuant to the Peace Agreement signed in Algiers on 12 December 2000 between the governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia. Unlike the SCSL, the ICC and the ICTR, the Commission is not concerned with criminal responsibility for violations of international humanitarian law. Instead, it is mandated under Article 5 of the Agreement to “decide through arbitration all claims for loss, damage or injury by one Government against the other, and by nationals ... of one party against the Government of the other party or entities owned or controlled by the other party that ... result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law”. Awards for successful claims are in the form of material and financial reparation and restitution.

genocide had been committed in Rwanda, it also recommended that those responsible should be brought to trial before an international tribunal.<sup>2</sup> Barely a week afterwards, on 1 July 1994, the UN Security Council underscored its grave concern that systematic, widespread and flagrant violations of international humanitarian law, including acts of genocide, had been committed in Rwanda.<sup>3</sup> Noting that perpetrators of such acts should be held individually accountable, the Security Council directed the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine the atrocities committed in Rwanda.<sup>4</sup> This Commission considered that, given the seriousness of the offences, an international criminal tribunal should be created to prosecute those responsible for the atrocities. They added that future deterrence could best be ensured through the development of a coherent body of international criminal law, preferably by international jurisdictions rather than domestic courts.<sup>5</sup> In parallel, on 28 September 1994, the newly installed government of Rwanda requested international assistance in investigating, prosecuting and trying those responsible for genocide.<sup>6</sup>

In November 1994 the Security Council, acting under Chapter VII of the UN Charter, as it had done the year before when establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), decided to set up the ICTR. Like the ICTY, the ICTR is thus a subsidiary organ of the Security Council, and all UN member states have an obligation in conformity with international law to co-operate with it. Under Article 1 of its Statute, the ICTR is mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such

2 Report by on the situation of human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. No. E/CN.4/1995/7, 28 June 1994. The Special Rapporteur was adamant that the massacres of the Tutsi constituted genocide. He explained that the intention to destroy the Tutsi group was clear from the incitements put out by the media and easy to deduce from the nature and extent of the killings of the Tutsi.

3 UN Doc. No. S/RES/935 (1994), 1 July 1994.

4 *Ibid.* See also UN Doc No. S/1994/1125, 4 October 1994. On 26 July 1994, the Secretary-General set up the Commission of Experts to investigate the situation in Rwanda and to determine whether there had been any specific violations of international humanitarian law and acts of genocide, and how to deal with any identifiable perpetrators. In its preliminary report, the Commission of Experts concluded that between 6 April and 15 July 1994 there had been an internal armed conflict within the territory of Rwanda and that the evidence showed that acts of genocide had been committed against the Tutsi group and that crimes against humanity were perpetrated in a concerted, planned, systematic and methodical way. The experts were of the view that prosecutions for crimes committed under international law during the armed conflict in Rwanda would be better undertaken by an international tribunal rather than by local courts. They explained that “municipal prosecution in these highly emotionally and politically charged cases can sometimes turn into simple retribution without respect for fair trial guarantees” and that “even where such trials are conducted with scrupulous regard for the rights of the accused, there is a great likelihood that a conviction will not be perceived to have been fairly reached”. *Ibid.*, paras. 133–141.

5 *Ibid.*, The Commission initially suggested that Rwandan cases be dealt with by the ICTY, as the creation of a separate ad hoc tribunal for Rwanda would be administratively inefficient and could lead to there being “less consistency in the legal interpretation and application of international criminal law”.

6 Letter of 28 September 1994 addressed by Rwanda’s Permanent Representative to the United Nations President of the Security Council, UN Doc. S/1994/1115, 28 September 1994.

violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994.<sup>7</sup> Interestingly, the ICTR was mandated to prosecute for serious violations of Common Article 3 to the 1949 Geneva Conventions and of the 1977 Additional Protocol II.<sup>8</sup>

During the discussion and adoption of Resolution 955 in the Security Council on 8 November 1994, the Rwandan ambassador declared: “The Tribunal will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person, all of which will be possible only if those responsible for the Rwandese tragedy are brought to justice.” It was hoped indeed that the ICTR would serve a dual purpose: on the one hand, to promote justice and, on the other, to aid the process of reconciliation in Rwanda.

### A hybrid court

In contrast to the ICTR, the SCSL was not initially contemplated as the means by which to bring peace and reconciliation to a country which had been torn apart by warring internal factions.

On 7 July 1999 the government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF) signed a peace agreement (the Lomé Peace Agreement) in which amnesty and immunity against judicial process was to be granted to combatants for atrocities committed during the conflict from March 1991 to July 1999. In accordance with Article IX (Pardon and Amnesty) of the Lomé Peace Agreement, the government of Sierra Leone was to grant absolute and free pardon and reprieve to all combatants and collaborators and ensure that no official or judicial action would be taken against any former members of the RUF, the Armed Forces Revolutionary Council (AFRC), the Sierra Leone Army (SLA), or the Civil Defence Forces (CDF) “in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement”. In addition, full immunity was to be granted to former combatants, exiles and other persons outside Sierra Leone for reasons related to the armed conflict.<sup>9</sup> A judicial institution to prosecute perpetrators of violations of IHL and crimes against humanity was not considered.

Nevertheless, on 12 June 2000, on behalf of the government and people of Sierra Leone, the president of Sierra Leone requested the president of the Security

7 UN Doc. S/RES/955(1994), 8 November 1994. The Security Council accepted that certain organizational and institutional links had to be established between the ICTR and ICTY to ensure a unity of legal approach, as well as economy and efficiency of resources. Consequently, it was decided that the Office of the Prosecutor and the Appeals Chamber were to be common to both Tribunals.

8 The inclusion of Common Article 3 to the 1949 Geneva Conventions and their 1977 Additional Protocol II in the jurisdiction of the ICTR was seen as the ICTR’s Statute “greatest innovation”, and a “development with enormous normative importance”. See Theodor Meron, “International Criminalization of Internal Atrocities”, *American Journal of International Law*, Vol. 89, p. 55.

9 In addition, the parties to the Lomé Agreement decided to establish a Commission for the Consolidation of Peace (CPP), which was to be responsible for implementing a post-conflict programme to ensure reconciliation and the welfare of all the parties to the conflict, especially the

Council “to initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone” to bring to justice “members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages”.<sup>10</sup> It was argued that the RUF leadership had reneged on the Lomé Agreement, notably by resuming their atrocities, mainly against civilians, and by taking 500 UN peacekeepers hostage.

In August 2000 the UN Security Council, by its Resolution 1315, requested the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent special court.<sup>11</sup> In the view of the Council, a credible system of justice and accountability for very serious crimes would end impunity and contribute to national reconciliation, and to the restoration and maintenance of peace. The Security Council recalled that at the time of the signing of the Lomé Agreement, the Special Representative of the Secretary-General appended a statement to the effect that it was understood that crimes of genocide, crimes against humanity, war crimes and other serious violations of IHL should not be covered by these amnesty provisions. Article 10 of the SCSL Statute reflects this position, in that it states that “an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to Articles 2 to 4 of the present Statute shall not be a bar to prosecution”.

The Secretary-General, in his report on the implementation of Resolution 1315 issued in October 2000, explained that unlike the ICTR and ICTY, which were established by resolutions of the Security Council and constituted as subsidiary organs of the UN, the Special Court, being established by an Agreement between the UN and the government of Sierra Leone, is therefore a treaty-based *sui generis* court of mixed jurisdiction and composition, which had to be incorporated at national level. Its material jurisdiction would comprise international and Sierra Leonean law, and it would be staffed by international and Sierra Leonean judges, prosecutors and administrative support staff.<sup>12</sup>

victims of war. Under Article VI (Commission for the Consolidation of Peace) of the Lomé Agreement, structures which were envisaged to further national reconciliation and the consolidation of peace included a Human Rights Commission and a Truth and Reconciliation Commission. A cursory look at the Secretary-General's third report on the UN mission in Sierra Leone of March 2000 reveals that these two commissions were seen as vital organs if the process of national healing and respect for the rule of law, democratic principles and human rights were to advance. Third Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2000/186, 7 March 2000.

10 Annex to Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. No. S/2000/786, 10 August 2000.

11 Security Council Resolution 1315, UN Doc. No. S/2000/1315, 14 August 2000. In the words of the Security Council, “persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations”. It added that the international community would exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.

12 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 9.

On 16 January 2002, the UN and the government of Sierra Leone signed the agreement on the establishment of the SCSL.<sup>13</sup> Pursuant to Article 1 of its Statute, the SCSL was mandated to prosecute persons who bear the greatest responsibility for serious violations of IHL and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.<sup>14</sup>

## A permanent treaty-based jurisdiction

The ICC, being both a treaty-based institution and also a permanent jurisdiction, is obviously fundamentally different from the SCSL, a hybrid UN–national institution, and the ICTR, an ad hoc UN Security Council subsidiary organ. The constitutive treaty is the Rome Statute of the International Criminal Court of 17 July 1998 (Rome Statute), adopted by 120 states at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Rome Statute entered into force on 1 July 2002, sixty days after sixty states had ratified or acceded to it.<sup>15</sup> Thus, unless there is a Security Council referral, as in the situation of Darfur, only state parties to the treaty will be bound by its provisions and required to co-operate with the ICC.<sup>16</sup> The ICC has often been referred to as “a court of last resort”, as emphasized in the preamble of the Rome Statute. Although the ICTR and the SCSL are also concurrently competent with national or domestic jurisdictions, both of them can claim primacy over national jurisdictions: over Sierra Leonean jurisdictions for the SCSL, and over all national courts for the ICTR. The ICC, however, shall be complementary to national criminal jurisdictions, and can only assume jurisdiction where states are “unwilling or unable” to prosecute or try alleged crimes covered by the ICC Statute.<sup>17</sup>

13 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

14 In determining the temporal jurisdiction of the SCSL, the Secretary-General felt that for the Court to have jurisdiction as of 23 March 1991, the date on which the civil war had started in Sierra Leone, would create too heavy a burden for the prosecution and the SCSL. Instead, 30 November 1996, the date of the conclusion of the Abidjan Peace Accord between the government and the RUF, was chosen, as it “would have the benefit of putting the Sierra Leone conflict in perspective [and] ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction”; Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 26, 27.

15 By the end of 2005, there were 100 state parties. In February 2003 the Assembly of States Parties elected the eighteen judges to serve terms of office of three, six or nine years. In April 2003 the Assembly elected Luis Moreno-Ocampo (Argentina) as Chief Prosecutor, and in June 2003, the judges sitting in plenary session elected the ICC Registrar.

16 Pursuant to Article 13 of the ICC Statute, the ICC can exercise its jurisdiction if (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a state party in accordance with Article 14; (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

17 According to the ICC Statute, a state might be deemed “unable” if due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary

In just over three and half years after the entering into force of the Rome Statute, four “situations” are now before the ICC. They concern crimes allegedly committed in the DRC,<sup>18</sup> Uganda, the Central African Republic<sup>19</sup> and the Darfur region of Sudan. The Prosecutor appears to be particularly active in relation to Uganda and Sudan. These two situations are very different for a large number of reasons, including the modalities of the exercise of competence of the court. Indeed, it was following a referral from President Museveni of Uganda in December 2003 that the ICC Prosecutor decided on 28 July 2004 to open investigations into crimes allegedly committed in northern Uganda. A bit over a year later, in 2005, indictments were issued by the ICC against five alleged Ugandan leaders of the Lord’s Resistance Army (LRA): Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya.<sup>20</sup>

As for Darfur, a preliminary investigation was opened following a referral by the UN Security Council on 31 March 2005.<sup>21</sup> Acting under Chapter VII of the UN Charter, the Security Council determined that the situation in Sudan constitutes a threat to international peace and security. It thus decided “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC”. The Security Council’s decision was primarily based on the report issued by the International Commission of Inquiry on Darfur, established earlier by the Security Council.<sup>22</sup>

evidence and testimony or otherwise unable to carry out its proceedings. A state might be deemed “unwilling” if (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned; (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

18 On 19 April 2004 the Prosecutor of the ICC received a letter signed by the president of the DRC referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since 1 July 2002. The Prosecutor was asked to investigate to determine whether any person should be charged with such crimes. On 21 July 2004 the Prosecutor decided that there was a reasonable basis to open the first investigation of the ICC. According to the Prosecutor an estimated 5,000 to 8,000 unlawful killings had been committed in the DRC since 1 July 2002, and information suggested that rape and other crimes of sexual violence, torture, child conscription and forced displacement continue to take place.

19 In January 2005 the ICC announced that the Prosecutor had received a letter sent on behalf of the government of the Central African Republic, referring the situation of alleged crimes committed on the territory of the Central African Republic since 1 July 2002. It remains for the Prosecutor to determine whether to initiate investigations.

20 See notably *ICC Newsletter* no. 6, available on <[www.icc-cpi.int](http://www.icc-cpi.int)> (last visited 21 March 2006).

21 UN Doc. S/RES/1593 (2005), 31 March 2005.

22 UN Doc. S/RES/1564 (2004), 18 September 2004. The Commission was mandated (i) to investigate reports of violations of IHL and human rights law in Darfur by all parties; (ii) to determine whether acts of genocide had occurred; (iii) to identify the perpetrators, and (iv) to suggest means of ensuring that those responsible for such violations are held accountable. In its report the Commission concluded that there had been serious violations of international human rights and humanitarian law amounting to crimes under international law in Darfur. Although it found that there had not been a policy of genocide, it concluded that some individuals might have committed acts of genocide. The Commission noted that the Sudanese justice system was unable and unwilling to address the situation in Darfur, namely because Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, and recommended that the Security Council refer the situation to the ICC.

The three different methods selected to establish the three above international criminal jurisdictions – a treaty for the ICC, a UN subsidiary organ for the ICTR, and a hybrid *sui generis* court for the SCSL, illustrate the evolving nature of international criminal justice since the early 1990s. Arguably, each successive model was seen as an improvement, taking in the experiences of and the lessons learned by its precursor(s).

## Legal challenges to jurisdiction

Despite the different manner in which the ICTR and SCSL have been created, the challenges to their establishment and jurisdiction have been near identical. Defendants at both institutions have moved against the Security Council's role in setting them up and, in particular in the case of the SCSL, there have been preliminary motions against the inclusion of certain crimes within its jurisdiction.

### Challenges to the jurisdiction of the International Criminal Tribunal for Rwanda

One of the first legal challenges to be put to the ICTR judges was on whether the Security Council had the power to establish a judicial body such as the ICTR. In *The Prosecutor v. Joseph Kanyabashi*, the defendant argued that the sovereignty of states, notably that of Rwanda, had been violated because the ICTR had not been established by treaty. The defendant also contended that the Security Council was not empowered under Chapter VII of the UN Charter to create an international judicial body. The trial chamber dismissed the arguments, explaining *inter alia* that membership of the UN necessarily entails certain limitations on the sovereignty of a member state, pursuant notably to Article 35 of the UN Charter.<sup>23</sup> The trial chamber noted that, although the Security Council is bound by the provisions of Chapter VII of the UN Charter, it has a wide margin of discretion in determining if there exists a threat to international peace and security, and that such discretion is not justiciable. The chamber added that the question of whether or not the conflict in Rwanda in 1994 posed a threat to international peace and security fell exclusively to the Security Council to decide.<sup>24</sup>

23 ICTR, *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, 18 June 1997, Decision on the Defence Motion on Jurisdiction (Kanyabashi Decision), para. 13-14.

24 *Ibid.*, paras. 19–22. The chamber also noted that the events in Rwanda had created a massive wave of refugees, many of whom were armed, into the neighbouring countries. In the view of the chamber there was a risk that this flood of refugees might destabilize the region. It felt that because of the distribution of population in certain countries neighbouring Rwanda, there were signs that the Rwanda conflict could eventually also spread to these countries. This conclusion finds support in reports by the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (UN Doc. No. S/ 1994/ 1157) and by the Commission of Experts appointed by the Secretary-General (UN Doc. No. S/ 1994/ 1125), which concluded that the conflict in Rwanda and the movement of refugees had created a highly volatile situation in the region, and thus by extension a threat to international peace and security.

In dealing with the argument that the establishment of an ad hoc tribunal was never a measure contemplated by Article 41 of the UN Charter, the trial chamber reasoned, in line with the earlier ICTY jurisprudence in the ICTY *Tadic* interlocutory appeal, that

While it is true that establishment of judicial bodies is not directly mentioned in Article 41 of the UN Charter as a measure to be considered in the restoration and maintenance of peace, it clearly falls within the ambit of measures to satisfy this goal. The list of actions contained in Article 41 is clearly not exhaustive but indicates some examples of the measures which the Security Council might eventually decide to impose on States in order to remedy a conflict or an imminent threat to international peace and security.<sup>25</sup>

The trial chamber thus confirmed that there was nothing under the UN Charter which precluded the Security Council from establishing such a body when a threat to peace and security exists.<sup>26</sup>

## Challenges to the jurisdiction of the Special Court for Sierra Leone

Similarly, and unsurprisingly, as with the ICTR, the first challenges by defendants at the SCSL were on jurisdictional grounds, with three points being of particular jurisprudential relevance: (i) the validity of the Lomé Agreement; (ii) the role of the Security Council in establishing the SCSL; and (iii) the recruitment of child soldiers as constitutive of a crime.

### *Validity of the Lomé Agreement*

The SCSL Appeals Chamber was called upon to pronounce on the validity of the amnesty provided by the Lomé Agreement. It was asked to rule that the government of Sierra Leone was bound to observe the amnesty granted under Article IX of the Lomé Agreement, and that the Special Court should not assert jurisdiction over crimes committed prior to July 1999, when the amnesty was granted, and that it would be an abuse of process to allow the prosecution of any of the alleged crimes pre-dating the Lomé Agreement. In its Decision of 13 March 2004, the Appeals Chamber dismissed the Preliminary Motions for lack of merit.<sup>27</sup> In its view, the Lomé Agreement was not a treaty or an agreement in the nature of a treaty, and, irrespective

<sup>25</sup> *Ibid.*, para. 27.

<sup>26</sup> It should be noted that the ICTR and national jurisdictions exercise concurrent jurisdiction over the offences committed in Rwanda. The ICTR nevertheless has primacy in cases of a jurisdictional conflict arising with a national court (Article 8(2) of the Statute). The ICTR is competent to try individuals, rather than states or criminal organizations (Article 5 of the Statute). Although any individual can be prosecuted by the ICTR for crimes committed in Rwanda in 1994, the Tribunal can try only Rwandan citizens for crimes committed in the territory of neighbouring states during this period (Article 7 of the Statute). *Kanyabashi* Decision, para. 35.

<sup>27</sup> SCSL, *Prosecutor Against Morris Kallon and Brima Bazzy Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Lomé Decision)*, Case No. SCSL-2004-15-AR72(E) and Case No. SCSL-2004-16-AR72(E), 13 March 2004.

of whether it was binding on the government of Sierra Leone, it did not affect the liability of individuals to be prosecuted before an international tribunal for international crimes, as included in Articles 2 to 4 of the SCSL Statute. It explained that the contracting parties to the Lomé Agreement were the government of Sierra Leone and the RUF, while the UN, the Organisation of African Unity, the Economic Community of West African States (ECOWAS), the government of the Togolese Republic and the Commonwealth were mere moral guarantors who assumed no legal obligation.<sup>28</sup> Moreover, the SCSL appeals judges were of the opinion that the Lomé Agreement did not remove the universal jurisdiction that other states have to prosecute persons accused of crimes incorporated under Articles 2 to 4 of the Statute (crimes against humanity, violations of Common Article 3 to the Geneva Convention and of Additional Protocol II, and other serious violations of international humanitarian law) and likewise did not remove SCSL jurisdiction to do so.<sup>29</sup> Citing case law and academic treatise, the Appeals Chamber stated,

[I]t stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.<sup>30</sup>

### *Delegation of power by the UN Security Council*

A second jurisdictional challenge against the SCSL contended that there had been an illegal delegation of power by the UN Security Council when it created the Special Court.<sup>31</sup> The arguments raised by the defendant concerned the power of the Security Council to delegate its powers to the Secretary-General to conclude an agreement between the UN and the government of Sierra Leone, and the power of the Secretary-General to conclude such an agreement on his own.<sup>32</sup> The Appeals Chamber gave short shrift to these grounds of appeal. In its view, no delegation of power is required for the Secretary-General in fulfilling and executing the orders of the Security Council. Thus, in concluding the agreement between the UN and the government of

28 Ibid., para. 41.

29 It should be noted that in determining the subject-matter jurisdiction of the SCSL in the light of the principle of *nullum crimen sine lege*, the UN Secretary-General declared that the international crimes included in the Statute were deemed to have the character of customary international law at the time of the alleged commission of the crimes. See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para. 12.

30 *Lomé Decision*, para. 71. However, the Appeals Chamber noted that crimes falling under Sierra Leonean law, as included in Article 5 of the Statute, did not benefit from universal jurisdiction and are not mentioned in Article 10 of the Statute. Thus whilst the judges found the Lomé Agreement, in particular its Article IX, to be of no relevance in cases before the SCSL, the ruling is limited to crimes covered by Articles 2 to 4 of the Statute. In the light of the Appeals Chamber's focused approach, SCSL jurisdiction for crimes falling under Sierra Leonean law, as listed in Article 5 of the Statute, could seemingly be questionable.

31 SCSL, *Prosecutor Against Moinina Fofana, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations (Delegation Decision)*, Case No. SCSL-2004-14-AR72(E), 25 May 2004.

32 Ibid., para. 12.

Sierra Leone, the Secretary-General was not acting on his own, but rather at the request of the Security Council in his capacity as its executive organ.<sup>33</sup> The judges also ruled, in dismissing the defendant's next argument, that the UN Charter, specifically Articles 1(1) and 42 thereof, granted the Security Council the power to create an international court. In a reasoning similar to the above ICTR *Kanyabashi* decision, the Appeals Chamber opined that the establishment of an international tribunal was akin to "an effective and collective measure for the prevention of and removal of threats to the peace" as contemplated under Article 1(1) of the UN Charter.<sup>34</sup> Finally, the Appeals Chamber was not convinced by the defendant's last contention that the Security Council had acted *ultra vires* in creating a *sui generis* organ such as the SCSL, over which it lacks effective authority and control.<sup>35</sup>

### *Recruitment of child soldiers*

Defendant Sam Hinga Norman moved in a preliminary motion that the SCSL lacked jurisdiction to try individuals for having recruited children under the age of 15 into armed forces or groups or using them to participate actively in hostilities.<sup>36</sup> Whilst the defendant conceded that child recruitment had acquired the status of a crime under international law, he argued that the Court had to identify the point at which it had become a crime entailing individual criminal responsibility so as to not violate the principle of *nullum crimen sine lege*.

In its Decision, the Appeals Chamber, referring to a plethora of sources, including the 1949 Geneva Conventions and their 1977 Protocols, the 1998 ICC Rome Statute, ICTR and ICTY jurisprudence, the 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the involvement of children in armed conflict, as well as national legislation, concluded that child recruitment was criminalized by November 1996.<sup>37</sup> In the view of the Appeals Chamber, Article 4 of the SCSL Statute, as it relates to child recruitment, therefore does not contravene the principles of legality and specificity.<sup>38</sup>

33 *Ibid.*, paras. 14–17.

34 *Ibid.*, paras. 18–20.

35 *Delegation Decision*, paras. 22–29. The appeal judges reasoned that, while the Security Council could not exercise judicial control over the SCSL, the SCSL could be controlled in administrative matters, including advice and policy direction. They noted that the Secretary-General represents the Security Council on the Court's Management Committee and at any time when there existed a threat to international peace and security, the Security Council would act in accordance with the UN Charter, even to override the Agreement establishing the SLSC.

36 SCSL, *Prosecutor Against Sam Hinga Norman, Decision Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-2004-14-AR72(E), 31 May 2004. Counsel for Moinina Fofana, as intervener, contended that child recruitment was not crime under customary international law, and that there was no sufficient state practice indicating an intention to criminalize it, para. 5.

37 *Ibid.*, paras. 30–51. The Appeals Chamber also considered *amici curiae* opinions filed by the University of Toronto, the International Human Rights Clinic and UNICEF.

38 *Ibid.*, para. 53. In reaching this conclusion, the Appeals Chamber noted that the norm prohibiting child recruitment as included in the Geneva Conventions and their Additional Protocols, as well as the near universal ratification of the 1996 Convention on the Rights of Child provided compelling evidence that this conventional norm had acquired customary status well before 1996. The Chamber also noted that the overwhelming majority of states did not practise the recruitment of children under 15 and had criminalized such behaviour prior to 1996.

This early case law on the establishment and jurisdiction of the ICTR and the SCSL ultimately reinforced the legitimacy of these jurisdictions, and clarified some important legal questions, in the furtherance of international criminal justice. Besides these legal challenges, the ICTR and SCSL have been confronted by many of the same difficulties as they have sought to become fully operational.

## Logistical challenges in the establishment of the international criminal jurisdictions

Although the ICTR was in principle established in November 1994, its judges were only elected in May 1995.<sup>39</sup> As there were no actual physical structures to house the ICTR at the time, the judges of the ICTR held their inaugural plenary session in June 1995 at the seat of the ICTY in The Hague.<sup>40</sup> The first indictment was submitted by the Prosecutor on 22 November 1995, and confirmed on 28 November 1995.<sup>41</sup> Further indictments against five individuals were confirmed in June 1996.<sup>42</sup> The first appearances of accused persons before the ICTR occurred on 30 and 31 May 1996 in a makeshift courtroom in the building hosting the ICTR in Arusha.<sup>43</sup> The ICTR considered these appearances to be particularly important as they represented the first sitting in Africa by an international criminal tribunal. Three trials began in early 1997, those of Jean Paul Akayesu, on 9 January 1997, Georges Rutaganda, on 18 March 1997, and just under a month later, on 9 April 1997, that of Clément Kayishema and Obed Ruzindana.

39 In its Resolution 989 (1995) of 24 April 1995, transmitted to the president of the General Assembly by a letter dated 24 April 1995, the Security Council proposed a list of candidates for judgeships. A month later, on 24 and 25 May 1995, the General Assembly, by decision 49/324, elected the first six judges for a four-year term of office. These were Judges Lennart Aspegren, Laity Kama, Tafazzal Hussain Khan, Yakov A. Ostrovsky, Navanethem Pillay and William Hussein Sekule. Pursuant to Article 15 of the ICTR Statute, Judge Richard Goldstone, as the then Prosecutor of the ICTY, was also to serve as the Prosecutor of the ICTR. On 20 March 1995 the Deputy Prosecutor was designated to act on behalf of the Prosecutor in Arusha and Kigali. The first Registrar of the ICTR, responsible for the administration of the Tribunal, was only appointed on 8 September 1995 by the UN Secretary-General. See generally, ICTR First Annual Report, UN Doc. No. A/51/399 – S/1996/778, 28 September 1996.

40 It was only for their second plenary session, in January 1996, that the judges met in Arusha. During this session they adopted the rules of detention and the directive for the assignment of defence counsel. In March 1996, in accordance with Rule 23 of the Rules of Procedure and Evidence, the judges decided to enter into an agreement with the International Committee of the Red Cross, which will thus become the independent authority responsible for inspecting detention conditions. See the ICTR First Annual Report.

41 The Indictment concerned massacres committed in the prefecture of Kibuye in Rwanda between April and June 1994. The accused were Clément Kayishema, Charles Sikubwabo, Aloys Ndimbati, Ignace Bagilishema, Vincent Rutaganira, Muhimana Mika, Obed Ruzindana and Ryandikayo.

42 A first indictment concerned Elie Ndayambaje, for mass killings in the Kabuje and Gisagara districts, Kibuye prefecture, and the second was against Elizaphan Ntakirutimana, Gérard Ntakirutimana, Obed Ruzindana and Charles Sikubwabo, for massacres committed in Kibuye prefecture. ICTR First Annual Report, para. 46.

43 The accused were Jean-Paul Akayesu, former mayor of the commune of Taba in Gitarama prefecture, and Georges Rutaganda, second vice-president of the Interahamwe za MRND, respectively. ICTR First Annual Report, para. 39.

Being only the second international criminal jurisdiction of its kind, and the very first in Africa, the ICTR was confronted by an array of teething troubles. The realities of international justice soon dawned on the international community, and many early headaches, administrative as well as judicial, were to afflict the ICTR.

On an administrative level, the UN Office of Internal Oversight Services found in 1997 that there existed severe mismanagement in many areas at the ICTR.<sup>44</sup> In one of its strongest findings it stated that “not a single administrative area of the Registry functioned effectively”. As a result, both the Registrar and the Deputy Prosecutor were replaced, and structural changes as well as new senior staff were put in place.<sup>45</sup> Moreover, whilst the first trials had started promptly, their progress was hampered, notably by the lack of courtrooms. Indeed, the two trial chambers were forced to share a single courtroom, which meant having to suspend one trial to allow another to continue. A second courtroom was finally built in August 1997, thereby allowing the trial chambers to speed up the trials by operating simultaneously.<sup>46</sup> Following a request from the President of the ICTR, the Security Council established a third trial chamber in 1998, increasing the number of judges from six to nine.<sup>47</sup>

When, a few years later, the international community came to establish the SCSL, there was a large consensus that a hybrid jurisdiction would be a preferable alternative to a fully fledged international tribunal. In the light of the experience of the ICTR in its initial years, the SLSC was to be a more limited and streamlined operation.<sup>48</sup>

Although the SCSL started its functions in July 2002, only seven months after the signing of the Agreement between the UN and the government of Sierra Leone on the establishment of the Court, like the ICTR it had to build detention facilities, a courthouse and office premises. The court premises were officially

44 Audit and Investigation of the International Criminal Tribunal for Rwanda, UN Doc. No. A/51/798, 6 February 1997.

45 ICTR Second Annual Report, UN Doc. No. A/52/582-S/1997/868, 13 November 1997, paras. 53–61.

46 ICTR Third Annual Report, UN Doc. A/53/429-S/1998/857, 23 September 1998, para. 77.

47 The Security Council was convinced that it was essential to add to the number of judges and trial chambers, in order to enable the ICTR to try without delay the large number of accused awaiting trial. See UN Doc. S/RES/1165 (1998), 30 April 1998. The first week of September 1998 was very much a turning point in the fortunes of the ICTR, with the guilty plea of Jean Kambanda, the prime minister of the interim government between April and July 1994. The case of Jean Kambanda represented the first ever conviction of a former head of government for genocide, and the issuance of the Judgement in the Akayesu case provided the first judicial interpretation of the crime of genocide. Since then, the ICTR has increased its output substantially and, to date, the trials of more than twenty-six accused have been completed and cases against twenty-six accused are under way. Five of the ongoing trials are joint cases implicating between three and six accused, most of whom are the alleged leading perpetrators of the massacres. The other trials involve single defendants. The ICTR has set many groundbreaking precedents, and found accountable the majority of the leaders of the massacres in Rwanda 1994. The ICTR has also developed an important corpus of jurisprudence, in particular on genocide and serious violations of Common Article 3 of the 1949 Geneva Conventions and their 1977 Additional Protocols. See also Erik Mose, “Main Achievements of the ICTR”, *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 920–943.

48 See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000.

opened on 10 March 2004. As none of the buildings which had been identified by the government of Sierra Leone to house the SCSL was found to be suitable due to security and renovation concerns, to save time and costs prefabricated structures were erected to host the office facilities. Nearly 340 expert international as well as national staff had to be recruited.

In the same vein as the ICTR, logistical constraints, in particular financing, have been a major concern for the SCSL. Unlike the ICTR, financed from the UN budget, the budget of the SCSL is dependent on voluntary contributions of states. Thus without state support the SCSL's activities can be severely constrained. Financial problems have lurked from day one of the SCSL's life. Possibly as a result of high costs at the UN ad hoc tribunals, and with the establishment of the ICC, states were reluctant to accept the Secretary-General's initial estimate of the SCSL's costs of operations for its first three years, namely, US\$30.2 million for the first year and \$84.4 million for the next two years. Faced with opposition from states, the budget for the first three years was lowered to \$19.219 million for July 2002–June 2003, \$32.534 million for July 2003–June 2004 and \$29.9 million for July 2004–June 2005.<sup>49</sup>

Moreover, the SCSL has struggled to receive all the pledged financing, with a shortfall of \$82 million for its first three-year budget. This prompted the UN Secretary-General to seek urgent subventions from the General Assembly, which though granted, failed to materialise as quickly as the SCSL had hoped.<sup>50</sup>

More fundamentally, as both the ICTR and the SCSL quickly realised and recognised, the complexity and nature of international justice meant that they must depend heavily on the co-operation of states, and on national judicial procedures, in a number of crucial areas. For instance, all the accused before the ICTR had to be arrested in third states and transferred to the ICTR detention facilities in Arusha. Before trial, sufficient time had to be accorded to the defence to prepare its case, which would entail having to identify potential witnesses, who, in the case of the ICTR, had to be tracked down in numerous countries other than Rwanda, often far from the seat of the Tribunal. As many of the witnesses were afforded protection by the ICTR and SCSL, arrangements for their resettlement and safe transfer to and from the Tribunal required much assistance from states and various organisations.<sup>51</sup>

This dependency on state support and on political stability and security in those states was highlighted in March 1997, when the defence in the *Rutaganda* trial seized an ICTR trial chamber of an extremely urgent motion for the taking of statements of sixteen witnesses who were living on the Tingi-Tingi refugee camp in the DRC (then Zaire). By the time that motion was heard, the refugee camp had been overrun and destroyed. The witnesses had disappeared. The trial chamber, fully cognisant of the need to ensure the full respect of the rights of the defendant,

49 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/2005/350, 27 May 2005, paras. 55–56.

50 *Ibid.*, para. 57.

51 *Ibid.*, paras. 33–38.

sought the co-operation of states, the UN, including the UN High Commissioner for Refugees, and any other organization that could be of help in locating those witnesses.<sup>52</sup> Following this decision, the security conditions for Rwandan refugees in the DRC deteriorated substantially, which did not facilitate the task of finding the missing witnesses.<sup>53</sup>

In the case of the SCSL, of the eleven accused still indicted, only one has yet to be brought before the Court, namely Johnny Paul Koroma who is still at large.<sup>54</sup> Unlike the ICTR, which, as a subsidiary organ of the UN Security Council, can report to the latter instances of non-co-operation by states, the SCSL does not benefit from such powers. The SCSL is very much in the hands of states and has to rely on their goodwill to obtain not only the arrest and transfer of all accused, but also help with the witness movement and relocation. The case of Charles Taylor highlighted this reliance on state cooperation. Having been indicted by the Special Court Charles Taylor, the former president of Liberia, was granted asylum by Nigeria in August 2003. It was not until March 2006, with the ending of his asylum by the Nigerian authorities, that Charles Taylor was finally transferred to the Special Court. This came a few months after the Security Council granted the UN Mission in Liberia a Chapter VII mandate to arrest Charles Taylor if he returns to his country.<sup>55</sup> Whilst the arrest and transfer of Charles Taylor was welcomed by the international community, it showed that much depends on the assistance states choose to provide, if the Special Court is to fulfill its mandate.

The ICC is most probably going to face similar issues in its relationship with states as those affecting the ICTR and SCSL, particularly as regards access to the crime sites, the protection of witnesses, preservation of evidence, and arrests of accused. Many of the cases with which the ICC will deal are likely to stem from post-conflict countries, the infrastructures of which have been severely weakened

52 ICTR, *Prosecutor v. Georges Rutaganda* (Case No. ICTR-96-3-T), Decision on the Extremely Urgent Request made by the Defence for the taking of a Teleconference Deposition, 6 March 1997.

53 ICTR Second Annual Report, paras. 21–24.

54 Of the remaining persons initially indicted, two of the accused, namely Foday Saybana Sankoh and Sam Bockarie, subsequently died. Ten accused are presently in the custody of the SCSL in Freetown; they are Charles Ghankay Taylor, Alex Tamba Brima, Moinina Fofana, Augustine Gbao, Morris Kallon, Brima Bazzy Kamara, Santigie Borbor Kanu, Allieu Kondewa, Samuel Hinga Norman and Issa Hassan Sesay. In January 2004 the trial chamber ordered the regrouping into three trials of these nine detainees, on the basis of their belonging to one of the parties to the conflict on Sierra Leone. As such, Issa Hassan Sesay, Morris Kallon and Augustine Gbao were joined in the case regarding the Revolutionary United Front (RUF Trial), Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu are to be tried together in the Armed Forces Revolutionary Council trial (AFRC Trial), and Samuel Hinga Norman, Allieu Kondewa and Moinina Fofana are to be jointly tried in the Civil Defence Forces trial (CDF Trial), see SCSL, *Prosecutor against Issa Hassan Sesay* (Case No. SCSL-03-05), *Alex Tamba Brima* (Case No. SCSL-03-06), *Morris Kallon* (Case No. SCSL-03-07), *Augustine Gbao* (Case No. SCSL-03-09), *Brima Bazzy Kamara* (Case No. SCSL-03-10) and *Santigie Borbor Kanu* (Case No. 03-13), *Decision and Order on Prosecution Motions for Joinder*, 27 January 2004; *Prosecutor against Samuel Hinga Norman* (Case No. SCSL-03-08), *Moinina Fofana* (Case No. SCSL-03-11) and *Allieu Kondewa* (Case No. SCSL-03-12), *Decision and Order on Prosecution Motions for Joinder*, 27 January 2004. All the trials have begun, the RUF trial on 5 July 2004, the AFRC trial on 7 March 2005 and the CDF trial on 3 June 2004. The Prosecution has closed its case in the CDF and AFRC trials on 14 July 2005 and 21 November 2005 respectively. See <[www.sc-sl.org](http://www.sc-sl.org)> (last visited 21 March 2006).

55 UN Doc. S/2005/1638, 11 November 2005.

by hostilities, and national resources depleted. Moreover, the location of the seat will be an important factor. Being based in The Hague, at a distance from the setting of the crimes, the Court's work will not be facilitated. For the sake of practicality and so as to not put the witnesses in too alien an environment by having to travel to The Hague to testify, the ICC may need to consider sitting elsewhere, for instance in Arusha, when hearing testimonies of witnesses coming from the DRC or Uganda. Thus state support and structures could be essential to enable the ICC to operate effectively. In one of the first situations initiated by the ICC some of these considerations have already come to the fore.

In the Darfur case, questions pertaining to state co-operation have arisen, and the insecurity prevailing in Darfur appears to have hampered the investigations. The reports prepared for the UN Security Council by the ICC Prosecutor on the actions he has taken to implement Resolution 1593 provide insights into the challenges he and his team face in investigating in Darfur. In his first report to the Security Council, dated 29 June 2005, the Prosecutor provided an overview of the preliminary investigations: a mammoth task of evidence gathering and analysis, including 2,500 items obtained from the International Commission of Inquiry and more than 3,000 documents from over one hundred groups and individuals. According to the ICC Prosecutor there is credible evidence that crimes falling under the jurisdiction of the ICC have been committed, with thousands of civilians killed, and more than 1.9 million displaced.<sup>56</sup>

One area of concern voiced by the Prosecutor in his most recent report to the Security Council, dated 13 December 2005, relates to the protection of witnesses and victims which could not be assured due to continuing insecurities in Darfur.<sup>57</sup> The Prosecutor saw this as a serious impediment not only to the investigations conducted by the ICC, but also to the work of the domestic judicial bodies set up by the Sudanese authorities. The Prosecutor nonetheless indicated that his office would soon initiate its second-stage investigations, focusing on specific incidents and on individuals bearing the greatest responsibility for these crimes. He emphasised, however, that no decision had yet been taken as to whom to prosecute.<sup>58</sup>

Another point stressed by the ICC Prosecutor in his reports to the Security Council on Darfur concerns the issue of complementarity. Since the UN Security Council referred the situation to the ICC for its investigation, the Sudanese authorities have seemingly taken steps to initiate prosecutions at the national level, and have established a special panel composed of national judges to investigate the crimes allegedly committed in Darfur.<sup>59</sup> The ICC Prosecutor reported that, while determining the admissibility of the Darfur situation, he had

56 Report of the prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005), p 4, available on <[www.icc-cpi.int](http://www.icc-cpi.int)> (last visited 21 March 2006).

57 Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005), available on <[www.icc-cpi.int](http://www.icc-cpi.int)> (last visited 21 March 2006).

58 *Ibid.*, p. 3.

59 Report of the Prosecutor to the Security Council Pursuant to UNSC 1593, p. 4.

received information from the Sudanese authorities on, notably, the Sudanese judicial system, the administration of justice in Darfur and traditional systems for alternative dispute resolution. The ICC also looked into the special courts and specialized courts which had been set up in 2004 by the Sudanese authorities, the committees against rape established by ministerial order in 2004, as well as the national commission of inquiry, and other ad hoc and non-judicial bodies.<sup>60</sup> The Prosecutor explained that while the Darfur case was admissible before the ICC, “this decision did not represent a determination on the Sudanese legal system as such, but is essentially a result of the absence of criminal proceedings relating to the cases on which the ORP is likely to focus”.<sup>61</sup>

This limited review of some of the logistical challenges encountered by the international criminal jurisdictions in their work so far shows that many of the same issues have come up before each of them. In particular, reliance and even dependence on the co-operation and goodwill of states to enable the fulfilment of their mandates is an ever recurring theme. The international courts have consistently had to turn to states for their finances, for the arrest and transfer of accused and to secure the appearance and protection of witnesses. The early signs are that the ICC is likewise going to have to define its relationship with states and assess with each of them a workable *modus vivendi*.

## Finishing the work

Because of their ad hoc nature, the ICTR and the SCSL knew from their inception that as temporary institutions with limited jurisdictions they would have to determine clearly how to proceed in order to fulfil their mandates effectively within a given timeframe. Accordingly, the ICTR Prosecutor determined early on that the investigations and prosecutions should concentrate on those most responsible for the crimes committed in Rwanda in 1994, so as to limit the number of cases to be tried in Arusha.

By 2003 the Security Council had confirmed that the time had arrived for the ICTR, as well as the ICTY, to start winding down and to bring to an end their activities. The Security Council endorsed the plans put forward by the ad hoc tribunals in which they suggested completing all investigations by 2004, trials by 2008, and appeal procedures by 2010.<sup>62</sup> This so-called “completion strategy” might have appeared to be a tall order, given the then prevailing speed of trials. The Tribunals seem, however, to have been granted the means needed to meet the challenge. At the ICTR, the creation of a pool of eighteen *ad litem* judges in August 2002, elected in 2003,<sup>63</sup> and the construction of a fourth courtroom increased the judicial capacity. The

60 Ibid.

61 Ibid., and Second Report of the Prosecutor to the Security Council Pursuant to UNSC 1593, pp. 5–6.

62 UN Docs. Nos. S/2003/1503, 28 August 2003 and S/1534/2004, 26 March 2004. The ICTR has yet to confirm its capacity to comply with the 2010 deadline as the date for completion of the appeals procedures. If this date is maintained, the ICTR will be closing its doors nearly sixteen years after the events in Rwanda in 1994, having completed cases against sixty-five to seventy persons.

63 UN Doc. No. S/2002/1431, 8 August 2002.

arrival of the *ad litem* judges, and careful judicial planning, made it possible to increase substantially the number of new trials, nearly doubling the ICTR's judicial output.<sup>64</sup>

Nonetheless, from examining the ICTR's completion strategy, which is updated and submitted to the Security Council in May and November each year, it appears that the ICTR will have to keep to a very tight schedule to meet its 2008 deadline and complete all trials. The completion strategy entails a web of meticulous planning and interrelated considerations taking into account sufficiency of resources, the length of trials (including estimates as to required trial days for each case) and the number of cases that can be transferred to national jurisdictions. Nevertheless, in his 2005 updates to the Security Council, the president of the ICTR remained confident that the ICTR would keep to the timeline.<sup>65</sup>

One of the more contentious aspects of the completion strategy is that cases investigated by international prosecutors may have to be transferred to national jurisdictions. The ICTR Prosecutor has targeted forty-one cases for transfer, comprising cases warranting further investigations and other cases fully investigated and where indictments have already been issued, the accused sometimes arrested and awaiting trial. The decision to transfer cases where indictments have already been confirmed rests with the ICTR judges, pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence. The Prosecution has declared that it is negotiating with a number of states, including Rwanda, to take over certain of the cases.<sup>66</sup> Whether the national legislation of states permits prosecution of individuals for crimes falling under the ICTR Statute, the actual ability of the national courts to handle such cases and the existence of the death penalty are but some of the considerations which must be taken into account by the ICTR in transferring the cases.<sup>67</sup> Moreover, failure successfully to transfer cases to national authorities risks jeopardizing the completion strategy.

The drafters of the Statute of the SCSL drew upon the experience of the *ad hoc* tribunals and specified that its mandate is to try only those bearing the greatest responsibility for the crimes falling within its mandate.<sup>68</sup> Its efforts and attention were thus to concentrate on a few key leaders and it was expected that the SCSL would try a limited number of cases. It was implied that that the SCSL would complete its activities within about three years.<sup>69</sup> In April 2004 the UN General Assembly requested the Secretary-General to invite the SCSL to adopt a completion strategy.<sup>70</sup> Although this request was made only a couple of years

64 Mose, above note 47.

65 Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2005/336, 24 May 2005, and ICTR President Addresses UN Security Council, ICTR/Info-9-2-460, Arusha, 16 December 2005, available on <www.ict.rg> (last visited 21 March 2006).

66 *Ibid.* As of November 2005, case files in respect of thirty suspects had been handed over to the Rwandan authorities, and one to Belgium.

67 *Ibid.*

68 Article 1 (Establishment of the Special Court) of the SCSL Statute.

69 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/2005/350, 27 May 2005, para. 37.

70 UN Doc. A/58/284, 8 April 2004.

after the SCSL had started its operations, it did not come as a surprise in the light of similar requests to the ICTR and ICTY in 2003, read in conjunction with the implied three-year lifespan of the SCSL.

In the resulting completion strategy prepared by the SCSL, the latter foresaw that the CDF and AFRC trials could be completed by the end of 2005 or early 2006, and the appeals in these cases heard by mid-2006. The SCSL also hoped that the RUF trial, including appeals, would be finished by early to mid-2007.<sup>71</sup> It remains, however, questionable whether the SCSL will be in a position to keep to the above timeframe.<sup>72</sup>

Yet, whilst suggesting 2007 as an estimate date for completing its work, the SCSL Registrar noted that as Charles Taylor and Johnny Koroma had yet to be arrested, this completion date might be affected.<sup>73</sup> He explained that, unless their indictments are withdrawn, or until such time as they are brought before the SCSL, it will not be possible to determine when all the trials, and thus the SCSL, will be closed.<sup>74</sup> It will be interesting to see whether the recent arrest of Charles Taylor and his impending trial will bring the Registrar to revise this date.

Although there remain doubts as to the exact date of closure of the ICTR and the SCSL, it is now clear that their days are numbered and that they will close within a few years. By then, the ICTR and the SCSL will have tried only a handful of individuals, the majority of the remaining perpetrators being left to be tried by national courts. This is of course coherent with their limited mandates, which are ad hoc in nature, and with the principle of concurrence of jurisdictions asserted in the statutes of the ICTR and SCSL. As they are concerned only with prosecuting those most responsible for the atrocities committed in Rwanda and Sierra Leone, their work must be furthered by national initiatives, such as national courts and community-based justice in the form of the gacaca in Rwanda, and other initiatives, such as the Truth and Reconciliation Commission in Sierra Leone.

Even if the ICC is a permanent institution, it will similarly not be spared efforts by state parties to streamline its operations and activities. For each situation it will in all likelihood be required to delimit clearly the parameters of its work, deciding how many suspects to investigate, prosecute and try, and how to define who are the “most responsible”. Also, it will have to ensure that – by being

71 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/72005/350, 27 May 2005.

72 The defence case in the CDF trial restarted in January 2006 and the RUF trial on 28 February 2006; no date has yet been set for the start of the defence in the AFRC trial, as any motions for acquittal will not be heard until mid-January. See <[www.sc-sl.org](http://www.sc-sl.org)> (last visited 21 March 2006). Thus if the SCSL succeeds in meeting the target dates in its Completion Strategy, it will have taken SCSL nearly five years for the SCSL to finish the cases against the accused already in detention, somewhat longer than the three years initially predicted by the international community.

73 Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, forwarding the SCSL Completion Strategy (18 May 2005)(Completion Strategy), UN Doc. A/59/816-S/72005/350, 27 May 2005.

74 *Ibid.*, para. 36. A similar position has been adopted by the ICTY in its completion strategy as concerns the arrests of Mladić and Karadžić. See press release of President Pocar’s Address to Security Council, 15 December 2005, CVO/MO/1037e, available on <[www.un.org/icty](http://www.un.org/icty)> (last visited 21 March 2006).

constrained to trying those bearing the highest responsibility – the fight against impunity continues to be fostered through the work of national jurisdictions. In this regard, the ICC may again be able to draw invaluable lessons from the ICTR and the SCSL.

## Concluding remarks

The above review of some of the operations of the ICTR and the SCSL shows that the delivery of justice through international jurisdictions is a complex process, often time-consuming. Indeed, at the end of 2005 the ICTR celebrated its eleventh year, the SCSL completed its fourth year, and the ICC was more than three and a half years old.

While the SCSL was established with the intent to remedy some of what were perceived to be the weaknesses of the ad hoc tribunals, with still so many unknowns in its lifespan it is difficult to assess whether this hybrid jurisdiction is a more reliable model for bringing justice to a country decimated by violations of international humanitarian law and other crimes. It may be closer to the victims and provide Sierra Leone and possibly its people with a sense of ownership. Nonetheless, it has already been beset by many of the same issues and constraints which have befallen the ICTR, all of which may well be inherent in trying to dispense international justice. It would appear, therefore, that the successful execution of the mandates of international criminal institutions has ultimately less to do with the manner in which they were created than with the support they receive from states. Indeed, through their activities and jurisprudence, the ICTR and the SCSL reminded us that international criminal tribunals do not operate in some vacuum but depend extensively on state co-operation.

The hopes and expectations of the victims, concerned states and the international community of the ICC are very high. It is far too early to assess how well this court, which has only just started operating, is faring. Only time will tell whether the lessons learnt from the ICTR and the SCSL will in any way prove beneficial to the ICC's operations, especially in Africa, as it works its way through its caseload. The first progress reports of the ICC suggests that it may well already be confronted with many of the same difficulties that the ICTR and the SCSL faced as they strove to bring to justice alleged perpetrators of serious violations of international humanitarian law, genocide and crimes against humanity.

However, with the support extended to all international criminal jurisdictions by most states, in particular African states, there is room for optimism that international criminal justice, through the ICTR, the SCSL and the ICC, will prevail over impunity in Africa. Indeed, it was an African state, Senegal, which was the first country to ratify the ICC Statute, and a majority of African states have followed suit. Nearly a third of the state signatories to the Rome Statute are African. Moreover, the African Union, in Article 4 (Principles) of its Constitutive Act, reserved to itself the right to intervene in a member state in respect of grave circumstances, such as war crimes, genocide and crimes against

humanity, and underscored its commitment to rejecting impunity. The African continent is therefore not merely the object of most international criminal justice efforts, but is clearly becoming one of its proponents, as African states become more actively involved in promoting it.

It is probably unavoidable that there will be certain tensions between national authorities and international criminal jurisdictions in delivering justice to the victims of some of the most heinous crimes known to mankind. Nonetheless, the experiences of the ICTR and the SCSL, and the fledgling ICC, have shown that despite being the continent where most of these crimes have been committed in the past couple of decades, Africa is also a continent clearly devoted to furthering accountability for such atrocities.

# International criminal justice: tightening up the rules of the game

**Luc Côté**

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## **Abstract**

*Although much has been said and written about the creation of the international criminal tribunals and their contribution to the development of international humanitarian law, there have been very few studies of the international prosecutor per se. In this article the author briefly surveys recent developments in the international criminal justice institutions, focusing particularly on the limits recently imposed on the discretionary powers of international prosecutors.*

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We have seen major advances in international criminal law over the past decade in terms of both instruments and institutions. Since the creation of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994, followed by the surprising adoption of the Statute of the International Criminal Court (ICC) in Rome in 1998 and, most recently, the experiment of the Special Court for Sierra Leone set up in 2002, bodies administering international criminal justice have wrought stunning and irreversible changes in the world of international criminal law. International humanitarian law has suddenly emerged from the state of hibernation into which it slid after Nuremberg and Tokyo. Over the past decade, judges in the various international criminal courts have been reworking and breathing new life into international humanitarian law, and one of the sources on which they have drawn in order to do so is international customary law. Whereas for many years international humanitarian law had been confined within diplomatic, political and

military circles, circumscribed and “confiscated” by the states,<sup>1</sup> the opening up of these new international judicial avenues, accessible to non-state actors, is a real revolution in international law. For ten years now we have been seeing international humanitarian law reclaimed by new actors who, thanks to these new international judicial bodies, now regularly subject it to a judicial control it has all too often eluded in the past.

When the United Nations Security Council set up the two first ad hoc international criminal tribunals, the move was fast and spectacular and, I would venture to suggest, somewhat impromptu. As a result, it escaped the control of the states to some degree, at least at the outset. Since then the states have seized the reins, and some of the key features of the bodies administering international criminal justice have been overhauled. This is particularly true of the powers vested in international prosecutors. In this article I shall briefly survey recent developments in the international criminal justice institutions, focusing particularly on the limits recently imposed on the powers of these new judicial bodies. These developments primarily concern the discretionary powers of international prosecutors. This choice of focus is not fortuitous. The discretionary exercise of the prosecutor’s powers is at the very heart of international criminal justice; the prosecutor decides, for example, whether or not to conduct an investigation and whether or not to charge particular individuals, and, if he decides to charge them, what the charges will be. Whether or not the prosecutor exercises his discretionary powers judiciously determines to a large degree the success or failure of international criminal tribunals. The prosecutor’s choices as to how many people will be accused, who they are and what their status will be, can jeopardize both the efficacy and the credibility of these new international judicial bodies. According to the well-known claims of its advocates, this “new international criminal justice” is supposed to put an end to impunity and give victims of serious violations of international humanitarian law access to justice. However, it is not exercised in a vacuum. Rather, it is one strand in the pursuit of “peace, security and well-being”<sup>2</sup> for the world that is one of the most crucial *raison d’être* of international relations. If we bear this in mind, we can grasp more easily why states perceive it as important to exercise better control over international criminal justice and, if necessary, to limit its uses and abuses.

## **The powers of the international prosecutor: one man’s warranty is another man’s wild card**

Although much has been said and written about the creation of the international criminal tribunals and their contribution to the development of international

1 O. Russbach, *ONU contre ONU, Le droit international confisqué*, Éditions de la Découverte, Paris, 1994.

2 “Recognizing that such grave crimes threaten the peace, security and well-being of the world”, Preamble to the Statute of the International Criminal Court, para. 3.

humanitarian law, there have been very few studies of the international prosecutor per se. And yet, of all the “organs” of the tribunals, the prosecutor is the best known to the man in the street; he or she is the public face of this new international criminal justice system. It is the prosecutor who knocks at the door of various states, various international organizations, to request their aid. And the voice that addresses public opinion through the media is most often that of the prosecutor. It is the prosecutor the most notorious “war criminals” have to fear. The prosecutor’s power over individuals is considerable and, as a result, the international criminal prosecutor has emerged as a major new figure in international politics.

On the international judicial stage the prosecutor plays a leading role; he has a say in every debate. By pressing charges on the basis of the investigations carried out under his authority, the prosecutor sets the international judicial machinery in motion. Similarly, the prosecutor’s decision to complete all inquiries and file the past charges will be the most determining factor in the court’s ability to end its mandate. In the context of the International Criminal Court (ICC), it is the prosecutor’s decision whether or not to press charges in a given situation that generally triggers or extinguishes international criminal proceedings, even though the decision is subject to judicial review.

Notwithstanding the fact that the source of their powers is to be found in the law, enshrined in the very statutes of the tribunals, prosecutors hold the most political office in international criminal justice. In determining who will be charged, when proceedings will be set in motion and what crimes the accused will be charged with, prosecutors cannot ignore the political dimension of their decisions, which lie at the heart of international relations and, in some cases, of the peaceful settlement of conflicts. The political importance of this role is illustrated<sup>3</sup> by the somewhat laborious “appointment” of the first prosecutor of the ICTY by the UN Security Council, which dragged out over a period of more than eighteen months, thereby effectively preventing the tribunal from doing its job during that time. Likewise, the powers of the prosecutor were at the very heart of the negotiations in Rome in the summer of 1998 that culminated in the creation of the ICC.<sup>4</sup> What troubled some, including a number of states involved in the negotiations on the ICC, was the discretionary power of the prosecutor to initiate investigations and bring prosecutions *proprio motu*, that is, without any control by states or the judges. They were wary of a powerful and uncontrollable prosecutor

3 See G. B. Bass, *Stay the Hand of Vengeance – The Politics of War Crimes Tribunals*, Princeton, Princeton University Press, 2000, p. 217. See also C. Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, New York, 1996, pp. 210–13.

4 “The ability of the ICC Prosecutor to initiate investigations *proprio motu* was the most controversial aspect of the Court’s trigger mechanism and was one of the main political/legal issues that had to be resolved before the Statute could be assured of adoption. Both opponents and proponents of the Prosecutor’s *proprio motu* powers – and the chasm was very wide – agreed that their inclusion or absence would fundamentally affect the Court’s structure and functioning”, M. Bergsmo and J. Pejic, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 360.

in whom “overreaching power”<sup>5</sup> was be vested, perceiving in this an imminent threat to the fragile balance of international relations and to peace talks which were already difficult enough. In short, the states feared the advent of this new, “independent” entity on which they would be unable to bring pressure to bear in the traditional manner. At the other end of the spectrum, the discretionary powers that put some on their guard were, for others, the very cornerstone of the international prosecutor’s independence. As Amnesty International put it, “the most important way to ensure that the prosecutor will be independent is to provide that the prosecutor has the power on his or her own initiative to initiate investigations and seek the approval of the appropriate judicial chamber of the court to begin a prosecution, without interference by any political body”.<sup>6</sup> This clearly illustrates the fact that the prosecutor’s independence and the discretionary power he needs in order to be able to exercise it are two sides of the same coin.

The discretionary powers at issue here are well known in common-law accusatorial systems: they are governed by the principle of “expediency of prosecution”, which leaves the prosecutor the final choice on whether or not to bring charges. Whereas this principle does not cause too many difficulties in domestic judicial systems, where it is mostly applied to the least serious crimes, it raises far more problems on the international scene. As Louise Arbour pointed out, “domestic prosecution is never really seriously called upon to be selective in the prosecution of serious crimes. In the ICTR, prosecutor has to be highly selective before committing resources to investigate and prosecute”.<sup>7</sup> It is therefore the transposition of these discretionary powers of selection on to the international scene that gives rise to questioning and anxiety. As the experience of the past ten years has shown, in the contexts of both the genocide committed in Rwanda and the violations of international humanitarian law perpetrated in the former Yugoslavia and in Sierra Leone, the number of potential suspects – people who are to some degree or another criminally “liable” for the atrocities committed – runs into thousands. As the first prosecutor of the ICTY and the ICTR, South African judge Richard Goldstone, put it, we are witnessing “the biggest criminal investigations ever undertaken in history; the number of potential suspects is significant, the number of witnesses runs into tens of thousands and the number of victims into millions”.<sup>8</sup> From a pragmatic viewpoint, it is not hard to imagine why the rule adopted in international criminal law should be that of “expediency

5 “Let me state unequivocally at the outset that there is more to fear from an impotent than from an overreaching Prosecutor. It is trite to recognize that an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith for improper purposes”, Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997, in *ICTY Yearbook*, 1997, p. 229.

6 Amnesty International, *The international criminal court: Making the right choices - Part II*, p. 9, IOR 40/01/97.

7 L. Arbour, “Progress and challenges in international criminal justice”, *Fordham International Law Journal*, Vol. 21, No. 2, 1997, p. 531.

8 See “Le Tribunal des tragédies” in *Politique Internationale*, No. 67, Spring 1995, p. 291, interview conducted by Florence Hartmann.

of prosecution”.<sup>9</sup> As the ICTY’s Appeals Chamber has acknowledged, in view of the limited resources at the disposal of each of the international criminal tribunals, the prosecutor will necessarily have “a broad discretion in relation to the initiation of investigations and in the preparation of indictments”.<sup>10</sup>

Although the number of crimes committed in connection with internal and international conflicts and the number of people suspected of committing them constitute a reality that calls for a degree of selection, the exercise of this discretionary power on the international scene must be sufficiently circumscribed to avoid all appearance of injustice and partiality. In general, the mandate of a body administering international criminal justice will be to examine conflicts of a political or ethnic nature in regions where there is great mistrust between different population groups who are often themselves involved in the crimes perpetrated against civilians. In this context the prosecutors must exercise their discretionary powers in the most transparent way possible so as to establish quickly the credibility and independence not only of the prosecutor’s office as such but also of the international judicial institution as a whole.

### **How the focus of the tribunals’ mandates has been narrowed from “persons responsible” to “those who bear the greatest responsibility” without jeopardizing the “interests of justice”**

The ad hoc tribunals (International Criminal Tribunals for the former Yugoslavia and Rwanda): “persons responsible”

In setting up the first two international criminal justice bodies since Nuremberg and Tokyo, the United Nations Security Council took a pioneering step. The jurisdiction of these two ad hoc institutions was carefully limited to the conflict that had continued to affect the former Yugoslavia since 1991 in the case of the ICTY, and all matters relating to the genocide committed in Rwanda in 1994 in the case of the ICTR. By choosing to take action over specific conflicts, “the Security Council indirectly vested in itself the powers of a prosecutor – who alone would decide on the expediency of creating special tribunals. [The TPis are therefore] tainted with this original sin”<sup>11</sup> that has made them the instrument of a selective international criminal justice. Although they are not directly instruments of the

9 Statute of the International Criminal Tribunal for Yugoslavia (SICTY), Article 18(1) and Statute of the International Criminal Tribunal for Rwanda (SICTR), Article 17(1), *in fine*: “[The Prosecutor] shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”

10 See *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21 Appeals Chamber, ICTY, 20 February 2001, para. 602: “In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.”

11 See P. Hazan, *La justice face à la guerre*, Stock, Paris, 2000, p. 69.

victors – as were Nuremberg and Tokyo – the ad hoc tribunals are nevertheless perceived as a tool of the powerful who use them to mask their indifference (Rwanda)<sup>12</sup> or their lack of commitment (former Yugoslavia)<sup>13</sup> and to salve their consciences.<sup>14</sup> If we look at the question from this angle, we can better understand the problems of credibility that hovered over the first incumbents of the prosecutor's office. In order to restore the faltering credibility of these fledgling international judicial institutions, the first prosecutors had to demonstrate quickly that it was possible to administer justice on the international scene efficaciously and in full independence. This may explain why at the outset the choice of people to be indicted seemed to be guided as much by considerations of the survival and credibility of the institution as by a clearly established prosecution strategy.<sup>15</sup>

What is more, in contrast to the Nuremberg Statute, which provided for the indictment of “major war criminals” only, the Statutes of the ad hoc tribunals mandate the prosecutor to investigate and prosecute “persons responsible for serious violations of international humanitarian law”<sup>16</sup> with no further restrictions. In criminal law the unqualified use of the word “responsible” leaves the door wide open to thousands of individual cases. In the absence of further qualifications or restrictions in the Statutes, the prosecutors of the ICTY and the ICTR have indicted over two hundred people.<sup>17</sup> Very quickly proceedings proliferated and the whole system became clogged up. This caused major delays which drew criticism from many different quarters. The costs of the two institutions, which were already high, skyrocketed with no sign of abatement. After

12 “The events in Rwanda and Burundi also confirm this pattern of indifference: only minimal efforts were made by the international community to protect the target of genocide or to punish the main perpetrators. No strategic interests were at stake”, R. Falk, *Human Rights Horizons – The Pursuit of Justice in a Globalizing World*, Routledge, New York, 2000, p. 180.

13 “Les gouvernements voulaient cacher leur impuissance politique derrière l'existence d'un tribunal”, Judge Cassese, and “Le TPI a été créé comme une catharsis, comme un exécutoire moral par un Conseil de sécurité qui se refusait à intervenir à fond politiquement et militairement dans l'ex-Yougoslavie”, another ICTY judge, quoted by Hazan, above note 11, p. 89.

14 “En réalité, l'objectif est moins de “dissuader” et de “réconcilier” ...que de reconforter l'opinion publique occidentale, par le jugement de quelques criminels”, *ibid.*, p. 77.

15 Re *Tadić*: “In the fall of 1994, mindful of the importance of our being able to present evidence as soon as possible in a public trial, we asked the Tribunal judges to request that German prosecution defer to our investigation”, M. Schrag, “The Yugoslav Crimes Tribunal: a Prosecutor's View”, *Duke Journal of Comparative & International Law*, Vol. 6, 1995, p.192. In the case of Jean Paul Akayezu, “he was arrested by the Zambian authorities following a Security Council Resolution (S/RES/978, 27 February 1995) requesting states “to arrest and detain persons ... against whom there is sufficient evidence of responsibility for acts of violence within the jurisdiction of the ICTR”. The Prosecutor was taken by surprise when he received a request for assistance by Zambia in late 1995 while his office was still not fully operational. He nevertheless decided to follow up on the Zambian demand and request the deferral of Akayezu and others much more to encourage other African states to collaborate with the ICTR than for the relative importance of the suspects in the Rwandan genocide. Two other persons arrested by the Zambian authorities were not requested by the prosecutor and were released without charges”, L. Côté, “Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law”, *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 162–86.

16 SICTR, Article 15, and SICTY, Article 16.

17 At the start of 2006, over 150 people had been indicted by the ICTR and over 70 by the ICTY.

barely ten years, the combined budget of the two ad hoc tribunals has swollen to over 10 per cent of the entire regular budget of the United Nations.<sup>18</sup>

The first to sound the alarm was ICTY President Claude Jorda. In 2000 he pointed out publicly that justice had a price and that he considered it essential that a timeframe be established for the completion of the tribunal's mandate, in co-operation with the prosecutor, "who initiates prosecution".<sup>19</sup> It would have been more reassuring to see an initiative of this kind originate with the Security Council, which created the body, or the prosecutor, who, as the initiator of all the tribunal's judicial acts, is the sole architect of the investigation and prosecution strategy. No such initiative was forthcoming, however, a fact that in itself reflects a certain malaise.<sup>20</sup> This proposal, which was to develop into a fully fledged completion strategy over the months that followed, met with only grudging support from the prosecutor, who pointed out the dangers of cut-price justice and the problem of non-co-operating states. In several respects, the prosecutor and the judges did not share the same vision of a completion strategy.<sup>21</sup> Ultimately, the Security Council intervened on two occasions. First of all it asked the prosecutor and the judges to concentrate on the prosecution and trial of "the most senior leaders suspected of being most responsible" (Security Council Resolution 1503 of 23 August 2003).<sup>22</sup> In so doing, it proposed a restrictive interpretation of the more open-ended notion of "person responsible", but stopped short of amending the Statute. Already, as we shall see, the UN had adopted similar wording in the case of the Special Court for Sierra Leone, where the prosecutor's powers of selection were limited to the "persons who bear the greatest responsibility".<sup>23</sup>

Subsequently, in view of the patent lack of enthusiasm evinced by the prosecutor of the ICTY, who announced the intention to press ahead with thirty fresh indictments,<sup>24</sup> the Security Council adopted Resolution 1534 (26 March 2004),<sup>25</sup> in which it addressed the judges directly in these terms:

18 "From modest beginnings in 1993 and 1994, the ICTY and ICTR have grown into enormous and extremely costly bureaucratic machines ... The total number of posts exceeds 2,200 and the combined budgets exceed \$250 millions per annum and are rising, representing more than 10 per cent of the total annual regular UN budget." R. Zacklin, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice*, Vol. 2 (2004), page 543.

19 D. Raab, "Evaluating the ICTY and its Completion Strategy", *Journal of International Criminal Justice*, Vol. 3 (2005), p. 84.

20 It is interesting to note that the first Security Council resolution that addressed the duration of the mandates of the ad hoc Tribunals was dated 30 November 2000, and followed the report by President Jorda. In it, the efforts of the Tribunal's judges are clearly highlighted in these terms: "Taking note with appreciation of the efforts of the judges of the International Tribunal for the former Yugoslavia, ... to allow competent organs of the United Nations to begin to form a relatively exact idea of the length of the mandate of the Tribunal", UN doc. S/RES/1329/2000, 30 November 2000.

21 In his report to the Security Council on 10 October 2003, President Meron of the ICTY "noted the Prosecutor's intention to indict approximately 30 additional individuals and, acknowledging the Prosecutor's prerogative in this regard, stated that these cases could not be completed within the existing Completion Strategy time frame. He concluded that "the matter is clearly one between the Council and the Prosecutor"". Raab, above note 19, p. 87.

22 UN doc. S/RES/1503 /2003, 28 August 2003.

23 Statute of the Special Court for Sierra Leone, Article 1 (2000), available on SCSL website at <<http://www.sc-sl.org/>> (last visited 20 February 2006).

24 Raab, above note 19, p. 87.

25 UN doc. S/RES/1534 /2004, 26 March 2004.

5. Calls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003).

The ICTY judges immediately responded by introducing a mechanism limiting the prosecutor's discretionary powers to select the suspects to be charged. This amendment to Rule 28 of the Rules of Procedure and Evidence assigned the judges the duty to determine whether "the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal", failing which it will be returned to the prosecutor without being put forward for confirmation. Here, we recognize once more the familiar language of the Security Council resolutions, which restrict indictments to the "most senior leaders suspected of being most responsible". This amendment drew sharp objections from the prosecutor, who took the view that it was *ultra vires*.<sup>26</sup> Although its purpose was laudable and in line with what the Security Council wanted, it nevertheless raises serious questions of competence.<sup>27</sup> Were the judges competent to introduce a new selection criterion not provided for in the Statute? And would not the amendment adversely affect the independence of the prosecutor? After all, the prosecutor's discretionary powers could now be restricted by judges whose authority to restrict them derived from a rule they themselves had adopted. One thing at least is certain, namely that this approach by the judges of the ICTY is one more illustration of the differing views taken by them and the prosecutor of the matter of the completion strategy.

At the ICTR, meanwhile, the new prosecutor quickly adopted and made public a completion plan in which he undertook to concentrate on those alleged to have been "in positions of leadership" and those who bore "the greatest responsibility for genocide", in the spirit of Resolution 1534. In a display of transparency more or less unprecedented where discretionary powers are concerned, the ICTR prosecutor listed in this document the various criteria he meant to apply to determine who "the most senior leaders" were before reassessing the pending cases and selecting those who would be indicted.<sup>28</sup>

This narrowing of the mandate of the ICTY and the ICTR was a reminder to everyone of the ad hoc nature of these bodies. The prosecutors of what were, after all, originally intended as ephemeral instruments now had to take this into account when drawing up their strategies, failing which they would be taken to

26 See L. D. Johnson, "Closing an International Criminal Tribunal while maintaining International Human Rights Standards and Excluding Impunity", *American Journal of International Law*, Vol. 99 (2005) p. 158.

27 D. A. Mundis, "The Judicial Effects of the Completion Strategies on the *Ad Hoc* International Criminal Tribunals", *American Journal of International Law*, Vol. 99, (2005), p. 142.

28 See Annexe to UN doc. S/2004/341, 30 April 2004, Completion Strategy of the International Criminal Tribunal for Rwanda, para. 14. See also H. B. Jallow, "Prosecutorial Discretion and International Justice", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 145–61.

task by the judges first of all and then by the Security Council. The negotiations for the establishment of the Special Court for Sierra Leone were to draw heavily on the experience of the ad hoc tribunals in their efforts to better define and limit the exercise of the prosecutor's power to choose.

### The Special Court for Sierra Leone: "those who bear the greatest responsibility"

At the very moment when questions were starting to be asked about the cost of the ad hoc tribunals and the duration of their mandates, the Security Council received a letter from the president of Sierra Leone in which he asked for assistance in setting up a Special Court to judge the crimes committed during the armed conflict that had ravaged his country. Drawing on the lessons of the past, the UN Secretary-General proposed that a judicial body be set up with a very limited mandate, a three-year lifespan and a total budget of less than US\$60 million.<sup>29</sup> He further proposed to limit the Court's jurisdiction to the "persons most responsible", specifying that the prosecutor was to be guided by this wording in the adoption of his prosecution strategy.<sup>30</sup> The final wording adopted by the Security Council was "to prosecute persons who bear the greatest responsibility", and the aim of "limiting the focus of the Special Court to those who played leadership role"<sup>31</sup> was stated explicitly. This time then, the sights were adjusted to provide for greater control of the prosecutor's discretionary powers in order to limit their exercise and ensure that the Court's judicial mandate would come to an end within a reasonable timeframe.

Nevertheless, this new wording was not without its dangers. In the course of a judicial review in the *Fofana* case, the judges rejected the prosecutor's motion, in which he cited the Secretary-General's Report, to the effect that the terms "bear the greatest responsibility" were merely a guide to the prosecutor in adopting a prosecutorial strategy.<sup>32</sup> The Court took the opposite view, seeing them as the expression of a key element in the personal jurisdiction of the judicial body under review: "[The issue of personal jurisdiction is a] jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted".<sup>33</sup> The explicit inclusion of the wording "bear the greatest responsibility" in the first article of the Statute that lays the foundations of the

29 "On the 14 June 2001, the UN Secretariat presented to the group of interested States revised budget estimates amounting approximately to \$57 million for the first three years of operation of the Court." See Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, S/2001/693/.

30 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (4 October 2000), para. 30. See also note 44 *infra*.

31 Letter dated 22 December 2000 from the President of the Security Council to the Secretary-General, S/2000/1234, para. 1.

32 *Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana*, SCSL Trial Chamber, 3 March 2004, SCSL-2004-14-PT, para. 3. See note 44 below.

33 *Ibid.*, para. 27.

Court's jurisdiction<sup>34</sup> made it more than probable that that wording would be seen as a key element of personal jurisdiction, despite the difficulty of determining its precise scope. But is this not tantamount to giving the judges a more political role generally much better suited to the prosecutor, namely that of determining who bears the greatest responsibility for the crimes committed? The Security Council, when it intervened in the completion strategy of the two ad hoc tribunals, did, after all, stop short of amending the constitutive Statutes, preferring to issue guidelines that have their place first and foremost in the political sphere.

### The International Criminal Court and the “interests of justice”

The creation of a permanent International Criminal Court with worldwide jurisdiction was attended by a set of political difficulties quite different from those that surrounded the birth of its predecessors, which were limited to specific conflicts. It is hardly surprising, therefore, that the ICC prosecutor's powers formed the issue most keenly debated in Rome and one that raised both fears and hopes. The states most firmly opposed to an overly “independent” and powerful prosecutor finally gave in, but not until they had ensured that they would be able to control and limit that prosecutor's powers. One of the ways in which they did so was to subject the very first stage in the process – the opening of an investigation – to judicial review by a pre-trial chamber.<sup>35</sup> This notwithstanding, it must be admitted that the principle of expediency of prosecution continues to hold sway, as the judges' task is limited to ensuring that the available evidence provides a “reasonable basis to proceed”.<sup>36</sup>

In exercising his discretionary powers, the prosecutor is bound to consider, in accordance with the provisions of Article 53 of the Statute of the ICC, “whether ... there are serious reasons to believe that an investigation would not serve the interests of justice”.<sup>37</sup> Likewise, upon investigation, the prosecutor can decide not to prosecute because “a prosecution is not in the interests of justice”.<sup>38</sup> This Statute marked the remarkable entry of the concept of the “interests of justice”, well known in domestic legal systems, into positive international criminal law. In the context of international criminal justice, which is at the very heart of international relations, conflicts and wars, this obligation to consider the interests of justice confers on the prosecutor a real – and inescapable – political

34 The first paragraph of Article 1 of the Statute of the Special Court for Sierra Leone reads as follows: “The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”

35 Statute of the ICC, Article 15.

36 “Like in paragraph 3, the “reasonable basis” standard in paragraph 4 is purely evidentiary and not one of appropriateness”, Bergsmo and Pejic, above note 4, pp. 360–70.

37 Statute of the ICC, Article 53 (1)(c).

38 *Ibid.*, Article 53 (2)(c).

responsibility.<sup>39</sup> Although Article 53 lists a number of criteria for determining whether or not the interests of justice will be served by an investigation or a prosecution (namely “the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”) this list is not exhaustive and cannot relieve the prosecutor of the duty he has, in certain cases, to “set off the obligation to serve interests of justice against the obligation to serve interests of peace”.<sup>40</sup> However, the way in which the prosecutor took the interests of justice into consideration when deciding not to investigate or prosecute will be subject to a judicial review<sup>41</sup> which, as a result, will find itself thrust into the very heart of international politics. This solution, however problematical it may be, was considered by states to be preferable to allowing the discretionary exercise of powers of selection by the prosecutor to stand alone.

## Conclusion

Over the past decade, the advent of new judicial institutions has ushered in a whole new phase in international criminal law. The Security Council’s first experiments in the form of the ICTY and the ICTR, followed by the adoption of the Rome Statute setting up the ICC and the appearance of new “hybrid” institutions, soon gave rise to a malaise among states referred to as “tribunal fatigue”. Portrayed initially as a financial malaise among the principal donor countries,<sup>42</sup> it can also be read as an attempt to dampen the zeal that fired the first institutions, and particularly their prosecutors. This is certainly strongly suggested by the saga of the completion strategies of the two ad hoc tribunals, which were pushed along by two strongly exhortative Security Council resolutions. Although these completion strategies concern the judicial bodies as a whole, they are primarily aimed at their prosecutors and impose a definite limit on the exercise of their discretionary powers. And yet, in view of the ad hoc nature of the first tribunals, it was rather to have been expected that the prosecutors would themselves adopt such strategies well before the Security Council saw fit to intervene. Furthermore, it would seem desirable for prosecutors to adopt a transparent strategy for the exercise of their powers in order to avoid any semblance of partiality, particularly in international criminal law that deals with

39 “... the term “in the interests of justice” also requires the Prosecutor to take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction”, M. R. Brubacher, “Prosecutorial Discretion within the International Criminal Court”, *Journal of International Criminal Justice*, Vol. 2 (2004), p. 81.

40 “En effet déterminer si une enquête sert ou non les intérêts de la justice, compte tenu des intérêts des victimes et/ou de la gravité du crime, pourra le conduire à faire un choix entre la nécessité d’ouvrir une enquête et celle de ne pas compromettre des négociations sur le point d’aboutir à la signature d’un accord de paix”, W. Bourdon, *La Cour pénale internationale*, Seuil, Paris, 2000, p. 165.

41 Statute of the ICC, Article 53, para. 3.

42 See Zacklin, above note 18.

crimes committed by organized groups in the context of political or ethnic conflicts.<sup>43</sup>

The Security Council can, in all legitimacy, define and limit the powers of the prosecutors of the judicial institutions it has set up, by means of resolutions (ICTY/ICTR) or bilateral agreements (Special Court for Sierra Leone).<sup>44</sup> Although it did so with a degree of success in the resolutions approving the completion strategies, its approach with the Special Court led to a somewhat unexpected outcome. By directly limiting the Court's jurisdiction in the very terms of the Statute that defines it, the Security Council opened the door to judicial review of a markedly more political question, namely who are the leaders "who bear the greatest responsibility"? There are those who would have liked to see this type of question remain the prerogative of the prosecutor, deeply embedded in his discretionary powers.<sup>45</sup>

Failing more direct control over the prosecutor by the Security Council along the lines of the ad hoc tribunals' model, as some would have liked to see, the states party to the Rome Statute favoured the option of assigning the judges greater control over the exercise of the prosecutor's discretionary powers, right from the initial, opening phase of an investigation. For its part, the Security Council received the right to defer decisions of the Prosecutor of the ICC in the interests of the obligation to "maintain or restore ... peace".<sup>46</sup> However, the most determining element here seems to me to be the arrival on the international criminal law scene of the concept of the interests of justice. This concept, which will quickly become the key element in the prosecutor's prosecution strategy, will necessarily be subjected to judicial review; its limits, if not its substance, will therefore be rapidly defined. Although judicial review of the prosecutor's most "political" decision should serve to reinforce its legitimacy, it nevertheless remains a perilous judicial exercise which, unbridled, could easily jeopardize the integrity of the International Criminal Court as a whole.

43 "Guidelines reduce the scope for arbitrariness...They provide a transparent standard by which prosecutors' decisions can be evaluated...They ultimately protect prosecutors, particularly those of the international tribunals, of accusations of initiating politically motivated prosecutions", D. D. N. Nsereko, "Prosecutorial Discretion Before National Courts and International Tribunals", *Journal of International Criminal Justice*, Vol. 3, (2005), 124, p.143. See also A. Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", *American Journal of International Law*, Vol. 97 (2003), p. 510.

44 "The Security Council, in the exercise of its responsibility under the UN Charter for the maintenance of international peace and security, as well as being the creator of the Tribunals, can legitimately prescribe general prosecutorial policy for the Tribunals. The Prosecutor is duty bound to implement such policy but exercises independent judgment in such implementation through the cases", H. B. Jallow, "Prosecutorial Discretion and International Justice", *Journal of International Criminal Justice*, Vol. 3 (2005), 145, p. 151.

45 Taking a different view from that of the Special Court's judges, the UN Secretary-General stated in his report that the wording "persons most responsible" was suggested not as a test criterion or a distinct jurisdictional threshold, but as a guide to the Prosecutor in the adoption of a prosecution strategy." *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, para. 30.

46 See Statute of the ICC, Article 16.

# Responsibility for war crimes before national courts in Croatia

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## **Abstract**

*This article analyses problems with which the Republic of Croatia, as a country in transition, has to contend during war crimes proceedings. A major characteristic of the recent wars waged on the territory of the former Yugoslavia is that war crimes were committed, though on a different scale, by all parties involved, irrespective of the political and other motives that prompted them to engage in armed conflict. Political unwillingness is the principal reason why national courts, including those in the Republic of Croatia, did not prosecute war crimes in accordance with internationally acceptable standards. The international community responded by setting up the International Criminal Tribunal for the former Yugoslavia (ICTY), the main objectives of which are to establish justice, render justice to victims and determine the historical truth. Implicitly, despite political and other opposition to its work, the ICTY is helping to define legal and ethical standards appropriate for a democratic society in the countries established on the territory of the former Yugoslavia. This is particularly important for the reason that all these countries aspire to membership of the European Union. The work of the ICTY, as well as proceedings before domestic courts, is therefore an important legal, political and moral catalyst on their way towards accession to the European Union. This is fully confirmed by the example of the Republic of Croatia.*

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The disintegration of the former Yugoslavia sparked a series of wars in which numerous atrocities were committed, in particular crimes against humanity, war

crimes and genocide. The brutality of the armed conflicts in Croatia<sup>1</sup> and in Bosnia and Herzegovina between 1991 and 1995, and of those that followed in Kosovo and Macedonia, took the international community by surprise. The lack of readiness of national judiciaries to prosecute perpetrators of crimes, together with a clearly expressed wish of the international community to “shape” the development of events in the Balkans not only by political and military means (negotiations, international forces, the NATO bombing campaign in the then Federal Republic of Yugoslavia) but also by the international criminal judiciary, led to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the first international court for war crimes to be established since the Second World War.<sup>2</sup> In addition to certain legal problems and doubts related to their work, a general remark applies to both the ICTY and its “twin,” the International Criminal Tribunal for Rwanda (ICTR),<sup>3</sup> namely that they are of a selective nature. Nonetheless these tribunals, together with the so-called mixed courts established for Bosnia and Herzegovina, Kosovo, Sierra Leone, Cambodia and East Timor,<sup>4</sup> have unquestionably made a significant contribution to the development of international criminal law and affirmation of the principle of universality. The crowning accomplishment of this accelerated development of international criminal law is the permanent International Criminal Court (ICC).

## Transition in the south-east European countries and responsibility for war crimes

The work of the ICTY should, however, also be viewed against the backdrop of the transition experienced by the countries that emerged from the dissolution of the former Yugoslavia.<sup>5</sup> That transition is a dual process, (i) from war to a peaceful society, particularly with regard to standards of justice and acceptance of international criteria for responsibility in armed conflicts; and (ii) from a single-party (or simplistically and to some extent wrongly termed communist) society to a pluralistic society based on what is commonly called Western democracy. Besides offering bright prospects for the development of newly established societies, both forms of transition have also revealed their darker side. More specifically, in terms of

1 The war in Croatia has complex historical, political and economic roots, and took the form of an armed conflict between the armed forces of a newly established country and the federal army supporting the interests of Serbia and the ethnic Serbs. For more details see Nikica Barić, *Srpska pobuna u Hrvatskoj 1990–1995*, Golden Marketing – Tehnička knjiga, Zagreb, 2005.

2 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), established by UN Security Council Resolution 827 (1993), 25 May 1993.

3 Established by UN Security Council Resolution 955 (1994).

4 For these courts see Ivo Josipović (ed.), *Responsibility for War Crimes: Croatian Perspective – Selected Issues*, Faculty of Law, University of Zagreb, Zagreb, 2005, pp. 30–61.

5 Slovenia (which, except for a short low-intensity conflict, was not affected by war), Croatia, Bosnia and Herzegovina, Serbia and Montenegro (the final legal status of which as a state is still open because of Montenegro's and Kosovo's aspirations to independence), and Macedonia.

responsibility for war crimes, the issue raised is the existence of double standards for responsibility – “ours” and “theirs” – when even the gravest crimes committed against enemies were not punished, whereas the criminal prosecution of representatives of hostile military formations was in many cases conducted without legal grounds, in a discriminatory manner and without any respect for the right to fair trial. Besides, in times of war and periods of transition, national judiciaries were both professionally and morally devastated and often accused of corruption and political or mafia connections. Different political, legal and moral standards in assessing responsibility for war crimes, combined with problems of the judiciary’s competence, have made it very difficult in all transitional countries to administer justice in accordance with internationally accepted standards.

The ICTY is playing an important part in various ways in the transition of those countries established by the dissolution of the former Yugoslavia. First, at times when national judiciaries were not ready to punish crimes by members of their own country, that Tribunal has enabled justice to be achieved and also rendered to victims. Second, during its work the ICTY has set new standards of responsibility for war crimes, crimes against humanity and genocide, thereby not only improving international criminal law and providing valuable experience for the establishment of the ICC, but also inducing national judiciaries to start adjusting their standards to those set by the ICTY. This has not only helped national courts to raise the quality of war crimes proceedings, but has also led to a general rise in legal awareness and the quality of the judiciary in newly established countries. The truth is that public opinion research still shows resistance among much of the population when it comes to making the country’s “own” perpetrators of crimes accountable, whether such proceedings are conducted before the ICTY or by domestic courts. Accused compatriots still enjoy the status of public heroes, and their possible responsibility is at most discussed sporadically or broached in the media without eliciting any broad public response.

### Command responsibility

Particularly important for raising awareness of responsibility for crimes is the doctrine of command responsibility formulated in Article 7 of the ICTY Statute and particularly Article 7(3), in that responsibility for crimes is centred on those who had real power, whether military or political, and who, by their decisions or omissions, led to commission of the crime by its direct perpetrators. According to that doctrine, the main culprits for crimes possibly committed by anonymous perpetrators are precisely those in positions of power. This approach and the doctrine of joint criminal enterprise met with resistance due to an alleged lack of legal grounds, as well as politicization, particularly in the countries that had waged defensive wars. As long as the doctrine of joint criminal enterprise, already accepted by the ICTY in the first case brought before it,<sup>6</sup> was applied to politically

6 *Tadić* case, IT-94-1.

marginal indictees, there were no broad objections to it either by the general public or in professional circles, but it encountered strong resistance when applied to high-ranking military and political officials.<sup>7</sup>

## Completion strategy

After the Security Council's decision that the Tribunal must complete its work by the year 2010, the ICTY started on the so-called Completion Strategy.<sup>8</sup> This requires, on the one hand, a rationalization of work with concentration only on the highest-ranking perpetrators of war crimes and compliance with a schedule according to which the ICTY is expected to complete investigations and file indictments by the end of 2004, to complete first-instance activities by the end of 2008 and to complete all work by the end of 2010. On the other hand, it means that the international community expects the former warring parties to demonstrate their membership of the group of democratic countries and their "capability" of acceding to the European Union by co-operating fully with the ICTY and by holding war crimes trials before their own courts. Such trials are expected to be fair and to adhere to the standards which are exemplary in democratic societies. Fairness includes the readiness to try one's "own" perpetrators of war crimes, which has seldom been the case in practice hitherto. General social, primarily political, improvements and the wish of the countries on the territory of the former Yugoslavia to join the European Union have also led to obvious changes in the prosecution of perpetrators of war crimes. In Croatia and in Serbia and Montenegro the national judiciary has been reinforced and has received professional training in conducting difficult proceedings such as those for war crimes; relevant regulations implementing international standards of criminal responsibility for crimes have been adopted;

7 For example, the *Slobodan Milošević* case, IT-02-54, and the *Ante Gotovina* case, IT-01-45. In Croatia, qualification of a resolute military liberating operation (the "Oluja" operation) as a joint criminal enterprise is a particularly sensitive issue both emotionally and politically. That qualification in the indictment of General Ante Gotovina provoked almost general disgust among the Croatian public. See the opinion of Mirjan Damaška, an esteemed Croatian professor at Yale University, in his article "How to defend Croatia in The Hague", in the *NACIONAL* weekly, No. 529, 3 January 2006, available in English at <<http://www.nacional.hr/articles/view/22379/18/>> (last visited 15 January 2006).

8 In its Resolution 1503 (2003) of 28 August 2003, the Security Council, *inter alia*, "7. Calls on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies) ...". The Security Council recalls the Completion Strategy in Resolution 1532 (2004) of 26 March 2004. With the purpose of completing their work accordingly, on 6 April 2004 the ICTY judges amended Rule 28 of the Rules of Procedure and Evidence, and introduced authorization for the Tribunal to ascertain whether a new indictment is in compliance with the restrictive approach to indictments (limitation to the most important cases) requested by the Security Council in its Resolution 1534, which also confirms the Completion Strategy. The Prosecutor, Carla Del Ponte, was not satisfied with this amendment (see text: "Del Ponte to bring disagreement with judges before the Security Council" of 28 April 2004, at <[www.vijesti.net](http://www.vijesti.net)> (last visited 15 January 2006)). However, the President of the ICTY, Theodor Meron, indicated that he would ask the Security Council to prolong the work of the Tribunal if some of the most important accused (Karadžić, Mladić) had not been prosecuted by the set date for completion (compare SHAPE News Summary & Analysis of 12 May 2004).

and separate courts or organizational units within them have been established for proceedings against perpetrators of war crimes. Furthermore, courts and judges are becoming specialized, new measures are being introduced for the protection of witnesses and victims, mutual co-operation is being established between the states (particularly in collecting evidence and making witnesses available), and other measures are being taken to reinforce the role of the judiciary. In Bosnia and Herzegovina and in Kosovo, where because of specific circumstances a decisive role is played by the international community in the administration, decisions on responsibility for war crimes are made by so-called mixed courts consisting of domestic and international judges and prosecutors. Such a solution obviously shows that there are no conditions for domestic courts to conduct fair proceedings for war crimes in accordance with acceptable international standards.

## Prosecution of war crimes in Croatia

Croatia, today often cited as an example of moving in the right direction and commended by the opening of accession negotiations between the Republic of Croatia and the European Union, has also experienced transitional problems relating to the work of the judiciary and the punishment of war crimes.<sup>9</sup> The opening of those negotiations was itself long postponed precisely because difficulties arose in Croatia's co-operation with the ICTY, above all in locating and arresting the Hague indictee General Ante Gotovina. Quite apart from those concerning prosecutions of perpetrators of war crimes, the Croatian judiciary also suffers from transitional problems mostly reflected in slowness of work and lack of efficiency. The high number – over 1.5 million – of unresolved cases, including those dating back several decades, the fact that many criminal offences have never been prosecuted and brought to trial, together with multiple public accusations of corruption among the judiciary, are just the most critical symptoms of these transitional problems. One of the largest and most important projects is to reform

9 Croatia's approach to the European Union was given a strong boost by the change of government in 2000. The previous Croatian Democratic Union government, which was considered nationalistically oriented and disinclined to co-operate with the ICTY, was replaced by a multi-party coalition headed by the Social Democratic Party. In 2001 the Stabilization and Association Agreement was concluded and ratified (official gazette *Narodne novine*, International Agreements, No. 14/2001). A major political provision of the Agreement was full co-operation by Croatia with the ICTY and a strengthening of the judiciary and the rule of law in Croatia. However, although a substantial improvement had been made, the expectations of full co-operation by the new government with the ICTY were not completely fulfilled, due primarily to strong political resistance. After the Croatian Democratic Union won the elections in 2003, contrary to expectation, full co-operation was established between Croatia and The Hague. After earlier delays this made it possible for accession negotiations to begin, following the EU Council of Ministers' Decision on 3 October 2005, with an exchange of general views at the first EU–Croatia Intergovernmental Conference.

the judiciary in Croatia, and some progress in improving the situation has been made in recent years.<sup>10</sup>

## War crimes trials in Croatia

Until recently, Croatia tried war crimes by applying its internal law on the basis of the activities of its police, state attorneys and judges. A number of cases will, however, be referred by the ICTY as part of its exit strategy and in accordance with Rule 11 *bis*<sup>11</sup> of its Rules of Procedure and Evidence to authorities of the various states, including Croatia, which means that the ICTY's desire to refer cases must be matched by the domestic judiciary's ability to conduct the trials *lege artis*. This calls for the appropriate legal instruments, a well qualified and capable judiciary and the relevant political will. In Croatia, taking over the Hague cases is considered to be not only a professional but also a major political issue, since nationals are thereby transferred from the competence of international courts to the jurisdiction of their own country's domestic courts, thus confirming the appropriate democratic status of that country and mitigating the serious political problems occasionally generated by the Hague trials.

Croatia has in fact held a large number of war crime trials, but almost all of them were against members of different hostile units, and only rarely against representatives of its own armed forces. Besides, the proceedings were partly conducted unfairly and sometimes even in a virtual travesty of justice. Although the number of those carried out properly (mostly against Serbs) is perhaps significantly higher than the number of cases in which verdicts convicting accused Serbs were obtained in an inappropriate manner under duress, initiation of the proceedings was refused, or proceedings were farcically directed towards acquittals for Croats, the general impression is crushing for the Croatian judiciary and the

10 An in-depth study of the reform of the judiciary in Croatia is beyond the scope of this article. For details of planned comprehensive reforms and of those already carried out, see the website of the Ministry of Justice, <<http://www.pravosudje.hr/default.asp?ru=121&sid=&akcija=jezik=1>> (last visited January 2006).

11 Rules of Procedure and Evidence, Rev. 37 (16 Nov. 2005), "Rule 11 *bis*, Referral of the Indictment to Another Court: A. After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested (Amended 10 June 2004); or (iii) having jurisdiction and being willing and adequately prepared to accept such a case (Amended 10 June 2004), so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (Revised 30 September 2002, amended 11 February 2005). B. The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Revised 30 September 2002, amended 10 June 2004, amended 11 February 2005). C. In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused. (Revised 30 September 2002, amended 28 July 2004, amended 11 February 2005) ...

state as a whole. Although the Croatian judiciary certainly has the professional and other qualifications to try all cases, it is obvious that the general political and moral climate was not conducive to initiating and conducting correctly criminal proceedings for war crimes. There are many reasons for this: politics, the influence of the media, relations between religious communities, the solidarity of different social groups and so on. The question is whether the state authorities are strong enough to change the attitude of the general public – and of the entire hierarchy of state bodies – towards this issue within a relatively short time. Because of the very points mentioned above, the international community carefully monitors trials in Croatia. The project “Dealing with the Past – Monitoring of War Crime Trials”, run by esteemed non-governmental organizations for the protection of human rights,<sup>12</sup> aims to improve judicial practice and help build trust in domestic courts. As the desired effects of war crime trials before domestic courts, the project places emphasis on justice for victims, fair trials of the accused, legal and political distancing of the social community from crimes, and raising moral, ethical, legal and political standards to the level necessary for Croatia’s accession to the European Union.<sup>13</sup> In summing up the findings, the non-governmental organizations stress as positive developments the adjustment of the domestic judiciary’s work to ICTY criteria, the enforcement of legal and institutional conditions for protection and support to witnesses, the establishment of regional co-operation in the prosecution of war crimes, the publicity given to proceedings and their openness to monitoring. On the other hand, they recognize as shortcomings the bias of the judiciary,<sup>14</sup> the large number of trials held *in absentia*,<sup>15</sup> the insufficient quality of indictments and the inappropriate treatment of witness, victim and plaintiff.<sup>16</sup> The same problems are seen in the technical

12 The project is carried out by the Centre for Peace, Non-violence and Human Rights in Osijek in co-operation with the Altruist Centre for Protection of Human Rights and Civic Freedoms, Split, the Civic Board for Human Rights in Croatia and the Croatian Helsinki Committee for Human Rights, with the support of the Delegation of the European Commission to the Republic of Croatia, the American Embassy in the Republic of Croatia and the Open Society Institute – Croatia. The results of monitoring of trials for war crimes in Croatia are published in *Monitoring of War Crime Trials: Annual Report 2005*, Centre for Peace, Non-violence and Human Rights, Osijek, 2005.

13 *Ibid.*, p. 6.

14 The conclusion about bias on grounds of the perpetrator’s ethnicity is based on the ratio of convictions and acquittals in relation to the nationality of the accused, the large disproportion between the numbers of accused Serbs and Croats, the fact that Croats were accused only in cases of murder whereas Serbs were also accused of other offences, and the attitude towards witnesses.

15 Trials *in absentia* also exist in Croatian law for other criminal offences, so remarks that such trials give rise to speculations about political motives for them, that they are long and futile, that they multiply the need for hearings and thus result in multiple re-victimization, and that they are not economical are made about all trials *in absentia*, and not only those for war crimes. According to Article 305(5) of the Croatian Criminal Procedure Act (hereinafter CPA), the accused can be tried *in absentia* only if he has fled or is otherwise not available to state authorities, and if there are particularly important reasons for him to be tried in spite of being absent (official gazette *Narodne novine*, Nos. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02 and 62/03). The decision on trial *in absentia* is made by the Trial Chamber upon obtaining the opinion of the Prosecutor.

16 Centre for Peace report, above note 12, pp. 8 ff. Although for methodological reasons some conclusions in the report can be considered rash, it does highlight the most important problems of war crime trials in Croatia.

equipment of courts (quality of courtrooms, security conditions, conditions for undisturbed hearings, means for audio- and audiovisual recording, etc.). Similar shortcomings of war crimes proceedings are also recognized by the OSCE Mission.<sup>17</sup>

From 1991 to 2005 in the Republic of Croatia 4,774 persons were reported for war crimes, 1,675 were indicted, 778 were convicted and 245 were acquitted. In 1993, the State Attorney of the Republic of Croatia announced the review of a large number of war crimes cases, which was carried out in 2005. He informed the public that this review had resulted in the suspension of over 800 proceedings.<sup>18</sup> In the period from 2003 to 2005 new procedures were opened, but in a significantly smaller number than before.

Since 2000 extensive efforts have been made in Croatia to address problems related to war crime trials. Such problems can be divided into real and legal ones. Substantive problems pertain primarily to the fact that quite a long time has passed since the crimes were committed and that many witnesses have died or moved away, do not remember the events well or do not want to testify because of threats, fear or for other reasons. Furthermore, according to experience hitherto, some pressure on judicial bodies by groups or the general public is also to be expected. To resolve these problems Croatia has attempted through broad education programmes to upgrade the professional level of policemen, judges and state attorneys, and also of members of non-governmental organizations and the media.

17 With reference to annual reports of the State Attorney of the Republic of Croatia and its own sources, the OSCE Mission to Croatia states in the document “Background information on war crime procedures in Croatia and findings from trial monitoring” that “Croatia since 1991 has engaged in the large-scale prosecution of war crimes. Nearly 5000 persons have been reported and over 1700 have been indicted. Final verdicts have been entered against 800 to 900 persons, of which more than 800 were convicted, while approximately 100 were acquitted. The overwhelming majority of proceedings were against Serbs for crimes against Croats and the vast majority of convictions were obtained against *in absentia* Serb defendants. Procedures are pending against another 1400 to 1500 persons, including indictments against 450 to 500 people and judicial investigations against another 850 to 900 persons. According to the Mission’s statistical report, during 2003, 37 individuals were arrested, 53 were indicted, 101 were tried, 37 were convicted, 4 were acquitted, charges were dropped against 12 individuals on trial and appeals of 83 individuals were pending at the Supreme Court. Between 1 January and 5 May 2004, 15 persons were arrested, 4 were indicted, 68 were on trial, 10 were convicted, 3 were acquitted and appeals of 63 persons were pending at the Supreme Court.” It is interesting that the OSCE data, the data of the State Attorney of the Republic of Croatia and those contained in the report of the Centre for Peace (above note 12), are not the same. Discrepancies in the numbers of reported, indicted and convicted persons probably result from the fact that a different methodology and different sources were used.

18 “The Croatian State Attorney suspended over 800 criminal proceedings which had been conducted for war crimes since the nineties”, said Croatian State Attorney Mladen Bajić. Bajić stated that this was a review of proceedings conducted mostly against Serbs, but also against Croats, in which it had been established that there were not sufficient elements for further prosecution. So far the Law of Forgiveness, relating to participation in armed rebellion, has been applied to 22,000 Serbs, but more than 500 Serbs are on the list of accused for war crimes, and many have been convicted and sentenced *in absentia* to long-term imprisonment. The Supreme Court rejected several verdicts convicting Serbs and several verdicts acquitting Croats, but the fact remains that so far only four members of Croatian armed forces have been convicted of crimes against Serbs (HTnet/Vecernji list, 29 May 2004). In part, the difference in the numbers of criminal prosecutions of members of Croatian and Serbian formations results from events unfolding in Croatia during the war and the number of crimes committed on both sides, but also from the Croatian judiciary’s unwillingness (or better, from a lack of the political will which precedes action by criminal prosecution authorities) to deal with cases involving their “own” compatriots.

## Legal problems

The main problem of possible domestic trials, particularly those which the ICTY has referred to Croatia as part of its exit strategy under Rule 11 *bis* of the Rules of Procedure and Evidence, is that Croatian substantive criminal law does not recognize the command responsibility laid down in Article 7(3) of the ICTY Statute. The second important problem concerns the usability of certain evidence which the ICTY might hand over to the Croatian criminal prosecution authorities in cases referred by it to Croatia, or in cases where the ICTY does not initiate the proceedings on its own.

Croatian law (like other European bodies of law) does not recognize command responsibility in the way stipulated by the ICTY Statute. It appears that despite its incorporation in the law by amendments and supplements to the Criminal Code in 2004, this provision cannot be applied for constitutional reasons (prohibition of retroactivity in substantive criminal law provisions, the principle of legality). Command responsibility therefore remains to be “covered” by interpretation of existing substantive criminal law, particularly of provisions relating to crimes of omission. Developments in this respect will be very interesting from a professional point of view, since so far the Croatian judiciary has shown no signs of an interpretative approach to legislation, especially the norms of criminal law. The role of the Supreme Court here will therefore be decisive. To date, most cases have been tried on grounds of direct responsibility for committing the crime or of ordering it to be committed. Almost without exception, they have concerned commanders of lower or intermediate rank, except in cases of high-ranking officers of the Serbian or Yugoslav forces against whom proceedings were or are being conducted *in absentia*. There have been no trials on grounds of command responsibility in the narrow sense of the term (Art. 7.3 of the ICTY Statute). A large number of trials of members of Serbian military formations, including the Yugoslav army, have taken place *in absentia*. The quality of these trials was low. A consistent problem during the presentation of evidence has been and still is the unwillingness of witnesses, particularly those from Serbia and Montenegro, to come and testify before the court. Nonetheless, there have been cases in which the Croatian court used the notion of command responsibility *stricto sensu*, in whole or in part. Here, the verdict in the case against Dinko Šakić, the Ustasha commander of the Jasenovac<sup>19</sup> camp who was tried in Zagreb in 1998–2000 after Argentina extradited him to Croatia, merits attention.<sup>20</sup>

19 During the Second World War Dinko Šakić was a member of military formations of the Independent State of Croatia, a quisling creation which, contrary to the majority Croat anti-Fascistic movement, collaborated with Germany and Italy. Jasenovac was a concentration camp notorious for mass murders and atrocities, where a large number of Jews, Serbs, Roma and anti-Fascist Croats were killed.

20 The first-instance verdict of the County Court in Zagreb of 4 October 1999 No. K-242/98 sentenced Šakić to twenty years' imprisonment (maximum penalty in the then Criminal Code). The Supreme Court of the Republic of Croatia confirmed the imposed punishment by verdict No. I Kž-210/00-5 of 26 September 2000.

Unfortunately, there have also been cases in Croatia in which proceedings were not conducted in a legally and morally acceptable manner.<sup>21</sup> It is encouraging, however, that in these proceedings the Supreme Court of the Republic of Croatia has quashed disputable verdicts and returned the case for retrial.

Yet war crime trials in Croatia can be successful only if observations which objectively draw attention to existing problems are taken into account. Like the report on the project by non-governmental organizations cited above, the OSCE report on war crimes proceedings in Croatia recognizes a certain progress.<sup>22</sup> But it is still very critical about the situation in the Croatian judiciary and in war crimes proceedings, emphasizing similar shortcomings to those mentioned in the aforesaid report: weaknesses of procedures *in absentia*,<sup>23</sup> discrimination on an ethnic basis “in initiating and conducting proceedings, as well as in their final outcome”, inappropriate treatment of witnesses, long duration of proceedings, weaknesses in presentation of evidence, public pressure, inferiority of indictments, inappropriate defence (particularly if tried *in absentia*), insufficiency and weaknesses in elaboration of the verdict and incoherent judicial practice.<sup>24</sup> Among other things, the OSCE stresses that the Croatian judiciary “largely reiterates the definition of genocide contained in Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide” describing it as “forcible population displacement”.<sup>25</sup> Interestingly, the OSCE does not highlight the two problems mentioned above (command responsibility, usability of evidence) which Croatian professional circles single out as presenting the biggest challenge to war crime trials taken over from the ICTY.

21 The press regularly reported on the “Lora case” and trial of the accused Karan in Gospić. On the other hand, it is generally considered that the proceedings against General Norac and others before the County Court in Rijeka have been conducted correctly. As these are *sub judice* cases, they will not be discussed here.

22 “Several indicators in 2004 permit a conclusion that, in general, the chances of a Serb war crime defendant to receive a fair trial before the Croatian judiciary improved when contrasted to past years. Prosecutors eliminated large numbers of unsubstantiated proceedings against Serbs. Serbs were convicted at a lower rate than in prior years and some unsubstantiated charges were dropped at trial. Although arrests still occurred on the basis of unsubstantiated or already dismissed charges, an increased number of Serbs arrested in 2004 were released when the charges were abandoned. The number of fully *in absentia* trials diminished considerably, particularly toward the end of the year, due to intervention by prosecutors, the Supreme Court, and the Ministry of Justice. High-ranking officials affirmed the importance of fair trials. These factors suggest progress toward remedying the significant ethnic bias against Serbs that has heretofore characterized Croatia’s prosecution of war crimes.” *Background Report: Domestic War Crime Trials 2004*, OSCE, 26 April 2005, p. 3. Changes in the legislation and the dropping of charges against 370 persons, mostly Serbs, in cases being conducted without legal grounds were described as positive (p. 9).

23 On weakness of trials *in absentia* see Mohamed El Zeidy, “*Universal Jurisdiction in Absentia: Is it a Legally Valid Option for Repressing Heinous Crimes?*”, Oxford University Comparative Law Forum, 2003, Oxford University Comparative Law Forum 4 at <<http://ouclf.iuscomp.org/articles/zeidy.shtml>> (last visited January 2006).

24 See *ibid.*, pp. 31–40. These conclusions are supported by numerous examples from court decisions, some of which (e.g. the *Karan*, *Lora* and *Savić* cases) have achieved notoriety among the Croatian public as well.

25 OSCE *Background Report*, above note 22, p. 20.

## Croatian legislation and punishment of war crimes

In the Republic of Croatia, the principal relevant legal sources of internal law relating to punishment of war crimes<sup>26</sup> or important for it are<sup>27</sup> the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), valid until the end of 1991, then taken over into the Croatian legal system as a Croatian law (with certain modifications) and later amended in content (but not in relation to command responsibility) and renamed the Basic Criminal Code of the Republic of Croatia;<sup>28</sup> the new Criminal Code, which came into force on 1 January 1998;<sup>29</sup> 1996 Constitutional Act on Co-operation of the Republic of Croatia with the International Criminal Tribunal;<sup>30</sup> 2003 Act on Application of the Statute of the International Criminal Court and Prosecution of Criminal Offences against International Laws of War and International Humanitarian Law;<sup>31</sup> Law on Protection of Witnesses;<sup>32</sup> Criminal Procedure Act;<sup>33</sup> Law on International Legal Assistance in Criminal Matters;<sup>34</sup> and Law on International Restrictive Measures.<sup>35</sup> Croatia is also bound by all the most important international conventions relating to war and humanitarian law, including the 1949 Geneva Conventions on the protection of war victims and their two 1977 Additional

26 For the sake of brevity, the term “war crime” as used in this paper means all criminal offences against values protected by international law relating to armed conflict and contained in the Criminal Code of the Republic of Croatia, as well as crimes listed in the ICTY and the ICC Statutes, respectively.

27 For detailed data on the most important sources of international law, particularly those binding for the Republic of Croatia, see Ivo Josipović, Davor Krapac and Petar Novoselec, “Stalni međunarodni kazneni sud”, *HPC-Narodne novine*, Zagreb, 2002, pp. 36–45.

28 See *Narodne novine* (Official Gazette of the Republic of Croatia), No. 53/1991 (taking over of the Criminal Code of the SFRY), and amendments and name change in *Narodne novine* 39/1992 and 91/1992. The consolidated text was published in *Narodne novine* 39/1993, and further amendments in *Narodne novine* 108/1995 16/1996 and 28/1996. Subject matter that at the time of the former SFRY was under the jurisdiction of the republics and provinces was regulated by the Criminal Code of the Republic of Croatia (previously Criminal Code of the Socialist Republic of Croatia). As this law has no content of interest for problems of war crimes, it will not be discussed here. The new Criminal Code which brought together the subject matter of criminal legislation was published in *Narodne novine* 110/1997 and entered into force on 1 January 1998. Corrections, amendments and supplements were published in *Narodne novine* 27/98, 50/00 (Decision of the Constitutional Court), 129/00, 51/01, 111/03, 190/03 (Decision of the Constitutional Court on suspension of amendments and supplements published in *Narodne novine* 111/03 because they were not passed by the necessary majority of votes in Parliament) and 105/04. Nevertheless, the last adopted amendments included the amendments relating to war crimes.

29 See previous note.

30 *Narodne novine*, 32/1996. In spite of tempestuous debates during its adoption, permanent challenges to it in high political circles and several requests for examination of its constitutionality (not yet resolved by the Constitutional Court), this Act is one of our most durable laws. Moreover, it entirely fulfils its purpose (complete co-operation of the Republic of Croatia with the ICTY). It is obvious that political reasons also contribute to its duration. Although the Constitutional Act itself does not contain substantial provisions on war crimes, it regulates co-operation between Croatia and the ICTY.

31 *Narodne novine*, No. 175/103. This law has no direct impact on command responsibility, but its provisions on conducting war crime procedures were to be important for the determination thereof.

32 *Narodne novine*, No. 163/03.

33 *Narodne novine*, Nos. 110/97, 27/98, 58/99, 112/99, 58/202, 143/02, 62/03 and 178/04.

34 *Narodne novine*, No. 178/04.

35 Ibid.

Protocols (which Croatia accepted by succession); the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (which Croatia likewise accepted by succession); the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; and the Rome Statute of the International Criminal Court, which Croatia ratified by the Law on Ratification of the Rome Statute of the International Criminal Court.<sup>36</sup>

### Co-operation with the International Criminal Tribunal for the former Yugoslavia

Croatia's precise co-operation with and fulfilment of its obligations towards the ICTY are regulated by the Constitutional Act on Co-operation of the Republic of Croatia with the International Criminal Tribunal. It renders possible all modes of co-operation with the ICTY, including the transfer or extradition of the accused. For this very reason it is often a target for criticism by those politicians, experts and analysts who oppose full co-operation with the ICTY.<sup>37</sup> However, the Act does not regulate certain specific features of war crime trials before Croatian courts. Ratification of the Rome Statute served as an occasion to introduce, at the end of 2003, separate provisions on command responsibility into the Croatian Criminal Code. Although that harmonization with the Rome Statute was effected in accordance with the whole Croatian system of criminal law, the Constitutional Court of the Republic of Croatia dismissed those very extensive amendments to the Criminal Code of 2003 in their entirety (and not only the provisions on command responsibility) because they had not been passed by the required majority of votes of representatives in the Croatian Parliament. The new government submitted less ambitious amendments and supplements to the Criminal Code to Parliament; the amendments were far fewer, but the provisions on command responsibility and improved provisions on crimes against humanity were identical to the previous version. The said amendments and supplements were adopted in 2004. In them, command responsibility is regulated according to German law.<sup>38</sup> This removed theoretical and practical contradictions to the Rome Statute and the Croatian Criminal Code.<sup>39</sup> But the question remains of how to deal with command responsibility before Croatian courts in cases of crimes committed before the amendments to the Criminal Code entered into force.

36 *Narodne novine*, Međunarodni ugovori (International Conventions), 5/2001.

37 For a detailed description of the adoption and application of the Constitutional Act and the reasons for which it is contested, see Ivo Josipović, *The Hague Implementing Criminal Law*, Hrvatski pravni centar and Informator, Zagreb, 2000.

38 See *Völkerstrafgesetzbuch* of 26 June 2002, paras. 4, 13 and 14.

39 On the most important theoretical obstacles concerning command responsibility and particularly on problems relating to its application in Croatian law, see Petar Novoselec, "Materijalnopravne odredbe Rimskog statuta", in Josipović, Krapac and Novoselec, above note 27, pp. 106 ff. See also Davor Derčinović, *Kritički o institutu zapovjedne odgovornosti u međunarodnom kaznenom pravu*, Zbornik Pravnog fakulteta u Zagrebu 1/2001, and Mirijan Damaška, "The shadow side of command responsibility", *American Journal of International Law*, Vol. 80, No. 3 (1986).

## Criminal offences

Descriptions of certain criminal offences (crimes) in the Criminal Code of the Republic of Croatia and the Basic Criminal Code of the Republic of Croatia which correspond to the crimes listed in the ICTY Statute were inherited from the criminal legislation of the former Yugoslavia. These are the criminal offences of “Genocide” (Article 156 of the Criminal Code), “War crime against civilians” (Article 158), “War crime against wounded and sick” (Article 159), “War crime against prisoners of war” (Article 160), “Illegal killing and wounding of enemy” (Article 161), “Unlawful appropriation of belongings from the killed or wounded on battlefield” (Article 162), “Illegal means of combat” (Article 163), “Wounding of negotiators” (Article 164), “Inhumane treatment of wounded, sick and prisoners of war” (Article 165), “Unjustified delays in return of prisoners of war” (Article 166), and “Destruction of cultural property and objects containing cultural property” (Article 167). Croatian legislation also recognizes a criminal offence of “Aggressive war” (Article 157), which corresponds to a crime against peace. The descriptions are identical in both laws, and both are cited here because there may be doubt about which of them should be applied in certain cases. It is worth mentioning that until 2004 Croatian legislation did not include a separate offence of crimes against humanity, and that the latest amendments to the Criminal Code introduced that criminal offence in a way which almost entirely follows the wording of the Rome Statute of the ICC. However, it is hard to imagine a situation in which some forms of conduct qualified in international law as a crime against humanity (especially those listed in Article 5 of the ICTY Statute) could not be considered as one of the forms of war crime in Croatian legislation. In particular, it is important to note that the provisions relating to the above-mentioned criminal offences make no distinction between military commanders and civilian superiors, so that in this respect all doubts about punishing civilian “commanders” (superiors) are to be dismissed. Most descriptions of the said crimes begin with the formulation “Whoever, by violating the rules of international law...”<sup>40</sup> Moreover, in the description of other criminal offences, responsibility is not limited to military commanders.<sup>41</sup> Similarly, the formulation “Whoever, by violating the rules of international law ...” clearly shows that this is about blanket norms, the full content of which is formed by application of relevant norms of international law: “Considering that war crimes against the civilian population can be committed only by violating the rules of international law, the court is obliged to exactly indicate, in a verdict pronouncing the accused guilty for that criminal offence, which rules of international law the

40 Genocide, war crime against civilians, war crime against wounded and sick, war crime against prisoners of war, illegal killing and wounding of enemy, wounding of negotiators, inhumane treatment of wounded, sick and prisoners of war, destruction of cultural goods and objects with cultural goods, illegal means of combat (para. 2).

41 Thus we see the formulations: “Whoever orders ...” (Unlawful appropriation of belongings from the killed or wounded on the battlefield) or “Whoever makes or improves, produces, purchases...” (Illegal means of combat, para. 1).

accused had violated.”<sup>42</sup> It should be emphasized that the Criminal Code recognizes a separate criminal offence of “Organizing a group and inciting to genocide and war crimes” (Article 123), and that the latest amendments to the Criminal Code in 2004 introduced the separate criminal offences of “Command responsibility” (Article 167a),<sup>43</sup> “Planning criminal offences against values protected by international law” (Article 187a) and “Subsequent assistance to the perpetrator of a criminal offence against values protected by international law” (Article 187b).

## Constitutional provisions

Some of the above legal sources have specific meaning for the punishment of war crimes. However, prior to consideration of these specific provisions of certain laws, it is appropriate to recall the relevant provisions of the Constitution of the Republic of Croatia. First of all, there are the constitutional provisions on application of norms of international law. Thus Article 140<sup>44</sup> of the Constitution of the Republic of Croatia states that “International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects.” Such a formulation clearly indicates which international contracts form part of the internal legal system, but it also clearly (*a contrario*) excludes international customary law from direct application. It hence rules out the need for discussion of possible solutions for application of command responsibility according to the criteria of Article 7(3) of the ICTY Statute – a discussion which would stem from the idea that such command responsibility should be applied as part of international customary law.<sup>45</sup> At the same time it also makes redundant, at least for this article, the otherwise very interesting discussion as to whether command responsibility under Article 7(3) of the ICTY Statute is a part of international customary law at all, and if so, since

42 The Constitutional Court of the Republic of Croatia in its decision U-III-368/98. Also, Supreme Court of the Republic of Croatia in cases Kž-213/01 and Kž-588/02.

43 *Command Responsibility* (1) A military commander or another person acting in effect as a military commander or as a civilian in superior command or any other person who in a civil organization has the effective power of command or supervision shall be punished for the criminal offenses referred to in Articles 156 through 167 of this Code if he knew that his subordinates had committed these criminal offenses or were about to commit them and failed to take all reasonable measures to prevent them. The application of this Article excludes the application of the provision contained in paragraph 3, Article 25 of this Code. (2) The persons referred to in paragraph 1 of this Article who had to know that their subordinates were about to commit one or more criminal offenses referred to in Articles 156 through 167 of this Code and failed to exercise the necessary supervision and to take all reasonable measures to prevent the perpetration of these criminal offenses shall be punished by imprisonment for one to eight years. (3) The persons referred to in paragraph 1 of this Article who do not refer the matter to competent authorities for investigation and prosecution against the perpetrators shall be punished by imprisonment for one to five years.

44 The Constitution of the Republic of Croatia – consolidated text, *Narodne novine* No. 41/2001.

45 But when the Croatian Criminal Code describes different crimes as performed “against international law” (so-called blanket norm), this also includes violations of international customary law.

when? Since the *Yamashita* case, since the entry into force of Protocol I additional to the Geneva Conventions, since the ad hoc International Criminal Tribunals started work, or since some other point in time? Replies to these questions would be relevant for application of command responsibility only if we would like or be able to apply it, as a part of international customary law, to cases of crimes committed in the war on the territory of the former Yugoslavia.<sup>46</sup>

In addition, the constitutional provisions important for the application of criminal legislation and relevant norms in criminal legislation should likewise be borne in mind. Article 31(1) (first sentence) of the Constitution specifies that “no one shall be punished for an act which before its perpetration was not defined by law or international law as a punishable offence, nor may he be sentenced to a punishment which was not defined by law” (principle of legality and implicit prohibition of retroactivity of criminal legislation).<sup>47</sup> Furthermore, the Constitution stipulates that “if after the perpetration of an act a less severe punishment is determined by law, such punishment shall be imposed” (Article 31(1), second sentence – principle of obligatory application of less severe law). With regard to the principle of legality (and implicit prohibition of retroactivity) and the principle of application of less severe law, the Criminal Code went much further by prescribing that “no one shall be punished nor can other criminal sanctions be imposed upon him for an act which before its perpetration was not defined by law or international law as a punishable offence and for which the law did not define the kind and measure of punishment the perpetrator can be sentenced to”.<sup>48</sup> The principle of legality according to the Criminal Code namely requires prior prescription of the type and measure of punishment for a certain criminal offence. Also, in relation to the obligatory application of less severe law, the Criminal Code specifies that “if after commitment of a criminal offence the law is amended once or several times, it is obligatory to apply the law that is less severe for the perpetrator”.<sup>49</sup> Unlike the Constitution, which links the application of less severe law exclusively to prescribed punishment, the Criminal Code gives broader scope to the application of less severe law, linking that principle not only to punishment but also to other possible criteria (the statute of limitations, for example).<sup>50</sup> It must be stressed that during the war in Croatia (1991–5) the most severe punishment prescribed by criminal law was twenty years’ imprisonment. In view of all that has been said above, it is easy to conclude that for crimes committed in the course of the war, Croatian courts cannot hand down a prison sentence that would be more severe than twenty years’ imprisonment. Of course,

46 See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC/Cambridge, 2005, Rules 152/3, pp. 556–63 and the references mentioned there.

47 Obviously, such a formulation excludes the exceptional possibility stipulated by Article 89(5) of the Constitution that “Only individual provisions of a law may have a retroactive effect for exceptionally justified reasons.”

48 Principle of legality, Article 2(2) of the Criminal Code.

49 Obligatory application of less severe law, Article 3(2) of the Criminal Code.

50 Compare Bačić, Franjo, *Kazneno pravo, opći dio*, peto izdanje, Zagreb 1998.

many will consider such a punishment too mild for serious criminal offences (particularly genocide).

## Implementation of the International Criminal Court Statute

A specific, maybe unusual, but certainly pragmatic legal source important for the criminal prosecution of perpetrators of war crimes before Croatian courts is the Act on Application of the Statute of the International Criminal Court and the Prosecution of Criminal Offences against International Laws of War and International Humanitarian Law (hereinafter: Act on Application). The name of the Act already indicates that it has been passed for the sake of implementing the Rome Statute of the ICC. But together with its content on implementation the Act also has specific provisions supplementing domestic legislation and pertaining to the prosecution of war crimes, independently of the ICC's jurisdiction. These provisions are also applicable for the prosecution of perpetrators of crimes committed during the 1991–5 war. Furthermore, certain solutions in that Act were purposely created to facilitate the conduct, and improve the efficiency, of proceedings for crimes of that period,<sup>51</sup> particularly those referred to the national judiciary by the ICTY. The legislator aims to achieve the intended goal by several important measures. First of all the Act enables (optionally, at the proposal of the State Attorney, and to be decided by the President of the Supreme Court of the Republic of Croatia) all or some actual war crimes proceedings to be conducted in one of four “big” county courts: Osijek, Rijeka, Split and Zagreb (Article 12). In addition, special investigation departments were established within these four courts, with specially qualified investigating judges (Article 13(1) and (3)). In accordance with the need for specialization, professionalization and resistance to possible pressures, war crime cases are not tried by mixed panels of judges and jurors but by a panel of three professional, specially qualified judges (Article 13(2), (3) and (4)). A special state attorney for war crimes has been appointed, with authority for the entire state (Article 14). A special department for war crimes is

51 “In the Conclusion of the Government of the Republic of Croatia of 11 January 2001, it was already assessed that the previous activities of the police and the judicial institutions on the revealing, investigating and prosecuting war crimes committed during and immediately after the Homeland War had not given adequate results. In addition, it was emphasized that Croatia had to collect the data on the war crimes committed in the course of the aggression against it more efficiently and that it had to inform the International Criminal Tribunal for the Former Yugoslavia accordingly. In the meantime, apart from the continuation of the described situation, some proceedings before the Croatian courts have been a travesty of court. These were: the “Lora” case before the County Court in Split and the “Karan” case before the County Court in Gospić. They received widespread media coverage. In the latter case, the statement of reasons in the judgment of the guilt of the accused was based on the “historical guilt of his people”. Later, the Supreme Court abolished both judgments to be retried. However, in her discussion during the second reading of the Act in *Sabor*, the representative Ljerka Mintas-Hodak denied the right of the proposer of the Act to motivate its passage in such a way, because “some even dared to apostrophize and refer to some concrete and recent cases, like the one at the court in Split. Such conduct of the authorities is utterly inadmissible, not only because it proves the interference of politics in the work of the judiciary but because it sanctions lack of confidence in the quality of the country's own judiciary” (Transcript, 493/6/KM).” See Josipović, above note 4, p. 201, ref. 53.

established within the police service (Article 15). Owing to the fact that war crimes are the gravest criminal offences, often committed in an organized manner and in conjunction by several persons, Article 16 of the Act stipulates that the Law on the Office for Suppression of Corruption and Organized Crime must also be applied to war crimes cases, in relation to the possibility of longer pre-trial detention under investigation (up to one year), a stronger role of the state attorney and special use of the institution of witness-penitent. Also, the Act requires the application of the highest standards of protection of victims and witnesses (Articles 8 and 9).<sup>52</sup>

### **Taking over proceedings from the International Criminal Tribunal for the former Yugoslavia: a test of democratic maturity of Croatia as a society in transition**

The fact that criminal procedures against top domestic military and political officers are conducted before an international court is a serious legal, moral and political challenge for any country. First of all it demonstrates that, at least in the opinion of the international community, the legal and moral system necessary for sentencing perpetrators of the crimes is not sufficiently developed in that country. Moreover, and as shown by the experience of the countries on the territory of the former Yugoslavia, there is a serious gap between the way in which war events (including crimes and their perpetrators) are perceived by the home population, who regard the accused as heroes, and the way in which the international community sees them through the eyes of the ICTY. The legal obligation to cooperate with the ICTY, and particularly to extradite the accused to the Hague Tribunal, is considered in some sections of the population to be a betrayal of national interests. The governments of all former warring countries have therefore expressed an interest in taking over proceedings from the ICTY. But this brings new challenges. First, in order for the ICTY to refer proceedings, it must be sufficiently assured of the domestic judiciary's capability of conducting the proceedings fairly and adhere to internationally accepted standards. This presupposes appropriate legislation and independent judges with the appropriate professional and moral profile. The idea of a betrayal of national interests that followed co-operation with the ICTY is now being transformed into dissatisfaction that (domestic) courts try "our heroes". The capability of holding fair trials is estimated by the ICTY when deciding on the referral of criminal prosecution. But the procedures themselves will be evaluated through detailed monitoring. If this evaluation is positive, it will certainly open the door to membership of the European Union, whereas a negative evaluation will almost certainly close it for a considerable period of time.

52 With respect to the protection of witnesses, the Law on the Protection of Witnesses will be applied, *Narodne novine*, No. 163/03.

## First trial cases

As part of its “Completion Strategy” mentioned above,<sup>53</sup> and in order to reduce its workload, the ICTY has decided to refer certain cases to national judiciaries. Its Rules of Procedure and Evidence include the provisions of Rule 11 *bis*, which allow for the possibility of referring cases from the ICTY to national courts.<sup>54</sup> The Republic of Croatia has repeatedly expressed its wish to take over those cases in which the accused are citizens of Croatia, or cases of crimes that took place in Croatia. Two such referrals have been possible hitherto. In the case against the so-called Vukovar trio, Šljivančanin, Radić and Mrksić (Case No. IT-95-13/1-PT), the Office of the Prosecutor proposed that the Tribunal refer the case to a national court; both the Republic of Croatia and Serbia and Montenegro expressed an interest in taking it over. The Office of the Prosecutor did not make any proposals as to which of the two countries the case should be referred to, while both countries had their own arguments, both explicitly legal and implicitly political. The Croatian request was based on the legal and moral demand that the accused be tried in the country where the crimes were committed. This is a very important principle, given that the said case concerns the most serious crimes committed during the war in Croatia. On the other hand, Serbia and Montenegro emphasized that it had extradited the accused to the Hague Tribunal, and not to a third country. Also, its Constitution does not allow extradition to a third country; thus, by taking such a step, the ICTY would be indirectly violating Serbia and Montenegro’s Constitution. With regard to both countries, there were implicit doubts as to their ability to conduct an unbiased trial. This sensitive issue was resolved when the Office of the Prosecutor withdrew its request, leaving the case within the jurisdiction of the ICTY.<sup>55</sup>

Yet another case Croatia hoped to take over was that against the Croatian generals Rahim Ademi and Mirko Norac (Case No. IT-04-78/PT). The Office of the Prosecutor proposed its referral, though without any great enthusiasm, emphasizing that it was a case which, owing to the seriousness of the crime and the responsibility of the accused, should be tried in The Hague. In view of the completion strategy and the Tribunal’s excessive workload, it was nonetheless proposed that the case be referred to Croatia.<sup>56</sup> Without going into the quite lengthy procedure in detail, it should be mentioned that the Office of the Prosecutor, the accused and their defence lawyers, the Republic of Croatia and the *amici curiae*<sup>57</sup> submitted some very interesting motions to the Tribunal. During the procedure some very important issues emerged with regard to the objectivity,

53 See note 8 above.

54 The section on the referral of cases is from Josipović, above note 4, pp. 230–2.

55 See Decision on Prosecutor’s motion to withdraw motion and request for referral of indictment under Rule 11 *bis* (30 June 2005).

56 See Request by the Prosecutor under Rule 11 *bis* for referral of the indictment to another court, filed 2 September 2004.

57 The distinguished professors Davor Krapac of the University of Zagreb and Mirjan Damaška of Yale University appeared before the Tribunal as *amici curiae*.

independence and professionalism of the Croatian judiciary in conducting *lege artis* hearings for war crimes, and concerning the question of whether Croatia has a satisfactory legal framework for conducting proceedings in accordance with the indictment issued by the Chief Prosecutor of the ICTY. At the hearing held on 11 February 2005, the Tribunal closely examined the possibility of trying the accused for command responsibility in Croatia, as provided for by Article 7(3) of the ICTY Statute.<sup>58</sup> The conclusion of the *amici curiae* was that this would be possible, based on a “creative interpretation of the existing legislation”.<sup>59</sup> The ICTY decided to refer the case to the Republic of Croatia. In the decision (IT-04-78-PT of 14 September 2005) the Referral Bench found that Croatian substantive law has “limited difference” compared with the ICTY Statute, that witness protection measures available in Croatia are sufficient to ensure a fair trial, that Croatian courts can perform a fair trial and that the death penalty is not applicable. However, in referring the case to Croatia, the chamber ordered regular monitoring of the trial in Croatia, asking the Prosecutor to report to the Referral Bench regularly. The decision was welcomed in the Croatian media and among politicians.

### Main legal problems

The main legal problems to be faced by the Croatian judiciary in processing the cases taken over from the ICTY<sup>60</sup> will be

- (a) “translation” of the Hague indictments into indictments which, in content and form, are in compliance with indictments provided for by the Croatian Criminal Procedure Act;
- (b) admissibility of evidence collected by the ICTY Office of the Prosecutor, and

58 At the hearing, the statement and answers given by *amicus curiae* Prof. Davor Krapac were of central importance. In summary, he stated that the Croatian judiciary was professionally equipped to conduct war crimes proceedings, also pointing to the solutions contained in the Act on Application of the Statute of the International Criminal Court and the Prosecution of Criminal Offences against the International Law of War and Humanitarian Law (special panels, special prosecutor, centralization of the decision-making process in the four courts, provisions regarding evidence, and so on), the new Witness Protection Act, and other circumstances which justified handing the case over to Croatia. He also emphasized the harmonization of Croatia’s substantive criminal law with international criminal law, but at the same time drew attention to the problems of observing the principle of legality and prohibiting retroactivity.

59 See Prof. Krapac’s detailed, professionally grounded statement at the hearing, as per transcript, p. 80 ff. Available at <<http://www.un.org/icty/transe78/050217MH.htm>> (last visited January 2006).

60 It can be expected that in these proceedings, and because of application of the new Act on Application of the Statute of the International Criminal Court and the Prosecution of Criminal Offences against International Law of War and Humanitarian Law (specialized courts and specialized panels) and the attention with which the domestic and professional public will monitor the trials, there will be no “non-legal” problems such as those that existed in some previously conducted war crimes proceedings (bias of courts, public pressure, other problems quoted in the OSCE *Background Report*, above note 22).

- (c) application of the command responsibility recognized by Article 7(3) of the ICTY Statute to some modes of individual responsibility existing in Croatian criminal legislation.

Of course, these problems are interrelated and come to light as soon as the State Attorney starts to compile the indictment, since for obvious reasons proceedings before Croatian courts must be conducted according to internal law.<sup>61</sup> Article 28 of the Act on Application therefore specifically stipulates that in proceedings taken over from the ICTY, Croatian material and procedural legislation shall be applied. The Croatian prosecutor compiles the indictment in accordance with Croatian law, but on the basis of facts contained in the ICTY indictment. However, as a ground for his indictment he can, by rule,<sup>62</sup> only present evidence collected by the ICTY Office of the Prosecutor. The Act on Application, in Article 28(4), prescribes that all evidence derived by the ICTY and its Prosecution Office according to the Rules of Procedure and Evidence can be used before a Croatian court. During the indictment phase this rule is applicable, but during the trial phase problems can appear: according to Croatian law some sources of information cannot be used in evidence, because the Criminal Procedure Act explicitly rules out the use of that evidence owing to the manner in which it has been obtained or derived. Apart from the general provision on illegal evidence in its Article 9(2),<sup>63</sup> the Criminal Procedure Act explicitly defines certain forms of evidence as illegal. These are (i) sources of information obtained by illegal application of secret surveillance measures;<sup>64</sup> (ii) records of illegal searches;<sup>65</sup> (iii) records of interrogation of the accused in a prohibited manner;<sup>66</sup> and (iv) records of witness interrogations which, because of the content or circumstances of interrogation, the law disqualifies from the court's decision-making process, for example, records of interrogation by a person acting as an expert but who cannot be one.<sup>67</sup> Problems most likely to arise are those related to acceptance of testimonies of persons – especially the accused – given to the ICTY Office of the Prosecutor, and acceptability of intelligence data (particularly data produced by secret recording and wire-tapping), documents obtained by the ICTY as photocopies and not as originals, and testimonies of persons who would later

61 The reasons lie in general considerations of state sovereignty, the fact that the ICTY regulations were created separately and specifically for that court, the fact that Croatian judges and other participants in the proceedings share the same legal culture, the necessity for the procedure to be conducted within a consistent legal system, etc.

62 The Croatian prosecutor can request the conduct of investigations and the collection of other evidence. However, this would mean that evidence received from the ICTY is not considered sufficient for an indictment. Probably such an attitude would have certain political implications too.

63 “Evidence obtained by violating the right to defence, dignity, respect, and honour and inviolability of personal and family life guaranteed by the Constitution, the law or international law, as well as evidence obtained by violating provisions governing criminal proceedings and explicitly laid down by this Law and other evidence derived therefrom, is illegal.”

64 Criminal Procedure Act, Article 182.6.

65 *Ibid.*, Article 217.

66 *Ibid.*, Article 225.9.

67 *Ibid.*, Articles 235 and 250.1.

not appear before the Croatian court. The defence can be expected mostly to attack the legality of evidence collected by the ICTY and used by the domestic court.

Even in the early stage of completing the indictment, the Croatian prosecutor will have problems with “translating” the personal responsibility of the accused according to the ICTY Statute’s Article 7(3) (command responsibility), since the present Criminal Code’s new provision on command responsibility (Article 167a) was introduced into Croatian legislation only in 1994 and cannot, owing to the constitutional prohibition of retroactivity and to the principle of legality, be applied to crimes that were committed in wartime (1991–5). Still, command responsibility can to a lesser extent be “covered” by application of the law in force at the time the crime was committed. The crucial point is the form of command responsibility in which the commander is a direct perpetrator of a crime by acting, including giving orders for a crime to be committed, or by omission, that is, not taking action (Article 7(1) of the ICTY Statute). In cases when the commander acts as a guarantor, the crime is committed by his subordinates.

The first criterion for establishing command responsibility is that the commander knew that they were about to commit the crime and failed to take the necessary and reasonable measures for it to be prevented (Article 7(3) of the ICTY Statute). This form of criminal responsibility of a commander is undoubtedly also applicable before domestic courts and under domestic law, as it concerns collaboration in crime by not acting (omission): in failing to take action to prevent a crime he knew was about to be committed, the commander obviously agreed to the prohibited consequence. A responsibility corresponding to that laid down in Article 7(1) and part of Article 7(3) (first criterion for establishing responsibility) of the ICTY Statute<sup>68</sup> has been repeatedly applied in the practice of Croatian courts. However, according to the ICTY Statute’s Article 7(3) – which is disputable – there are other criteria for establishing command responsibility, namely the other two cases in which subordinates have committed a crime. In the first case, the commander did not know that his subordinates were about to commit the crime, but had reason to know, and because of this “failure to know” he did not take the necessary and

68 Thus in the verdict on Dinko Šakić (see note 20 above) the County Court in Zagreb states that the accused is guilty “as a member and officer of “Ustasha Defense” in command of Stara Gradiska and Jasenovac camps who performed various functions ... contrary to the principles and provisions of Articles 46 and 50 of the Regulations annexed to the 1907 Hague Convention (IV) on Laws and Customs of War on Land while managing Jasenovac camp; by commands and other forms of management – the making and implementing of decisions – he abused, tortured and murdered prisoners in that he personally ordered such acts and participated in their commitment and that as a commander of the camp he did not do anything to prevent directly subordinate members of the “Ustasha Defense” from committing such acts ...”. In case K-19/02-81 the County Court in Karlovac sentenced the accused Milan Strunjas to twelve years’ imprisonment (the Supreme Court of the Republic of Croatia confirmed the decision by verdict I Kz-743/03), as he “made plans for the attack and seizure of the Municipality of Slunj by the so-called Krajina Army contrary to Articles 3, 27, 32 and 53 of the Geneva Convention on the Protection of Civilian Persons in Time of War ... and commanded this formation, before entering Hrvatski Blagaj, Donja and Gornja Glina, Pavlovac, Donji and Gornji Niksic, Cerovac, Cvitovic, Marindolsko Brdo and Gornji and Donji Kremen, although there were no troops in these villages and no resistance was given, to shoot at houses and farm buildings with all the weapons they had, which members of this formation did”, so that these activities led to murders, serious injuries, destruction and theft, as is factually described in the verdict.

reasonable measures to prevent the crime. The problem with this form of responsibility is that the Croatian Criminal Code punishes negligence only when to do so is exclusively stipulated by the law. Considering that the Criminal Code does not punish negligence in cases of war crimes (as according to the predominant understanding of criminal responsibility for acts such as war crimes, it might even be understood as *contradictio in adjecto*), the sole application of provisions of the Criminal Code cannot lead to punishment of a commander responsible in this manner according to Article 7(3) of the ICTY Statute. Also, this form of responsibility raises the issue of causality between failure of the commander and the crime itself.

The second disputable form of command responsibility according to Article 7(3) of the ICTY Statute is his responsibility as a guarantor for punishing crimes of his subordinates. In this case the commander did not know and could not have known that his subordinates were about to commit crimes (and for that reason failed to take measures to prevent those crimes), or he did know and did take all necessary and reasonable measures to prevent the crime, which was nevertheless committed; on getting to know about the crime he did not, however, take the necessary measures to punish the perpetrator. In Croatian law this means filing a criminal report, taking some restraint measures (which of course do not exclude criminal responsibility) such as the arrest of the perpetrator of flagrant criminal offences according to Article 94(1) of the Criminal Procedure Law and so on. Under the Croatian Criminal Code, in this case the commander bears no responsibility for the war crime itself. But possibly Article 300 of the Criminal Code on the criminal offence (crime) of “Failure to report a committed criminal offence” can be applied or, if it is a case of subsequent assistance to the perpetrator (*auxilium post delictum*), the provision of Article 301 of the Criminal Code (offence of assistance to perpetrator after commission of criminal offence). The criminal offence provision in Article 300 pertains to anyone who does not report a committed grave criminal offence despite knowing that this report would enable or significantly facilitate clarification of the offence or discovery of the perpetrator of the most serious crimes. For this offence the law prescribes imprisonment of up to three years (Article 300(1)). It also stipulates that any official or responsible person who does not report the commission of a grave criminal offence which came to his knowledge in the performance of his duty shall be sentenced to the same punishment (up to three years’ imprisonment). Bearing in mind that in the cases described above there is no intent, recklessness or even negligence of the commander in relation to the war crime, nor any causal link between his action and the crime, the Croatian Criminal Code as amended in 2004, as well as the German Penal Code, regulates this form of responsibility as an independent criminal offence (Article 167a(3) of the Criminal Code). It is important to note, however, that if the commander failed to take the necessary and reasonable measures to prevent the crime, he is not exculpated by taking measures to punish the perpetrator. In a word, without appropriate incrimination during the time when crimes were committed (1991–5), the stated forms of command responsibility cannot be applied unless Croatian prosecutors and courts find a way to “cover” the said cases of command responsibility through interpretation,

by combining domestic and international law. From the corpus of international law consideration should primarily be given to the application of Protocol I additional to the 1949 Geneva Conventions,<sup>69</sup> the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,<sup>70</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>71</sup> The European Convention contains in Article 7(2) an exception to the principle of legality and implicitly also an exception to the prohibition of retroactivity. Such a provision can perhaps lead the court to apply (by interpretation) the new provisions of the Criminal Code even to the war crimes committed in 1991–5 (retroactivity!).<sup>72</sup> In any case, Croatian case-law has

69 Protocol I additional to the 1949 Geneva Conventions was adopted on 8 June 1977 and entered into force on 7 December 1978. Croatia is a party to it by succession to the former SFRY. Additional Protocol I contains two important articles relating to command responsibility. Article 86, entitled “Failure to act”, states in paragraph 1 that parties “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.” Article 86(2) further specifies that “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.” Article 87 of the Protocol requests parties to require their *military* commanders to take various measures to prevent crimes and punish perpetrators, including initiation of penal proceedings (emphasis added). Although the text of Articles 86 and 87 speaks of “commander” and only in one place refers to “military commanders and members of armed forces under their command”, it is obvious from the context that the provisions of Articles 86 and 87 are meant to relate to military commanders. Likewise, Protocol I pertains to international armed conflicts, unlike Protocol II, which relates to non-international armed conflicts and which does not stipulate a similar responsibility of commanders.

70 Entered into force on 11 November 1970. Croatia became party to it by succession. This convention stipulates that no statutory limitation shall apply to war crimes, meaning those defined as such by the Charter of the International Military Tribunal of 1945, crimes which constitute grave breaches of the Geneva Conventions, crimes against humanity (whether committed in time of war or in time of peace), crimes resulting from the policy of apartheid, and the crime of genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed (Article I (b)). Article 18(2) of the Criminal Code of the Republic of Croatia also contains a provision of non-application of statutory limitations to the criminal offences of genocide, aggressive war, war crimes and other criminal offences to which international law stipulates that no statutory limitations are to be applied.

71 Adopted in Rome on 4 November 1950. Croatia ratified the European Convention in 1997 by passing the Law on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols 1, 4, 6, 7 and 11 (*Narodne novine*, International contracts, 18/1997). Croatia later ratified other protocols and additional protocols, but they are not of interest for this exposé.

72 Article 7(1) of the European Convention, similar to the Constitution of the Republic of Croatia, requires that an act must, to be punishable as a criminal offence, have been defined as such under internal or international law at the time when it was committed, and the application of less severe law is linked exclusively to a definition of milder punishment. But paragraph 2 stipulates that “This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.” This very important exception to the principle of legality stems from the fact that it was established immediately after the Second World War at the time when Nazi perpetrators of war crimes were being tried and sentenced and when numerous legal issues and problems arose, including the question to which extent these proceedings respected the principle of legality. Considering that the Constitution of the Republic of Croatia as a legal source (and *not* as a source of criminal-legal norms) does not stipulate the “general principles of law”, in application of command responsibility in domestic law a question will arise about the role of that legal source, introduced into the domestic legal system by an international contract that is above the law but not above the Constitution.

not yet established precedents that would completely resolve the problem of command responsibility. However, the probable scenario of criminal prosecution (indictments and trials) in Croatia is that the prosecutor will try to avoid qualifications pertaining to the establishment of forms of responsibility which are not covered by the Croatian Criminal Code. Also, for legal (but also political) reasons he will try to avoid qualifications which include joint criminal enterprise.

## Probable developments and conclusion

In view of the importance for Croatia of the prosecution of war crimes, but also the fact that the Croatian judiciary is burdened by numerous weaknesses of a transitional society, probable developments in the prosecution of war crimes in Croatia include the following.

1. The continuation of trials in cases autonomously initiated by the Croatian judiciary. Constant international monitoring of these trials will lead to a continuation of trends towards a higher quality of trials, a lessening of bias based on the ethnicity of the accused, and a selection of cases whereby those initiated for political reasons or without sufficient evidence will be dropped. These proceedings will take place for years and will represent a permanent challenge to the Croatian judiciary and to democracy.
2. It is to be expected that the ICTY will not refer a large number of cases to Croatian courts. Besides those in which it has filed indictments (*Norac* and *Ademi* cases) it is probable that there will be very few cases of that kind, and perhaps no more. On the other hand, the ICTY will certainly refer evidence and documents necessary for criminal prosecution in several cases in which indictments have not been filed before it. In all cases taken over from The Hague, the international community will carefully monitor the fairness of the trials.

Finally, just as co-operation with the ICTY (particularly in the *Gotovina* case) was a key to opening Croatia's negotiations on accession to the European Union, the quality and fairness of criminal proceedings for war crimes will be an important key to their positive conclusion. Certainly, that moment will be a clear sign that the transition of Croatia from war to peace and from a single-party society to a society that has embraced Western pluralistic democracy is very nearly or entirely completed.

# Humanitarian organizations and international criminal tribunals, or trying to square the circle

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## Abstract

*This article looks at the role of humanitarian organizations in the context of judicial procedures in a global environment which was modified by the establishment of international criminal courts. It shows the struggles and tensions that humanitarian organizations face when, on the one hand, they bring assistance and protection to victims of armed conflicts and other situations of violence and, on the other hand, they contribute to the fight against impunity in cases of grave violations of international humanitarian law. The author suggests some elements of an operational framework which should contribute to the achievement of these difficult-to-reconcile objectives.*



It is a well-known fact that humanitarian organizations operating in conflict areas to assist and protect the civilian population often learn things that could be used as evidence in international criminal proceedings. Because they work in the field, these organizations are in a position to relate events and may even witness or be direct victims of serious violations of international humanitarian law. They are

\* The opinions expressed herein are those of the author and are in no way intended to represent the views of organizations with which she is, or has been, associated.

sometimes the only international presence that the parties to the conflict will allow in sensitive areas, precisely where violations of humanitarian law are most likely to occur. This is not merely speculation; in practice, the prosecutors of international criminal tribunals have had recourse to the voluntary testimony of representatives of humanitarian organizations in various cases. It was, in fact, on the basis of this practice that the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) sought to have a former employee of the International Committee of the Red Cross (ICRC) testify in 1999. This resulted in an important ruling on the absolute testimonial immunity of the ICRC, which was subsequently included in the constitutive documents of the International Criminal Court (ICC).

With the ICC now becoming operational, the question of the role of humanitarian organizations in international criminal proceedings has particular resonance, extending beyond the limited geographical jurisdiction of ad hoc tribunals. It covers all situations that the ICC might investigate, which are very often those in which humanitarian operations have been, or are being, deployed. In their investigations ICC representatives come into contact with national and international humanitarian players, with representatives of third states, and with international and non-governmental organizations, all working to different ends among the same populations. Some organizations operating in the field are also actively involved in gathering evidence that could be useful to the ICC Prosecutor, making it difficult at times to draw a clear distinction between all the players concerned. Attacks on humanitarian workers just after the ICC issued the first arrest warrants in Uganda would seem to suggest that individuals fearing prosecution by the ICC regard organizations working in the field as auxiliaries in the inquiry, potential informants or key witnesses for the prosecution.<sup>1</sup> They may be tempted to try and get rid of humanitarian organizations, either by directly threatening the safety of their workers or by simply refusing them access to the scenes of their crimes and, consequently, to the populations directly affected by them.

The purpose of this paper is to provide insight into the state of the relationship that has developed between humanitarian organizations and the international criminal tribunals since the latter's establishment. The paper refers to humanitarian organizations as a group, as far as this is possible, although, in practice, the fact that their mandates differ significantly can affect the nature of their relationship with judicial bodies. The paper also seeks to present the legal framework in which this relationship can work and the incentives established to encourage the co-operation of these important players in judicial proceedings. In this connection it examines the relevant provisions of the constitutive documents of the international criminal tribunals and recent developments in related case-law. The second part of the paper focuses on the conditions required to ensure

1 For references to these incidents in the press, see Oxfam International, "Recent killings of aid workers leave hundreds of thousands without help and living in fear in northern Uganda" (press release, 26 October 2005), available at <[http://www.oxfam.org/en/news/pressreleases2005/pr051026\\_uganda](http://www.oxfam.org/en/news/pressreleases2005/pr051026_uganda)> (last visited 5 April 2006).

that the global system for humanitarian action can fulfil the twofold objective of assisting and protecting victims of armed conflict or other forms of violence and of punishing serious violations, when the latter involves co-operation with international criminal tribunals. In this regard, the paper takes a look at the measures that could be adopted with a view to prevention, that is, before judicial co-operation is actually required. This is followed by a review of the different courses of action and arrangements that humanitarian organizations can adopt to minimize the impact of participation in legal proceedings on their operations and those of other organizations, when judicial co-operation is inevitable.

### **Appraisal of the relationship between humanitarian organizations and international criminal tribunals**

The establishment of international criminal tribunals and the fact that humanitarian organizations are seen to possess information that could be used as evidence in international criminal proceedings has forced those organizations to assess the impact of judicial co-operation on their ability to fulfil their mandate. Generally speaking, however, they have not published any policies they may have adopted to establish a framework for such co-operation, although this has not prevented them, in practice, from establishing links with international criminal tribunals. Only the ICRC has felt the need to recall its policy in this regard, including it in the broader framework of its guidelines on action in the event of violations of international humanitarian law.<sup>2</sup> These guidelines make it clear that the ICRC does not participate in legal proceedings, which means that it does not provide internal or confidential documents or testimony, even when protection is provided. It is, however, prepared to provide to any party that requests them documents that have already been made public, something which has been done on a number of occasions. It is also ready to maintain contacts with judicial bodies on general issues relating to the application or interpretation of international humanitarian law.<sup>3</sup> In this way, the ICRC seeks to balance its operational prerogatives and the duty it has to promote international humanitarian law and combat impunity.

Other humanitarian organizations have pushed back the boundaries of co-operation, agreeing to take part in international legal proceedings in different ways. Developments show that the ad hoc international criminal tribunals have adopted the practice of submitting reports produced by humanitarian and human rights organizations as evidence for the prosecution, in some cases without the

2 “Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence”, *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400, also available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList598/7DC331BDCEDA586BC1257060002AB5B0>> (last visited 5 April 2006) (hereinafter Guidelines). An earlier version of these guidelines was published in the *International Review of the Red Cross*, No. 221, March–April 1981, pp. 76–83.

3 Guidelines, p. 398.

author having to testify in court. When referred to in judgments, these reports would appear to have probative value, at least for the purpose of putting specific crimes into context. Some humanitarian organizations have also agreed to testify voluntarily for the prosecution, although it may be that they could have been forced to do so by virtue of the broad coercive powers granted to the ad hoc international criminal tribunals to ensure the co-operation of individuals or entities in a position to provide evidence of violations.

As a general rule the co-operation of humanitarian organizations is carefully circumscribed in negotiations with the party that wants them to give evidence, most often the Prosecutor. Testimony may also be conditional on certain requirements, which are discussed in detail below. The jurisprudence of the two ad hoc international criminal tribunals supplements the applicable legal instruments, specifying the conditions under which protective measures or privileges, whether established in their constitutive documents or not, are granted, and stipulating which organizations may benefit from them.

### Legal framework for testimony given by humanitarian organizations and applicable provisions

Three cases are distinguished here: the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone and the ICC.<sup>4</sup>

#### *The International Criminal Tribunals for the former Yugoslavia and Rwanda*

The Statutes of the two ad hoc international criminal tribunals impose an express obligation on states to co-operate with them.<sup>5</sup> They specifically provide that states must co-operate with the tribunals and comply without undue delay with any request for assistance with the taking of testimony and the production of evidence. The binding force of this obligation derives from the provisions of Chapter VII and Article 25 of the Charter of the United Nations.<sup>6</sup> States are therefore required to adopt domestic measures establishing a system for the purpose of obtaining, by force if necessary, any evidence requested by the tribunals from natural or legal persons. If they refuse to comply, they can be found in contempt of court.

When humanitarian organizations are approached by the defence or the prosecution and asked to co-operate, they can have recourse to various

4 On this subject see K. Mackintosh, “Note for humanitarian organizations on cooperation with international tribunals”, *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, pp. 131–46.

5 ICTY Statute, Article 29; ICTR Statute, Article 28. This obligation is restated in UN Security Council Resolution 827 (1993), para. 4, concerning the ICTY and in Resolution 955 (1994), para. 2, concerning the ICTR. See also Article 54 of the Rules of Procedure and Evidence (RPE) of the Tribunals.

6 ICTY, *Blaskić*, Appeals Chamber, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 26.

mechanisms established in the texts, particularly if they are required to testify in court, in order to minimize the impact of co-operation on their operations and to keep publicity to a minimum, if they so wish and all the conditions are met. For example, they can provide the prosecution with information but ask it not to disclose the source, even when the evidence is exculpatory and regardless of the intended purpose.<sup>7</sup> They can also ask for protective measures to be applied, such as non-disclosure of the information to the general public and even the defence,<sup>8</sup> or request leave to provide evidence in a written statement rather than as oral testimony in court.<sup>9</sup>

### *Sierra Leone*

The conditions established for the Special Court for Sierra Leone are similar to those applying to the two ad hoc international criminal tribunals, except that, in this case, only the state of Sierra Leone is bound by the obligation to co-operate with the Court. In an agreement between Sierra Leone and the United Nations, the government undertakes to co-operate with the Special Court.<sup>10</sup> In keeping with the spirit of this agreement, the implementing legislation provides that any orders issued by the Court shall have the same force or effect as orders issued by domestic courts, which means that recalcitrant witnesses on the territory of Sierra Leone, including people associated with humanitarian organizations, can be compelled to testify before the Court.<sup>11</sup> However, it is clear that this power does not extend beyond the borders of Sierra Leone and that there is no similar obligation binding on other states.

### *International Criminal Court*

Unlike the two ad hoc international criminal tribunals, which were established by Security Council resolutions in accordance with Chapter VII of the Charter of the United Nations, the ICC was established on a consensual basis. Furthermore, while the international criminal tribunals have primacy over domestic courts, the ICC is intended to complement them, and all the co-operation mechanisms that have been established are based on this premise. Therefore the binding force of the ICC does not derive from the powers vested in the Security Council by the Charter of the United Nations. However, the

7 RPE of the Tribunals, Rules 68 (amended in 2004) and 70. For an extensive interpretation of this provision, which does not take into account the purpose of disclosure on a confidential basis (for example, for the purpose of generating new evidence), see ICTY, *Milosević*, Appeals Chamber, Case No. IT-02-54, public version of the confidential decision on the interpretation and application of Rule 70 of the RPE of the Tribunals (23 October 2002), paras. 20 and 25.

8 *Ibid.*, Rule 75.

9 *Ibid.*, Rule 92 *bis*.

10 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 17 (16 January 2002).

11 The Special Court Agreement, 2002, Ratification Act, 2002, Article 20.

obligation to co-operate remains for both states that are party to the Rome Statute of the ICC and those that are not because they are bound by the provisions of international law in general and international humanitarian law in particular. More specifically, the Rome Statute establishes that states parties have a general obligation to co-operate fully with the ICC in the investigation and prosecution of crimes undertaken by it.<sup>12</sup> It further provides that states must comply with requests by the ICC to provide assistance in facilitating the voluntary appearance of persons as witnesses before the court, which suggests that the ICC itself does not possess the necessary powers to compel a witness to testify.<sup>13</sup> It is of course possible, however, for domestic implementing legislation to go beyond the requirements of the Statute and establish sanctions for recalcitrant witnesses.

States not party to the Rome Statute are clearly not bound by any obligation to co-operate under treaty law. The possibility established in the Statute for those states to co-operate with the Court<sup>14</sup> fits neatly with their obligation under international humanitarian law to stop grave breaches. It could also be considered that states not party to the Statute that do co-operate are complying with their obligation to take action to put an end to serious violations of international humanitarian law.<sup>15</sup>

The constitutive documents of the ICC establish mechanisms similar to those of the ad hoc international criminal tribunals to encourage witnesses to testify or provide evidence. The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that were obtained on a confidential basis and solely for the purpose of generating new evidence.<sup>16</sup> Similarly, witnesses may rely on various measures which were established to protect them and which limit the information that is made public.<sup>17</sup> It is expressly provided that any such measures taken by the ICC must be exercised in a manner that is not prejudicial to or inconsistent with the rights of the accused and the standards that ensure a fair and impartial trial and must take into account the needs of all victims, a requirement that is not made for the ad hoc tribunals.<sup>18</sup> In short, humanitarian organizations may take advantage of the confidentiality rule, arguing that the information that they have access to in the course of their work is not subject to disclosure.<sup>19</sup> While only the ICRC is recognized as being covered by professional privilege, which means that any information, documents or other evidence which comes into its possession in the course of the performance of its functions is privileged and therefore not subject to disclosure,

12 Rome Statute, Article 86.

13 *Ibid.*, Article 93(1)(e).

14 *Ibid.*, Article 87(5).

15 Additional Protocol I, Article 89.

16 Rome Statute, Article 54(3)(e), and ICC RPE, Rule 82.

17 Rome Statute, Article 68.

18 *Ibid.*

19 ICC RPE, Rule 73.

the rules do allow other humanitarian organizations to prove that their information is confidential.<sup>20</sup>

## Jurisprudence

Decisions handed down by the two ad hoc international criminal tribunals and the Special Court for Sierra Leone since 1999 have supplemented the ruling issued in the *Simić* case concerning humanitarian workers in general. Some of these decisions consider the provisions described above and stipulate the conditions of application, while others examine the question of recognition of privilege, which would provide protection for humanitarian workers and prevent from them being forced to testify because of the nature of the work they carry out.

### *The International Committee of the Red Cross: the Simić case*

This well-known case raised the question of whether a former ICRC interpreter could testify as a prosecution witness, acting on his own initiative, in a case being tried by the ICTY.<sup>21</sup> In a decision issued in July 1999, the trial chamber came to the conclusion that the ICRC enjoys an absolute privilege to withhold information and that it therefore cannot be compelled to testify or produce evidence of any kind. The trial chamber added that this privilege is part of international customary law and is binding on the Tribunal.

While recognizing the privilege of non-disclosure, the trial chamber took the precaution of limiting the applicability of the finding in the *Simić* case as a precedent for other humanitarian organizations. It emphasized the *sui generis* status of the ICRC among humanitarian organizations and recognized that it has the international legal personality necessary to carry out the “fundamental task” conferred upon it by the international community in accordance with the relevant provisions of international humanitarian law, namely to “assist and protect the

20 Para. 2 of Rule 73 reads: Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that: a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and c) Recognition of the privilege would further the objectives of the Statute and the Rules. The conditions established in sub-paragraphs (a) and (b) stipulate that disclosure may only be ordered when the interested party consents to such disclosure or when it has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

21 Various authors have discussed this case: G. Rona, “The ICRC privilege not to testify: Confidentiality in action”, available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList109/C3B5CC5CF93CE974C1256E4E00351893>> (last visited 5 April 2006); S. Jeannot, “Recognition of the ICRC’s long-standing rule of confidentiality”, *International Review of the Red Cross*, No. 838, June 2000, pp. 403–26; S. Jeannot, “Testimony of ICRC delegates before the International Criminal Court”, *International Review of the Red Cross*, Vol. 82, No. 840, December 2000, pp. 993–1000; A.-M. La Rosa, *Juridictions pénales internationales – la procédure et la preuve*, Presses Universitaires de France, Paris, 2003, pp. 157–210.

victims of armed conflicts”.<sup>22</sup> It further specified that this evidentiary immunity is largely based on the ICRC’s long-standing practice of working with the parties to a conflict with utmost discretion and confidentiality, an approach based on its consistent adherence to the basic principles governing its activities, particularly impartiality, independence and neutrality. The chamber adds that “the breach of confidentiality [testifying in particular] would have the adverse effect of destroying the relationship of confidence on which [the ICRC] operates”.<sup>23</sup> This distinguishes the ICRC still further from other humanitarian organizations, whose statutes or practice encourage denunciation of the violations that they witness. Another decision of the ICTY concerning a war correspondent, rendered in 2002 by the Appeals Chamber, gives a clearer indication of the measures that the tribunal is prepared to take to accommodate humanitarian actors.

### *War correspondents: the Brdjanin case*

As part of this case the Appeals Chamber heard an appeal concerning a subpoena issued by the trial chamber to compel a war correspondent to testify in connection with an interview he conducted while reporting on the conflict in the former Yugoslavia.<sup>24</sup> Specifically, in February 1993 the *Washington Post* carried an article by the appellant, Jonathan Randal, about an individual who was being prosecuted by the ICTY. The article contained statements by the accused which could have indicated his criminal intent to commit some of the crimes with which he was charged. The subpoena was intended to permit the journalist to be questioned in court about the reliability of the statements quoted in his article. It is important to note that this decision did not concern the protection of confidential sources, as the interview had already been published. The issue here was whether a privilege should be recognized for war correspondents, allowing them to refuse to testify in legal proceedings.

The Chamber considered that it needed to address three questions. First, is there a public interest in the work of war correspondents? If there is – and this is the second question – would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work and, if so, what test is appropriate to balance the public interest in accommodating the work of war correspondents against the public interest in having all relevant evidence available to the court and, where appropriate, the right of the defendant to challenge the evidence against him? These questions can also be asked, as discussed below, in respect of the protection of the sources of an official working for the Office of the United Nations High Commissioner for Human Rights (UNHCHR) in a case being tried by the Special Court for Sierra Leone.

22 *Simić*, Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (27 July 1999), paras. 47 and 72.

23 *Ibid.*, para. 64.

24 *Brdjanin*, Appeals Chamber, Case No. IT-99-36, Decision on interlocutory appeal (11 December 2002).

On the first two questions, the Chamber found in the affirmative. In its view, war correspondents play a vital role in bringing the horrors and reality of conflict to the attention of the international community.<sup>25</sup> It is because their investigative work and reporting enables citizens of the international community to receive vital information from war zones that it is important to protect the ability of war correspondents to carry out their functions and not because they occupy some special professional category. The Appeals Chamber acknowledged that it is impossible to determine with certainty whether and to what extent compelling war correspondents to testify before the ICTY would hamper their ability to work, but was reluctant to discard such a possibility lightly. What really matters is that war correspondents must continue to be perceived as independent observers and not potential witnesses for the prosecution. It therefore considered that

compelling war correspondents to testify before the International Tribunal *on a routine basis* may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern. The Appeals Chamber will not unnecessarily hamper the work of professions that perform a public interest.<sup>26</sup>

In short, before forcing a war correspondent to testify in court, the Chamber considered that the tribunal must weigh the public interest in facilitating the work of war correspondents against the interest of justice in having all relevant evidence put before it for proper assessment. Taking these conditions into account, the Tribunal can only issue a subpoena to a war correspondent if a two-pronged test is satisfied. First, it must be demonstrated that the evidence sought is of direct and important value in determining a core issue in the case and, second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.<sup>27</sup>

This decision of the ICTY Appeals Chamber has particular resonance, given the authority issuing it, and is binding on the trial chambers.<sup>28</sup> Furthermore, it should not be forgotten that the two ad hoc international criminal tribunals share the same appeal judges<sup>29</sup> and that the Special Court for Sierra Leone is guided, as established in its constitutive documents, by the findings of their Appeals Chamber.<sup>30</sup>

### *United Nations High Commissioner for Human Rights – the Brima case*

In this case, which is still in progress, the prosecution appealed against a trial chamber's decision to order a former member of the UN Mission in Sierra Leone

25 Ibid., para. 36. It further observes that "The information uncovered by war correspondents has on more than one occasion provided important leads for the investigators of this Tribunal."

26 Ibid., para. 44 (emphasis added).

27 Ibid., para. 50.

28 On this subject see ICTY, *Aleksovski*, Appeals Chamber, Case No. IT-95-14/1, Judgment (24 March 2000), para. 107. See also ICTR, *Semanza*, Appeals Chamber, Case No. ICTR-97-20, Decision, Separate Opinion of Judge Shahabuddeen (31 May 2000).

29 ICTR Statute, Article 13, para. 4; ICTY Statute, Article 14, para. 4.

30 Statute of the Special Court for Sierra Leone, Article 20, para. 3.

to disclose the names of his sources for information contained in the reports that he produced on the situation in the country during the period relevant to the indictment of the case.<sup>31</sup> In other words, the Prosecutor is opposed to such an official being compelled by the Court to breach the understanding of confidentiality established with a third party prior to and in order to obtain information relevant to the performance of his functions.<sup>32</sup>

The appeal examines the scope of the provisions of the Rules of Procedure and Evidence aimed at protecting the sources of information submitted to the court and raises the question of whether this category of employee can, by reason of the nature of the work they carry out, claim privilege, which would allow them to decline to reveal the identity of their sources. In the past, this question had been resolved by simply not compelling witnesses to disclose such information without the chamber having to rule on whether privilege existed or not.<sup>33</sup> In view of their prominent role in this area, UNHCHR, Amnesty International and Human Rights Watch were granted leave to appear as *amici curiae*.<sup>34</sup>

While bearing some resemblance to the earlier cases mentioned above, this case differs substantially in various respects. It involves a United Nations official who belongs to the same system as the ad hoc international criminal tribunals and whose primary function is to report human rights violations. In this capacity, the sole purpose of his work is denunciation, and he should be encouraged to testify before the international criminal tribunals – as mentioned by the Chamber – because the purpose of the reports he produces is to gather first-hand information from people who have been witnesses to or victims of violations within the jurisdiction of these tribunals. As some of the people he talks to fear the publicity that their testimony could attract, he usually promises not to reveal their identity. In this case, then, confidentiality is associated with the relationship of trust developed with the people able to provide information and not with the authorities, with which he generally has no contact at all in this respect. He needs to ensure confidentiality in order to establish sufficient credibility to encourage the people he approaches to confide in him. The international criminal tribunals have systematically recognized jurisdictional immunity for such employees, in their capacity as United Nations officials, which requires the chambers to seek a waiver

31 Special Court, *Brima*, Case No. SCSL-04016, Decision on the Prosecution's oral application for leave to be granted to witness TF1-150 to testify without being compelled to answer any questions in cross-examination that the witness declines to answer on grounds of confidentiality pursuant to rule 70 (B) and (D) of the Rules (16 September 2005). See *ibid.*, Dissenting Opinion of Justice Doherty on the Prosecution's oral application for leave to be granted to witness TF1-150 to testify without being compelled to answer any questions in cross-examination that the witness declines to answer on grounds of confidentiality pursuant to rule 70 (B) and (D) of the Rules (22 September 2005).

32 *Ibid.*, Prosecution appeal against decision on oral application for witness TF1-150 to testify without being compelled to answer questions on grounds of confidentiality (19 October 2005), para. 50.

33 ICTY, *Blaskić*, Case No. IT-95-14, Decision of Trial Chamber I on protective measures for General Philippe Morillon, witness of the Trial Chamber (12 May 1999); ICTR, *Bizimungu*, Case No. ICTR-99-50, Decision on Defence motion for exclusion of portions of testimony of expert witness Dr. Alison Des Forges (2 September 2005).

34 Their briefs were filed on 15 and 16 December 2005, and the joint defence response was issued on 17 January 2006.

of immunity from the Secretary-General if they want them to testify in court. The privilege of non-disclosure of sources would then be added to jurisdictional immunity, which in this case had been waived on the condition that he testify in closed session, which had already been allowed.<sup>35</sup>

In the light of the foregoing, it seems difficult to draw any kind of analogy between this and the *Simić* case, which is concerned with the absolute testimonial immunity of the ICRC and is based on legal considerations that do not apply here. Taking into account the *sui generis* nature, the legal status and the fundamental mission of the ICRC to help victims, which are derived from the fundamental texts of international humanitarian law recognized by the international community as a whole, the principles underlying the organization's activities and the working procedures it employs, the *Simić* case cannot be considered as a precedent to be relied on in this case or in other cases involving other humanitarian actors. The ICRC's hallmark practice of working with the utmost discretion and confidentiality has the objective of establishing the relationship of trust with the authorities and the parties to the conflict upon which the ICRC depends to obtain access to the victims, and therefore to carry out its mandate, and not of gathering evidence for reporting and denunciation purposes, as in the *Brdjanin* case. The *Brdjanin* case could, however, provide some guidance in that it establishes an approach that recognizes the existence of competing public interests, balances them against each other and proposes a solution that ensures that justice is done and that fair trial standards are fully respected. This is, in fact, the view put forward in the dissenting opinion issued by one of the judges.<sup>36</sup>

### *Volunteers of National Red Cross and Red Crescent Societies*

Two decisions have been issued in connection with two different cases brought before the ICTR concerning volunteers working in the field for national societies in the territory of a third state during a conflict. They raised the question of whether humanitarian workers belonging to institutions that are part of the International Red Cross and Red Crescent Movement, as the ICRC is, are entitled to the same kind of testimonial immunity that the ICRC enjoys when they are involved in international relief operations and, if so, to what extent and under what conditions. In both cases, the defence objected to prosecution witnesses testifying, arguing that it was necessary first to obtain permission from the ICRC, because the principle of testimonial immunity recognized in the *Simić* case applied.

Both decisions recognize the absolute testimonial immunity of the ICRC, which prevents any current or former employee from testifying in a court of law.<sup>37</sup>

35 It should be noted that this same witness was compelled (but refused) to reveal his sources in the *Norman* case (Case No. SCSL-03-14), in which he testified in closed session.

36 *Brima*, above note 31.

37 ICTR, *Nyiramasuhuko*, Case No. ICTR-97-21, Decision on Ntahobali's extremely urgent motion for inadmissibility of witness TQ's testimony (15 July 2004); *Muvunyi*, Case No. ICTR-2000-55, Reasons for the Chamber's decision on the accused's motion to exclude witness TQ (15 July 2005).

While in the first decision the chamber avoided deciding the question of fact, arguing that neither the ICRC nor the national society in question was opposed to the witness testifying, in the second, it comes to the conclusion that the witness was working for the national society and not the ICRC when he observed the events relevant to the case.<sup>38</sup> The chamber further finds that the testimonial privilege of the ICRC does not apply to national societies,<sup>39</sup> except in cases in which national society employees are integrated into ICRC teams for a limited period of time.<sup>40</sup> In such cases, the integration to which the Chamber refers is distinct from international relief operations where the components of the Movement co-ordinate themselves.<sup>41</sup> However, it adds that no evidence has been proffered to establish that national societies could, in certain situations, be entitled to testimonial immunity in their own right, implying that it does not completely rule out the possibility of demonstrating the existence of a form of testimonial immunity for national societies that is not dependent on the immunity granted to the ICRC. However, the conditions and methods of application remain to be defined. In short, while the Chamber considered that it was under no obligation, under international law, to seek the permission of the national society to hear the testimony of the witness, it is nonetheless regrettable that the party intending to call the volunteer as a witness – the prosecution in this case – did not first contact the national society at the appropriate time in order to offer it an opportunity to intervene if it so wished.

### **Assistance for victims and repression of violations: reconciling the irreconcilable in the global system for humanitarian action?**

In the face of the growing complexity of the humanitarian environment, it is legitimate to ask whether it is still possible and workable to pursue the twofold objective of assisting victims and publicly condemning violations in the current humanitarian environment, particularly when the latter involves co-operating with international criminal tribunals working in the same theatre of operations. If humanitarian organizations are associated with judicial bodies in the field, those

38 *Muvunyi*, above note 37, para. 14.

39 More specifically, the Chamber emphasizes: 15. ... the ICRC and national Red Cross societies are entirely different organizations in law and a clear distinction between them needs to be drawn at all times. The [Belgium Red Cross Society] is a *national* organization with a *national* statute and *national* arrangements. It is governed by means of organs set up by its statutes...16. While international law grants the ICRC the exceptional privilege of non-disclosure of information which is in the possession of its employees and which relates to the ICRC's activities, and consequently bars the Chamber from admitting such information, it is the Chamber's view that such privilege is *not* granted to national Red Cross societies. The privilege derives from the ICRC's pivotal and unique role in the regime established by the Geneva Conventions and the first Protocol. (citations omitted)

40 *Muvunyi*, above note 37, para. 17.

41 *Ibid.*, para. 16. On this subject, see Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement ("Seville Agreement"), Council of Delegates, 25–27 November 1997, particularly Articles 5 and 6 (situations where the ICRC undertakes general direction and co-ordination).

individuals who are liable to prosecution are likely to feel threatened and may attempt to neutralize them. They may decide to cease all co-operation, denying or restricting access to victims, without making any distinction between the different organizations operating in the area. Experience has shown that, unfortunately, there are those who will not hesitate to threaten or compromise the safety of the staff of humanitarian organizations, forcing them to leave the area and cease their activities aimed at helping the affected populations. In the resulting climate of tension and hostility, the organizations that are still allowed access to the victims are likely to see the humanitarian dialogue with the parties concerned deteriorate.

This is by no means a plea to standardize the modes of action employed by humanitarian organizations, to favour one working procedure over another or to remain inactive in the face of violations of fundamental rights. The existence of a variety of modes of action seems, in practice, to serve the interests of the victims. The aim, rather, is to focus attention on the formulation of conditions that make for a better understanding of the working procedures of humanitarian organizations by all their contacts and ensure that their policy on co-operation with international criminal tribunals is as consistent and predictable as possible. However, if, in the light of established criteria, a humanitarian organization decides to co-operate with an international criminal court or is compelled to do so, it must be fully aware of the consequences and make use of the mechanisms established in the relevant provisions to minimize the impact of such action on other activities that it carries out and on the global humanitarian environment.

### More predictable policy: thinking before the need to co-operate in judicial proceedings arises

Denunciation and persuasion are two courses of action or approaches adopted in response to or in anticipation of violations, with a view to promoting greater respect for international law. Persuasion is used to convince the authorities responsible for unlawful conduct to prevent or put an end to violations of international norms, while public condemnation of violations is used as a means of putting pressure on the authorities or other entities that have committed violations to change their behaviour. These are complementary modes of action used in response to violations, and it is up to each individual organization to assess the situation and choose the approach that will enable it to achieve the best results. For example, the ICRC's preferred mode of action in response to a violation of international humanitarian law committed by a specific party is to make representations within the framework of a bilateral confidential dialogue with that party.<sup>42</sup> This institutional choice arises from a pragmatic approach based on years

42 With regard to the guidelines mentioned above, this approach is also preferred in other situations of violence in which the ICRC operates. See above, note 1. See also J. Kellenberger, "Speaking out or remaining silent in humanitarian work", *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 593–609. For an analysis of ICRC working procedures relating to detention, see A. Aeschlimann, "Protection of detainees: ICRC action behind bars", *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 83–122.

of experience, which has shown that confidentiality enables candid talks to take place with the authorities and entities concerned, avoiding the risk of politicization associated with public debate. This policy also has the long-term objective of achieving a permanent change in behaviour and thereby contributing to a lasting improvement in the situation and, in turn, easing the plight of populations affected by conflicts or situations of violence.

However, in many situations the ICRC works side by side with other organizations, which may be more vocal in speaking out to condemn violations while at the same time pursuing the other component of the twofold objective, that of assisting those affected by violations. It is not a matter of favouring one mode of action over another or of evaluating which is more effective; they should simply be regarded as complementary modes of action that are implemented to deal with violations and that enrich the global system of humanitarian protection and assistance.

The advent of international criminal tribunals with the authority to try people responsible for serious violations of international humanitarian law has undoubtedly changed the face of humanitarian action in terms of the potential consequences of the modes of action preferred by humanitarian actors and, more importantly, the way that they are perceived by the parties to the conflict. In this new environment, where humanitarian organizations are believed to possess first-hand information, denunciation is no longer confined to issuing public statements, but has become synonymous with judicial proceedings. As mentioned above, this association is likely to affect the quality of humanitarian dialogue and encourage people who are potential targets of such tribunals to limit access to the scenes of their crimes, which would have disastrous consequences for humanitarian action as a whole. Efforts to minimize these adverse consequences would be greatly furthered by rendering more predictable the conditions that would ensure that the parties concerned have a better understanding of the cases where these organizations could have recourse to a denunciation policy involving co-operation in international criminal proceedings. It should be clearly established that humanitarian organizations, that is, organizations that endeavour to relieve the suffering of individuals, being guided solely by their needs, without discrimination of any kind,<sup>43</sup> do not work for international criminal tribunals, even if they do share the same ideals.

This is the context in which the ICRC published its guidelines in June 2005 on action in the event of violations of international humanitarian law or other fundamental rules protecting persons in situations of violence. While emphasizing that the preferred mode of action of the ICRC is to make bilateral confidential representations, the guidelines also make it clear that confidentiality is not an end in itself, nor is it unconditional: in reality, the “purpose and the

43 Taken from the Fundamental Principles declared by the 20th International Conference of the Red Cross, quoted by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, Merits, Rec. 1986 pp. 14 ff., para. 242.

justification of the ICRC's confidentiality thus rest on the quality of the dialogue that the ICRC maintains with the authorities and on the humanitarian impact that its bilateral confidential representations can have".<sup>44</sup> In the event that its representations do not have the desired impact, the ICRC reserves the right to have recourse to other subsidiary modes of action, including public condemnation, the conditions for which are specified in detail in the guidelines.<sup>45</sup>

The ICRC will issue a public statement to the effect that acts attributed to a party to a conflict constitute a violation of international humanitarian law only in exceptional circumstances and when all of the following four conditions are met:

- (1) the violations are major and repeated or likely to be repeated;
- (2) its delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources;
- (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations; and
- (4) such publicity is in the interest of the persons or populations affected or threatened.<sup>46</sup>

The guidelines explain that the ICRC resorts to issuing a public declaration when it hopes that this will prompt the authorities or other parties to a conflict to improve the substance of its dialogue with the ICRC and take account of its recommendations. By laying down strict conditions under which the ICRC may resort to this mode of action and making them public, it seeks to avoid taking any of the parties unawares, which could lead to reactions that are counterproductive for humanitarian dialogue.

Public condemnation by the ICRC must not, however, be confused with providing evidence to an international criminal tribunal. These are two different modes of action which do not serve the same purpose, are not part of the same logic and do not involve the same authorities. The purpose of humanitarian action is, above all else, to save lives, not to establish criminal responsibility. This is a justification for the ICRC not to provide testimony or confidential documents in connection with investigations or legal proceedings relating to specific violations, even on a confidential basis.<sup>47</sup> In practice, those working for humanitarian organizations are generally ill-equipped to collect evidence in accordance with the technical standards required for judicial proceedings.

44 Guidelines, above note 2, p. 395.

45 In addition to public condemnation, the guidelines also mention humanitarian mobilization and a public statement on the quality of the bilateral confidential dialogue as other subsidiary modes of action that could be employed before proceeding to public condemnation.

46 The same guidelines apply to violations of fundamental rules protecting persons in situations of violence.

47 Guidelines, above note 2, pp. 398–9.

## Development of modes of action aimed at minimizing the impact of judicial co-operation

There are various ways of minimizing the impact of judicial co-operation on the humanitarian environment, based on practice and the relevant texts of the ad hoc international criminal tribunals. However, it is important to note that it is not so much the actual act of co-operating in judicial proceedings as the risks such co-operation entails that can jeopardize activities intended to protect and assist victims.

### *Argument based on privilege*

The above-mentioned developments in jurisprudence reveal that some international and non-governmental organizations operating mainly in the field of human rights rely on the nature of their mandate (UNHCHR) or the functions that they perform (Amnesty International and Human Rights Watch) for recognition of the right of non-disclosure of information in judicial proceedings. If recognized, this privilege could, by analogy, be extended to other humanitarian organizations. It has already been observed that the precedent set by the *Simić* decision is of little use in establishing such recognition. The *Brdjanin* case, however, offers more possibilities, as the tribunal considers that it is a matter of weighing competing public interests and ensuring that justice is done according to fair trial standards. This is, in fact, what the *amici curiae* and the Prosecutor of the Special Court for Sierra Leone are attempting to demonstrate in the case involving a former member of the United Nations Mission in Sierra Leone, when they argue for recognition of privilege allowing him not to reveal the sources of the information used in the reports he produced, on the grounds that he needs to preserve the relationship of trust with potential witnesses and direct victims of violations in order to obtain information from them.

Obviously, all these organizations can also claim a non-disclosure privilege for employees belonging to certain professional categories (lawyers, doctors, etc.), for which professional privilege is traditionally acknowledged, owing to the confidential nature of the work involved.

### *Protection of confidentiality*

As mentioned above, humanitarian organizations can also provide information to the requesting party on condition that it is kept confidential.<sup>48</sup> Although there is no guarantee that the information provided by the organization or the fact that it co-operated will not be leaked, resulting in the undesirable consequences described above, this mode of action enables humanitarian organizations to concentrate, at least in the public eye, on providing assistance to populations in

<sup>48</sup> See above, text accompanying footnotes 7 to 20.

need. The mechanisms available for preserving confidentiality can also be useful in cases in which organizations are compelled to provide information in their possession.

### *Testifying: protective measures and forms of testimony*

Testifying in court is the most visible form of co-operation with international criminal tribunals. However, there are certain mechanisms that can be employed to minimize visibility. For example, a humanitarian organization can ask for protection measures to be applied provided that the conditions established in the relevant provisions – mainly related to safety and security – are met. Measures include testifying in closed session, non-disclosure of the records of the trial to the public and removing names and identifying information from the court's public records. A request can also be made for witnesses to provide evidence in a written statement rather than testify in court or to appear as expert witnesses, who, in practice, seem to be granted more latitude to maintain the confidentiality of their sources.<sup>49</sup>

However, when an organization is asked by one of the parties to testify in international criminal proceedings, it should not wait for the court to issue a binding order before negotiating the conditions under which it will appear. In practice, the court is generally disposed to grant measures of protection agreed with the parties in advance, including testifying in closed session, even if this sometimes compromises the principle of openness in judicial proceedings.

## **Concluding remarks**

International criminal repression as a means of punishing, preventing and putting a stop to serious violations of international humanitarian law has become one of the preferred modes of action supported almost unanimously by states, international organizations and the civil society, and the fact that international criminal tribunals have become operational has undoubtedly changed the face of the global humanitarian environment. It has been seen that the presence of a judicial component in the field can cause individuals liable to criminal investigation and prosecution – who are often those in a position to improve the situation – to withdraw from humanitarian dialogue and even deny humanitarian organizations access to the scenes of their crimes and, consequently, the victims. They may also be tempted to threaten the safety of humanitarian workers, regarding them as potential witnesses for the prosecution.

Admittedly, humanitarian organizations face a very difficult dilemma, and finding a solution is like trying to square the circle. On the one hand they cannot ignore the important role of international criminal prosecution in efforts

49 ICTR, *Bizimungu*, above note 33.

to achieve greater respect for the law, while on the other they are reluctant to put their operations in the field at risk by being seen to co-operate in judicial proceedings. Furthermore, a categorical refusal to co-operate could lead to their being compelled to testify by virtue of the powers vested in international criminal courts, when immunity does not apply.

In the light of this, it is suggested that humanitarian organizations address the issue before any actual involvement in judicial proceedings is required, with a view to incorporating the terms and conditions under which they would resort to public condemnation and the extent to which this would involve judicial co-operation within the framework of a coherent operational strategy. This would allow all the parties concerned to gain a clearer perception of the modes of action employed by humanitarian organizations and make their actions more consistent and predictable. This, in turn, would help to avoid surprises and reactions that could prove counterproductive for the humanitarian environment as a whole. Efforts to increase the awareness of international criminal tribunals about these issues must continue, with a view to providing a better understanding of the scope of co-operation and the different forms it may take.

It has also been seen that, when a humanitarian organization decides to co-operate with an international criminal court or is compelled to do so, there are mechanisms, established in the relevant texts, which can be used to minimize the impact of such co-operation on its other activities and on humanitarian action in general. It is hoped that this paper, by identifying the push-and-pull factors and tensions involved in this issue, will help to define the balance to be struck between effective assistance and protection for victims – the fundamental purpose of humanitarian action – and progress in the fight against impunity, with national and international courts working together to create a truly universal system of justice.

## REPORTS AND DOCUMENTS

# Adoption of an Additional Distinctive Emblem

On 12 and 13 September 2005, Switzerland opened informal consultations on the holding of a diplomatic conference necessary for the adoption of a Third Protocol Additional to the Geneva Conventions on the Emblem in which all States party to the Geneva Conventions were invited to take part.

Meeting in Seoul from 16 to 18 November 2005, the Council of Delegates adopted by consensus a resolution in which the Council:

- welcomed the work achieved since the 28th International Conference, in particular by the Government of Switzerland in its capacity as depositary of the Geneva Conventions, resulting in the convening on December 5, 2005 of the diplomatic conference necessary for the adoption of the proposed Third Protocol Additional to the Geneva Conventions on the Emblem;
- urged National Societies to approach their respective governments in order to underline to them the necessity to settle the question of the emblem at the diplomatic conference through the adoption of the proposed draft third additional Protocol;
- requested the Standing Commission, the ICRC and the Federation as a matter of urgency to undertake the measures needed to give effect to the third Protocol after its adoption, especially with a view to ensuring the achievement as soon as possible of the Movement's principle of universality.<sup>1</sup>

The Diplomatic Conference was convened by Switzerland and held in Geneva from 5 to 8 December 2005.

*International Review of the Red Cross*

1 Council of Delegates, Seoul, 16–18 November 2005, Resolution 5: “Follow-up to Resolution 5 of the Council of Delegates in 2003, Emblem”, *International Review of the Red Cross*, Vol. 87, No. 860, December 2005, p. 768.

## **Final Act of the Diplomatic Conference on the adoption of the Third Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an Additional Distinctive Emblem (Protocol III)**

1. The Diplomatic Conference convened by the Swiss Federal Council, as the depositary of the Geneva Conventions of 1949 and their Additional Protocols of 1977, with a view to adopting the Third Protocol Additional to the Geneva Conventions, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), was held in Geneva, Switzerland, from 5 to 8 December 2005.
2. The delegations of 144 High Contracting Parties to the Geneva Conventions participated in the Conference. The list of participating High Contracting Parties is enclosed in Annex 1.<sup>2</sup>
3. The list of observers which were present at the Conference is enclosed in Annexe 2.
4. The International Committee of the Red Cross (ICRC), the International Federation of the Red Cross and Red Crescent Societies (IFRC), and the Standing Commission of the Red Cross and Red Crescent participated in the work of the Conference as experts.
5. The Conference had before it a draft of Protocol III prepared by the ICRC in consultation with the IFRC, following discussions within a Joint Working Group established by the Standing Commission of the Red Cross and Red Crescent pursuant to the mandate assigned to it by Resolution 3 of the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent and subsequent consultations, and circulated on 12 October 2000 by the depositary.
6. Under agenda item 1, the Secretary General of the Conference, Ambassador Didier Pfirter (Switzerland) opened the Conference on 5 December 2005.
7. Under agenda item 2, Federal Councillor Micheline Calmy-Rey, Head of the Swiss Federal Department of Foreign Affairs, and Mr. Jakob Kellenberger, President of the International Committee of the Red Cross, made opening statements.
8. Under agenda item 3, the Conference then proceeded to the election of Ambassador Blaise Godet, Permanent Representative of Switzerland to the United Nations Office in Geneva, as its President.
9. Under agenda item 4, the Conference adopted its rules of procedure based on the draft rules transmitted on 30 May 2005 by the depositary to the High Contracting Parties of the Geneva Conventions of 1949.
10. Under agenda item 5, the Conference approved the draft agenda presented by the depositary (Annex 3).
11. Under agenda item 6, the Conference elected the representatives of the following High Contracting Parties as Vice-Presidents: Afghanistan, Austria,

<sup>2</sup> The annexes 1 to 3 of the Final Act are not reproduced in the present issue of the *International Review of the Red Cross*.

- Chile, the People's Republic of China, the Democratic Republic of the Congo, Croatia, Ecuador, Ghana, Honduras, the Republic of Korea, Libya, Mauritania, Mexico, Nepal, Norway, the Russian Federation, Pakistan, Slovakia, Spain, Tanzania, Timor-Leste, Uganda, the United States of America.
12. Under agenda items 7 and 8, the Conference established the following organs in accordance with its rules of procedure:
    - General Committee: The President of the Conference, the Vice-Presidents of the Conference, the Chairpersons of the Drafting Committee and of the Credentials Committee and the Secretary General.
    - Drafting Committee: South Africa (chair), Brazil, Costa Rica, Ethiopia, the Hashemite Kingdom of Jordan, Japan, New Zealand, Nigeria, Pakistan, Romania, Senegal, Slovenia, the Syrian Arab Republic, the United Kingdom, the United States of America.
    - Credentials Committee: Chile (chair), Australia, Canada, the Republic of the Congo, Guatemala, Republic of Korea, Madagascar, the Syrian Arab Republic, Ukraine.
  13. Under agenda item 9, the Conference held a general debate during which statements were made by representatives of 57 High Contracting Parties, some of whom spoke on behalf of groups of States. The Conference also heard statements by observers and by participants invited in an expert capacity.
  14. The Conference heard statements by the ICRC and the IFRC concerning the name of the additional emblem. Although Protocol III referred to the additional emblem as the "third Protocol emblem", the ICRC and the IFRC informed the Conference that the designation "red crystal" had gained currency and would be introduced formally at the next International Conference of the Red Cross and Red Crescent.
  15. The President informed the Conference that, following the Informal Discussions among High Contracting Parties on 12-13 September 2005, Switzerland, as the depositary of the Geneva Conventions, had conducted intensive consultations. These latter led to the signing of a Memorandum of Understanding (MoU) and an Agreement on Operational Arrangements (AoA) between Magen David Adom in Israel (MDA) and the Palestine Red Crescent Society (PRCS) on 28 November 2005 in Geneva, which were concluded in an effort to facilitate the adoption of Protocol III and to pave the way for the admission of both societies to the International Red Cross and Red Crescent Movement at the next International Conference of the Red Cross and the Red Crescent.
  16. The Conference was also informed that Switzerland accepts to monitor the implementation of the MoU and the AoA, in close co-operation with the ICRC and the IFRC and with respect for their mandates, as well as to

report to the next International Conference of the Red Cross and Red Crescent.

17. The President of the Credentials Committee presented its report: The Committee proposed to accept the credentials of 144 delegations, entitling them to take part in the voting. The Conference adopted the Committee's report, thus closing the debate under agenda item 9.
18. In accordance with agenda item 10, the Conference proceeded to the adoption of Protocol III. The delegations of Pakistan and Yemen had previously proposed thirteen amendments, which enjoyed the support of Organization of the Islamic Conference (OIC) countries. At the request of Pakistan, a roll-call vote was held on these amendments to the Protocol III as a whole with the following results:
 

Votes cast	107
Votes in favour of the amendments	35
Votes against the amendments	72
Abstentions	29
Required 2/3 majority to accept the amendments in accordance with Art. 37 para. 2 of the rules of procedure	72
19. Explanations of vote were made by the delegations of India, Chile, Colombia, the Russian Federation, Brazil and Venezuela.
20. Having failed to gain the necessary two-thirds majority, the amendments, in accordance with Article 37 para. 2 of the rules of procedure, were thus rejected by the Conference.
21. At the request of the Syrian Arab Republic, Protocol III was then put to a roll-call vote with the following results:
 

Votes cast	125
Votes in favour of the adoption of Protocol III	98
Votes against the adoption of Protocol III	27
Abstentions	10
Required 2/3 majority to accept Protocol III in accordance with Art. 37 para. 1 of the rules of procedure	84
22. Explanations of vote were made by the delegations of the People's Republic of China, the Hashemite Kingdom of Jordan, the Democratic Republic of the Congo, Lebanon, Singapore, the Russian Federation, Kenya, Turkey, the Holy See, Pakistan, the Arab Republic of Egypt and Israel.
23. Having thus obtained the necessary two-thirds majority in accordance with Article 37 para. 1 of the rules of procedure, the Conference adopted on 8 December 2005 the Third Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem whose certified true copies of the English, French and Spanish texts are annexed to this Final Act (Annex 4)<sup>3</sup>.

<sup>3</sup> Only the English version is reproduced hereafter in the present issue of the *International Review of the Red Cross*.

24. Upon the proposal of its President, the Conference mandated the depositary of the Geneva Conventions of 1949 and their Additional Protocols to establish the Final Act of the Conference. The President then closed the Conference on 8 December 2005.
25. Protocol III was opened for signature subject to ratification on the same day, in accordance with its provisions under Article 8. It will remain open for signature subject to ratification at the Swiss Federal Department of Foreign Affairs, Berne, until 7 December 2006, whereupon it will be opened for accession in accordance with its provisions under Article 10.
26. After entry into force, Protocol III shall be transmitted by the depositary to the Secretary General of the United Nations for registration and publication.
27. This Final Act has been established by the depositary of the Geneva Conventions of 1949 and their Additional Protocols in conformity with the mandate given by the Conference on 8 December 2005.  
Done at Berne on 31 January 2006 in Arabic, Chinese, English, French, Russian and Spanish, the original and the accompanying documents to be deposited in the archives of the Swiss Confederation.

## **Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)**

### **Preamble**

*The High Contracting Parties,*

*Reaffirming* the provisions of the Geneva Conventions of 12 August 1949 (in particular Articles 26, 38, 42 and 44 of the First Geneva Convention) and, where applicable, their Additional Protocols of 8 June 1977 (in particular Articles 18 and 38 of Additional Protocol I and Article 12 of Additional Protocol II), concerning the use of distinctive emblems,

*Desiring* to supplement the aforementioned provisions so as to enhance their protective value and universal character,

*Noting* that this Protocol is without prejudice to the recognized right of High Contracting Parties to continue to use the emblems they are using in conformity with their obligations under the Geneva Conventions and, where applicable, the Protocols additional thereto,

*Recalling* that the obligation to respect persons and objects protected by the Geneva Conventions and the Protocols additional thereto derives from their protected status under international law and is not dependent on use of the distinctive emblems, signs or signals,

*Stressing* that the distinctive emblems are not intended to have any religious, ethnic, racial, regional or political significance,

*Emphasizing* the importance of ensuring full respect for the obligations relating to the distinctive emblems recognized in the Geneva Conventions, and, where applicable, the Protocols additional thereto,

*Recalling* that Article 44 of the First Geneva Convention makes the distinction between the protective use and the indicative use of the distinctive emblems,

*Recalling further* that National Societies undertaking activities on the territory of another State must ensure that the emblems they intend to use within the framework of such activities may be used in the country where the activity takes place and in the country or countries of transit,

*Recognizing* the difficulties that certain States and National Societies may have with the use of the existing distinctive emblems,

*Noting* the determination of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and the International Red Cross and Red Crescent Movement to retain their current names and emblems,

*Have agreed on the following:*

## Article 1 – Respect for and scope of application of this Protocol

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. This Protocol reaffirms and supplements the provisions of the four Geneva Conventions of 12 August 1949 (“the Geneva Conventions”) and, where applicable, of their two Additional Protocols of 8 June 1977 (“the 1977 Additional Protocols”) relating to the distinctive emblems, namely the red cross, the red crescent and the red lion and sun, and shall apply in the same situations as those referred to in these provisions.

## Article 2 – Distinctive emblems

1. This Protocol recognizes an additional distinctive emblem in addition to, and for the same purposes as, the distinctive emblems of the Geneva Conventions. The distinctive emblems shall enjoy equal status.
2. This additional distinctive emblem, composed of a red frame in the shape of a square on edge on a white ground, shall conform to the illustration in the Annex to this Protocol. This distinctive emblem is referred to in this Protocol as the “third Protocol emblem”.
3. The conditions for use of and respect for the third Protocol emblem are identical to those for the distinctive emblems established by the Geneva Conventions and, where applicable, the 1977 Additional Protocols.
4. The medical services and religious personnel of armed forces of High Contracting Parties may, without prejudice to their current emblems, make temporary use of any distinctive emblem referred to in paragraph 1 of this Article where this may enhance protection.

### Article 3 – Indicative use of the third Protocol emblem

1. National Societies of those High Contracting Parties which decide to use the third Protocol emblem may, in using the emblem in conformity with relevant national legislation, choose to incorporate within it, for indicative purposes:
  - a) a distinctive emblem recognized by the Geneva Conventions or a combination of these emblems; or
  - b) another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross through the depositary prior to the adoption of this Protocol.Incorporation shall conform to the illustration in the Annex to this Protocol.
2. A National Society which chooses to incorporate within the third Protocol emblem another emblem in accordance with paragraph 1 above, may, in conformity with national legislation, use the designation of that emblem and display it within its national territory.
3. National Societies may, in accordance with national legislation and in exceptional circumstances and to facilitate their work, make temporary use of the distinctive emblem referred to in Article 2 of this Protocol.
4. This Article does not affect the legal status of the distinctive emblems recognized in the Geneva Conventions and in this Protocol, nor does it affect the legal status of any particular emblem when incorporated for indicative purposes in accordance with paragraph 1 of this Article.

### Article 4 – International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies

The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and their duly authorized personnel, may use, in exceptional circumstances and to facilitate their work, the distinctive emblem referred to in Article 2 of this Protocol.

### Article 5 – Missions under United Nations auspices

The medical services and religious personnel participating in operations under the auspices of the United Nations may, with the agreement of participating States, use one of the distinctive emblems mentioned in Articles 1 and 2.

### Article 6 – Prevention and repression of misuse

1. The provisions of the Geneva Conventions and, where applicable, the 1977 Additional Protocols, governing prevention and repression of misuse of the distinctive emblems shall apply equally to the third Protocol emblem. In particular, the High Contracting Parties shall take measures necessary for the prevention and repression, at all times, of any misuse of the distinctive emblems

mentioned in Articles 1 and 2 and their designations, including the perfidious use and the use of any sign or designation constituting an imitation thereof.

2. Notwithstanding paragraph 1 above, High Contracting Parties may permit prior users of the third Protocol emblem, or of any sign constituting an imitation thereof, to continue such use, provided that the said use shall not be such as would appear, in time of armed conflict, to confer the protection of the Geneva Conventions and, where applicable, the 1977 Additional Protocols, and provided that the rights to such use were acquired before the adoption of this Protocol.

### Article 7 – Dissemination

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that this instrument may become known to the armed forces and to the civilian population.

### Article 8 – Signature

This Protocol shall be open for signature by the Parties to the Geneva Conventions on the day of its adoption and will remain open for a period of twelve months.

### Article 9 – Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Geneva Conventions and the 1977 Additional Protocols.

### Article 10 – Accession

This Protocol shall be open for accession by any Party to the Geneva Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

### Article 11 – Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.
2. For each Party to the Geneva Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

### Article 12 – Treaty relations upon entry into force of this Protocol

1. When the Parties to the Geneva Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.

2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

### Article 13 – Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, whether a conference should be convened to consider the proposed amendment.
2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Geneva Conventions, whether or not they are signatories of this Protocol.

### Article 14 – Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in a situation of armed conflict or occupation, the denunciation shall not take effect before the end of the armed conflict or occupation.
2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.
3. The denunciation shall have effect only in respect of the denouncing Party.
4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict or occupation, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

### Article 15 – Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Geneva Conventions, whether or not they are signatories of this Protocol, of:

- a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 8, 9 and 10;
- b) the date of entry into force of this Protocol under Article 11 within ten days of said entry into force;
- c) communications received under Article 13;
- d) denunciations under Article 14.

## Article 16 – Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.
2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

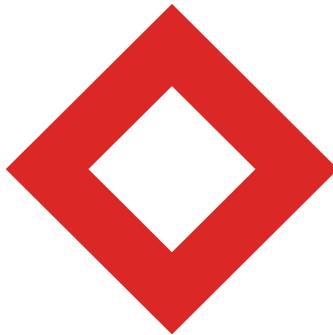
## Article 17 – Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Geneva Conventions.

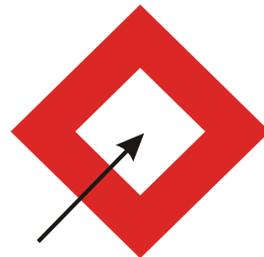
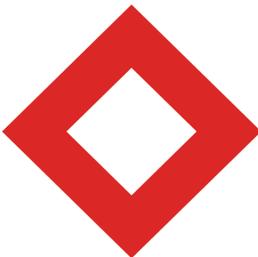
## Annex Third Protocol Emblem

(Article 2, paragraph 2 and Article 3, paragraph 1 of the Protocol)

*Article 1 – Distinctive emblem*



*Article 2 – Indicative use of the third Protocol emblem*



Incorporation in  
accordance with Art. 3

# National implementation of international humanitarian law

## Biannual update on national legislation and case law July–December 2005

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### A. Legislation

#### Afghanistan

The *Order of the Minister of National Defence on the Establishment of a Board of Curriculum on [the integration of] the International Law of Armed Conflict into the Educational and Training Institutions of the National Armed Forces, as well as National Army Units* was adopted in July 2005. The Order nominates the members of the Board and defines a number of duties and actions to be undertaken for the training and education of national armed forces in the law of armed conflict. These activities include in particular the preparation of teaching materials, the appointment of instructors, and the proposed establishment of a legal department within the education and training institutions of the Ministry of Defence.

#### Brazil

The *Law No. 11.254 on the Establishment of Administrative and Penal Sanctions in relation to Activities prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*<sup>1</sup> was adopted on 27 December 2005 and published in the Official Gazette on 28 December 2005. It entered into force on the day of its publication.

1 Lei No. 11.254 de 27 de Dezembro de 2005. Estabelece as sanções administrativas e penais em caso de realização de atividades proibidas pela Convenção Internacional sobre a Proibição do Desenvolvimento, Produção, Estocagem e Uso das Armas Químicas e sobre a Destruição das Armas Químicas existentes no mundo (CPAQ).

The law provides for administrative and penal sanctions in the case of activities prohibited by the Chemical Weapons Convention of 13 January 1993.

## Colombia

*Law No. 971<sup>2</sup> setting out regulations for the urgent search mechanism and other provisions* was adopted on 14 July 2005 and published in the Official Gazette on 15 July 2005. The purpose of the law is to permit national authorities to take immediate measures in order to prevent forced disappearances and to search for missing persons. The law provides for applicable rules and procedures, and establishes a mechanism to preserve the rights of persons unaccounted for.

## France

*Instruction No. 201710<sup>3</sup> on the implementation of the Decree relating to general military discipline<sup>4</sup>* was adopted on 4 November 2005. The aims of this directive and its Annex I are to define the rules relating to military discipline in the various army corps and their respective hierarchical structures. The directive outlines the duties and responsibilities of military commanders and their subordinates, as well as those of servicemen engaged in combat or held in enemy hands. While recalling that the primary duty of a subordinate is to obey orders, it stipulates that he or she must refuse to execute an order which is *manifestly unlawful*, subject to his or her criminal and disciplinary responsibility. The directive also provides for a range of measures to be taken for the treatment of prisoners of war. It addresses the duties and responsibilities of medical personnel in times of armed conflict and provides for the latter's special protection and for their entitlement, in accordance with international humanitarian law conventions, to make use of the red cross emblem for the purpose of identification.

## Lesotho

The *Lesotho Chemical Weapons Act 2005<sup>5</sup>* was published in the Official Gazette on 9 June 2005. The purpose of the Act is to make provision for giving effect to certain obligations of the Kingdom of Lesotho as a party to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, and for related matters. It establishes a legal framework for inspection and for the seizure and forfeiture

2 Ley número 971 de 2005 por la cual se reglamenta el mecanismo de búsqueda urgente y se dictan otras disposiciones, Diario oficial número 45.970 de 15 de julio de 2005.

3 Instruction No. 201710/DEF/SGA/DFP/FM/1 d'application du décret relatif à la discipline générale militaire du 4 novembre 2005, publié au BOC/BP No. 49 du 5 décembre 2005, pp. 8299–329.

4 Décret No. 2005-796 du 15 juillet 2005, publié au Journal Officiel No. 165 du 17 juillet 2005, texte No. 9; BOEM 300.

5 Chemical Weapons Act 2005, published in *Lesotho Government Gazette* (Extraordinary), Vol. L, No. 62, 9 June 2005, p. 583.

of goods controlled and prohibited under that Convention, and provides for penalties for violators. The Chemical Weapons Act authorizes the Minister to designate a National Authority on Chemical Weapons within a department, organ or unit of Lesotho's security establishment. The Act also grants the Minister the authority to adopt regulations giving effect to the provisions of the Act and of the said Convention.

## Peru

*Law No. 28665 on the Organization, Duties and Competence of the Special Jurisdiction in Penal Military Police Matters*<sup>6</sup> was approved on 29 December 2005 and promulgated on 6 January 2006. It was published in the Official Gazette on 7 January 2006. Chapter III of the Law, entitled "Organization of the special jurisdiction in penal military police matters in time of armed conflict", defines international and non-international armed conflicts and gives the executive branch the authority, during an armed conflict, to initiate proceedings before the special jurisdiction. It furthermore entrusts the Commander with the responsibility to establish within the new jurisdiction both a jurisdictional and a non-jurisdictional board and to designate the members and the judges on such boards. The *Code of Military Justice*<sup>7</sup> was approved on 10 January 2006 and published in the Official Gazette on 11 January 2006. Part II of the Code, entitled "Crimes against international humanitarian law", defines crimes committed against protected persons and includes provisions on command responsibility, superior orders and universal jurisdiction, in accordance with Protocol I additional to the Geneva Conventions of 1949.

## Singapore

*The Biological Agents and Toxins' Act No. 36 of 2005*<sup>8</sup> was passed by the Parliament of Singapore on 18 October and entered into force on 3 January 2006. The Act implements the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction and provides for prohibitions relating to biological agents and toxins as defined in that Convention. Any person who contravenes the prohibitions contained in the Act commits a criminal offence and is liable to a fine or imprisonment, or both. Moreover, the Act stipulates that a District Court shall have jurisdiction to try certain offences under the Act (other than those defined under sections 5, 16 and 30), and to impose appropriate penalties.

6 Ley número 28665 de organización, funciones y competencia de la jurisdicción especializada en materia penal militar policial.

7 Código de Justicia Militar Policial. Decreto legislativo número 961.

8 Biological Agents and Toxins Act 2005, No. 36 of 2005. An Act to prohibit or otherwise regulate the possession, use, import, transshipment, transfer, and transportation of biological agents, inactivated biological agents and toxins, to provide for safe practices in the handling of such biological agents and toxins, and to make a related amendment to the Infectious Diseases Act (Revised Edition, Chapter 137).

## Sudan

The *Interim Decree Law concerning the Sudanese Red Crescent Society*<sup>9</sup> was signed and entered into force on 3 August 2005. The Decree defines the legal personality, mandate and spheres of competence of the National Society. It outlines the aims and responsibilities of the National Society as an auxiliary to the armed forces in the provision of medical services in all fields of activity specified under the 1949 Geneva Conventions in favour of military and civilian victims of armed conflict, and in support of state structures in emergency and aid activities. It reiterates the stipulation that the National Society shall be bound by the seven Fundamental Principles of the International Red Cross and Red Crescent Movement and declares misuse of the red crescent emblem of the Society to be an offence liable to punishment under domestic law.

## Syria

The *Law No. 36 on the Protection of the Emblem*<sup>10</sup> was adopted on 23 November 2005. It defines the persons entitled to make use of the protective and of the indicative emblem. It also provides for the protection of the emblems and the names of the red crescent and red cross and for penalties in cases of emblem misuse, and assigns responsibility for monitoring application of the law to the Syrian Red Crescent Society.

## United Kingdom (Gibraltar)

The *Weapons of Mass Destruction (Amendment) Ordinance 2005 [Gibraltar]*<sup>11</sup> was enacted by the Gibraltar House of Assembly on 23 May 2005. The Ordinance provides new definitions for and clarifications of the Weapons of Mass Destruction Ordinance 2004 [Gibraltar].<sup>12</sup>

## United States

The *Directive of the Department of Defense 3115.09 on Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*<sup>13</sup> was adopted on 3 November 2005.

9 2005 Interim Decree Law concerning the Sudanese Red Crescent Society, signed 3 August 1426 (Hijra).

10 Law 36 on the Protection of the Emblem, 23 November 2005.

11 Weapons of Mass Destruction (Amendment) Ordinance 2005 [No. 38 of 2005], First Supplement to the Gibraltar Gazette, No. 3471 of 26 May 2005.

12 The Weapons of Mass Destruction Ordinance 2004 [Gibraltar]. An Ordinance to make provision for the purpose of prohibiting the development, production, acquisition and possession of certain weapons of mass destruction; implementing in Gibraltar the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, signed at Washington, London and Moscow on 10 April 1972, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, signed at Paris on 13 January 1993; and for connected purposes, Second Supplement to the Gibraltar Gazette, No. 3437 of 4 November, 2004, [Legal Notice No. 105 of 2004].

13 DoD Directive No. 3115.09, Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, November 3, 2005.

By the authority vested in the Secretary of Defence under Title 10, Title 50, United States Code, Executive Order 12333, “United States Intelligence Activities”, December 4, 1981, as amended, the Directive consolidates and codifies existing departmental policies, including the requirement for humane treatment during all intelligence interrogations, detainee debriefings or tactical questioning to gain intelligence from captured or detained personnel. It stipulates that all interrogations shall be conducted humanely and in accordance with applicable law and policy, including the laws of war, assigns responsibilities, and establishes requirements for reporting violations.

The *Amendment to the 2006 Department of Defence Authorization Bill*<sup>14</sup> relating to the military use of riot control agents was adopted on 9 November 2005. The amendment restates the current policy of the United States with regard to the use of riot control agents by military forces. It notably provides that riot control agents, as they are not chemical weapons, may be employed by members of the Armed Forces in war in defensive military mode in order to save lives. The President may consequently authorize their use as *legitimate, legal and non-lethal alternatives to the use of lethal force*.

## B. Case law

### Colombia

On 2 March 2004, the Constitutional Tribunal of Colombia<sup>15</sup> gave effect to *Law No. 833* of 10 July 2003 approving the *Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict* of 25 May 2000 (hereinafter *Optional Protocol*).

The Constitutional Tribunal, having considered the purposes of the *Optional Protocol*, declared the latter consistent with Colombia’s Constitution,<sup>16</sup> which recognizes the special protection and the specific rights of children, and called upon the State to adopt all measures required to give effect to these rights. The Tribunal held that the *Optional Protocol*, while increasing the protection of children from direct involvement in armed conflict and imposing commitments in this regard upon States Parties, develops and strengthens Colombia’s constitutional requirements.

On 10 May 2005, the Constitutional Tribunal of Colombia<sup>17</sup> gave effect to draft statutory *Law No. 064* (Senate) and *197* (Chamber) of 2003<sup>18</sup> regulating the

14 Amendment to the 2006 FY Department of Defence Authorization Bill, 9 November 2005.

15 Sentencia C-172/04: Revisión de Constitucionalidad de la Ley 833 del 10 de julio de 2003, “por medio de cual se aprueba el “PROTOCOLO FACULTATIVO DE LA CONVENCION SOBRE LOS DERECHOS DEL NIÑO RELATIVO A LA PARTICIPACION DE NIÑOS EN LOS CONFLICTOS ARMADOS”, adoptada en Nueva York el veinticinco (25) de mayo de dos mil (2000).

16 Constitución Política de Colombia, Article 44.

17 Sentencia C-473/05: Revisión de constitucionalidad del proyecto de ley estatutaria número 065 de 2003 Senado, 197 de 2003 Cámara, “por medio de la cual se reglamenta el mecanismo de búsqueda urgente y se dictan otras disposiciones”.

18 Proyecto de ley estatutaria número 065 de 2003 Senado y 197 de 2003 Cámara.

mechanism established to conduct immediate investigations into enforced disappearances. In examining the constitutionality of the draft law, the Court referred to the Inter-American Convention on the Forced Disappearance of Persons (adopted at Belém do Pará on 9 June 1994 at the Twenty-fourth Regular Session of the General Assembly), the Declaration on the Protection of All Persons from Enforced Disappearance,<sup>19</sup> the Rome Statute of the International Criminal Court and the report of the Working Group on Enforced or Involuntary Disappearances.<sup>20</sup>

## Germany

On 28 July 2005, the Higher Regional Court of Cologne (hereinafter Regional Court)<sup>21</sup> dismissed an appeal concerning the civil responsibility of the German State for alleged violations of international humanitarian law committed by NATO forces in Kosovo.

The case concerned the civil law suit brought against the German state by the victims of a NATO air bombardment which had destroyed a bridge in the Serbian town of Varvarin, thereby killing both military personnel and civilians. The bridge, it was claimed, had served no military purpose and had not represented a legitimate military target at the time. In a first judgment in the case, the District Court of Bonn had rejected the compensation claims and dismissed the case as a matter of principle, holding that any entitlement based on public international law only existed between states and that no exceptions to this principle could be derived from the rules of international humanitarian law.

In contrast to the lower court, the Higher Regional Court of Cologne, while ruling against the claimants on the facts of the case, accepted the claim in principle. The Court first confirmed that no individual claim to compensation existed under international humanitarian law. It did not, however, exclude the possibility of claims based on national law as such, and notably on the German law, deriving from Germany's Basic Law and Civil Code, on compensation for wrongful acts committed by government authorities. In support of its ruling, the Regional Court referred further to recent developments in international law, such as the evolving codification of rules on the protection of the individual under human rights and humanitarian law, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Rome Statute of the International Criminal Court.

The Higher Regional Court nevertheless rejected the claims and held that German officials had not, in view of the facts of the case, violated any laws by their indirect involvement in the bombing and therefore had not triggered the liability of the German state.<sup>22</sup>

19 A/RES/47/133.

20 Doc. E/CN.4/1989/18/Add.1, 6 February of 1989.

21 Oberlandesgericht Köln (Higher Regional Court of Cologne), Judgment of 28 July 2005, Case No. 7 U 8/04.

22 The judgment is not final and leave for further appeal to the Federal High Court has been granted.

## Spain

On 5 October 2005, Spain's Tribunal Constitucional<sup>23</sup> ruled that cases of genocide committed abroad could be prosecuted in Spain, irrespective of whether the victim is a Spanish national. In so doing, the Constitutional Court overruled the interpretation given by Spain's Tribunal Supremo (Supreme Court)<sup>24</sup> to section 23(4) of the Organic Law on the [organization of the] Judicial Power (i.e. the judicial system),<sup>25</sup> on the grounds that it had denied the right to effective access to justice as guaranteed under Section 24.1 of the Spanish Constitution.

The case in question related to the prosecution of acts committed in Guatemala in the 1970s and 1980s and alleged to have constituted crimes of genocide, terrorism and torture. The plaintiffs challenged the restrictive interpretation given by the Supreme Court to the principle of universal jurisdiction under Spanish law.

Section 23(4) of the Organic Law on the Judicial Power recognizes the principle of universal jurisdiction over several crimes, including genocide and terrorism. The Supreme Court had rejected the case, on the basis of the principle of *subsidiarity* under section 6 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and ruled that the plaintiffs had failed to prove that the courts of another state (Guatemala) had *de facto* rejected the claim. The Constitutional Court decided that such an interpretation defeated the purpose of universal jurisdiction as provided for under both Spanish law and the Genocide Convention, and held that it is enough, in order for domestic courts to exercise jurisdiction, to present serious and reasonable evidence of a failure to prosecute. Furthermore, the Constitutional Court rejected the Supreme Court's assertion that, since no international treaty establishes the principle of universal jurisdiction, universal jurisdiction is restricted under customary international law. While referring to the definition of universal jurisdiction in criminal matters given by the Institute of International Law in 2005, the Constitutional Court held that international law does not subject the competence of States to prosecute genocide and punish offenders to the existence of a connection or link with the place of jurisdiction, whether based on the principles of territoriality, active or passive personality, or *national interest*.

## United Kingdom

On 12 August 2005, the United Kingdom's High Court of Justice<sup>26</sup> rejected the case advanced on behalf of a dual British and Iraqi national arrested and detained

23 Sala Segunda del Tribunal Constitucional, *Rigoberta Menchú and others*, 5 October 2005.

24 Plenary Assembly of the National Audience, No.115-2000, 13 December 2000; Supreme Court, No.327-2003, 25 February 2003.

25 Ley orgánica del poder judicial (LOPJ).

26 United Kingdom High Court of Justice, Queen's Bench Division, *The Queen (on the application of Hilal Abdul-Razzak Ali Al-Jedda) v. Secretary of State for Defence*, 12 August 2005, Citation number [2005] EWHC 1809 (Admin).

in Iraq by British forces on suspicion of membership in a terrorist group deploying its activities in Iraq. In the proceedings, the claimant contended that his continued detention in Iraq and the failure to return him to the United Kingdom were unlawful and in breach of the rights conferred on him by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as scheduled to the United Kingdom's Human Rights Act 1998. In rebuttal, the main argument of the defendant Secretary of State was that the claimant's detention was authorized under United Nations' Security Council Resolution 1546 of 8 June 2004 (hereinafter Resolution 1546), and that the effect of the said resolution was to displace the claimant's rights under the ECHR.

The Court first examined the scope of application of the 1998 Act. In so doing, it recognized that the latter was capable of applying to the claimant since he had been detained, although outside the UK, in a facility operated by British forces. It also confirmed, on the basis of precedent, that UK courts had a duty to interpret the Human Rights Act and the latter's jurisdictional scope in a manner consistent with the duties of the UK under the ECHR as interpreted by the European Court of Human Rights in Strasbourg. Accordingly, the public authorities of the UK were required to secure the rights recognized under the Convention.

The Court then proceeded to examine whether Resolution 1546 had the effect, as a matter of international law, of displacing the claimant's *right to liberty and security of person* as recognized under Article 5 of the ECHR. The Court first recognized that the said rights, while deriving from Article 5 of the ECHR as set out in Schedule 1 of the Human Rights Act, are domestic rights conferred by the UK Act and enforceable before UK courts. Considering the natural meaning and context of Resolution 1546, the Court determined that the latter's intention had been to continue the mandate of the multinational force in Iraq after the transfer of authority of the Coalition Provisional Authority to the Iraqi Interim Government. Hence, the Court concluded, by Resolution 1546, the Security Council had continued the powers previously exercised by the multinational force when in belligerent occupation; these, the Court held, included the power under Article 78 of the Fourth Geneva Convention of 1949 relative to the protection of civilian persons in a time of war to detain persons *for imperative reasons of security*, and thus had the effect of displacing Article 5 of the ECHR.

Considering further the lawfulness of the detention under the regime established by Resolution 1546, the Court concluded that the procedures applicable to the claimant's detention did not strictly meet the procedural requirements under Article 78 of the Fourth Geneva Convention, but that the non-compliance was in its view more technical than substantial.

Last, in examining the legality of the defendant's failure to return the claimant to the UK, the Court concluded that the power of internment under Resolution 1546 is directed towards the detention of persons in Iraq, not their removal therefrom. Consequently a transfer to the UK would involve actions inconsistent with Resolution 1546.

For these reasons, the Court dismissed the case brought on the claimant's behalf.

## United States

On 9 September 2005, the US Court of Appeals for the Fourth Circuit<sup>27</sup> reversed the judgment of the District Court of South Carolina, which had held that the US President lacks the authority to detain militarily a US citizen arrested in the United States on suspicion of having been recruited abroad by al Qaeda members in order to commit terrorist acts in the US. Following the President's determination that the appellant in the case was an *enemy combatant*, the latter had been taken into military custody and had subsequently filed a petition for a writ of *habeas corpus*. The District Court had held that his continued detention was unlawful under the Constitution and the laws of the United States and that the defendant should have been either charged or released.

The issue raised before the Court of Appeals was whether the President possesses the authority to detain militarily a US citizen closely associated with al Qaeda, an entity with which the United States is at war, who had taken up arms on behalf of that enemy in a foreign combat zone, and who thereafter had travelled to the United States with the avowed purpose of further prosecuting that war on American soil against American citizens and targets.

The reasoning of the Court of Appeals is based on the *Authorization for Use of Military Force Joint Resolution*, enacted by the US Congress on 18 September 2001, which states that "The President is authorized to use all necessary and appropriate force ... in order to prevent any future acts of international terrorism against the United States ...", as well as on the Supreme Court's ruling in the *Hamdi v. Rumsfeld* case.<sup>28</sup> In that decision, the Supreme Court had interpreted the *Joint Resolution* and upheld that the Executive has the authority to detain citizens who qualify as "enemy combatants" *within the meaning of the laws of war*. The petitioner in the present case contended that his situation was different from that of *Hamdi*, for the latter had had been captured on a foreign battlefield. Referring to the reasoning of the Supreme Court, the Court of Appeal found no support for a distinction to be drawn on the basis of the *locus of capture* and concluded that the petitioner's military detention was authorized as *an incident fundamental to the President's prosecution of the war against al Qaeda in Afghanistan*. The petitioner also contended that his military detention was "neither necessary nor appropriate", since he was amenable to criminal prosecution. The Court of Appeal held that the availability of criminal process cannot be determinative of the power to detain, since the mere availability of criminal prosecution could not, of

27 US Court of Appeals for the Fourth Circuit, *Jose Padilla v. C.T. Hanft, et al.*, No. 05-6396, 9 September 2005.

28 US Supreme Court, *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.*, No. 03-6696, 28 June 2004, see also "National implementation of international humanitarian law: Biannual update on national legislation and case law", January–June 2004', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, p. 705.

itself, guarantee the very purpose for which detention is authorized in the first place, namely the prevention of return to the field of battle.

In the case, the Court of Appeals concluded that the petitioner *unquestionably* qualified as an “enemy combatant” and that his military detention was therefore justified and fully authorized under the *Authorization for Use of Military Force Joint Resolution*.

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